EFiled: Dec 26 2024 02:00PM EST
Filing ID 75311989
Case Number 461,2024

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ORIGIS USA LLC, and GUY VANDERHAEGEN, Plaintiffs-Below/Appellants, v. GREAT AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY, BRIDGEWAY INSURANCE COMPANY, RSUI INSURANCE COMPANY, ASCOT SPECIALTY INSURANCE COMPANY, ENDURANCE ASSURANCE COMPANY, BERKSHIRE HATHAWAY SPECIALTY INSURANCE CORPORATION, IRONSHORE INDEMNITY, INC., and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA Defendants-Below/Appellees.	No. 461, 2024 On Appeal from the Superior Court of the State of Delaware C.A. No. N23C-07-102 SKR

OPENING BRIEF OF APPELLANTS ORIGIS USA LLC AND GUY VANDERHAEGEN

Dated: December 19, 2024

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NATURE OF PROCEEDINGS

Origis USA LLC ("Origis USA") and Guy Vanderhaegen ("Vanderhaegen," with Origis USA, the "Insureds") appeal the May 9, 2024 Memorandum Opinion and Order issued by the Superior Court granting Motions to Dismiss this action ("May 9 Order") and a June 26, 2024 bench ruling denying their Motion for Clarification of the May 9 Order ("June 26 Bench Ruling"). Copies of the May 9 Order and June 26 Bench Ruling are attached at Exhibits A and B, respectively.

The Insureds have been sued in an action pending in federal district court for the Southern District of New York (the "Underlying Lawsuit") brought by former investors in Origis USA's former parent company (the "Investors"). The Investors seek hundreds of missions of dollars in damages. The Insureds have incurred, and will continue to incur, substantial costs in defending the Underlying Lawsuit ("Defense Costs") and may incur additional costs in the event of a settlement or judgment (collectively, "Insured Losses").[1] The Insured Losses are covered by directors and officers liability ("D&O") policies (collectively, the "Policies") issued by the appellee insurers (collectively, the "Insurers"). The Policies at issue incept

[1] As a result of motions to dismiss in the Underlying Lawsuit, Origis USA is no longer a party in that action. However, Origis USA incurred substantial Defense Costs prior to its dismissal and continues to incur certain Defense Costs related to the Underlying Lawsuit.

in 2021 (the "2021 Policies"/"2021 Insurers") and 2023 (the "2023 Policies"/"2023 Insurers"—referred to in prior briefing as the "Current D&O Coverage Tower").[2]

The Insureds' Complaint asserts claims for declaratory judgment and breach of contract arising out of the Insurers' improper refusals to cover the Insured Losses. In its May 9 Order, the Superior Court granted the 2021 Insurers' Motions to Dismiss (without prejudice) based on its erroneous conclusion that, by virtue of a so-called "No Action" clause applicable to the 2021 Policies, this action is premature until the Underlying Action is fully resolved through judgment or settlement. The Superior Court also granted the 2023 Insurers' Motions to Dismiss based on its separate erroneous finding that: (i) the Underlying Lawsuit does not allege a "Claim" covered by the 2023 Policies; and (ii) even if it did allege such a Claim, coverage is precluded by so-called "Prior Acts Exclusions" in the 2023 Policies. The Insureds thereafter moved for clarification that the No Action clause ruling in the May 9 Order did not apply to the 2021 Insurers' obligation to advance Defense Costs, which expressly incepts "prior to … final disposition" of the Underlying Lawsuit. The Superior Court erroneously denied that motion in its June 26 Bench Ruling.

The Insureds filed their Notice of Appeal in this matter on November 4, 2024. (A01352-61).

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[2] The appellee Insurers are identified individually in the Insureds' Notice of Appeal. (A01356).

SUMMARY OF ARGUMENT

1. The Policies require the Insurers to indemnify any judgment or settlement in the Underlying Litigation. They further require the 2023 Insurers to defend the Underlying Lawsuit and the 2021 Insurers to "advance" the costs of defending it "prior to its final disposition." The Complaint sets forth valid causes of action for declaratory judgment and breach of contract based on the Insurers' improper refusals to honor these obligations.

