EFiled: Oct 06 2023 04:42PM EDT
Filing ID 71040448
Case Number 183,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FERRELLGAS PARTNERS L.P., FERRELLGAS, L.P., BRIDGER LOGISTICS, LLC, BRIDGER ADMINISTRATIVE SERVICES II, LLC, BRIDGER LAKE, LLC, BRIDGER LEASING, LLC, BRIDGER MARINE, LLC, BRIDGER RAIL SHIPPING, LLC, BRIDGER REAL PROPERTY, LLC, BRIDGER STORAGE, LLC, BRIDGER TERMINALS, LLC, BRIDGER TRANSPORTATION, LLC, BRIDGER SWAN RANCH, LLC, BRIDGER ENERGY, LLC, J.J. ADDISON PARTNERS, LLC, AND J.J. LIBERTY, LLC, Plaintiffs-Below/ Appellants, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant-Below/ Appellee.	No. 183, 2023 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N19C-05-275-MMJ CCLD

OPENING BRIEF ON APPEAL OF PLAINTIFFS-BELOW/APPELLANTS

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NATURE OF PROCEEDINGS

This action seeks a judicial determination of the existence of insurance coverage for an ongoing underlying lawsuit that has been pending since 2017. The present appeal concerns whether a duty to advance defense costs has been triggered.

Plaintiffs-Below/Appellants (1) Ferrellgas Partners L.P. ("FGP") and Ferrellgas, L.P. ("FG," and with FGP, "Ferrellgas"), (2) Bridger Logistics, LLC ("Bridger Logistics"), and (3) Bridger Administrative Services II, LLC, Bridger Lake, LLC, Bridger Leasing, LLC, Bridger Marine, LLC, Bridger Rail Shipping, LLC, Bridger Real Property, LLC, Bridger Storage, LLC, Bridger Terminals, LLC, Bridger Transportation, LLC, Bridger Swan Ranch, LLC, Bridger Energy, LLC, J.J. Addison Partners, LLC, and J.J. Liberty, LLC (collectively, the "Bridger Subsidiaries," and together with Ferrellgas and Bridger Logistics, "Plaintiffs") appeal from the Superior Court's January 21, 2020, Memorandum Opinion ("Summary Judgment Order") (attached as Exhibit A), which (a) denied Plaintiffs' Motion for Partial Summary Judgment on Count I of Plaintiffs' Amended Complaint as to defense costs against Defendant-Below/Appellee Zurich American Insurance Company ("Zurich"), (b) granted summary judgment in favor of Zurich on Count I of Plaintiffs' Amended Complaint as to defense costs against Zurich, and (c) dismissed Count I.

Zurich issued a claims-made insurance policy to non-party Bridger, LLC

("Zurich Policy") for the policy period December 17, 2014, through December 17, 2015 ("Policy Period"). A0140-142. Bridger Logistics and the Bridger Subsidiaries (which are current or former direct or indirect subsidiaries of Bridger, LLC) are insureds under the Zurich Policy. A0162; A0193; A0320-21.

On February 2, 2017, during the reporting period of the Zurich Policy, Eddystone Rail Company, LLC ("Eddystone") filed a complaint in the United States District Court for the Eastern District of Pennsylvania, Case No. 17-cv-00495 ("Eddystone Litigation"). A0245; A0247-273. Eddystone named as defendants Ferrellgas, Bridger Logistics, and the Bridger Subsidiaries (along with Julio Rios ("Rios") and Jeremy Gamboa ("Gamboa"), former directors and officers of certain of the entities). A0275-303. The operative amended complaint in the Eddystone Litigation ("Eddystone FAC") alleges the defendants engaged in Wrongful Acts (as defined in the Zurich Policy) in a business relationship between Eddystone and non-party Bridger Transfer Services, LLC ("BTS"), a former subsidiary entity of Bridger Logistics. A0275-303. The Eddystone Litigation remains pending and no judgment has been entered.

Zurich issued a full denial of coverage for the Eddystone Litigation and refused to advance defense costs as required under the Zurich Policy. A0304-18. After several subsequent denials, in May 2019, Plaintiffs filed this lawsuit against Zurich in the Delaware Superior Court. A0025-55. Plaintiffs' operative amended

complaint ("Coverage Complaint") named Zurich and Beazley Insurance Company, Inc. ("Beazley"), which insured certain Plaintiffs under a different primary policy ("Beazley Policy"), as defendants. A0056-86. The Coverage Complaint sought a judicial determination of the existence of insurance coverage for the Wrongful Acts asserted against Bridger Logistics and the Bridger Subsidiaries (Zurich) and Rios and Gamboa (Beazley) in the Eddystone Litigation. *Id.* Both insurers answered the Coverage Complaint, and Zurich asserted a counterclaim for declaratory judgment. A0005; A0324-377.

In July 2019, Plaintiffs filed a motion for partial summary judgment as to Zurich and Beazley on Count I (Zurich) and Count II (Beazley) of the Coverage Complaint, seeking a declaration that both insurers were obligated to advance defense costs for the Eddystone Litigation. A0087-323. Plaintiffs did not move for summary judgment on their separate counts for breach of contract against Zurich (Count III) or Beazley (Count IV), which are based on the insurers' failure to indemnify their respective Insureds (as defined herein) for the Eddystone Litigation, which was (and remains) pending, and thus not ripe for disposition. A0087-0128. The insurers filed cross-motions for summary judgment. A0007; A583-623.

On January 21, 2020, the Superior Court entered the Summary Judgment Order denying Beazley's motion for summary judgment and granting summary judgment in favor of FG, holding Beazley was obligated to advance defense costs

for Rios and Gamboa under the Beazley Policy. *Id.* At 34-35.

As to Zurich, the Superior Court denied Plaintiffs' motion for summary judgment, granted summary judgment in favor of Zurich, and dismissed Count I of the Coverage Complaint. *Id.* At 24-26. The Superior Court incorrectly held Zurich had no duty to advance. *Id.*

In February 2020, the Superior Court denied Beazley's application for interlocutory appeal of the Summary Judgment Order and, in September 2020, denied Beazley's application for interlocutory review of a separate order requiring it to advance defense costs for Rios and Gamboa. A1238-60; A1272-77. Plaintiffs subsequently settled their dispute with Beazley, and per Court order dated November 10, 2021, the litigation was "dismissed as to Beazley only."[1] A1278-79. Zurich's counterclaim, and Count III of the Coverage Complaint, which sought a finding that Zurich was in breach for (among other things) failure to indemnify its insureds for the underlying Eddystone Litigation, remained pending. Exhibit A at pp. 24-26; Exhibit B.

On September 27, 2022, the Prothonotary served a letter upon counsel requesting an update on the status of the litigation. A1280. Plaintiffs responded that in late 2021, FG filed a companion lawsuit in this Court against XL Specialty

[1] Plaintiffs nonetheless include certain facts as to Beazley for relevant procedural and factual context.

Insurance Company ("XL"), the carrier providing the next layer of coverage above Beazley, seeking a declaration that XL owed a duty to advance defense costs, and that it voluntarily dismissed that litigation on May 6, 2022. *See Ferrellgas, L.P. v. XL Specialty Ins. Co.*, Case No. N21C-12-050 MMJ ("XL Lawsuit").[2] A1281-82. Plaintiffs also advised that they had been in discussion with Zurich about the resolution of Count III (which remained pending), a potential appeal of the Summary Judgment Order, and a possible resolution of claims against Zurich, and that they had been in discussions with insurers excess to Zurich, whose coverage had now been triggered. *Id.* Plaintiffs requested that the Court continue the matter for 45 days. *Id.* Zurich, despite not having previously addressed the Superior Court on this point, responded to the Prothonotary's letter with its position that all claims had been adjudicated or settled, and this action before the Superior Court could be "administratively closed." A1283-84.

