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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/Cross Appellant.*	No. 183, 2023 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N19C-05-275-MMJ CCLD

APPELLEE'S ANSWERING BRIEF ON APPEAL
AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

OF COUNSEL:

Louis A. Bové
(*Pro Hac Vice*)
BODELL BOVE, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
Phone: 215-864-6602
Fax: 215-864-6610
Email: lbove@bodellbove.com

Date: November 3, 2023

BODELL BOVE, LLC

Bruce W. McCullough (Del. ID 3112)
1225 N. King Street, Suite 1000
Wilmington, DE 19801-3250
Phone: 302-655-6749
Fax: 302-655-6827
Email: bmccullough@bodellbove.com

Attorneys for Defendant-Below/Appellee and Cross Appellant, Zurich American Insurance Company

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NATURE OF THE PROCEEDINGS

Defendant-Below/Appellee and Cross-Appellant, Zurich American Insurance Company ("Zurich") issued Zurich American Insurance Company Private Company Select Insurance Policy No. MPL 0083979-00 (the "Zurich Policy"), effective December 17, 2014 to June 24, 2015, to non-party Bridger, LLC, a Texas based company. B0267-0381.[1] The Zurich Policy allows for the reporting of claims first made against a qualifying insured during a **Run-Off Coverage Period**,[2] but excludes from the scope of that coverage **Loss**, inclusive of any defense, on account of 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 "Run-Off Date"). Zurich Policy at Endorsement #42, Section II., B0378. Consequently, the Zurich Policy does not cover any **Claim** reported during the **Run-Off Coverage Period** which is based upon, arises out of, or is attributable to any alleged **Wrongful Act** which took place subsequent to June 24, 2015, or any other **Wrongful Act** which shares a common nexus to any fact, circumstance,

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[1] Zurich refers to the defined terms in the Zurich Policy in bold, as set forth in the coverage forms comprising the Zurich Policy.

[2] The **Run-Off Coverage Period** is defined to mean "the period of the extended coverage under the Liability Coverage Parts [i.e., June 24, 2015 to June 24, 2021] during which any Claims first made shall be deemed to have been made during the Policy Period." Zurich Policy at Endorsement #42, Section II., B0378.

situation, event, transaction, cause or series of facts, circumstances, situations, events, transactions or causes (i.e., **Interrelated Wrongful Acts**) taking place subsequent to June 24, 2015, regardless of whether any **Wrongful Act** or **Interrelated Wrongful Acts** took place prior to that Run-Off Date. *Id.* at Section IV ("Run-Off Exclusion"), B0378; and *id.* at General Terms and Conditions, Section II., Item R. (definition of **Interrelated Wrongful Acts**), B0283.

The Eddystone Litigation,[3] which is the **Claim** at issue in the instant coverage litigation, arises out of a February 1, 2016 breach of a Rail Facilities Services Agreement ("RSA") between Eddystone Rail Company, LLC ("Eddystone") and Bridger Transfer Services, LLC ("BTS") that was the subject of a January 24, 2017 arbitration award in Eddystone's favor. See generally, Eddystone Litigation First Amended Complaint ("Eddystone FAC"), B0121-0149. Prior to the breach, Ferrellgas Partners L.P. and Ferrellgas, L.P. (collectively "FGP") acquired BTS and its parent, Bridger Logistics, along with a number of Bridger Logistics' subsidiaries (referred to as the "Fraudulent Transfer Recipient Subsidiaries"). First Amended Complaint ("FAC") at ¶44, B0036. The FGP acquisition of BTS and the various Bridger entities occurred on June 24, 2015, i.e., the Run-Off Date applicable to the Zurich Policy. *Id*. and Zurich Policy at

[3] *Eddystone Rail Company, LLC v. Bridger Logistics, LLC et al*., U.S.D.C., E.D. Pa., Case No. 2:17-cv-00495-JDW (the "Eddystone Litigation").

Endorsement #42, Section III. and IV., B0378. Following that acquisition, a downturn in the crude oil market impacted the profitability of BTS's continued performance under the RSA. Eddystone Litigation FAC at ¶¶60-64, B0136-0137; FAC at ¶70, B0043. As a consequence, FGP and the various Bridger entities it now owned, allegedly developed a plan to wind down and strip BTS of its assets to evade the RSA obligations in advance of the default (i.e., the breach of the RSA) on February 1, 2016. Eddystone Litigation FAC at ¶64, B0136-0137.

During the **Run-Off Coverage Period**, Eddystone sued FGP, Bridger Logistics, and the Fraudulent Transfer Recipient Subsidiaries (collectively "Ferrellgas"), along with two of FGP's officers (who are not named in this action), in an effort to recover the arbitration award; that is, the consequential damages arising out of the February 1, 2016 breach of the RSA. FAC at ¶¶58, 59, B0040; Eddystone FAC at Prayer for Relief, B0147-0148. Eddystone alleges that FGP, Bridger Logistics, and the two officers exercised control over BTS and used that control to strip BTS of its assets so as to render BTS insolvent and unable to meet its obligations under the RSA. Eddystone FAC at ¶¶65-69, B0137-0138. Consequently, Eddystone seeks to set aside the transfers to the Fraudulent Transfer Recipient Subsidiaries, and otherwise hold FGP and Bridger Logistics accountable for BTS's debt under the RSA under an "alter ego" theory, and for an alleged

breach of a fiduciary duty of care and loyalty. Eddystone FAC at Counts One through Four, B0140-0148.

Because this **Claim** unquestionably arises out of **Wrongful Acts** or **Interrelated Wrongful Acts** which took place in whole or in part after FGP's acquisition of Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries, Zurich properly disclaimed coverage for the Eddystone Litigation. B0198-0210.

On May 29, 2019, Ferrellgas (as noted *supra*, FGP, Bridger Logistics, and the Fraudulent Transfer Recipient Subsidiaries) filed this coverage action against Beazley Insurance Company, Inc. ("Beazley"), which issued a D&O policy to FGP (the "Beazley Policy"), and Zurich seeking "a judicial determination of the existence of insurance coverage" under the Beazley Policy and Zurich Policy for the Eddystone Litigation. Appellants' Op. Br. at 3. Ferrellgas filed the operative First Amended Complaint (as noted, the "FAC") in this action on July 1, 2019, B0025-B0149, and ten days later, on July 11, 2019, filed a Motion for Partial Summary Judgment on Defense Costs against Beazley and Zurich, B0150.

On July 26, 2019, Zurich filed its Answer to the FAC with Affirmative Defenses, and a single-count Counterclaim for Declaratory Relief seeking "a judicial declaration that Zurich has no coverage for any aspect of the Eddystone Litigation and has no obligation to defend, indemnify or pay any sums associated

with the Eddystone Litigation under [the Zurich Policy]." B0212-0432. On September 18, 2019, Zurich filed (1) a Motion For Summary Judgment requesting "judgment in its favor and a declaration that it has no insuring obligation in favor of the plaintiffs in this action relative to the underlying [Eddystone Litigation], based on the limited ground that the Run-Off Exclusion in [the Zurich Policy] precludes coverage for any qualifying insured in that litigation", B0433-434, together with Zurich's Opening Brief in Support of its Motion for Summary Judgment, B0435-0701; and (2) its Answering Brief in Response to Ferrellgas' Motion for Partial Summary Judgment, B0702-0741.

On October 18, 2019 Ferrellgas filed a Combined Reply Brief in Support of the Motion for Partial Summary Judgment on Defense Costs against Zurich, and Response to Zurich's Motion for Summary Judgment. B0742-0770. On November 1, 2019, Zurich filed its Reply Brief in Support of its Motion for Summary Judgment. B0771-0799.

Beazley also filed an opposition to Ferrellgas' Motion For Partial Summary Judgment, and cross moved for summary judgment on its own behalf during the same time frame. See Dockets (B0001-0024), Transaction ID 64219887 & 64219946.

On November 13, 2019, the Honorable Mary M. Johnston heard argument on the motions for summary judgment, and took the matters under advisement. B0800.

On January 21, 2020, the Superior Court granted Zurich's Motion For Summary Judgment, declaring there is no coverage for the Eddystone Lawsuit under the Zurich Policy:

> The Court finds that the Eddystone Litigation is excluded from coverage by the Zurich Policy. Therefore, Zurich's Motion for Summary Judgment is hereby GRANTED. Plaintiffs' Motion for Partial Summary Judgment on Count I, duty to advance defense costs, is hereby DENIED, and Count I is hereby DISMISSED.

See January 21, 2020 Order and Opinion (Exhibit "A" to Appellants' Opening Brief), reported at *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 Del. Super. LEXIS 41, at *24 (Super. Ct. Jan. 21, 2020). The Superior Court, however, found that the Beazley Policy afforded coverage for the Eddystone Lawsuit:

> Therefore, [the Beazley Policy's] coverage applies to the alleged "Wrongful Acts" and any "Interrelated Wrongful Acts" committed on or after June 21, 2015 by Rios and Gamboa in their concurrent capacity as FG officers. Beazley's Motion for Summary Judgment is hereby DENIED and Plaintiffs' Motion for Partial Summary Judgment on Count II, advancement and reimbursement of defense costs pursuant to the Beazley Policy, is hereby GRANTED.

Id. at *33-34.

Following failed attempts by Beazley for an interlocutory appeal to this Court, *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 Del. Super. LEXIS 86

(Super. Ct. Feb. 17, 2020), *Beazley Ins. Co. v. Ferrellgas Partners L.P.*, 239 A.3d 408 (Del. 2020), *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 Del. Super. LEXIS 2793 (Super. Ct. Sep. 17, 2020), Beazley resolved the coverage claims against it, and the remaining parties to the case entered into a stipulation of dismissal, approved by the Superior Court on November 10, 2021. B0836-0837.