I. THE 2021 INSURERS

2. The 2021 Policies are subject to the No Action clause contained in the primary policy issued by Great American Insurance Company (the "Great American Policy"), to which the 2021 excess Policies "follow form." The Superior Court concluded, with virtually no analysis, that the No Action clause unambiguously renders this action—including its claims for declaratory relief—premature prior to resolution of the Underlying Lawsuit. This conclusion—which is based, at least in part, on a mistaken belief that there was no dispute regarding the meaning of the clause's amorphous language—is reversibly erroneous.

3. First, the Superior Court's overly-broad reading of the No Action clause: (i) cannot logically be squared with the 2021 Insurers' express obligation to advance Defense Costs "prior to … final disposition" of the Underlying Lawsuit; and (ii) is contrary to Delaware's reasonable expectations doctrine.

4. Second, the Superior Court reversibly erred in: (i) failing to address the Insureds' arguments that the No Action clause is not a valid basis for the 2021 Insurers' Motions to Dismiss in light of the Insureds' well-pled allegations that the 2021 Insurers have breached the terms of their Policies; and (ii) holding that the Insureds' Defense Cost advancement arguments were waived.

5. Third, the Superior Court's overly-broad reading of the No Action clause is contrary to Delaware law, including: (i) the only two Delaware cases that have addressed its relevant language; and (ii) Delaware's Declaratory Judgment Act.

6. Fourth, the Superior Court's overly-broad reading of the No Action clause is contrary to the interpretations of virtually every other court nationwide, which have held that it: (i) is inapplicable to actions by insureds against their insurers—particularly declaratory judgment actions; (ii) is inconsistent with declaratory judgment statutes; and (iii) conflicts with the insurer's duty to defend or advance defense costs prior to resolution of an underlying action and, therefore, is ambiguous.

7. In addition, the Superior Court's overly-broad application of the No Action clause, if enforced, would violate Delaware's strong public policy interests: (i) in having D&O coverage disputes involving Delaware insureds adjudicated under Delaware law; and (ii) favoring settlement of disputes.

II. THE 2023 INSURERS

8. The Amended Complaint in the Underlying Lawsuit (the "UAC") is largely focused on allegations that the Insureds wrongfully induced the Investors to sell their shares in Origis USA's former parent company. However, Paragraphs 158-160 of the UAC allege that the Insureds breached their contractual obligations to provide certain information to the Investors long after they sold their shares. Because the conduct alleged in Paragraphs 158-160 is of a substantially different nature than the inducement-focused allegations, is alleged to have occurred much later, and is set apart in a separate section of the UAC, the allegations in Paragraphs 158-160 constitute a separate and distinct "Claim" against the Insureds.

9. Nevertheless, the Superior Court erroneously concluded that Paragraphs 158-160 do not comprise a separate Claim—purportedly because they do not seek any relief. In reaching this conclusion, the Superior Court erroneously drew factual inferences favoring the 2023 Insurers—notwithstanding that they were the moving parties. Had the Superior Court correctly drawn inferences favoring the Insureds (as was required), it could not have logically reached this conclusion.

10. The Superior Court also erroneously concluded that, even if Paragraphs 158-160 set forth a separate Claim, it is excluded from coverage because it "arises from" non-covered wrongful conduct alleged elsewhere in the UAC—and therefore is subject to the 2023 Policies' Prior Acts Exclusions. The Superior Court's single-

paragraph analysis in this regard erroneously ignores both: (i) the key factual distinctions between Paragraphs 158-160 and the other allegations in the UAC; and (ii) numerous Delaware cases confirming their lack of relatedness.