On March 2, 2023, Plaintiffs filed a motion to dismiss Zurich's counterclaim and Count III of the Coverage Complaint and for Entry of Judgment ("Motion to Dismiss"). A1285-95. Plaintiffs advised the Superior Court that they had now "exhausted the limits under the Zurich Policy and the excess layers ha[d] been triggered," and were moving to "voluntarily dismiss Count III for breach of contract

[2] This Court may take judicial notice of the XL Lawsuit. *See* D.R.E. 202(d)(1)(C).

as to Zurich" and for "dismissal of Zurich's counterclaim" so that they "may appeal the [Summary Judgment] Order on the advancement of defense costs as to Zurich." A1290. Zurich objected to the Motion to Dismiss, arguing the Superior Court had already granted judgment on its counterclaim and dismissed Plaintiffs' Count III in the Summary Judgment Order. A1296-1304. On May 9, 2023, the Superior Court granted the Motion to Dismiss without prejudice and entered final judgment. *See* Judgment, attached as Exhibit B.

On May 30, 2023, Plaintiffs filed a notice of appeal. A1343-45. On June 9, 2023, Zurich filed a notice of cross-appeal, appealing from the May 10, 2023, order entering final judgment. A1346-50.

SUMMARY OF ARGUMENT

1. The Superior Court erred in failing to correctly apply well settled Delaware law in finding Zurich had no duty to advance defense costs in the Eddystone Litigation. Despite recognizing that it is not bound by (a) the causes of action, (b) prayer for relief, or (c) Eddystone's characterization of its allegations in the Eddystone FAC, the Superior Court incorrectly relied on the causes of action and prayer for relief in the Eddystone FAC in finding there is no duty to advance. Exhibit A at pp. 23-24.

2. The Superior Court erred when it incorrectly declined to apply the reasonable expectations of the insureds doctrine. The Superior Court incorrectly interpreted the Exclusion in a subsequently purchased Run-Off Endorsement (as defined herein) to the Zurich Policy to mean that a Wrongful Act – even if it began *before the inception of the Zurich Policy (December 17, 2014) or purchase of the Run-Off Endorsement* – is covered only if it stopped *in its entirety* prior to the date of the Run-Off Endorsement – June 24, 2015. *Id.* at pp. 24-26. The Exclusion, as applied by the Superior Court, violates the reasonable expectations of the Insureds (as defined herein) and cannot be enforced in a manner that reduces previously purchased coverage.

3. The Eddystone FAC sets forth two discrete sets of Wrongful Acts – the Inducement Acts (February 2013 to April 2014) and the Improper Transfer Acts

(May 2015 – January 2016) (as defined herein). The Exclusion in the subsequently purchased Run-Off endorsement to the Zurich Policy removes from coverage any Wrongful Acts, including any Interrelated Wrongful Acts (as defined herein), that occurred in whole or in part subsequent to June 24, 2015. A0245. Whether acts are "Interrelated" is analyzed under Delaware law by a review of the policy language. As relevant here, the Inducement Acts do not have a "common nexus of any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transaction or causes" with the later Improper Transfer Acts. Accordingly, Zurich is obligated to advance defense costs for the Eddystone Litigation.

STATEMENT OF FACTS

A. The Zurich Policy

Zurich issued the Zurich Policy to Bridger, LLC for the policy period December 17, 2014 through December 17, 2015. A0140-42; A0245. The Zurich Policy provides an aggregate of $10 million in coverage for "Management and Company Liability," with eroding limits for the advancement of defense costs. A00140-42.

In conjunction with FGP's acquisition of Bridger Logistics and the Bridger Subsidiaries on June 24, 2015, Bridger, LLC paid approximately $80,000 to purchase a run-off endorsement ("Run-Off Endorsement") to extend the claims-made coverage period through June 24, 2021. A0287-88, ¶¶50, 52; A0245; A0321. The Run-Off Endorsement also contained an Interrelated Wrongful Acts exclusion ("Exclusion"), which provides that the "Underwriter shall not be liable for 'Loss' on account of, and shall not be obligated to defend, any 'Claim' made against any Insured based upon, arising out of, or attributable to any 'Wrongful Acts' including any 'Interrelated Wrongful Acts,' taking place in whole or in part subsequent to [June 24, 2015]," the date that FGP acquired Bridger Logistics and the Bridger Subsidiaries. A0287-88, ¶¶50, 52; A0245; A0321. The Exclusion does not include a notice or disclaimer indicating that it was reducing coverage already vested and existing under the Zurich Policy.

Coverage C of the Zurich Policy is "Company Liability Coverage," which provides that Zurich "shall pay on behalf of the Company all Loss for which the Company becomes legally obligated to pay on account of a Claim first made against the Company during the…Run-Off Coverage Period, if exercised, for a Wrongful Act taking place before or during the Policy Period…." A0160.

The Zurich Policy defines "Company" per endorsement as Bridger, LLC "and its Subsidiaries…." A0232. All entities meeting the definition of "Company" are "Insureds" under the Zurich Policy. A0162. Bridger Logistics and each of the Bridger Subsidiaries all meet the definition of "Subsidiary," fall within the definition of "Company," and are thus insureds under the Zurich Policy. A0162; A0193; A0320-21. For purposes of the Summary Judgment Order reviewed on appeal, Zurich does not contest that Bridger Logistics and the Bridger Subsidiary Plaintiffs are Insureds under the Zurich Policy. A0600.

The Zurich Policy defines "Loss" as the "total amount the Insureds become legally obligated to pay on account of Claims made against them for Wrongful Acts for which coverage applies, and includes Defense Costs." A0162. "Defense Costs" means "that part of Loss consisting of reasonable costs, charges, fees (including but not limited to attorneys' fees and expert's fees) and expenses…incurred by the Insureds…in defending or investigating Claims…." A0236.

"Claim" includes "a civil proceeding against any Insured." A0161. Plaintiffs incurred Loss in the form of Defense Costs in the Eddystone Litigation, which, as a "civil proceeding against any Insured," qualifies as a Claim. A0161; A0322. "Wrongful Acts" under the Zurich Policy are defined as "any errors, misstatement, misleading statement, act, omission, neglect or breach of duty actually or allegedly committed or attempted by…the [Insureds]." A0163. "Interrelated Wrongful Acts" are defined as "all Wrongful Acts that have as a common nexus of any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transactions or causes." A0150.

The Zurich Policy provides that Zurich "shall advance Defense Costs within ninety (90) days after receipt from the Insured of invoices for such Defense Costs" subject to a right of recoupment if it is ultimately determined that the Insureds are not entitled to coverage for Defense Costs. A0221-222. It further provides that if "in any Claim" the "Insureds incur both Loss [including Defense Costs] covered by this policy and loss not covered by this policy either because the Claim against the Insureds includes both covered and uncovered matters or because the Claim is made against" both Insureds and "others," then Zurich and the Insureds are required to use their best efforts to allocate defense costs. *Id.* Simply stated, the Zurich Policy envisions both covered and uncovered matters in a single Claim and Zurich is not permitted to withhold advancement of Defense Costs by asserting that some of the

claims in or parties to the Eddystone Litigation are not covered under the Zurich Policy.