Following the dismissal of the claims against Beazley, Ferrellgas did not appeal from the January 21, 2020 Order declaring that the Eddystone Litigation is excluded from coverage under the Zurich Policy. Instead, Ferrellgas waited more than three (3) years after that judgment, and the subsequent stipulated dismissal of all claims against Zurich's co-defendant, Beazley, and filed a "Motion To Dismiss Remaining Count" ostensibly contending that Count III "breach of contract" for Zurich's "refusing to, at a minimum, advance Defense Costs, in whole or in part, for Plaintiffs' and Rios and Gamboa's defense and refusing to indemnify Plaintiffs, Rios and Gamboa for Loss in the Eddystone Litigation" survived the Order declaring that the Eddystone Litigation is excluded from coverage. B0838-0845. Zurich opposed the Motion. B0846-0854. Following a hearing on May 8, 2023, B0855-0891, the Superior Court granted Ferrellgas' Motion to Dismiss Count III of the FAC, and entered a "final judgment" in this action on May 10, 2023, see Exhibit "B" to Appellants' Opening Brief, to which Zurich has filed a timely cross-appeal. B0893-0897.

SUMMARY OF THE ARGUMENTS

A. APPELLEE/CROSS APPELLANT'S ANSWER TO APPELLANTS' SUMMARY OF ARGUMENTS ON APPEAL

1. Denied. The Superior Court correctly considered whether the allegations of the underlying operative complaint, when read as a whole with all reasonable inferences favoring Ferrellgas, assert a risk within the coverage of the policy. Coverage under the Zurich Policy applies to a **Claim** for **Wrongful Act**. In order for a **Claim** to be "for" a **Wrongful Act**, it must seek redress in response to or as requital of that act. The Superior Court properly held that the allegations in the operative Eddystone Litigation First Amended Complaint asserted a **Claim** for **Wrongful Acts** which occurred in whole or in part *after* FGP's acquisition of Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries and, accordingly, was excluded from coverage under the Run-Off Exclusion.

2. Denied. The Superior Court correctly applied Delaware law concerning application of the reasonable expectations doctrine. The reasonable expectations applies after a determination that an insurance contract is ambiguous. The Run-Off Exclusion is clear and unambiguous, and none of the other prerequisites for application of the doctrine apply.

3. Denied. The Eddystone Litigation does not implicate a **Claim** "for" the so-called "inducement acts," and the Superior Court correctly so found. The so-called inducement acts, in any event, address the exact same representations and

practices which occurred both before and after the Run-Off Date, and share a common nexus with the post-acquisition **Wrongful Acts**, inclusive of the February 1, 2016 breach upon which the **Claim** in the Eddystone Litigation is based.

B. APPELLEE/CROSS APPELLANT'S SUMMARY OF ARGUMENT ON CROSS APPEAL

1. The Superior Court erred when it entertained and then granted a "motion to dismiss" a claim which had already been fully and finally adjudicated by that Court's prior Order declaring there is no coverage for the Eddystone Litigaiton under the Zurich Policy. The Superior Court's final act in this case was its approval of the stipulated dismissal of the remaining claims against the only other defendant in this action on November 10, 2021, rendering the instant appeal by Ferrellgas untimely. 10 *Del. C.* §148.

COUNTERSTATEMENT OF FACTS

A. THE EDDYSTONE LITIGATION

1. Overview of the Claim

The Eddystone Litigation seeks relief for the alleged breach of the RSA on February 1, 2016, when BTS stopped delivering crude oil to the Eddystone transloading facility, or making payments for the deficiencies in the monthly minimum volume commitment under the RSA. Eddystone FAC at ¶74, Counts One through Four, and Prayer for Relief, B0140-0148. Pursuant to the RSA's dispute resolution provision, Eddystone initially pursued this breach of contract claim through arbitration with the Society of Maritime Arbitrators (SMA) in New York seeking recovery for unpaid invoices that had accrued, and for future minimum volume payments. *Id.* at ¶75, B0140; *Eddystone Rail Co., LLC v. Rios*, 431 F. Supp. 3d 638, 640 (E.D. Pa. 2019). On January 5, 2017, Eddystone secured an arbitration award for a discounted present value of $139,050,406.77 for the consequential damages arising out of the breach. *Id*.

Having secured an award against BTS, Eddystone then sued BTS's corporate parent, Bridger Logistics, Bridger Logistics' parents, FGP, and two of their officers, Julio Rios and Jeremy Gamboa, alleging that these parties are liable for the debt BTS owes to Eddystone as BTS's "alter ego" or, alternatively, that these parties used their control over BTS to render BTS insolvent (and consequently

unable to meet its payment obligations to Eddystone) by means of intentional or constructive fraudulent transfers. See Eddystone Litigation Complaint, Counts One through Four, and Prayer for Relief, B0111-0118. Eddystone amended its complaint on September 7, 2018 to include the additional "Fraudulent Transfer Recipient Subsidiaries" of FGP, including Bridger Administrative Services II, LLC, Bridger Marine, LLC, Bridger Rail Shipping, LLC, Bridger Real Property, LLC, Bridger Storage, LLC, Bridger Swan Ranch, LLC, Bridger Terminals, LLC, Bridger Transportation, LLC, Bridger Energy, LLC, Bridger Leasing, LLC, Bridger Lake, LLC, Bridger Administration, Bridger Management, J.J. Liberty, LLC, and J.J. Addison Partners, LLC. See Eddystone FAC at ¶¶13-30, 33, B0126-0128.

The Eddystone FAC seeks the following relief from Ferrellgas and its two officers:

1. An award of all payments BTS owes to Eddystone under the RSA.

2. An award against Ferrellgas and its two officers (Rios and Gamboa) of all amounts awarded by the SMA arbitration panel in the arbitration between Eddystone and BTS.

3. All expectation damages available to a party injured by breach of contract at common law and by statute and such other and further relief as this Court deems just and proper.

4. An order avoiding all direct or indirect transfers from BTS to the Ferrellgas transferees and requiring the Ferrellgas transferees to undo those transfers.

5. Damages in the amount of the value of the transfers described in the previous paragraphs.

6. An award of compensatory damages against Ferrellgas and its two officers (Rios and Gamboa) for the economic injury they caused Eddystone through breach of their fiduciary duty in the amount of the foregone minimum volume payments owed under the RSA.

7. An award of punitive damages against Ferrellgas and its two officers (Rios and Gamboa) for their intentional fraudulent transfer and their willful breach of fiduciary duty.

8. Pre- and post-judgment interest, including under NY CPLR 5001 & 5004.

Eddystone FAC at Prayer for Relief. B0147-0148.

2. Operative Facts

On June 24, 2015, FGP acquired Bridger Logistics, BTS, and the Fraudulent Transfer Recipient Subsidiaries. Eddystone FAC at ¶52, B0134. At that time, BTS was a party to the RSA with Eddystone, which called for a minimum volume of rail-to-barge crude oil transfers at Eddystone's transloading facility over the course of several years. *Id.* at ¶37, B0129-0130. According to Eddystone, both before and after FGP's acquisition, Bridger Logistics and certain of its affiliates arranged for the transportation of crude oil shipments from North Dakota to the Eddystone facility by rail, where it was transferred from railcars to barges at Eddystone's dock and then transported down the Delaware River to Monroe Energy's refinery in Trainer, PA. *Id.* at ¶¶39, 41, B0130-0131. Both before and

after FGP's acquisition, BTS's payment obligations under the RSA were funded by Bridger Logistics and its affiliates. *Id.* at ¶¶47, 57, B0132, B0135. Through January of 2016, "Eddystone transloaded every trainload of crude oil that BTS and the Defendants brought to Eddystone." *Id.* at ¶5, B0123.

According to Eddystone, differential oil pricing called into question the economic viability of shipping crude oil from North Dakota to Pennsylvania and, by the fall of 2015, it was no longer sustainable. *Id.* at ¶¶61-64, B0136-0137. Consequently, Ferrellgas is said to have "developed a plan" to wind down this distribution chain and strip BTS of its assets so as to avoid payment to Eddystone for the anticipated deficiencies in the monthly minimum volume commitment under the RSA. *Id.* at ¶64, B0136-0137. This involved a four-step process:

> 65. Between late May 2015 and January 2016, Defendants Rios, Gamboa, Bridger Logistics, and FGP stripped BTS of assets, including cash flows, and caused BTS to operate as little more than a liability shield for other FGP entities. First, the Monroe revenues that had previously been credited to BTS were redirected to other FGP entities, including Bridger Logistics and Bridger Rail Shipping - and ultimately passed up to FGP. Bridger Logistics and Bridger Rail Shipping began making payments directly to Eddystone on the RSA.
>
> 66. Second, throughout this period BTS engaged in a series of intercompany transactions by which it transferred substantial assets to Defendants Bridger Logistics, Bridger Administrative Services II, LLC, Bridger Rail Shipping, LLC, Bridger Real Property, LLC, Bridger Transportation, LLC, Bridger Energy, LLC, Bridger Leasing, LLC, Bridger Lake, LLC, Bridger Administration, Bridger Management, J.J. Liberty, LLC, and J.J. Addison Partners, LLC. …

> 67. Third, BTS also transferred away all of its real and personal property and valuable commercial contracts to other FGP subsidiaries. For example, in January 2016, BTS transferred to Bridger Swan Ranch, LLC, a newly-formed FGP subsidiary, the Swan Ranch transloading facility with all of its transshipment infrastructure, including crude injection stations, a crude oil transmission pipeline, and associated fixtures, valued at $18.5-20 million. BTS also transferred to Bridger Swan Ranch, LLC, the associated throughput agreement with Shell that had $23.68 million remaining in fixed fees. BTS received no consideration. BTS granted Bridger Real Property, LLC, title to 15 acres of land in Laramie County, Wyoming for $10, though the land was valued by the county tax assessor at $950,000. BTS transferred tens of millions of dollars' worth of assets to Bridger Terminals, LLC, including land, injection stations, throughput agreements, and equipment, fixtures, and personal property for $10. BTS also allowed a blanket lien to be granted on its assets to secure loans made to FGP.
>
> 68. Fourth, in January 2016, Defendants Rios, Gamboa, Bridger Logistics, and FGP caused BTS to forgive millions of dollars in accounts receivable that it was owed by other Bridger Logistics and FGP affiliates, including the Additional Fraudulent Transfer Recipient Subsidiaries.