STATEMENT OF FACTS

I. THE UNDERLYING LAWSUIT

The UAC alleges that, prior to November 2021, Origis Energy NV ("Origis Energy") owned a controlling interest in Origis USA. (A00669-70, ¶ 52). Origis Energy, in turn, was owned by various interests, including the Investors and Vanderhaegen. (A00655, ¶ 10; A00669-70, ¶ 52). Pursuant to a Share Redemption Agreement ("SRA"), the Investors sold their ownership interests in Origis Energy in October 2020 and January 2021. (A00659, ¶ 23; A00689-70, ¶¶ 115-17). The UAC alleges that, in November 2021, Antin Infrastructure Partners ("Antin") bought Origis Energy's ownership interests in Origis USA (the "Antin Purchase") for multiples of the amounts paid to the Investors pursuant to the SRA. (A00695, ¶ 133; A00700, ¶ 152). The UAC further alleges that, prior to the Antin Purchase, the Insureds engaged in certain deceitful conduct that induced the Investors to enter into the SRA and sell their ownership interests in Origis Energy in a manner that caused them economic damage. (A00699-701, ¶¶ 147-153).

Although the UAC is largely focused on alleged events prior to the November 2021 Antin Purchase, it also includes specific allegations of wrongful conduct by the Insureds ***after*** that time. Specifically, and as discussed more in Section II.C. of the Argument below, Paragraphs 158-160 of the UAC allege, in pertinent part, that beginning in October 2022, the Insureds breached their contractual obligations under

the SRA by failing to produce certain information and documents in response to an "Indemnity Notice" from the Investors (the "Information Breach Claim"). (A00702).

II. THE INSURERS' COVERAGE OBLIGATIONS

During times relevant to this action, Origis USA purchased "claims made" D&O insurance in roughly annual periods. (A00073-74, ¶ 24). This insurance was purchased in layers, with numerous layers forming a "tower" of coverage during each annual period. (A00073-75, ¶¶ 24-30). The Policies issued by the initial—or "primary"—layer Insurers include the complete terms and conditions of coverage. (A00074, ¶ 25; A00075, ¶ 29). The successive layers of excess Policies generally "follow form" to the primary layer—meaning they adopt the same terms and conditions as the primary layer except where stated otherwise. (A00074, ¶ 26; A00075, ¶ 30).

The Underlying Lawsuit implicates both the 2021 Policies (in effect from June 2021 to June 2022) and the 2023 Policies (in effect from February 2023 to February 2024). The following diagram depicts both towers:

Great American issued the primary Policy in the 2021 tower, and the remaining Policies in that tower follow form to the Great American Policy. The UAC implicates the 2021 tower by virtue of its allegations that the Insureds committed "Wrongful Acts" during the policy period of the 2021 tower. (A00955). When Antin acquired a controlling interest in Origis USA on November 18, 2021 (the "Cut-Off Date"), Origis USA purchased an "extended reporting period" ("ERP") from each of the 2021 Insurers. *Id*. The ERPs provided coverage for an additional six years with respect to any Claims made against the Insureds for "Wrongful Acts" allegedly occurring on or before the Cut-Off Date. *Id*. Because

the Underlying Lawsuit was asserted against the Insureds within the six-year ERP window, the 2021 Insurers are required to cover it. (A00955-56).

Bridgeway Insurance Company ("Bridgeway") issued the primary Policy in the 2023 tower, and the remaining Policies in that tower follow form to the Bridgeway Policy. (A00956). The 2023 tower is implicated by the Underlying Lawsuit because: (i) it was first asserted against the Insureds on or about February 14, 2023—during the policy period of the 2023 tower; and (ii) the Information Breach Claim alleges Wrongful Acts against the Insureds occurring after the Cut-Off Date. *Id*.

Both of the Insureds are covered under the Policies. (A00073-74, ¶ 24; A00075, ¶ 28). The terms of the Policies require the Insurers to pay amounts that the Insureds may later incur in connection with a judgment or settlement of the Underlying Lawsuit. (A00067, ¶ 2). In addition, each of the Policies imposes an obligation to pay the Insureds' Defense Costs. In particular, the 2023 Insurers are required to defend the Underlying Lawsuit (A00275, Section IV.A.) and the 2021 Insurers are required to advance Defense Costs incurred in the Underlying Lawsuit "***prior to its final disposition***" (A00108, Section B(3)) (emphasis added).