B. The Eddystone Litigation

The Eddystone Litigation was filed on February 2, 2017, within the reporting period of the Zurich Policy. A0246-73; A0245. The Eddystone FAC alleges that Rios and Gamboa "owned and operated a crude oil trading and logistics business" and "created a series of nominally different companies with the name 'Bridger' to carry on this business…." A282, ¶33. These entities included Bridger, LLC, Bridger Logistics, and the Bridger Subsidiaries, which "provided logistics services for the transport of crude oil from wellhead to end markets in North America." A0275-303, ¶ 33. Eddystone alleges that Bridger Logistics was the sole member of BTS and the direct or indirect sole member of the Bridger Subsidiaries. A0282, ¶34.

According to the Eddystone FAC, in early 2013 "shipping crude oil out of North Dakota by rail represented a profitable business opportunity," as companies could "buy crude oil from the oil production area in North Dakota at a discounted price and later resell it to refineries on the East Coast," keeping as a profit the difference between the cost of North Dakota crude and the higher cost of Brent crude, the "primary benchmark price for crude oil on the East Coast." A0283, ¶35. This required "access to a transloading facility to transfer the crude oil" brought in on "rail cars to barges for shipment to oil refineries on the Delaware River." A0283,

¶36. The Eddystone FAC alleges Plaintiffs subsequently engaged in two discrete sets of Wrongful Acts in two discrete periods during the Zurich Policy.

First, the Eddystone FAC alleges Wrongful Acts committed between January 2013 and April 2014 by Rios and Gamboa, in their official capacities, and by Bridger Logistics, to induce Eddystone (a) to enter into a Rail Facilities Services Agreement (the "RSA") with BTS and only BTS based on the allegedly false representation that BTS was a bona fide and independent entity able to meet its financial obligations, and (b) to spend over $170 million in constructing a facility (the "Eddystone Facility") for the transloading of oil for BTS under the RSA ("Inducement Acts"). A0282, ¶33; A0283, ¶36; A0284, ¶38; A0285, ¶¶42, 44-45. The Inducement Acts necessarily terminated after the RSA was signed (February 2013) and at the latest when the Eddystone Facility was completed (April 2014).

Second, the Eddystone FAC alleges Wrongful Acts committed by Plaintiffs between May 2015 and January 2016, when the price of oil changed, to strip BTS of its assets without providing payment for Bridger Logistics' obligations to BTS and its creditor, Eddystone (the "Improper Transfer Acts"). A0290-91, ¶¶64-65.

The Inducement Acts and the Improper Transfer Acts are neither contemporaneous nor related. One is an alleged scheme to induce Eddystone to enter into the RSA with only BTS and spend $170 million only a "façade" limited liability company standing behind the RSA. The other is an alleged scheme to avoid the

obligations of the RSA *after* the price of oil changed, rendering shipment of North Dakota crude unprofitable.

The Eddystone FAC asserts specific counts for (1) alter ego liability, (2) intentional fraudulent transfer, (3) constructive fraudulent transfer, and (4) breach of fiduciary duty. A0294-301.

1. The Inducement Acts

Eddystone alleges that in 2013, North Dakota "wellhead prices were substantially lower" than the benchmark crude oil "otherwise available to Delaware River refineries," such that shippers (and providers of transportation, such as Bridger Logistics) could make a profit on North Dakota crude "even after accounting for the cost of transportation." A0276-77, ¶4. In order to "take advantage of" this opportunity, Rios, Gamboa, and Bridger Logistics allegedly "entered into negotiations with Eddystone to induce Eddystone to commit to building a facility that would give Bridger Logistics exclusive transloading capacity to refineries on the Delaware River." A0283, ¶36.

On February 13, 2013, Eddystone entered into the RSA with BTS, whereby Eddystone agreed to construct the Eddystone Facility – a trans-loading facility on the Delaware River – which would transfer crude oil from railcars to river barges for shipment downstream to oil refineries. A0276-77, ¶¶3, 4; A0283-84, ¶¶36, 37. In exchange, BTS "agreed to bring a minimum of 64,750 barrels of crude oil to the

[Eddystone] Facility every day from the time Eddystone completed the [Eddystone] Facility until June 2019." A0276, ¶¶ 3; A0283-84, ¶37. If BTS failed to meet this minimum daily delivery, it would "make a deficiency payment" to Eddystone "of $1.75 for each barrel" below the minimum volume commitment. A0283-84, ¶37. Eddystone alleges that it invested $170 million in the construction of the Eddystone Facility, which was completed in April 2014. A0284, ¶38.

Eddystone alleges that it entered into the RSA with BTS (and only BTS) based on false representations made by its parent company, Bridger Logistics, and officers Rios and Gamboa, holding out that BTS was an "independent, bona fide company with substantial operations and capital…." A0283, ¶36; A0285, ¶42. Bridger Logistics and Rios and Gamboa "represented that, as of December 31, 2014, BTS had total assets of $98.1 million, including shareholders' (members') equity of $37.9 million, including crude oil truck injection units, construction in progress, and receivables." A0285, ¶42. Eddystone alleges it entered into the RSA and "spent over $170 million in constructing a rail-to-barge crude oil transloading facility for BTS" that employed "about 50 people" in "reliance on the promise to make" payments for five years on a minimum daily amount of oil – including deficiency payments if the minimum could not be met – and on "Defendants' holding out of BTS as a bona fide company." A0284, ¶38.

Eddystone alleges the representations of Bridger Logistics and Rios and Gamboa were false because BTS was not a bona fide and independent entity, but rather "a façade" dependent upon Bridger Logistics, Rios and Gamboa, and others to provide "amounts sufficient to allow BTS to make all of the RSA payments due to Eddystone." A0285, ¶44; A0286, ¶¶46-47; A0286-87, ¶49; A0296, ¶84. In fact, Eddystone alleges that Bridger Logistics ultimately did in fact "provide funds to BTS so that BTS could make its payments" to Eddystone "that gave rise to th[e required] capacity" under the RSA. A0277, ¶6. In essence, Eddystone alleges it was dependent upon Bridger Logistics, Rios, and Gamboa to meet the obligations of the RSA, and was induced into entering into an agreement under which it would have no direct remedy against those same parties.

2. The Improper Transfer Acts

Eddystone alleges Bridger Logistics is the parent of BTS, and that BTS "made the transloading capacity it obtained from Eddystone available to Bridger Logistics on a long-term, exclusive basis." A0276-77, ¶¶4, 6. According to the Eddystone FAC, "Bridger Logistics and its affiliates" entered into arrangements with a shipper (through Bridger Marketing, LLC) and refinery owner (Monroe Energy LLC) whereby "it would have crude oil" purchased by the shipper "loaded into railcars in North Dakota rail loading facilities, ship[ped]…by train to" the Eddystone Facility, and "transload[ed]…to barges on the Delaware River alongside" the Eddystone

Facility, which "would carry the crude oil to [the] refiner[y] downriver." A0276, ¶4; A0284, ¶40.