Id. at ¶¶65-68, B0137-0138.

Throughout this post-acquisition process, FGP left BTS "without any valuable assets and ongoing businesses so that it served as a mere tool of Defendants through which they hoped to evade the RSA obligations without cost to the Defendants. BTS's revenue and profits were re-directed to Bridger Logistics, Bridger Rail Shipping, the other Additional Fraudulent Transfer Recipient Subsidiaries, and ultimately passed up to FGP." *Id.* at ¶69, B0138.

Ultimately, on February 1, 2016, BTS stopped delivering oil to the Eddystone facility, or paying for the deficiencies in the minimum volume commitment, in breach of the RSA. *Id*. at ¶74, B0140. In response, Eddystone filed a demand for arbitration with the SMA and, on January 5, 2017, secured an award for unpaid invoices that had accrued to date and for future minimum volume payments in light of BTS's anticipatory breach of contract. *Id.* at ¶75, B0140.

Eddystone now seeks to recover that arbitration award (i.e., the consequential damages arising out of the February 2016 breach of the RSA) from Ferrellgas, Rios and Gamboa on theories of alter ego liability, intentional and constructive fraudulent transfer, and breach of the duty of care and loyalty to creditors. Eddystone FAC at Counts One through Four, and Prayer for Relief, B0140-0148.

Eddystone's alter-ego claim "is one seeking to impose liability based on a breach of the RSA." *Eddystone Rail Co., LLC v. Bridger Logistics, LLC*, 2022 U.S. Dist. LEXIS 100287, at *8 (E.D. Pa. Mar. 21, 2022). To support the "alter-ego" theory of liability, Eddystone claims that BTS was "completely dominated" by FGP, Bridger Logistics, Rios and Gamboa, who directed and controlled "its day-to-day operations and treat[ed] it like a mere department instead of respecting it as an independent legal entity." Eddystone FAC at ¶¶9, 77, 84, B0124, B0140-142. Given the "improper use of the company form both before and after the sale

of Bridger Logistics to FGP", Eddystone asserts that the court should "disregard BTS's status as a separate entity" and hold these defendants liable for the breach of the RSA. *Id.* at ¶¶85, 86, B0142.

The fraudulent transfer counts are premised upon the transfer of BTS's assets to Bridger Logistics and the other Fraudulent Transfer Recipient Subsidiaries of FGP, marked by six "badges of fraud", all of which occurred after the FGP acquisition on June 24, 2015 (i.e., after the Run-Off Date). *Id.* at ¶¶88, 92, B0142-0145. Both counts seek avoidance of the transfers to Ferrellgas, and the return of BTS's assets "necessary to satisfy obligations owed to Eddystone" under the RSA. *Id.* at ¶¶93, 98, B0145-0146.

In its final, related count, Eddystone asserts that the fraudulent transfers drove BTS into a "zone of insolvency" and that FGP, Bridger Logistics, Rios and Gamboa, as "BTS's controlling persons," breached their duty of care and loyalty to Eddystone as BTS's creditor. *Id.* at ¶¶100-103, B0146-0147.

Notably, and indisputably, the Eddystone Litigation does not seek to set aside the RSA on fraudulent inducement grounds, nor does it seek to recover the costs it incurred constructing the transloading facility which supported the admitted performance under RSA through January of 2016. Rather, Eddystone seeks to enforce the RSA as written to recover the consequential damages occasioned by its breach in January of 2016. *Id.* at Counts One through Four, and

Prayer For Relief, B0140-0148. The facts supporting the actual claims advanced against Ferrellgas in the Eddystone Litigaiton were succinctly summarized by the District Court in connection with the motion to dismiss the Eddystone FAC:

> In June 2015, BTS's parent, Bridger Logistics, was purchased by Defendants Ferrellgas Partners, L.P. and Ferrellgas, L.P. (collectively, "Ferrellgas"). At that time, BTS owed to Eddystone a remaining minimum volume obligation of approximately $150 million. Eddystone alleges that Ferrellgas promptly caused Eddystone to abandon more than $10 million of net accounts receivables with its affiliates, the Defendants in this litigation. In addition, Ferrellgas allegedly began crediting the revenue associated with BTS's transloading capacity to its affiliate Defendant Bridger Rail Shipping, LLC ("Bridger Rail Shipping") and causing Bridger Rail Shipping to cover the RSA payments as they came due, while leaving the long-term obligation in BTS. According to Eddystone, as it became clear that a halt to shipping was imminent, Ferrellgas caused BTS to transfer the remainder of its assets to the affiliates who are now Defendants in this litigation. Eddystone asserts that BTS then defaulted on the RSA.

Eddystone Rail Co., LLC v. Rios, 431 F. Supp. 3d at 640.

B. THE ZURICH POLICY

The Zurich Policy was issued to Bridger, LLC which, prior to June 24, 2015, was the alleged parent of Bridger Logistics and its subsidiaries. Appellants' Op. Br. at 2. Consequently, Ferrellgas contends that the **Insureds**, for purposes of the Run-Off Endorsement, include Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries of FGP. *Id.*[4] Ferrellgas does not contend that FGP

[4] Zurich disputes this contention and previously reserved the right to challenge, following appropriate discovery, whether any named defendants in the Eddystone

(Ferrellgas Partners, L.P. and Ferrellgas, L.P.) have coverage under the Zurich Policy, or that FGP's agreement to defend and indemnify Rios and Gamboa in the Eddystone Litigation is covered under the Zurich Policy.

The Zurich Policy's Management and Company Liability ("M&CL") coverage part affords coverage to a qualifying **Company**, defined collectively as the **Policyholder** (Bridger, LLC) and its **Subsidiaries**, under Insuring Agreement C:

> MANAGEMENT AND COMPANY LIABILITY COVERAGE PART
>
> I. INSURING CLAUSES
>
> …
>
> C. COMPANY LIABILITY COVERAGE
>
> The Underwriter 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 **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**, subject to the applicable Limits of Liability set forth in Items 2 and 6 of the Declarations.

Zurich Policy, M&CL, Section I.C., B0293.

FAC qualify as **Insureds** under the Zurich Policy. B0442-0443; B0712. For purposes of the instant appeal only, Zurich accepts Ferrellgas' contention that Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries qualify as **Subsidiaries** under the Zurich Policy and, consequently, qualify as **Insureds** under the definition of **Company**.

Loss is defined to include "the amount the **Insureds** become legally obligated to pay on account of **Claims** made against them for **Wrongful Acts** for which coverage applies" and, where coverage applies, would include **Defense Costs**. *Id.* at Section III.E (as amended by Texas Amendatory Endt. #5, Section II.B), B0295 and B0333. A **Claim** is defined to include "a civil proceeding against any **Insured** commenced by the service of a complaint or similar pleading," *id.* at Section III.A, B0294, and all **Claims** which arise out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** are deemed to be one **Claim**. Zurich Policy at General Terms and Conditions, Section III.D., B0285.

> A **Wrongful Act**, for purposes of the M&CL coverage part, means:
>
> any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any of the Insured Persons, individually or otherwise, in their capacity as such, or in an Outside Position, or with respect to Insuring Clause C, by the Company …

id. at M&CL, Section III.J, B0296, and an **Interrelated Wrongful Act** is defined as:

> **Interrelated Wrongful Acts** means all **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes.

id. at General Terms and Conditions, Section II.R., B0283.

The Zurich Policy's **Policy Period** is December 17, 2014 to June 24, 2015, and the **Run-Off Coverage Period** is June 24, 2015 to June 24, 2021; however,

coverage for a **Claim** made during the **Run-Off Coverage Period** is excluded where such **Claim** is based upon, arising out of, or attributable to any **Wrongful Acts** including any **Interrelated Wrongful Acts**, taking place in whole or in part after June 24, 2015:

> 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 06/24/2015.

(as noted *supra*, the "Run-Off Exclusion"). *Id.* at Run-Off Endorsement (Endt. #42), B0378.

The **Insured** has the duty to defend any covered **Claim**. *Id.* at Endt. #22, Section I.A.1.a., B0354. Zurich's obligation is limited to a duty to indemnify covered **Defense Costs**. *Id.*, Section I.A.1.c.iii., B0355.