III. THE INSURERS BREACH THEIR COVERAGE OBLIGATIONS

On or about March 9, 2023—shortly after being served with the initial Complaint in the Underlying Lawsuit—the Insureds tendered it to the Insurers for

indemnification and defense. (A00077, ¶ 38). Of the Insurers at issue in this appeal, only Great American ever provided the Insureds with a written coverage position.[3] (A00077-78, ¶ 39). In particular, Great American denied coverage for indemnification of any settlement or judgment that may later occur in the Underlying Lawsuit. (A00614) ("Great American does not believe coverage is available under Policy [*sic*] for the [Underlying] Lawsuit"). Likewise, Great American effectively denied its express obligation to advance the Insureds' Defense Costs, proposing that it would advance a mere ten percent (10%)—which was further subject to numerous reservations and caveats.[4] (A00624). As the Insureds allege in their Complaint,

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[3] Notably, before Great American provided its coverage positions, it first filed a declaratory judgment action against the Insureds in Florida federal district court (the "Florida Action")—apparently preferring that forum to Delaware. (A00959). Because the Florida Action was limited to just the Great American Policy, it did not provide the potential for complete relief from the Insured Losses. As such, the Insureds moved to dismiss it in favor of this action. (A00960). Ironically, in its opposition to the Insureds' motion to dismiss the Florida Action, Great American argued that it was free to seek a declaratory adjudication against the Insureds whenever and wherever it chose, but the Insureds were precluded by the No Action clause from pursuing this action until the Underlying Lawsuit was fully resolved. (A01117-20). The Florida federal court apparently was so underwhelmed by Great American's No Action clause argument that it did not even address it in its otherwise detailed opinion. (A01097-01103).

[4] Great American's obligation to advance Defense Costs also is subject to certain conditions, including that "the Insureds and the Insurer have agreed upon the allocated portion of the Costs of Defense attributable to covered Claims against the Insureds." (A00108, Section VI.B.(3)(c)). In unilaterally and arbitrarily determining that it would advance only 10% of the Insureds' Defense Costs, Great American did not even attempt to reach agreement with its Insureds about an

Great American's proposal is grossly inadequate on its face and was not made in good faith. As such, it was a breach of Great American's express Defense Cost advancement obligations. (A00078-79, ¶ 41; A00081, ¶¶ 53-55).

With respect to the remaining Insurers, their failure to provide any substantive response to the Insureds' coverage claims effectively was a repudiation of their coverage obligations. (A00079, ¶ 42). To date, none of the Insurers—despite numerous requests from the Insureds—has contributed a single dollar toward the Insured's substantial Defense Costs, which now total several million dollars. (A00961-62, nn. 8-9).

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appropriate allocation. (A00078-79, ¶ 41; A01329). Rather, it opted to surreptitiously sue them—before even providing them with its coverage positions.

ARGUMENT

I. THE "NO ACTION" CLAUSE DOES NOT RENDER THIS ACTION PREMATURE

A. Question Presented

Whether the Superior Court reversibly erred in concluding that the No Action clause applicable to the 2021 Policies precludes this action—including its claims for declaratory judgment—prior to resolution of the Underlying Lawsuit. (Preserved on appeal at A00969-86; A01261-74; A01325-31; Exh. B at 4-13, 16-20).