Eddystone alleges that on June 24, 2015, Bridger, LLC sold Bridger Logistics (and the Bridger Subsidiaries) to FGP. A0288, ¶¶52-53. Petroleum prices fell, "making North Dakota crude, given its higher transport cost to market, more expensive relative to" benchmark crude, leading to "huge monthly losses to the shipper that had contracted to purchase oil for" the refinery. A0277-78, ¶7. Eddystone alleges that "if the shipper defaulted, Bridger Logistics would still have to pay its obligations to BTS for the reserved capacity of the Eddystone terminal, but would have to find a new destination for the crude oil." *Id.*

Eddystone alleges that in January 2016, Bridger Logistics "made modifications to its agreements with the shipper and the refinery that allowed them to unwind the crude oil supply arrangements," and used its "control of BTS to render it insolvent and unable to pay its creditors." A0278, ¶8. Eddystone alleges that (a) beginning in May 2015, Plaintiffs "transferred all of BTS' other assets to other F[errelgas] entities, leaving it stripped of resources," that (b) in June 2015, Plaintiffs "caused BTS to forgive millions of dollars in accounts receivable that it was owed by other Bridger Logistics and F[errellgas] affiliates, including the [Bridger Subsidiaries]," that (c) Bridger Logistics then sold BTS "for $10 to a newly formed subsidiary of the shipper," and that (d) by February 2016 the "now-defunct BTS

immediately defaulted on its payments to Eddystone" under the RSA. A0278, ¶8; A0288-89, ¶¶55, 56.

In April 2016, Eddystone filed a demand for arbitration, seeking an "award" from BTS, now owned by the shipper, for "unpaid invoices that had accrued to date and for future minimum volume payments in light of BTS' anticipatory breach of contract." A0294, ¶¶73-75. In January 2017, BTS consented to an arbitration award. A0294, ¶75.

Ferrellgas, Bridger Logistics, and the Bridger Subsidiary Plaintiffs are named defendants in the Eddystone FAC, along with Rios and Gamboa. A0279-81, ¶¶12-30.

C. Zurich's Refusal to Advance Defense Costs

Zurich issued full denials of coverage for the Eddystone Litigation under Coverage C (Company Liability) of the Zurich Policy. A0304-18. Zurich based its denials upon the Exclusion to the Run-Off Endorsement, asserting that the only Wrongful Acts alleged are the Improper Transfer Acts, which "took place in whole or in part subsequent to" June 24, 2015, or are Interrelated to Wrongful Acts that took place subsequent to that date. *Id.*[3]

[3] While Zurich's denial also cites to several other exclusions that "may serve to preclude or limit coverage," it does not deny coverage based on those exclusions. *Id.*

As of the date of the Summary Judgment Order appealed from, Ferrellgas, Bridger Logistics, and the Bridger Subsidiary Plaintiffs were paying counsel to provide them with a common defense to the Eddystone Litigation, without any reimbursement from Zurich. A0322.

D. The Delaware Coverage Action

Plaintiffs filed the present action in Delaware Superior Court on May 29, 2019, against their primary level insurers Beazley and Zurich, seeking a declaration of coverage for the Eddystone Litigation. A0025-55.

The operative Coverage Complaint in this action asserts counts against Zurich for (a) a declaratory judgment that Zurich is required to reimburse and advance defense costs incurred by Bridger Logistics and the Bridger Subsidiaries in the defense of the Eddystone Litigation (Count I), and (b) breach of contract for failing to indemnify Bridger Logistics and the Bridger Subsidiaries in the Eddystone Litigation (Count III). A0056-86. The Coverage Complaint asserts counts against Beazley for (a) a declaratory judgment that Beazley is required to reimburse and advance defense costs incurred by FG in the defense of Rios and Gamboa (Count II) and (b) breach of contract for failing to indemnify Rios and Gamboa in the Eddystone Litigation (Count IV). A0056-86.[4]

[4] This appeal does not involve any issues regarding coverage for Ferrellgas under the Zurich Policy. Ferrellgas is not an insured under the Zurich Policy.

On July 11, 2019, Plaintiffs filed a motion for partial summary judgment on Counts I and II, seeking declarations that Zurich and Beazley "as a matter of law" had a duty to advance defense costs in the Eddystone Litigation." Exhibit A at p. 7; A0087-0128. As to Zurich, Plaintiffs argued that the Inducement Acts constituted Wrongful Acts that were completed prior to June 24, 2015, and that triggered Zurich's duty to advance. A0114-27.

Zurich filed a cross motion for summary judgment asking the "Court to dismiss Count I on the grounds that Zurich has no duty to advance defense costs covering the Eddystone Litigation." Exhibit A at p. 7; A0583-623. Zurich argued the Eddystone FAC does not seek to set aside the RSA based on "fraudulent inducement" grounds, that the Eddystone Litigation constitutes a single Claim under the Zurich Policy, that the Claim seeks to recover for the Improper Transfer Acts arising out of an alleged February 2016 breach of the RSA by BTS, and that all of the acts alleged in the Eddystone FAC either occurred after June 24, 2015, or are Interrelated to acts that occurred after that date, such that there is no coverage under the Exclusion to the Run-Off Endorsement. Exhibit A at pp. 11-23; A0590-91; A0863-66.

The Court heard argument on November 13, 2019, and subsequently entered the Summary Judgment Order. Exhibit A. The Court granted summary judgment in favor of FG as to Beazley, finding it had a duty to advance defense costs for the

defense of FG's former directors and officers Rios and Gamboa in the Eddystone Litigation. Exhibit A at pp. 32-35. The Court incorrectly denied Plaintiffs' motion as to Zurich, incorrectly granted Zurich's motion, held Zurich had no duty to advance, and dismissed Count I of the Zurich FAC. *Id.* at pp. 24-26.

The Superior Court did not engage in a choice-of-law analysis between application of Delaware or Texas law, finding that under Delaware law, "a choice-of-law analysis" should be avoided "if the result would be the same under the law of either of the competing jurisdictions." *Id.* at p. 9. While Plaintiff argued for the application of Delaware law, Zurich "concede[d] that Texas and Delaware law on interpretation of insurance contracts provides for the same outcome on the relevant coverage issues." *Id.* at pp. 9-10. The Superior Court also held that "Delaware court[s] consistently have held that Delaware law applies to disputes over directors and officers liability ('D&O') insurance coverage, where, as here, the insured companies are Delaware [entities]." *Id.*

Acknowledging that insurance contracts are contracts of adhesion and that the "rules of construction differ from those applied to most contracts," the Superior Court correctly held that when ambiguous, the "doctrine of *contra proferentem* requires [it] to interpret the [insurance] policy in favor of the insured because the insurer drafted the policy," and that the Superior Court must look to the "reasonable expectations of the insured at the time when [it] entered the contract." *Id.* at p. 11

(citations omitted).][5] In contrast, when policy language is "clear and unambiguous," the Superior Court held, each party "will be bound by its plain meaning." *Id.* (citations omitted).

The Superior Court correctly found that (1) it is "not bound by either the causes of action or requests for relief set forth in the [Eddystone] FAC" in determining whether there is a duty to advance, that it rather (2) "looks at the facts stated in the complaint as well as any causes of action, and may review the complaint as a whole and consider all reasonable inferences that may be drawn from the allegations therein," and that it (3) "looks beyond Eddystone's *characterization* of" the allegations in the Eddystone FAC. *Id.* at p. 23 (internal citation omitted) (emphasis original) (capitalization original).