C. THE SUPERIOR COURT'S DECLARATION OF NO COVERAGE UNDER THE ZURICH POLICY FOR THE EDDYSTONE LITIGATION

Ferrellgas filed the instant coverage action on May 29, 209 against Beazley and Zurich seeking "a judicial determination of the existence of insurance coverage" under the Beazley Policy and Zurich Policy for the Eddystone Litigation. Appellants' Op. Br. at 3. Ferrellgas filed the operative First Amended Complaint (as noted, the "FAC") on July 1, 2019, B0025, and ten days later, on July 11, 2019, filed a Motion for Partial Summary Judgment on Defense Costs against Beazley and Zurich; that is, "partial summary judgment consisting of a

declaration that Beazley and Zurich owe a duty to advance plaintiffs' defense costs of the Eddystone Litigation." B0157.

On July 26, 2019, Zurich filed its Answer to the FAC with Affirmative Defenses, and a single-count Counterclaim For Declaratory Relief seeking "a judicial declaration that Zurich has no coverage for any aspect of the Eddystone Litigation and has no obligation to defend, indemnify or pay any sums associated with the Eddystone Litigation under [the Zurich Policy]." B0265.

On September 18, 2019, Zurich filed (1) a Motion For Summary Judgment requesting "judgment in its favor and a declaration that it has no insuring obligation in favor of the plaintiffs in this action relative to the underlying [Eddystone Litigation], based on the limited ground that the Run-Off Exclusion in [the Zurich Policy] precludes coverage for any qualifying insured in that litigation", B0433, together with Zurich's Opening Brief in Support of its Motion for Summary Judgment, B0435-0701; and (2) its Answering Brief in Response to Ferrellgas' Motion for Partial Summary Judgment, B0702-0741. Zurich expressly reserved, and did not waive, the alternative bases for the relief sought by its counterclaim, including application of the Absolute Breach of Contract Exclusion and other potentially dispositive coverage defenses in the event its dispositive motion was not granted. B0442-0443; B0712. Zurich also reserved on the choice of law issues presented by the competing motions. B0453-0455; B0717-0719.

Further briefs on the cross-motions were filed on October 18, 2019 (Ferrellgas' Combined Reply Brief in Support of the Their Motion for Partial Summary Judgment on Defense Costs against Zurich and Response to Zurich's Motion for Summary Judgment), B0742-0770, and on November 1, 2019 (Zurich's Reply Brief in Support of its Motion for Summary Judgment), B0771-0799. Beazley also filed an opposition to Ferrellgas' partial summary judgment, and cross moved for summary judgment on its own behalf during the same time frame. See Dockets (B0001-0024), Transaction ID 64219887 & 64219946.

On November 13, 2019, the Honorable Mary M. Johnston heard argument on the motions for summary judgment, and took the matters under advisement. B0800.

On January 21, 2020, the Superior Court granted Zurich's Motion For Summary Judgment, declaring there is no coverage for the Eddystone Lawsuit under the Zurich Policy:

> The Court finds that the Eddystone Litigation is excluded from coverage by the Zurich Policy. Therefore, Zurich's Motion for Summary Judgment is hereby GRANTED. Plaintiffs' Motion for Partial Summary Judgment on Count I, duty to advance defense costs, is hereby DENIED, and Count I is hereby DISMISSED.

Ferrellgas Partners L.P., 2020 Del. Super. LEXIS 41, at *24.

Examining the well pleaded facts and the causes of action advanced in the Eddystone FAC as a whole, and considering all reasonable inferences therefrom in

the light most favorable to Ferrellgas, the Superior Court correctly concluded that the Eddystone Litigation addresses damages arising out of the February 16, 2016 breach of the RSA and the so-called "transfer acts"—not damages based on fraud in the inducement, or any damages separate and apart from the breach of contract. *Id*. at *22-23. Because coverage under the Zurich Policy does not extend to **Loss** on account of any **Claim** 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 Superior Court correctly held that Run-Off Exclusion plainly and unambiguously precluded coverage. *Id.*

D. FERRELLGAS FAILS TO TIMELY APPEAL THE NO COVERAGE DECLARATION

The January 21, 2020 "no coverage" Opinion and Order determined the merits of the controversy between Ferrellgas and Zurich and left nothing for future determination or consideration as between those parties. However, the Superior Court's January 21, 2020 Opinion and Order conversely found that the Beazley Policy afforded coverage for the Eddystone Lawsuit:

> Therefore, [the Beazley Policy's] coverage applies to the alleged "Wrongful Acts" and any "Interrelated Wrongful Acts" committed on or after June 21, 2015 by Rios and Gamboa in their concurrent capacity as FG officers. Beazley's Motion for Summary Judgment is hereby DENIED and Plaintiffs' Motion for Partial Summary Judgment on Count II, advancement and reimbursement of defense costs pursuant to the Beazley Policy, is hereby GRANTED.

Id. at *33-34. Consequently, the no coverage declaration respecting the Zurich Policy remained interlocutory while Ferrellgas' coverage claims against Beazley were further litigated. Del. Super. Ct. Civ. R. 54(b).

Beazley ultimately resolved the coverage claims against it, and the remaining parties to the case entered into a stipulation of dismissal which was approved by the Superior Court on November 10, 2021. B0836-0837. At that point in time, the Superior Court's January 21, 2020 Order granting summary judgment on Zurich's counterclaim and declaring there is no coverage for the Eddystone Litigation under the Zurich Policy became a final judgment, leaving nothing for future determination or consideration by the court in this case.

Following the dismissal of the claims against the only other party to the litigation, Ferrellgas elected not to appeal the January 21, 2020 declaration. Instead, Ferrellgas waited more than three (3) years after that judgment, and the subsequent stipulated dismissal of all claims against Zurich's co-defendant, Beazley, and filed a "Motion To Dismiss Remaining Count", ostensibly contending that a breach of contract claim for failure to indemnify under the Zurich Policy survived the Order declaring that the Eddystone Litigation is excluded from coverage under the Zurich Policy. B0838-0845. Zurich opposed the Motion. B0846-0854.

Following a hearing on May 8, 2023, B0855-0891, the Superior Court granted Ferrellgas' Motion to Dismiss Count III of the FAC, and entered a "final judgment" in this action on May 10, 2023, thus enabling the instant untimely appeal by Ferrellgas. See Exhibit "B" to Appellants' Opening Brief.

Zurich has timely cross-appealed from the May 10, 2023 Order. B0893-0895.

ARGUMENT

Appellee's Answering Argument On Appeal

A. THE SUPERIOR COURT CORRECTLY DETERMINED THAT ZURICH HAS NO COVERAGE FOR THE EDDYSTONE LITIGATION

1. Question Presented

Whether the Superior Court Correctly Determined that the Eddystone FAC, when read as a whole and drawing all reasonable inferences therefrom in favor of the non-moving party, advanced a **Claim** for a **Wrongful Act** or **Interrelated Wrongful Act** which occurred in whole or in part after the Run-Off Date.

2. Scope of Review

The 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).

3. Merits of the Argument

The Superior Court properly held that the Eddystone FAC is a **Claim** for **Wrongful Acts** which occurred, in whole or in part, after FGP's acquisition of Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries and, accordingly, was excluded from coverage under the Zurich Policy's Run-Off Exclusion.

a. The Duty to Advance Defense Costs

The **Insured**, not the Underwriter, has the duty to defend any covered **Claim** under the Zurich Policy. Zurich Policy at Endt. #22, Section I.A.1.a. ("It shall be

the duty of the **Insureds** and not the duty of the Underwriter to defend any **Claims** which are made against the **Insureds** and which are covered by the **Liability Coverage Parts**."). B0354. Hence, Zurich's obligation is limited to a duty to indemnify covered "Defense Costs". *Id.*, Section I.A.1.c.iii., B0355.

The test applicable to Zurich's duty to pay defense costs under Delaware law "is whether the allegations of the complaint, when read as a whole, assert 'a risk within the coverage of the policy'." *Verizon Communs., Inc. v. Ill. Nat'l Ins. Co.*, 2017 Del. Super. LEXIS 250, at *18 (Super. Ct. Mar. 2, 2017) (citing *Cont'l Cas. Co. v. Alexis I. Du Pont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974)), *rev'd and remanded on diff't grounds sub nom.*, *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566 (Del. 2019). Under Texas law, which Zurich maintains may apply to the Zurich Policy pending discovery, B0453-0455 and B0717-0719, the duty to advance defense costs is not necessarily limited to the four corners of the operative pleading. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 574 (5th Cir. 2010) ("no Texas state court has applied the [Eight Corners] rule to a case, like the present one, involving a duty to advance defense costs"); *Oceans Healthcare, L.L.C. v. Ill. Union Ins. Co.*, 379 F. Supp. 3d 554, 567 (E.D. Tex. 2019) (substantively identical defense reimbursement clause demonstrated the parties' choice to provide for the use of extrinsic evidence to determine whether a particular claim is subject to a run-off exclusion).