B. Scope of Review

This Court reviews *de novo* decisions: (i) granting motions to dismiss; and (ii) involving interpretation of insurance policy language. *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019); *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006). Where policy language is ambiguous—*i.e.*, "reasonably or fairly susceptible of different interpretations"—it is "construed most strongly against the insurance company that drafted it." *Viacom Inc. v. U.S. Specialty Ins. Co.*, 2023 Del. Super. LEXIS 728, at *17 (Aug. 10, 2023). In deciding a motion to dismiss, the Court must: (i) accept all well-pleaded factual allegations as true; (ii) draw all reasonable inferences in favor of the non-moving party; and (iii) grant dismissal only if the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances

susceptible to proof. *Century Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits

The No Action clause in the Great American Policy—to which the other 2021 Policies follow form—states that:

> With respect to any **Liability Coverage Part**, no action shall be taken against the **Insurer** unless, as a condition precedent thereto, there has been full compliance with all the terms of this Policy, and until the **Insured's** obligation to pay has been finally determined by an adjudication against the **Insured** or by written agreement of the Insured, claimant and the **Insurer**.

(A00111, Section XI.A).

Focusing solely on the second component of the clause,[5] the Superior Court concluded in its May 9 Order that the Insureds are precluded from pursuing any of the relief sought in this action until there has been a full resolution of the Underlying Lawsuit by judgment or settlement. Exh. A at 11. This conclusion was expressly premised on its belief that there was no dispute regarding the proper ***interpretation*** of the No Action clause. *Id*. ("Great American … argues that the plain language of the No Action clause blocks [the Insureds'] ability to bring this coverage dispute before the Underlying Litigation concludes. [The Insureds] ***do not disagree that the No Action clause's plain language calls for that result***." (emphasis added)).

[5] The first component of the No Action clause—*i.e.*, "full compliance with all the terms of this Policy"—was not in dispute in the 2021 Insurers' Motions to Dismiss.

Accordingly, the Superior Court limited its analysis to whether the No Action clause should in light of competing fairness or public policy considerations, ultimately holding that it should be enforced because "[t]he courts of this State hold freedom of contract in high—some might say, reverential—regard." *Id*. (citation omitted).

The Superior Court's belief that the Insureds did not dispute Great American's interpretation of the No Action clause—for which it cited no support in the record—plainly was mistaken. Nowhere in their Complaint, briefing, or oral arguments do the Insureds concede—expressly or impliedly—that the language of the No Action clause, if enforced, would have the effect of precluding this action. To the contrary, the Insureds cited cases from Delaware and across the country representing the overwhelming majority view that the language of the No Action clause is ***not properly interpreted*** as precluding actions by insureds against their insurers—particularly declaratory judgment actions.[6] (A00971-74). In any event, the Superior Court undertook no meaningful textual analysis of the Great American Policy, including the No Action clause or other policy provisions that directly conflict with its overly-broad reading of the No Action clause. Had the Superior Court done so (as was required), it could not logically have concluded that the No Action clause

[6] Moreover, the Insureds stated clearly in their oral arguments that their positions regarding the No Action clause were based in interpretation of its language rather than considerations of "fairness or equity." (A01262 at 63:1-6; A01264-70 at 65:15-71:4).

precludes this action—particularly its claims for declaratory relief. Its failure to do so was reversible error.

1. The Superior Court's Overly-Broad Reading of the No Action Clause Is In Direct Conflict With the 2021 Insurers' Express Defense Costs Advancement Obligation

The Insureds have incurred millions of dollars in Defense Costs to date, none of which have been paid by the Insurers. (A00961-62, nn. 8-9). After the Superior Court issued its May 9 Order, the Insureds moved for clarification regarding the scope of its No Action clause ruling—which did not specifically address their declaratory judgment claim as to Defense Costs. In their Motion for Clarification, the Insureds established that the Superior Court expansive reading of the No Action clause directly conflicted with the 2021 Insurers' obligation to advance Defense Costs ***prior to*** … ***final disposition*** of the Underlying Lawsuit. (A01325-31) (emphasis added) (citing A00108, Section VI.B.(3)). Notwithstanding this plain conflict, the Superior Court's June 26 Bench Ruling summarily denied the Insureds' motion, holding that: (i) there was no basis to exempt the 2021 Insurers' Defense Cost advancement obligations from its prior No Action clause ruling; and (ii) in any event, the Insureds had waived this argument by failing to raise it specifically in their briefing. Exh. B at 22-24. Like its prior No Action clause ruling, the Superior Court's June 26 Bench Ruling also is reversibly erroneous.