Nonetheless, the Superior Court incorrectly applied these standards in holding that the Inducement Acts did not even potentially fall within the scope of coverage, reasoning that (a) Eddystone "did not pursue a Claim for the Inducement Acts" and (b) the Eddystone FAC "does not, on its face, assert a fraudulent inducement action" or seek any damages from the Inducement Acts in the prayer for relief. Exhibit A at pp. 23-24. This holding is in error because there is no specific causation requirement

[5] As set forth herein, the Superior Court improperly applied the reasonable expectations doctrine, which is applied to determine if there is an ambiguity and not invoked only after a finding of ambiguity. *See infra* at pp. 37-40.

under the Zurich Policy or Delaware law that a Claim, cause of action, or prayer for relief be premised upon a particular Wrongful Act. The Inducement Acts are Wrongful Acts asserted in a "Claim" – the Eddystone Litigation – and thus trigger the duty to advance. That a duty to advance exists is reflected in the Zurich Policy, which expressly provides that there may be both covered and uncovered matters *within* a Claim and provides a procedure for allocating coverage between the two. A0161; A0221-22. To the extent the Zurich Policy requires that the Eddystone FAC state a separate cause of action for the Inducement Acts (which it expressly does not), the alter ego count in the Eddystone FAC clearly, seeks, in whole or in part, relief from the Inducement Acts.

The Superior Court further found the Run-Off Endorsement was unambiguous and held there was no duty to advance under the Zurich Policy, reasoning that "all Claims in the [Eddystone FAC] stem from the February 16, 2016, breach of the RSA," that "[a]ll requested relief in the Eddystone FAC is in the nature of damages for breach of contract," that the "RSA breach and the causally-related [Improper] Transfer Acts purportedly occurred between May of 2015 and January of 2016," and that the "Wrongful Acts which gave rise to the Claims based on th[e] breach [of the RSA] took place predominantly subsequent to the [June 24, 2015] coverage expiration." Exhibit A at pp. 23-26 (capitalization original).

The Superior Court accordingly denied Plaintiffs' motion for partial summary judgment on Count I, granted Zurich's motion for summary judgment, and dismissed Count I. *Id.* at pp. 34-35.

Plaintiffs ultimately settled their dispute with Beazley and then moved to dismiss Zurich's counterclaim for declaratory judgment and Plaintiff's Count III for breach of contract for failure to indemnify, as Plaintiffs had exhausted the limits under the Zurich Policy and sought to appeal the Summary Judgment Order on advancement of defense costs as to Zurich. A1285-95. The Court granted the motion to dismiss and entered judgment on May 9, 2023. *See* Exhibit B. This appeal followed.

ARGUMENT

A. The Superior Court Improperly Held That Zurich Does Not Owe a Duty to Advance.

1. Question Presented

Did the Superior Court err in finding, after purportedly applying the Delaware duty to advance standard, that Zurich had no duty to advance defense costs for the defense of Bridger Logistics and the Bridger Subsidiaries in the Eddystone Litigation? Preserved on appeal at A0087-323; A1090-1127.

2. Scope of Review

A decision on "cross-motions for summary judgment" is reviewed *de novo* "both as to the facts and the law to determine whether or not the undisputed material facts entitled [either] movant to judgment as a matter of law." *Wilmington Trust, N.A. v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1071 (Del. 2023).

3. Merits of the Argument

The Superior Court incorrectly applied the duty to advance analysis in finding there was no duty to advance defense costs under the Zurich Policy for the Eddystone Litigation.

a. The Duty to Advance Standard under Delaware Law.

Under Delaware law, an insurer's duty to defend its insured and to advance defense costs arises "as soon as the allegations of the underlying complaint show a potential that liability within coverage will be established." *WoodSpring Hotels LLC*

v. Nat'l Union Fire Ins. Co. of Pittsburgh Pa., 2018 WL 2085197, at *8 (Del. Super. May 2, 2018) (analyzing duty to advance).[6] Put another way, both duties are triggered "whenever the [allegations in the] underlying complaint allege[] facts that fall within the scope of coverage," with the duty construed "broadly in favor of the policyholder." *Verizon Comm'ns, Inc. v. Ill. Nat'l Ins. Co.*, 2017 WL 1149118, at *6 (Del. Super. Jan. 31, 2019), *rev'd on other grounds*, 222 A.3d 566 (Del. 2019); *Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 3662269, at *2 (Del. Super. Aug. 18, 2021). "Doubts and ambiguities should be resolved in favor of coverage." *Guaranteed Rate*, 2021 WL 3662269, at *2.

In determining whether there is a duty to defend or advance, a court must "review[] the complaint as a whole and consider[] all reasonable inferences that may be drawn from the allegations. *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *10 (Del. Super. Jan. 31, 2019) (the "key is whether the allegations of the complaint, when read as a whole, assert a risk within the coverage of the policy") (internal citations omitted). As recognized by the Superior Court, a court "looks

[6] The standards for duty to defend and duty to advance under Delaware law are largely the same. *See, e.g., Stillwater Mining Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, 289 A.3d 1274, 1281, n. 34 (Del. 2023) (recognizing that "some jurisdictions draw a distinction between the two"). The primary difference is that the duty to advance is subject to a "later crawl back of any uncovered expenses." *AR Capital, LLC v. XL Specialty Ins. Co.*, 2018 WL 6601184, at *9 (Del. Super. Dec. 12, 2018).

beyond the *characterization* of the acts alleged" in the complaint and "examines those *acts* to determine" if they fall within the scope of coverage. *Id.* (looking past characterization of underlying complaint in finding duty to advance) (emphasis original).

To determine if an insurer has a duty to defend or advance, a court applies the following principles: (a) where there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (b) any ambiguity in the pleadings should be resolved against the carrier; and (c) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend or advance arises. *CVR Ref., LP v. XL Specialty Ins. Co., et al.*, 2021 WL 5492671, at *9 (Del. Super. Nov. 23, 2021).

Whether there is a duty to advance defense costs "is made from the perspective of the outset of the case, not the outcome." *Liberty Ins. Underwriters, Inc. v. Cocrystal Pharma, Inc.*, 2023 WL 3067498, at *4 (3d Cir. Apr. 25, 2023) (citing *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *6 (Del. Super. Sept. 25, 2020)). "Under a policy that contains a duty to advance, an insurer has an absolute duty to advance costs for any litigation that falls within the policy terms." *Legion Partners*, 2020 WL 5757341, at *6. In "any event, advancement is subject to repayment, should subsequent proceedings

determine that the Policy did not provide coverage." *Guaranteed Rate*, 2021 WL 3662269, at *3; A0221-22.

b. Zurich Bears the Burden of Establishing an Exclusion to Coverage.

Once a duty to advance is triggered, the insurer "can be excused from its duty…only if it can be determined as a matter of law that there is no possible factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured." *WoodSpring Hotels*, 2018 WL 2085197, at *8 (analyzing duty to advance). This is an extremely high bar, as the duty to indemnify is not determined until the final conclusion of the underlying litigation. *See, e.g.*, *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009) ("indemnification claims do not accrue until the underlying claim is finally decided").