The Superior Court applied the duty to defend test as articulated in *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 Del. Super. LEXIS 55, at *22-23 (Super. Ct. Jan. 31, 2019) ("the Court reviews 'the complaint as a whole' and considers 'all reasonable inferences that may be drawn from the alleged facts.' The key is 'whether the allegations of the complaint, when read as a whole, assert 'a risk within the coverage of the policy'.") (citations omitted). *Ferrellgas Partners L.P.*, 2020 Del. Super. LEXIS 41, at *21-22 (citing *IDT*, 2019 Del. Super. LEXIS 55, at *22-23). Applying that standard, the Superior Court correctly held that the **Claim** advanced in the Eddystone FAC is based upon, arose out of, or was attributable to **Wrongful Acts** which took place, in whole or in part, after June 24, 2015 (the Run-Off Date). Hence, any distinction to be drawn between the duty to advance and duty to defend is immaterial. *Stillwater Mining Co. v. Nat'l Union Fire Ins. Co.*, 289 A.3d 1274, 1281 n.34 (Del. 2023) (referencing the terms "duty to advance defense costs" and "duty to defend" interchangeably because the distinction between the duty to defend and the duty to advance defense costs was immaterial to the Court's decision).

b. Policy Interpretation

When the language of an insurance policy is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007);

Oceans Healthcare, 379 F. Supp. 3d at 560 (the court is obligated to give the words their "plain meaning" even if this means coverage is denied). An insurance policy is not ambiguous merely because the parties do not agree on the proper construction; rather, ambiguity exists only when the controverted provision is "reasonably or fairly susceptible to different reasonable interpretations." *Axis Reinsurance Co. v. HLTH Corp*., 993 A.2d 1057, 1062 (Del. 2010); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003) (same).

c. The Run-Off Exclusion

The Run-Off Exclusion at issue in this case is hardly novel, and the courts in Texas and Delaware, among other states, have uniformly concluded it is enforceable as its plain terms dictate. See e.g., *Oceans Healthcare*, 379 F. Supp. 3d at 568-69; *HLTH Corp. v. Clarendon Nat'l Ins. Co*., 2009 Del. Super. LEXIS 437 (Del. Super. Ct. July 15, 2009).

Ferrellgas, notably, does not substantively address a single case addressing this exclusion, nor does it substantively challenge the Superior Court's finding that it is clear and unambiguous. The cases interpreting run-off exclusions are, however, both instructive and compelling to the issue before this Court.

The run-off endorsement at issue in *Oceans Healthcare* provided that "[t]he Insurer shall not be liable for that portion of Loss under this Coverage Section on account of any Claim: Alleging, based upon, arising out of, attributable to, directly

or indirectly resulting from, in consequence of, or in any way involving any Wrongful Act or Interrelated Wrongful Act taking place, in whole or in part, subsequent to the Run-Off Date." *Oceans Healthcare*, 379 F. Supp. 3d at 568. The court explained that "when an exclusion precludes coverage for injuries 'arising out of' described conduct, the exclusion is given a broad, general and comprehensive interpretation," such that "[a] claim need only bear an incidental relationship to the described conduct for the exclusion to apply." *Id.* (citing *Century Surety Company v. Seidel*, 893 F.3d 328, 333 (5th Cir. 2018)). Further, since the exclusion specifies that coverage for a "Claim" arising out of any "Wrongful Acts" or "Interrelated Wrongful Acts" which occurred in "whole or in part" subsequent to the run-off date is excluded, coverage for the entire "Claim" is barred if any "Wrongful Act" or "Interrelated Wrongful Act" occurred after that date. *Oceans Healthcare*, 379 F. Supp. 3d at 568.

The *Oceans Healthcare* insured was served with an OIG Subpoena arising out of an investigation into possible False Claims Act (FCA) violations. *Id*. After concluding that an OIG Subpoena qualified as a "Claim", *id.* at 561, the court held that the "Claim" would be "precluded from coverage if it alleges, is based upon, arises out of, is attributable to, directly or indirectly results from, is in consequence of, or in any way involves any alleged FCA violation or alleged FCA violation that have a common nexus any fact, circumstance, situation, event, transaction, cause

or series of facts, circumstances, situations, events, transactions or causes taking place, in whole or in part, subsequent to December 27, 2012 [the run-off date]." *Id.* at 568. Because the OIG Subpoena requested documents generated before and after the run-off date, coverage for the "Claim" was precluded. *Id.* at 568-69.

The same construction has been endorsed in Delaware. To begin with, Delaware, like Texas, applies a broad construction of the phrase "arising out of." *Pac. Ins. Co. v. Liberty Mut. Ins. Co*., 956 A.2d 1246, 1257 (Del. 2008) (commenting that the phrase is "one that lends itself to uncomplicated common understanding," and holding "under Delaware law, the term 'arising out of' is broadly construed to require some meaningful linkage between the two conditions imposed in the contract."). Consequently, this Court found that a substantively identical run-off exclusion – which applied "where all or any part" of any Wrongful Acts or Interrelated Wrongful Acts were committed after the run-off date – precludes coverage regardless of whether any "Wrongful Acts" are alleged to have occurred prior to that date. *HLTH Corp.*, at *54-55.

The D&O policy at issue in *HLTH Corp.* provided:

> Zurich shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to September 12, 2000.

Id., at *15. Old Republic issued a follow form excess policy over the Zurich policy and denied coverage for the underlying claim based on this exclusion. *Id.* at

*16. This Court held that this exclusion's "clear language" served "to exclude claims 'arising out of' Wrongful Acts committed or allegedly committed, at least partially after September 12, 2000, regardless of whether certain acts in furtherance of the underlying conspiracy were committed before the cut-off date." *Id.* at *49. According to the Court, the dispositive issue, properly framed, was "whether the claim arises out of any Wrongful Act, as described in the insurance contract, that was alleged or committed in whole or in part after September 12, 2000." *Id.* at *53. Consequently, because the insured conceded (as Ferrellgas does here) that at least some "Wrongful Acts" occurred after the run-off date, coverage was barred. *Id*. at *54-55.

HLTH Corp. was not decided in a vacuum. The Court addressed two other decisions, each of which it found persuasive. *Bainbridge Mgmt., LP v. Travelers Cas. & Sur. Co. of Am.*, 2006 U.S. Dist. LEXIS 22911 (N.D. Ind. Apr. 10, 2006) addressed a D&O policy which excluded losses "arising out of or in any way related to any Wrongful Act committed or alleged to have been committed, in whole or in part, prior to October 6, 1998." *HLTH Corp*., at *48 (citing *Bainbridge*, at *3.). In *Bainbridge*, the insured had engaged in a scheme to defraud beginning in 1995 and continuing until December, 2001, and contended that it had coverage based on those wrongful acts which occurred after the cut-off date; that is, from October 6, 1998 through December, 2001. The *Bainbridge* court

rejected that argument, holding that "the policy provides no independent coverage of Wrongful Acts that occur on or after October 6, 1998, and excludes coverage for Claims, in their entirety, that arise from or are related to any Wrongful Acts that occurred before that date." *Bainbridge*, at *15.

The second case, *Champlain Enterprises, Inc. v. Chubb Custom Ins. Co*., 316 F. Supp. 2d 123 (N.D.N.Y. 2003), was "illustrative … because the Court there barred all claims, even those for Wrongful Acts occurring outside the exclusionary period, because the broad language in the exclusionary provision acted as a complete bar." *HLTH Corp*., at *51. In *Champlain*, the underlying lawsuit alleged state law claims of breach of fiduciary duty, unjust enrichment, and waste and diversion of corporate assets. *Champlain*, 316 F. Supp. 2d at 125. These claims originated, in part, from the purchase, storage, and renovation of four World War II-era airplanes. *Id.* at 126. The exclusion in the policy provided that the underwriter "shall not be liable for Loss on account of any Claim ... based upon, arising from, or in consequence of Wrongful Acts or Interrelated Wrongful Acts which were committed, attempted or allegedly committed or attempted in whole or in part prior to May 20, 1999." *Id.* at 127. Because some of the alleged improper storage and renovations of the airplanes occurred after that cut-off date, the insured argued coverage applied. The court disagreed, holding that "[a]ny portion of the alleged improper storage and renovation not explicitly covered by the exclusion

most certainly arise from the portion that is covered." *Id*. at 129. Reviewing that decision, Judge Cooch reasoned that "the [*Champlain*] Court's holding was premised on the fact that the claims 'ar[o]se from' acts that occurred within the exclusionary period regardless of whether certain acts occurred outside the exclusionary period." *HLTH Corp*., at *51. This, again, reinforced the only plausible reading of the run-off endorsement and exclusionary language at issue in *HLTH Corp*. (and here); i.e., coverage is barred where the **Claim** arises from a **Wrongful Act** or **Interrelated Wrongful Act** which occurred, in whole or in part, after the run-off date.

d. The Superior Court Properly Held that the Eddystone Litigation Was Excluded From Coverage Under the Zurich Policy's Run-Off Exclusion

The Zurich Policy forecloses coverage for 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." Under the plain terms of this Run-Off Exclusion, if a **Claim** (defined as a civil proceeding) is based upon, arises out of, or is attributable to a **Wrongful Act** that took place, in whole or in part, subsequent to June 24, 2015, coverage is excluded. Moreover, if the **Claim** is based upon, arises out of, or is attributable to any **Wrongful Acts** that have a common nexus to any fact, circumstance, situation, event, transaction, cause or series of facts,

circumstances, situations, events, transactions or causes (i.e., any I**nterrelated Wrongful Acts**) which take place in whole or in part subsequent to June 24, 2015, coverage is excluded.

Ferrellgas admits that the Eddystone Litigation "is a 'Claim' – a 'civil proceeding against any Insured commenced by the service of a complaint or similar pleading'." Appellants' Op. Br. at 29, 31 ("A Claim is a 'civil proceeding against any Insured' – here the entire Eddystone Litigation"). Hence, the question conclusively addressed by the Superior Court is whether that **Claim** is based upon, arises out of, or is attributable to any **Wrongful Act** or **Interrelated Wrongful Act** alleged to have taken place in whole or in part after June 24, 2015.