First, there simply is no way to logically or textually square language requiring Great American to "advance Costs of Defense in any Claim ***prior to its final disposition***" with the Superior Court's overly-broad reading of the No Action clause that renders that obligation unenforceable until the Underlying Lawsuit is resolved—which could be years after the obligation is triggered. While the Superior Court's overly-broad reading theoretically might be squared with the obligation to indemnify judgments or settlements (which is not triggered until a settlement or judgment in the underlying action has occurred), it cannot—on its face—be reconciled with the Defense Cost advancement language expressly requiring performance ***prior to final disposition*** of the Underlying Lawsuit. *See, e.g., Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyd's London*, 2020 Del. Super. LEXIS 2804, at *16-17 (Sept. 25, 2020) (a duty to advance defense costs "means [the insurer] has a duty to reimburse reasonable defense costs arising out of a covered Claim ***while the litigation underlying that Claim is ongoing***. . .. A duty to advance is distinct from the duty to indemnify because ***the duty to advance defense costs is triggered at the beginning of the case***, as opposed to the duty to indemnify, which is triggered at the end of the case." (emphasis added)). Indeed, the word "advance" specially denotes anticipatory action. *See* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/advance (last visited Dec. 16, 2024)

(defining "advance," in its adjectival form, as "made, sent, or furnished ahead of time").

This irreconcilable policy language conflict has been recognized by numerous courts across the country—which the Superior Court simply disregarded. *See, e.g.*, *Tesler v. Certain Underwriters at Lloyd's, London (In re Spree.com Corp.)*, 2002 Bankr. LEXIS 742, at *24-31 (Bankr. E.D. Pa. June 20, 2002) (because it is inconsistent with other policy provisions requiring payment or advancement of defense costs as they are incurred, the No Action clause is ambiguous in that regard and does not delay insured's declaratory judgment claims); *Fight Against Coercive Tactics Network v. Coregis Ins. Co.*, 926 F. Supp. 1426, 1435 (D. Colo. 1996) (No Action clause does not preclude declaratory judgment action seeking adjudication of insurer's obligation to advance defense costs); *Mid-Continent Cas. Co. v. Advantage Med. Elecs, LLC*, 196 So. 3d 238, 250 (Ala. 2015) ("[Insurer] argues that [insured] must first suffer a final judgment in the [underlying] litigation before it can obtain a judgment declaring that [insurer] has a duty to defend in the [underlying] litigation. We find this construction [of the No Action clause] untenable and simply not supported by the policy language ….").

Consistent with these cases, Delaware Superior Court Judge Meghan Adams recognized this same irreconcilable policy language conflict after the Superior Court issued the May 9 Order and June 26 Bench Ruling in this action. *See* Transcript of

July 24, 2024 motion hearing and bench ruling in *Pangea Equity Partners, LP v. Great Am. Ins. Group*, C.A. No. N23C-12-060 MAA CCLD, attached hereto at Exhibit D, at 34-35. In *Pangea*, the insured (Pangea) filed a declaratory judgment action seeking to recover its defense costs incurred in an underlying lawsuit from Great American. Emboldened by the erroneous No Action clause rulings in this action, Great American argued that Judge Adams should simply follow the rulings in this action and dismiss Pangea's coverage case because the underlying action was still being litigated. *Id*. at 3-17. Pangea responded, *inter alia*, that the Superior Court's expansive reading of the No Action clause in this action was plainly in conflict with Great American's express duty to defend—which was triggered at the outset of the underlying action. *Id*. at 17-34.