Thus, the insurer bears the burden of establishing that a policy exclusion applies to bar coverage, with exclusions narrowly construed. *Deakyne v. Selective Ins. Co. of Am.*, 728 A.2d 569, 574 (Del. Super. 1997); *see also WoodSpring Hotels*, 2018 WL 2085197, at *8 (the insurer "must show that the allegations of the underlying complaint are solely and entirely within specific and unambiguous exclusions from coverage"); *Guaranteed Rate*, 2021 WL 3662269, at *1 (the "burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer"). Delaware courts "interpret exclusionary clauses with a strict and narrow construction and give effect to such exclusionary language

only where it is found to be specific, clear, plain, conspicuous, and not contrary to public policy." *Verizon Commc'ns Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2022 WL 14437414, at *6 (Del. Super. Oct. 18, 2022); *see also Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 627 (Del. 2003) (insurance policy exclusions must be afforded a narrow construction).

Zurich cannot meet its burden that this duty is barred by the Exclusion to the Run-Off Endorsement, which must be narrowly construed in favor of coverage. Zurich owes a duty to advance defense costs.

c. The Eddystone Litigation is a "Claim" for "Loss" Made During the Zurich Policy Period.

Plaintiffs seek coverage from Zurich under Coverage C – Company Liability Coverage. A0114. As set forth above, Zurich is obligated to pay on behalf of "the Company all Loss for which the Company become legally obligated to pay on account of a Claim first made against the Company during the Policy Period or the Extended Reporting Period or Run-Off Coverage Period, if exercised, for a Wrongful Act taking place before or during the Policy Period." A0160.

For purposes of the Summary Judgment Order being appealed, it is undisputed that Bridger Logistics and the Bridger Subsidiaries are Insureds under the Zurich Policy. A0600. It is also undisputed that the Eddystone Litigation is a "Claim" – a "civil proceeding against any Insured commenced by the service of a complaint or similar pleading." A0161. It is also undisputed that the Eddystone Litigation, filed

in February 2017, was filed within the extended reporting period of the Zurich Policy. A0245. It is also uncontested for the purposes of the Summary Judgment Order being appealed that Bridger Logistics and the Bridger Subsidiaries have suffered Loss in the form of defense costs. A0322; A0600. Finally, the Superior Court indicated (and Zurich did not dispute) that the Inducement Acts constitute Wrongful Acts under the Zurich Policy. Exhibit A at p. 15 ("If the Inducement Acts constitute a separate Claim independent of the [Improper] Transfer Acts, coverage might not be excluded by the [Exclusion to the] Run-Off [Endorsement].)"

Accordingly, at issue in this appeal is whether the Inducement Acts trigger Zurich's duty to advance defense costs, and if they are, whether Zurich can establish that the Inducement Acts took place subsequent to June 24, 2015, or are Interrelated with Wrongful Acts that continue through or past June 24, 2015.

d. The Superior Court Erred in Finding No Duty to Advance Even Though the Inducement Acts Trigger that Duty.

The ruling being appealed from here is the Superior Court's holding that there was no duty to advance because Eddystone "did not pursue a Claim for the Inducement Acts." Exhibit A at p. 25.

The Superior Court erred when it failed to correctly apply well-settled principles to determine whether Zurich owed a duty to advance defense costs in the Eddystone Litigation. It correctly recognized that it is not bound by (a) the causes of action, (b) prayer for relief, or (c) Eddystone's characterization of the allegations

in the Eddystone FAC. *Id.* at pp. 23-24. Nonetheless, the Superior Court incorrectly applied these standards in holding that the Inducement Acts did not even potentially fall within the scope of coverage because the Eddystone FAC "does not, on its face, assert a fraudulent inducement action" or seek any damages from the Inducement Acts in the prayer for relief. *Id.*

Thus, despite setting forth the proper legal standard, the Superior Court improperly based its decision on whether the Eddystone Litigation "pursued" a specific cause of action for fraud in the inducement – the "characterization" of the acts – as opposed to "examining those *acts* to determine" if they fall within the scope of coverage. *Guaranteed Rate,* 2021 WL 3662269, at *2 (complaint must be read as a whole at the outset of the litigation to determine if it alleged a risk within the coverage). The Superior Court incorrectly applied this standard in finding that Zurich had no duty to advance defense costs in the Eddystone Litigation.

i. The Zurich Policy Does Not Require that There be a Specific Claim Seeking Relief for the Inducement Acts.

The Superior Court's finding that there was no duty to advance defense costs is premised upon the improper interpretation of the Zurich Policy as requiring that a specific Claim be pursued for the Inducement Acts. However, all Coverage C of the Zurich Policy requires to trigger coverage is "Loss" for which the Insureds become legally obligated to pay "on account of a Claim" "for a Wrongful Act." A0160.

A Claim is a "civil proceeding against any Insured" – here the entire

Eddystone Litigation. A0161. The Eddystone Litigation was brought against the Plaintiffs for Wrongful Acts. There can be no dispute that the Inducement Acts meet the Zurich Policy definition of Wrongful Acts. Nor can there be a dispute that the Defense Costs incurred by Bridger Logistics and the Bridger Subsidiaries – Insureds under the Zurich Policy – constitute Loss under the Zurich Policy.

The Court's mechanistic comparison of the Inducement Acts with the various causes of action and prayers for relief and imposition of an extra-contractual causation requirement was improper, given that there is no specific causation requirement that a Claim, cause of action, or prayer for relief be premised upon a particular Wrongful Act in the Zurich Policy or Delaware law.

Instead, the Zurich Policy only requires a Claim for a Wrongful Act to trigger coverage. Stated another way, the Inducement Acts are Wrongful Acts asserted in a Claim (the Eddystone Litigation) and for which Bridger Logistics and the Bridger Subsidiaries have suffered Loss in the form of covered defense costs, thus triggering a duty to advance. Delaware law requires that a court construe an insurance policy and any ambiguities therein in favor of coverage. *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021) (where "there is more than one reasonable interpretation of an insurance policy, Delaware courts apply the interpretation that favors coverage"); *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *7 (Del. Super. Aug. 31, 2011) (citing *Pac. Ins. Co. v. Liberty Mut.*

Ins. Co., 956 A.2d 1246, 1255 (Del. 2008) (Any doubts regarding coverage "are to be resolved in favor of the insured.") The Superior Court erred in construing these allegations not in favor of but against coverage.

Thus, contrary to the Superior Court's ruling, the Eddystone FAC can be read as triggering coverage for the Inducement Acts, especially as the determination of whether there is a duty to advance defense costs under the Zurich Policy is evaluated at the outset of the litigation. *Liberty Ins. Underwriters*, 2023 WL 3067498, at *4. Because these allegations lie within the coverage of the Zurich Policy, a duty to advance was triggered. *Guaranteed Rate*, 2021 WL 3662269, at *2; *see also WoodSpring Hotels*, 2018 WL 2085197, at *8. Zurich, accordingly, owes a duty to advance defense costs for the Eddystone Litigation unless the Exclusion from the Run-Off Endorsement applies.

ii. The Superior Court Erred When it Held that the Alter Ego Count in the Eddystone FAC Does Not Seek Relief For the Inducement Acts.

In the event that further analysis is necessary, the duty to advance is also triggered by the alter ego count in the Eddystone FAC. The gravamen of the Inducement Acts, which occurred between January 2013 and April 2014, is that Rios, Gamboa, and Bridger Logistics improperly induced Eddystone to enter into the RSA with BTS (and only BTS), which was allegedly not a bona fide entity with sufficient assets to perform under the RSA. A0283, ¶36; A0285, ¶42. Based on

these inducements, Eddystone entered into the RSA with BTS, and thus had no entity against which it could directly enforce the RSA. A0283-86, ¶¶36-46. It, as a result of this inducement, was required to seek recovery of its arbitration award from Ferrellgas, Bridger Logistics, and the Bridger Subsidiaries under an alter ego theory.