The Eddystone Litigation undeniably arises out of – and is dependent upon – the breach, in February 2016, of the RSA. The factual allegations in the Eddystone FAC are addressed to Ferrellgas' alleged scheme to avoid liability for the breach once it determined that the continued performance under the RSA would be unprofitable. And the relief sought in the Eddystone FAC exclusively addresses recovery of the sums due and owing under the RSA on account of that breach.

To begin, the well pled averments in the Eddystone FAC establish that **Wrongful Acts** upon which the **Claim** is premised occurred in whole or in part after FGP's acquisition of Bridger Logistics and the Fraudulent Transfer Recipient Subsidiaries. On June 24, 2015, BTS's parent, Bridger Logistics, was purchased

by Ferrellgas. Eddystone FAC at ¶52, B0134. At that time, BTS owed Eddystone a remaining minimum volume obligation under the RSA. *Id.* at ¶54, B0134. Eddystone alleges that Ferrellgas stripped BTS of its assets and cash flows from other contracts, forgave millions of dollars in accounts receivables held by BTS, and redirected revenue streams. *Id.* at ¶¶55-65, B0134-0137. As the changing oil prices caused profits to turn into losses under the RSA in the fall of 2015, *id.* at ¶62, Ferrellgas "developed a plan to wind down the exposure", *id.* at ¶64, further stripping BTS of its assets and re-directing revenues, *id.* at ¶¶65, 66, and "transferring away all of its real and personal property and valuable contracts to other FGP subsidiaries", *id.* at ¶67. B0136-0138. The end result left BTS "without any valuable assets and ongoing businesses so that it served as a mere tool of [Ferrellgas] through which they hoped to evade the RSA obligations without cost ...." *Id.* at ¶69, B0138. Then, on February 1, 2016, Ferrellgas defaulted under the RSA, leading to the SMA arbitration and an award of damages on account of that breach. *Id.* at ¶¶74-75, B0140.

The causes of action advanced in the Eddystone FAC are exclusively designed to create a fund from which Eddystone can collect the SMA arbitration award or the equivalent consequential damages arising out of the February 2016 breach of the RSA. The "alter ego" count seeks to impose liability upon FGP, Bridger Logistics, Rios, Gamboa, and Bridger Rail Shipping for that breach, as a

consequence of their alleged dominion and control over and undercapitalization of BTS. B0140-0142. The fraudulent transfer counts seek to avoid transfers directed by FGP, Bridger Logistics, Rios and Gamboa which were ostensibly made to avoid the debt under the RSA, and to create a fund to recover for the February 2016 breach from the transferees. B0142-0146. The breach of a fiduciary duty count similarly seeks to hold these same defendants accountable for the breach and the damages flowing from the same, suggesting that those defendants, as BTS's controlling persons, had a duty of care and loyalty to creditors once those same fraudulent transfers placed BTS in the "zone of insolvency." B0146-0147.

The specific relief sought in the Eddystone FAC is limited to damages on account of that breach:

1. An award of all payments BTS owes to Eddystone under the RSA.

2. An award against Ferrellgas and its two officers (Rios and Gamboa) of all amounts awarded by the SMA arbitration panel in the arbitration between Eddystone and BTS.

3. All expectation damages available to a party injured by breach of contract at common law and by statute and such other and further relief as this Court deems just and proper.

4. An order avoiding all direct or indirect transfers from BTS to the Ferrellgas transferees and requiring the Ferrellgas transferees to undo those transfers.

5. Damages in the amount of the value of the transfers described in the previous paragraphs.

6. An award of compensatory damages against Ferrellgas and its two officers (Rios and Gamboa) for the economic injury they caused Eddystone through breach of their fiduciary duty in the amount of the foregone minimum volume payments owed under the RSA.

7. An award of punitive damages against Ferrellgas and its two officers (Rios and Gamboa) for their intentional fraudulent transfer and their willful breach of fiduciary duty.

8. Pre- and post-judgment interest, including under NY CPLR 5001 & 5004.

Eddystone FAC at Prayer for Relief, B0147-0148.

The lynchpin of the Eddystone FAC is the breach of the RSA – without which the claims in the Eddystone Litigation could not lie. The fraudulent transfers, the scheme to avoid liability under the RSA, and the ultimate default under the RSA took place after FGP's acquisition of Bridger Logistics on June 24, 2015. The Superior Court – reading the operative pleading as a whole and considering all reasonable inferences therefrom in a light most favorable to Ferrellgas – correctly so found:

> Viewing the Eddystone FAC in the light most favorable to Plaintiffs, the Court finds that all Claims in the FAC stem from the February 16, 2016 breach of the RSA. All requested relief in the Eddystone FAC is in the nature of damages for breach of contract. Eddystone is not seeking reformation of the RSA or to set aside the RSA. The Court finds that the Eddystone Litigation does not raise a Claim for damages based on fraud in the inducement, the Inducement Acts, or any damages separate and apart from the breach of contract claim.

Ferrellgas Partners L.P., 2020 Del. Super. LEXIS 41, at *22-23.

e. The So-Called "Inducement Acts" Do Not Form the Basis of any Claim Not Dependent Upon the Post-Acquisition Breach and Other Wrongful Acts

In an effort to manufacture coverage for a post-acquisition risk Zurich does not insure, Ferrellgas unilaterally references the ongoing "misstatements, misleading statements, acts or omissions" concerning BTS's *bona fides* as the "inducement acts". Ferrellgas then strains reason to suggest that these so-called "inducement acts"— which do not by themselves form the basis of any claim for relief in the Eddystone FAC – are sufficient in and of themselves to afford a basis to pay defense costs merely because they are "wrongful acts" pled in the Eddystone FAC as having occurred before and after the Run-Off Date. Ferrellgas is wrong.

The Zurich Policy covers **Loss** on account of a **Claim** for **Wrongful Acts**, not the **Wrongful Acts** themselves. *Westport Ins. Corp. v. Mylonas*, 704 F. App'x 127, 130 (3d Cir. 2017) ("A claim is not the underlying wrong or wrongs, but rather the demand for loss made upon the insured party …"). In order for a claim to be "for" a wrongful act, it must seek redress in response to or as requital of that act. *RSUI Indem. Co. v. Desai*, 2014 WL 4347821, at *4 (M.D. Fla. 2014); *Employers' Fire Ins. Co. v. ProMedica Health Sys., Inc.*, 524 Fed. Appx. 241, 252-53 (6th Cir. 2013) (a claim that does not seek redress for the "Wrongful Act" at issue is not "for a Wrongful Act"). This naturally follows from the definition of

the preposition "for" – which is "[u]sed to indicate the object or purpose of an action or activity." The American Heritage Dictionary 329 (3d ed. 1994).

The required causal link between a claim and the precipitating wrongful act was the foundation of this Court's decision in *Solera*, which addressed whether an appraisal action is a "claim . . . made against [Solera] *for* any actual or alleged violation" of securities law (i.e., a "Securities Claim"). *In re Solera Ins. Coverage Appeals*, 240 A.3d at 1130-31 (emphasis added). Following *Solera*, the court in *Jarden, LLC v. ACE American Insurance Company*, 2021 Del. Super. LEXIS 534, (Del. Super.), *aff'd*, 273 A.3d 752 (Del. 2022), squarely addressed whether an appraisal action is *for* a wrongful act and concluded it was not, *id*., at *14-15, explicitly holding that "the D&O Policies' coverage … only applies to a claim 'for' a Wrongful Act." *Id* at *17. See also, *MPM Holdings Inc. v. Fed. Ins. Co*., 2022 Del. Super. LEXIS 102, at *12 (Super. Ct. Mar. 15, 2022) (holding an appraisal action "does not seek redress or reprisal for any wrongful conduct" and, thus, "is not a claim for a Wrongful Act.").

Eddystone does not advance a claim to set aside the RSA on grounds that it was fraudulently induced, reform it as a consequence of any misrepresentation, or recover sums it spent building the transloading facility; rather, it seeks to *enforce* the RSA *as written* to recover the consequential damages occasioned by its breach on February 1, 2016. Hence, the Eddystone Litigation does not implicate a **Claim**

"for" the so-called inducement acts, and the Superior Court correctly so found. *Ferrellgas Partners L.P.*, 2020 Del. Super. LEXIS 41, at *24.

Ferrellgas' argument that Eddystone FAC seeks independent relief for the so-called inducement acts in the alter ego claim fares no better.

To begin, the alter ego claim "is one for breach of the RSA" and represents an effort to use the alter ego doctrine to hold others liable for that breach. *Eddystone Rail Co., LLC v. Bridger Logistics, LLC,* 2022 U.S. Dist. LEXIS 100287, at *6. All agree that BTS performed fully under the RSA through January of 2016. *Id.* at ¶5, B0123. Consequently, the alleged misrepresentations concerning BTS's financial autonomy was of no actionable consequence while Zurich was on the risk. Standing alone (as Ferrellgas insists these alleged misrepresentations should be viewed), the so-called "inducement acts" bear no direct relation to the **Claim** at issue in the Eddystone Litigation absent the breach in February of 2016. The Zurich Policy's Run-Off Endorsement affords coverage for **Claims** for **Wrongful Acts** which occur during the *policy period* – not **Claims** which arise out of, are based upon, or are attributable to **Wrongful Acts** which occur during the ***Run-Off Coverage Period***.