Judge Adams agreed with Pangea and refused to dismiss its case, holding that the Court was "struggl[ing] … with squaring the policy language of the duty to defend with this No Action clause" and, as a result, that the language of the No Action clause was "at least ambiguous" in this regard. *Id*. at 34-35. In so doing, Judge Adams declined to follow the No Action clause rulings in this action—including that the No Action clause is plain and unambiguous (*see* Exh. A at 11-12) and that there is no conflict between the No Action clause and an insurer's contemporaneous defense obligation (*see* Exh. B at 24-25). Exh. D at 34-35. Although Judge Adams was addressing duty to defend language (as opposed to duty

to advance defense costs language at issue here), both duties arise at the outset of the underlying action under Delaware law. *See, e.g.*, *Legion Partners*, 2020 Del. Super. LEXIS 2804, at *17 ("Delaware recognizes that both duties arise 'whenever the underlying complaint alleges facts that fall within the scope of coverage[.]'"). The Insureds here asserted this same fundamental policy language inconsistency in their Motion for Clarification, but it was summarily—and erroneously—denied. *See* Exh. B at 4-9; 16-20; 23-25.

In sum, the Superior Court's overly-broad reading of the No Action clause effectively reads the advancement of Defense Costs provision out of the Great American Policy—which is wholly inconsistent with the strict contractarian reasoning of its No Action clause rulings (*see* Exh. A at 11-12; Exh. B at 24-25) and well-settled Delaware rules of insurance policy interpretation. *See, e.g.*, *Legion Partners*, 2020 Del. Super. LEXIS 2804, at *17 (Delaware courts interpret both the duty to defend and the duty to advance defense costs broadly in favor of coverage); *Arch Ins. Co. v. Murdock*, 2020 Del. Super. LEXIS 156, at *14 (Jan. 17, 2020) ("Insurance policies 'are construed as a whole' …. In other words, the Court is to interpret the insurance policy through a reading of ***all of the relevant provisions of the contract as a whole***, 'and not on any single passage in isolation.'" (emphasis added) (citation omitted)).

Second, the Superior Court's No Action clause rulings are wholly inconsistent with Delaware's reasonable expectations doctrine—which holds that where policy language is ambiguous or conflicting, it must be interpreted to protect the insured's objectively reasonable expectations of coverage. *See, e.g.*, *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 319 A.3d 849, 868 (Del. 2024) (insurance "policy will be read in accordance with the reasonable expectations of the insured 'so far as its language will permit'" (citations omitted)); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982) (even if not ambiguous, policy language that conflicts with other policy language or "contains a hidden trap or pitfall" also is interpreted to honor insured's reasonable expectations). As confirmed most recently in *Pangea*, the language of the No Action clause is "at least ambiguous" with respect to whether it applies to a declaratory judgment claim involving an insurer's defense cost payment obligations given conflicting language in the policy requiring payment of such costs as they are incurred. *See* Exh. D at 34-35.

The Superior Court's summary disregard of this plain policy language conflict and resulting ambiguity here is reversibly erroneous because it turns the reasonable expectations doctrine on its head, effectively depriving the Insureds of a fundamental benefit of the D&O coverage they purchased. By the time the Insureds are permitted to seek recourse for the Defense Costs the 2021 Insurers have wrongfully failed to advance, they may be driven into severe financial hardship or even bankruptcy—

which is precisely the outcome they reasonably expected to avoid in purchasing D&O coverage requiring advancement of their Defense Costs "***prior to*** … ***final disposition***" of the Underlying Lawsuit.

Third, putting aside the merits of the Superior Court's reading of the No Action clause, it reversibly erred in relying on the clause as a basis to dismiss the Insureds' Complaint in light of its clearly-stated allegations that the 2021 Insurers had actually (or anticipatorily) breached their obligations to advance the Insureds' Defense Costs. (A00079, ¶¶ 42-43; A00081-82, ¶¶ 53-57). Under Delaware law, a "party who first commits a material breach of a contract cannot enforce the contract going forward." *Preferred Inv. Servs. v. T&H Bail Bonds, Inc.*, 2013 Del. Ch. LEXIS 190, at *70 (July 24, 2013); *see also* 3 *New Appleman on Insurance Law Library Edition* § 16.03 (2024) ("A wrongful disclaimer releases the insured from the conditions of the contract"). Likewise, the Superior Court was required to accept all of the Insureds' well-pleaded factual allegations as true and to draw all reasonable inferences in their favor as the non-moving parties. *See* Argument Section I.B. above.