The FAC alleges the following relevant facts:

- Rios, Gamboa and Bridger Logistics ***induced*** Eddystone to enter into the RSA and build the Eddystone Facility by "holding out" BTS as "an independent, bona fide company with substantial operations in addition to the RSA," such as "total assets of $98.1 million" that "did not include any value for the RSA contract." A0283, ¶36; A0285, ¶42 (emphasis added).

- These statements were false because BTS was not a bona fide and independent entity, but rather "a façade" dependent upon Bridger Logistics, Rios, Gamboa, and others to provide "amounts sufficient to allow BTS to make all of the RSA payments due to Eddystone." A0285-87, ¶¶44, 46-47, 49; A0296.

- Under the RSA, BTS ***promised*** Eddystone to transload a total of 118,168,750 barrels of crude oil at the Eddystone facility over a period of five years and two months from the date construction was completed. A0283-84, ¶37 (emphasis added).

- Eddystone entered into the RSA in reliance on the ***promise*** to make at least minimum payments every month for the barrels of crude oil shipped to the Eddystone facility. *Id.* (emphasis added).

- Eddystone entered into the RSA and "spent over $170 million in constructing a rail-to-barge crude oil transloading facility for BTS" in "reliance on the promise to make these payments and on Defendants' holding out of BTS as a bona fide company." A0284, ¶38.

The above allegations clearly constitute Wrongful Acts asserted in a Claim (the Eddystone Litigation), regardless of whether they are reduced in the Eddystone FAC to a discrete count, or how Eddystone characterizes the relief sought.

Eddystone clearly seeks relief for the Inducement Acts in its alter ego claim. There would be no need to assert this claim had Eddystone not been induced into contracting with only BTS. Specifically, Count I of the Eddystone FAC alleges that BTS was "a façade for the operations of its 100% equity owner, Bridger Logistics, Bridger Logistics control persons Rios and Gamboa, and F[errellgas], and Bridger Rail Shipping" and "[i]n light of the alter ego relationship between BTS and Bridger Logistics, F[errellgas], Rios, Gamboa, and Bridger Rail Shipping, Eddystone is entitled to an order from this Court piercing the corporate veil of BTS." A0296, ¶¶84, 86. A purpose of Count I is to remedy the alleged wrong brought about by the Inducement Acts and allow Eddystone to recover from the real parties-in-interest who induced it to enter into the RSA with only BTS. It also triggers the duty to advance.

e. The Superior Court Erred in Holding that the Exclusion Applies to Bar Zurich's Duty to Advance.

The Superior Court erroneously dismissed the Inducement Acts from its coverage analysis, finding that "[a]ll requested relief in the Eddystone FAC is in the nature of damages for breach of contract" and that the "RSA breach and the causally-related [Improper] Transfer Acts purportedly occurred between May of 2015 and

January of 2016." Exhibit A at pp. 23-26. Based on this analysis, the Court held that the "Wrongful Acts which gave rise to the Claims based on th[e] breach [of the RSA] took place predominantly subsequent to the [June 24, 2015] coverage expiration," and that the Exclusion thus applied to bar Zurich's duty to advance. *Id.* (capitalization in original).

As argued above, this was error. The Inducement Acts are Wrongful Acts arising in a Claim that began before or during the Zurich Policy period *and concluded* prior to June 24, 2015, resulting in Loss. A0160; A0245. Regardless of the Superior Court's analysis of the Improper Transfer Acts or the breach of the RSA, the Inducement Acts triggered the duty to advance and the Exclusion does not bar coverage for the Inducement Acts, including Zurich's duty to advance the defense costs incurred in the Eddystone Litigation. The Inducement Acts are separate and apart from the Improper Transfer Acts, since they necessarily terminated at the latest in April 2014 when Eddystone completed construction of the Eddystone Facility, as required under the RSA with BTS. *See infra* at pp. 42-45. A0282-85, ¶¶ 33, 36, 38, 42, 44-45. Any later Wrongful Acts are unrelated.

B. The Superior Court Improperly Failed to Apply the Reasonable Expectations of the Insured Doctrine.

1. Question Presented

Did the Superior Court err when it declined to apply the reasonable expectations of the insureds doctrine? Preserved on appeal at A0087-323; A1090-1127.

2. Scope of Review

The Court's scope of review is *de novo*. *See supra* at p. 25.

3. Merits of the Argument

Delaware courts consider "the reasonable expectations of the insured at the time of entering into the contract to see if the policy terms are ambiguous or conflicting, contain a hidden trap or pitfall, or if the fine print takes away that which has been provided by the large print." *Com. Assocs., LP v. Hanover Ins. Co.*, 2022 WL 539000, at *7 (Del. Super. Feb. 22, 2022), *aff'd*, 286 A.3d 966 (Del. 2022). Policy language "is interpreted broadly to protect the insured's objectively reasonable expectations," while exclusionary clauses are "accorded a strict and narrow construction." *Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879, at *7 (Del. Super. Sept. 29, 2016), *abrogated on other grounds by First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006 (Del. 2022). The reasonable expectations doctrine can be applied to "fulfill an insured's expectations

even where those expectations contravene the unambiguous, plain meaning of exclusionary clauses." *Id.*

Accordingly, if "two clauses are inconsistent and both were drafted by the insurer, the one which should defeat the insurance will be rejected or the one which affords the most protection to the insured will control and be given effect." *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 390 (D. Del. 2002) (quoting *Sherman v. Underwriters at Lloyd's, London*, 1999 WL 1223759, at *3 (Del. Super. Nov. 2, 1999) (*contra proferentem* rule in insurance context "reduces an insurance company's incentive to construct a policy where certain provisions purport to give coverage while other clauses take that very coverage away").

The Superior Court erred when it held that it would "*only* apply [the reasonable expectations doctrine] where the policy is ambiguous." Exhibit A at p. 11 (emphasis original). Delaware law, as stated by this Court in *Com. Assocs.*, applies "the reasonable expectations of the insured … to see if the policy terms are ambiguous," not *after* it has determined ambiguity. 2022 WL 539000, at *7.

The Superior Court also erred in construing the language in the Exclusion to the Run-Off Endorsement by itself without reference to the coverage provisions in the Zurich Policy, since Delaware law requires analysis of the Zurich Policy as a whole to determine if "policy terms are ambiguous or conflicting, contain a hidden trap or pitfall, or if the fine print takes away that which has been provided by the

large print." Exhibit A at p. 24 (the "Court finds that the Run-Off Exclusion language is not fairly or reasonably susceptible to more than one meaning"). When read properly as a whole, the application of the Exclusion to the Run-Off Endorsement is irreconcilable with the coverage provided by the Zurich Policy, and the reasonable expectations of the insureds must be considered and the Zurich Policy construed in favor of coverage.

The Eddystone FAC clearly alleges Wrongful Acts that occurred before or during the Zurich Policy that, if the subject of a timely claim, would have been covered under the Zurich Policy had the Run-Off Endorsement – which was purchased to provide *additional* coverage – not been purchased. As the Superior Court acknowledged, the Eddystone FAC alleges that Plaintiffs "defrauded" it, based on Wrongful Acts beginning in 2013. Exhibit A at p. 23. Nonetheless, finding the Exclusion to the Run-Off Endorsement unambiguous, the Superior Court interpreted the Exclusion to mean that a Wrongful Act – even if it began *before the inception of the Zurich Policy or purchase of the Run-Off Endorsement* – is covered only if it stopped *in its entirety* prior to June 24, 2015. This reading eliminates coverage for previously covered conduct based on an endorsement that was purchased to increase coverage. *See Alstrin*, 197 F. Supp. at 397.