The so-called inducement acts, in any event, indisputably share a "common nexus to the facts, circumstances, situations, events, and transactions, or cause, or series of facts, circumstances, situations, events, transactions or causes" which

took place subsequent to June 24, 2015. The Eddystone FAC alleges that Bridger Logistics, among others, completely "dominated BTS in all aspects of its business, directing and controlling its day-to-day operations and treating it like a mere department instead of respecting it as an independent legal entity" both before and after FGP's acquisition. Eddystone FAC at ¶77, B0140-0141. Both before and after the acquisition, Bridger Logistics is said to have funded BTS's obligations under the RSA. *Id.* at ¶¶49, 57, 83, B0132-0133, B0135, B0142. BTS's "undercapitalization" is said to have occurred after the post-acquisition transfers, *id.* at ¶78 ("after Defendants stripped BTS, BTS was not capitalized with sufficient resources for its business") and ¶92(f) (as a result of the transfers, BTS immediately became insolvent), although Eddystone alternatively alleges that BTS was insolvent from the moment it entered into the RSA through its breach of the RSA in February 2016, *id.* at ¶¶103. B0141, B0145, B0147. Hence, the same acts which Ferrellgas now asserts led to the formation of the RSA continued unabated after the Run-Off Date.

The dominance and control over BTS which continued throughout the life of the RSA is what gives rise to the alter-ego theory, is what enabled the offending post-acquisition fraudulent transfers to avoid liability under the RSA, and is what led to the claimed breach of the fiduciary duty of care and loyalty following BTS's insolvency. BTS's financial *bon fides* never changed; rather, the alleged plan to

avoid its liability under the predicate RSA matured once it became clear in the fall of 2015 that use of the Eddystone facility would no longer garner a profit for its controlling entities. At best, those acts give rise to that **Claim** only when paired with the **Interrelated Wrongful Acts** which plainly occurred after the Run-Off Date. Compare, *Madison Materials Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 523 F.3d 541, 544 (5th Cir. 2008) (explaining that previous acts of embezzlement that occurred outside of a policy period were related to other acts of embezzlement that occurred within the policy period because they were part of the same embezzlement scheme).

In sum, and contrary to Ferrellgas' argument, the alleged misrepresentations concerning BTS's *bona fides* and the alleged improper use of the "company form" occurred before and after the Run-Off Date, and relate to the exact same subject (the RSA) – the breach of which gives rise to the **Claim** and any potential "alter ego" liability. Thus, the so-called inducement acts necessarily share "a common nexus" to the series of circumstances, events, and transactions which took place subsequent to June 24, 2015, regardless of whether the same could be legitimately characterized as a **Claim** for a **Wrongful Act** which also took place prior to that Run-Off Date. *Bainbridge Mgmt., LP*, 2006 U.S. Dist. LEXIS 22911 at *15 (the policy provides no independent coverage of Wrongful Acts that occur outside of

the exclusion, and excludes coverage for Claims, in their entirety, that arise from or are related to any Wrongful Acts that occurred within the exclusion).

B. Superior Court Correctly Held That The Reasonable Expectations Doctrine Does Not Apply

1. Question Presented

Whether the Superior Court correctly determined that the reasonable expectations doctrine did not apply to the clear and unambiguous Run-Off Exclusion.

2. Scope of Review

The Court's scope of review is *de novo*. *In re Solera Ins. Coverage Appeals*, 240 A.3d at 1130.

3. Merits of the Argument

The reasonable expectations doctrine applies only after a determination that an insurance contract is ambiguous:

> With all due deference, we decline to extend the reasonable expectations doctrine as far as it has been taken in some other jurisdictions; … Therefore, we hold that the doctrine of reasonable expectations is applicable in Delaware to a policy of insurance only if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print purports to take away what is written in large print.

Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927-28 (Del. 1982).

Thus, contrary to the premise of Ferrellgas' argument, the reasonable expectations doctrine is not reflexively applied to every policy of insurance; rather, it applies only where the terms of the policy provision in question are first found to be ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if

the fine print purports to take away what is written in large print. Accord, *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1108 (Del. 2015) (the "doctrine applies only after a determination that an insurance contract is ambiguous"). Hence, the Superior Court *followed the law* when it explained that it would "only apply this doctrine where the policy is ambiguous." *Ferrellgas Partners L.P*, 2020 Del. Super. LEXIS 41, at *10 (citing *Hallowell*, at 926). Here, the Run-Off Exclusion is clear and unambiguous, and none of the other prerequisites for application of the doctrine are implicated.

For the same reason, Ferrellgas' dissertation regarding the generic law guiding application of an exclusion to coverage is misplaced. "When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because 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." *Hallowell*, 443 A.2d at 926. Ferrellgas does not point to any ambiguity in the Run-Off Exclusion because there is none.

Ferrellgas nonetheless cobbles together an argument nominally premised upon reasonable expectations, but actually advocates that the run-off coverage is somehow illusory. That argument fails as well.

Bridger, LLC negotiated and paid for a Run-Off Endorsement which deems **Claims** first made during the **Run-Off Coverage Period** as having been made

during the **Policy Period**. B0378. The notion that the Run-Off Endorsement "reduces" coverage makes no sense because the same coverage available when the policy was in effect is allowed, even though the **Claim** is first made during the **Run-Off Coverage Period**.

Likewise, the notion that the Run-Off Endorsement renders coverage "illusory" is not supportable. The Run-Off Endorsement affords the same coverage for a **Claim** first made during the **Run-Off Coverage Period** as would have been available had the **Claim** been made during the policy period. *Old Republic Ins. Co. v. Rexene Corp*., 1990 Del. Ch. LEXIS 187 (Del. Ch. Nov. 5, 1990) (applying tail coverage in that manner); *EMSI Acquisition, Inc. v. RSUI Indem. Co*., 306 F. Supp. 3d 647, 657 (D. Del. 2018) (addressing similar coverage parameters under a pre-acquisition policy). As such, the Run-Off Endorsement affords a valuable benefit: It allows coverage for a **Claim** first made *after* the effective dates of claims made coverage, provided that **Claim** does not arise out of **Wrongful Acts** or **Interrelated Wrongful Acts** which occurred, in whole or in part, after the Run-Off Date. Neither the policy (when it was in effect) nor the Run-Off Endorsement insures a **Claim** which arises out of fresh "Wrongful Acts" or "Interrelated Wrongful Acts" which occur after the policy expired.

Alstrin v. St. Paul Mercury Ins. Co., 179 F. Supp. 2d 376 (D. Del. 2002), cited by Ferrellgas, does not remotely suggest a different outcome. The issue

before the *Alstrin* court was whether the internal endorsements in a run-off endorsement replaced or supplemented the policy's first sixteen endorsements, not whether a run-off exclusion creates "illusory" coverage. *Alstrin*, 179 F. Supp. 2d at 391. The *Alstrin* court agreed that the run-off endorsement did not include "going forward coverage"; it certainly did not find the same to render coverage "illusory" or serve as a "reduction" in the agreed coverage. *Id.* at 393-4. Instead, the *Alstrin* court found that a "deliberate fraud exclusion" was inconsistent with the grant of coverage for securities claims under the 33 and 34 Acts because that exclusion "would eviscerate coverage for the majority of securities claims." *Id.* at 398.

Contrary to Ferrellgas' contention, the doctrine of *contra proferentum* has no application here either. C*ontra proferentum* is not applicable "unless there is some ambiguity in the policy language; in other words, if the language is clear and unambiguous a Delaware court will not destroy or twist the words under the guise of construing them." *Hallowell*, 443 A.2d at 926 (citing *Apotas v. Allstate Insurance Co.*, 246 A.2d 923, 925 (Del. 1968) and *Novellino v. Life Ins. Co. of North America*, 216 A.2d 420, 422 (Del. 1966)). Like the reasonable expectations doctrine, *contra proferentum* is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of the policy language. *Hallowell*, 443 A.2d at 927; *IDT Corp*., 2019 WL 413692 at *17 ("this rule is applicable only

where the policy language is indeed ambiguous"). There is no ambiguity in the Run-Off Exclusion. Consequently, the parties are bound by their agreement.

C. The Claim Is Dependent Upon Wrongful Acts Which Occurred, in Whole or in Part, After The Run-Off Date

1. Question Presented

Whether the so-called inducement acts share a common nexus with the post-acquisition breach of the RSA and other **Wrongful Acts** which indisputably form the bases of the **Claim**.

2. Scope of Review

The Court's scope of review is *de novo*. *In re Solera Ins. Coverage Appeals*, supra, 240 A.3d at 1130.

3. Merits of the Argument

Ferrellgas returns to the same failed "inducement act" argument in its final refrain. This time, Ferrellgas argues – unconvincingly – that the inducement acts are not "interrelated wrongful acts" even though, standing alone, they do not form the basis of any claim.

The Zurich Policy defines an **Interrelated Wrongful Act** as all **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes. Zurich Policy at General Terms and Conditions, Section II.R., B0283. Under the Run-Off Exclusion, coverage is barred for any claim based upon, arising out of, or attributed to any **Interrelated Wrongful Acts** which took place after June 24, 2015. B0378.

Ferrellgas insists that it engaged in "two schemes" – one to induce Eddystone to enter into the RSA, and a second to avoid the obligations of the RSA after continued performance under that same contract became unprofitable. Appellants' Op. Br. at 44. Even assuming Eddystone was seeking relief for the first "scheme", which it plainly is not, the fact remains that both "schemes" address the exact same transaction or, at a minimum, have in common the same causally connected facts, circumstances, or transactions which occurred after FGB's acquisition; i.e., the Run-Off Date.