Simply put, "no one" purchasing the Run-Off Endorsement would intend to spend over $80,000, as Bridger, LLC, did, to eliminate existing coverage. *Alstrin*,

179 F. Supp. 2d at 397; *First Bank of Del, Inc. v. Fid. & Deposit Co. of Md.*, 2013 WL 5858794, at *9 (Del. Super. Oct. 30, 2013) (refusing to apply exclusion under reasonable expectations doctrine where an "abstract possibility of some coverage surviving the fraud exclusion is not sufficient to persuade the Court to apply an exclusion that is almost entirely irreconcilable with the Loss Event coverage"). A024; A0321. The Exclusion to the Run-Off Endorsement, as applied by the Superior Court, violates the reasonable expectations of the Insureds and cannot be enforced in a manner that reduces previously purchased coverage. *See also Fiserv Sols., Inc. v. Endurance Am. Specialty Ins. Co.*, 2016 WL 8674661, at *20 (E.D. Wis. Sept. 30, 2016) (finding definition of "Interrelated Wrongful Acts" ambiguous and construing in favor of coverage when "one interpretation eliminates virtually all coverage for an activity" that was otherwise covered).

C. The Inducement Acts Are Not Interrelated to the Later Improper Transfer Acts.

1. Question Presented

Are the Inducement Acts Interrelated to Wrongful Acts that occurred in whole or in part subsequent to June 24, 2015, such that the Exclusion to the Run-Off Endorsement removes the Inducement Acts from the duty to advance? Preserved on appeal at A0087-323; A1090-1127.

2. Scope of Review

The Court's scope of review is *de novo*. *See supra* at p. 25.

3. Merits of the Argument

The Superior Court discussed – but did not decide – whether the Inducement Acts were Interrelated to the Improper Transfer Acts, improperly finding instead that Eddystone did not "pursue" a Claim for the Inducement Acts and that there was no duty to advance defense costs based on the Exclusion to the Run-Off Endorsement. Exhibit A at pp. 17-21, 23-26. Notwithstanding, the Inducement Acts are not Interrelated to the Improper Transfer Acts, and independently trigger Zurich's duty to advance.

The Zurich Policy defines "Interrelated Wrongful Acts" as "all Wrongful Acts that have as a common nexus of any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transaction or causes." A0150.

In the Superior Court, Plaintiffs relied on the "fundamentally identical" standard set forth in *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043, at *10 (Del. Super. July 23, 2019), in arguing that the Inducement Acts were not Interrelated to the Improper Transfer Acts. A1106-09. The Superior Court discussed (but did not analyze) the "fundamentally identical" standard. Exhibit A at pp. 17-21. Regardless, this standard was abrogated by this Court subsequent to the Summary Judgment Order in *First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006 (Del. 2022). The Court in *First Solar* held that "[w]hether a claim relates back to an earlier claim is decided by the language of the policy, not a generic 'fundamentally identical' standard." *First Solar*, 274 A.3d at 1013.

The Inducement Acts do not have a "common nexus of any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transaction or causes" to the Improper Transfer Acts which allegedly occurred between late May 2015 and January 2016 when Rios, Gamboa, Bridger Logistics, and Ferrellgas allegedly stripped BTS of assets in order to avoid its obligations to Eddystone. A0291-92, ¶¶65-68. During this period, BTS allegedly "engaged in a series of intercompany transactions by which it transferred substantial assets" to various subsidiaries, including Defendants Bridger Administrative Services, LLC, Bridger Rail Shipping, LLC, Bridger Real Property, LLC, and Bridger Energy, LLC. A0291, ¶66.

After these intercompany transactions allegedly took place, on January 13, 2016, Bridger Logistics, Bridger Marketing (now renamed Jamex Marketing) and Monroe Energy, LLC "suspended their arrangement for the sale and delivery of crude oil" to Eddystone. A0288, ¶53; A0292-93, ¶70. BTS allegedly became insolvent as a result of these transactions/transfers. A0300, ¶96. These intercompany transactions formed the basis for the Intentional Fraudulent Transfer and Constructive Fraudulent Transfer claims asserted in the Eddystone FAC. A0296-300, ¶¶87-98. The allegations included in the breach of fiduciary count in the Eddystone FAC are based on what Bridger Logistics, Ferrellgas, Rios and Gamboa did *after* BTS allegedly became insolvent. A0300-01, ¶¶99-103.

The only parties alleged to have engaged in the Inducement Acts are Rios, Gamboa, and Bridger Logistics, while all of the other parties named in the Eddystone FAC are alleged to have engaged in the Improper Transfer Acts. The Eddystone FAC alleges a scheme or plan by Bridger Logistics, Rios, and Gamboa to gain access to a transloading facility on the Delaware River so that they could profit from the relatively lower price for North Dakota crude in early 2013 (long before Run-Off Exclusion cut-off date of June 24, 2015). A0283, ¶¶35-36.

In order to profit from this opportunity, Rios, Gamboa, and Bridger Logistics allegedly induced Eddystone into executing the RSA with BTS on February 13, 2013, and constructed the Facility to transload North Dakota crude onto barges on

the Delaware River by promising to make certain payments and holding out BTS as "an independent bona fide company with substantial operations" and assets in addition to the RSA. A0283-85, ¶¶36, 38-42. This scheme, alleged to insulate Bridger Logistics, Rios and Gamboa from liability, was necessarily completed by April 17, 2014 at the later after both the RSA was signed and the Eddystone Facility completed. A0284, ¶38.

The Improper Transfer Acts took place long after that scheme was completed. The Eddystone FAC alleges that, after the price for North Dakota crude narrowed dramatically and resulted in multi-million-dollar losses each month, "[Plaintiffs] developed a plan to…strip BTS of its assets, but without providing payment for Bridger Logistics' obligations to BTS and its creditor Eddystone." A0290-91, ¶¶61-65. The Inducement Acts and Improper Transfer Acts are not interrelated as there is no allegation in the Eddystone FAC of a scheme to induce Eddystone to enter into the RSA with BTS and spend $170 million to build the Eddystone Facility, just so that Plaintiffs could later breach the RSA, strip all the assets from BTS, and leave Eddystone with a dormant facility.

Thus, there are two unrelated alleged schemes: one to induce Eddystone to enter into the RSA only with BTS and to build the Facility so the parties could exploit the favorable price of North Dakota crude, and a second to avoid the obligations of the RSA, *but only after* the price of North Dakota crude fell. Because

the two sets of Wrongful Acts do not have a "common nexus of any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transaction or causes," the Exclusion to the Run-Off Endorsement does not preclude coverage under the Policy and Zurich had a duty to advance Plaintiff's defense costs in the Eddystone Litigation.

CONCLUSION

Plaintiff respectfully requests that this Court reverse the Superior Court's order granting Zurich's motion for summary judgment and denying Plaintiffs' motion for partial summary judgment, and remand to the Superior Court with an instruction that it enter judgment in favor of Plaintiff and against Zurich on Count I of the Coverage Complaint.

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Dated: October 6, 2023

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