As explained *supra*, the so-called inducement acts address the exact same representations and practices which occurred both before and after the Run-Off Date, and not only share a common nexus of facts, circumstances, and events which took place after the Run-Off Date, but are also dependent upon those post-acquisition acts and the February 2016 breach upon which the **Claim** for a **Wrongful Act** in the Eddystone Litigation is based. The so-called first "scheme" implicating misrepresentations concerning BTS's capitalization, the funding of its obligations under the RSA, and the control exercised by its parents (even if the same can be said to constitute "Wrongful Acts" in the absence of the subsequent breach) plainly have a common nexus with those exact same acts which occurred after June 24, 2015 and, of course, are united by the common "transaction" which forms the basis of the **Claim** at issue. Eddystone FAC at ¶1 ("This is an Action for

money damages and avoidance of transfers arising from a maritime contract"). B0122.

As Ferrellgas is compelled to concede, even a "duty to defend" extends no further than the operative pleading permits. The facts pled in the Eddystone FAC plainly demonstrate that BTS performed fully under the RSA through January 1, 2016, and it was not until the halt to shipping was imminent that BTS's long-term obligation under the RSA became an issue. The focal point of the **Claim** is the February 2016 breach of the RSA, and BTS's inability to pay the resulting arbitration award as a result of its new owner's diversion of assets. Because the Eddystone **Claim** is based upon, arises out of, or is attributable to an **Interrelated Wrongful Act** which indisputably occurred after the Run-Off Date, coverage for the Eddystone Litigation is not available under the Zurich Policy.

Cross-Appellant's Argument On Cross Appeal

A. The Final Act in this Case Was the Approval of the Dismissal of Ferrellgas' Claims against the Remaining Party on November 10, 2021; Hence, the Instant Appeal by Ferrellgas is Untimely

1. Question Presented

Whether the Superior Court Erred in acceding to Ferrellgas' request that it dismiss Count III of the FAC some three (3) years after having fully adjudicated all the claims, rights, and liabilities as between Zurich and Ferrellgas under the Zurich Policy, and after it approved the dismissal of the remaining claims against the only other defendant. Preserved for appeal at B0846-0854; B0863-0874; B0876-0879; B0884-0885.

2. Scope of Review

The Court reviews a final judgment granting a motion to dismiss *de novo*. *Farmer v. Brosch*, 8 A.3d 1139, 1141 (Del. 2010)

3. Merits of the Argument

The Superior Court erred when it entertained and then granted a "motion to dismiss" a claim which had already been fully and finally adjudicated by that Court's prior Order declaring there is no coverage for the Eddystone Litigaiton under the Zurich Policy. The Superior Court's final act in this case was its approval of the stipulated dismissal of the remaining claims against the only other

defendant in this action on November 10, 2021, rendering the instant appeal by Ferrellgas untimely. 10 *Del. C.* §148.

a. The January 21, 2020 Opinion and Order Was a Final Adjudication of all Claims, Rights, and Liabilities between Zurich and Ferrellgas in this Action

The Declaratory Judgment Act extends the power of the Court to "declare rights, status and other legal relations whether or not further relief is or could be claimed." 10 *Del. C.* § 6501. When the Court exercises that power, "such declaration shall have the force and effect of a final judgment or decree." *Id*.

Zurich filed a single count Counterclaim in this action on July 26, 2019 requesting "a judicial declaration that Zurich has no coverage for any aspect of the Eddystone Litigation and has no obligation to defend, indemnify or pay any sums associated with the Eddystone Litigation under Zurich American Insurance Company Private Company." B0265.

On September 18, 2019, Zurich filed a Motion for Summary Judgment in this action requesting "judgment in its favor and a declaration that it has no insuring obligation in favor of the plaintiffs in this action relative to the underlying matter styled *Eddystone Rail Company, LLC v. Bridger Logistics, LLC et al*., U.S.D.C., E.D. Pa. Case No. 2:17-cv-00495-RK [i.e., the Eddystone Litigation], based on the limited ground that the Run-Off Exclusion in Zurich American

Insurance Company Private Company Select Insurance Policy No. MPL 0083979-00 precludes coverage for any qualifying insured in that litigation." B0433.

On January 21, 2020, the Superior Court granted Zurich's Motion for Summary Judgment, declaring that Zurich had no coverage obligation for the Eddystone Litigation:

> The Court finds that the Run-Off Exclusion applies to the Transfer Acts alleged in the Eddystone Litigation. Additionally, the Eddystone Litigation did not pursue a Claim for the Inducement Acts. Thus, the Eddystone Litigation is excluded from the Zurich Policy coverage. Therefore, Zurich's Motion for Summary Judgment is hereby GRANTED, Count I is dismissed, and Plaintiffs' Motion for Partial Summary Judgment on Count I, duty to advance defense costs, is hereby DENIED.
> …
> IT IS SO ORDERED.

Ferrellgas Partners L.P., 2020 Del. Super. LEXIS 41, at *33-34. See also, *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 Del. Super. LEXIS 2745, at *3 (Super. Ct. Aug. 20, 2020) ("On January 21, 2020, the Court granted Zurich's motion for summary judgment, and denied Plaintiffs' motion for summary judgment, finding that the Eddystone Litigation is excluded from the Zurich Policy language.").

The declaration of no coverage under the Zurich Policy left nothing for future determination or consideration between Zurich and Ferrellgas in this action, and had the "force and effect of a final judgment or decree." 10 *Del. C.* §6501.

b. The Approval of the Stipulation Dismissing the Remaining Claims in this Action on November 10, 2021 Was the Court's Final Act in This Action

On November 10, 2021, the Court approved a stipulation of dismissal of all claims against Beazley, the only other party to this litigation. B0836-0837. Zurich was not a party to the stipulation because the controversy as between Zurich and Ferrellgas, inclusive of any claimed right to relief under the Zurich Policy relative to the Eddystone Litigaiton, was fully and completely resolved by the Superior Court's January 21, 2020 declaratory judgment.

When a civil action involves multiple parties, a judgment regarding any claim or any party becomes final following the entry of the last judgment that resolves all claims as to all parties. Del. Super. Ct. Civ. R. 54(b); *Harrison v. Ramunno*, 730 A.2d 653, 653-54 (Del. 1999). The January 21, 2020 Order and declaration of no coverage dispositively defined the rights as between Ferrellgas and Zurich, and left nothing for future determination or consideration. The Superior Court's approval of the stipulated dismissal of all claims against the remaining defendant in this action thus resolved all claims as to all parties.

c. The Superior Court Erred When It Considered and then Granted Ferrellgas' Sham Motion to Dismiss

Ferrellgas elected not to appeal the Superior Court's January 21, 2020 declaratory judgment following stipulated dismissal of all claims as to the remaining defendant in this action. Instead, three (3) years after that declaratory

judgment order, and the subsequent stipulated dismissal of all claims against Zurich's co-defendant, Beazley, Ferrellgas filed a sham "Motion to Dismiss the Remaining Count without Prejudice and for Entry of Judgment." B0838-0845. In that motion, Ferrellgas pretends as if the Court did not previously declare "that the Eddystone Litigation is excluded from coverage by the Zurich Policy". Instead, they claim that a "no coverage" declaration did not address a claim against Zurich for failure to provide coverage (Count III of the FAC), or address Zurich's Counterclaim for a declaration of no coverage:

> The Court, however, has not addressed Count III of the Complaint against Zurich for breach of contract, which remains pending and seeks a finding that Zurich is in breach for (among other things) failure to indemnify Plaintiffs for the underlying Eddystone Litigation. As set forth above, the Court also did not rule on Zurich's counterclaim for declaratory judgment.

Ferrellgas Motion to Dismiss at ¶10. B0841.

A declaration of no coverage for the Eddystone Litigation under the Zurich Policy does, however, mean what it says, and that declaration left nothing for future determination or consideration between Zurich and Ferrellgas.

"A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration". *Tyson Foods, Inc. v. Aetos Corp*., 809 A.2d 575, 579 (Del. 2002). The merits of any controversy and the rights of the parties under the Zurich Policy were fully and completely resolved by the Court's January 21,

2020 Opinion and Order. And all claims against the remaining defendant, Beazley, were subject to a stipulated dismissal on November 10, 2021, when the Court performed its final act – approving that stipulation of dismissal.

Buyer's remorse over its election not to timely appeal a decision following a final judgment does not support a request to re-open a case to dismiss a non-existent claim. The Superior Court should not have granted a motion which, on its face, lacked any colorable plausibility, and was advanced solely to "re-start" an appeal clock which had long since expired. 10 *Del. C.* §148. The Superior Court should have denied the Ferrellgas motion and marked the matter administratively closed, as the January 21, 2020 Order and the Superior Court's approval of the stipulated dismissal of all claims against the remaining defendant in this action resolved all claims as to all parties as of November 10, 2021.

CONCLUSION

Zurich respectfully requests that this Court affirm the Superior Court's declaration that the Zurich Policy does not afford coverage for the Eddystone Litigation or otherwise dismiss Ferrellgas' appeal as untimely.

Respectfully Submitted,

BODELL BOVE, LLC

/s/ Bruce W. McCullough
Bruce W. McCullough (Del. ID 3112)
1225 N. King Street, Suite 1000
Wilmington, DE 19801-3250
Phone: 302-655-6749
Fax: 302-655-6827
Email: bmccullough@bodellbove.com

Attorneys for Defendant-Below/Appellee and Cross Appellant, Zurich American Insurance Company

OF COUNSEL:

Louis A. Bové
(*Pro Hac Vice*)
BODELL BOVE, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
Phone: 215-864-6602
Fax: 215-864-6610
Email: lbove@bodellbove.com

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