In their Motion for Clarification, the Insureds established that their allegations of breach precluded dismissal of this action because, if proven at trial, they would negate the 2021 Insurers' right to enforce the Great American Policy's conditions of

coverage, including the No Action clause.[7] (A01330-31). The Superior Court failed to address the breach preclusion issue altogether in its June 26 Bench Ruling. The Insureds' well-pleaded allegations of breach were required to be accepted—not ignored—on a motion to dismiss. The Superior Court reversibly erred in failing even to address—let alone accept—these allegations.

Fourth, the Superior Court's ruling that the Insureds waived their Defense Cost advancement position by failing to raise it in their briefing (Exh. B at 22) is incorrect. The Complaint (A00067-69, ¶¶ 3-6; A00077, ¶¶ 36-38; A00078-82, ¶¶ 41-57), the cases cited in their briefing—including *Tesler* and *Fight Against Coercive Tactics*—discussing in detail why No Action clauses do not apply to insurers' obligations to defend or advance defense costs (A00972-73), the Insureds' detailed Motion for Clarification (A01325-31), and a fulsome discussion of this issue during two oral arguments (A01268-74 at 69:14-75:10; Exh. B. at 4:17-9:7) all negate any notion of waiver. Where a matter can fairly be decided on its merits,

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[7] In its Superior Court briefing, Great American asserted that it did not breach its advancement obligations because it agreed to pay a mere ten percent of the Insureds' Defense Costs. The Insureds countered, *inter alia*, that this facially inadequate offer was not made in good faith and that Great American had failed to confer with the Insureds regarding a reasonable allocation of Defense Costs as the language of the Great American Policy requires. (A00975-76; A01337-39). In any event, these inherently factual disputes were not properly before the Superior Court on Great American's Motion to Dismiss. Indeed, the ***only*** relevant allegation before the Superior Court for that purpose—which it was required to accept as true regardless of Great American's allegations to the contrary—was that Great American had breached its Defense Costs advancement obligations.

Delaware law strongly disfavors technical defenses like waiver. *See, e.g., Episcopo v. Minch,* 203 A.2d 273, 275 (Del. 1964) ("appeals as well as trials should, where possible and where the other side has not been prejudiced, be decided on the merits and not upon nice technicalities of practice."). In any event, this issue plainly was preserved in the Superior Court and is now properly before this Court for consideration pursuant to Supreme Court Rule 8. *See Watkins v. Beatrice Cos*., 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal."); *Ebert v. Kent Cnty. Dep't of Planning Servs*., 2019 Del. Super. LEXIS 108, at *8 (Feb. 22, 2019) ("Delaware Supreme Court has adopted the 'modern rule' that 'de-emphasizes the technical procedural aspects of appeals and stresses the importance of reaching and deciding the substantive merits of appeals ….'" (citation omitted)).

2. The Superior Court's Overly-Broad Reading of the No Action Clause Is Contrary to Delaware Law

a. Delaware Caselaw

This Court has yet to address whether the No Action clause precludes actions by insureds against their insurers prior to resolution of the underlying action at issue. However, the Superior Court has twice considered this question in the specific context of Great American's No Action clause and decided ***in both cases that it does not***. Notably, this is the ***only*** case in which any Delaware court has held that it does.

Most recently, Judge Adams in *Pangea* (discussed in the preceding section) held that the language of Great American's No Action clause was "at least ambiguous" with respect to whether it precluded a declaratory judgment action for payment of defense costs. In so holding, Judge Adams declined to follow the No Action clause rulings in this action. Exh. D at 34-35.

Likewise, in *Wright Construction Co. v. St. Lawrence Fluorspar, Inc.*, 254 A.2d 252 (Del. Super. 1969), Great American asserted that its No Action clause preluded it from being impleaded into a claim against its insured "where no judgment has been entered against the insured[.]" *Id*. at 253. The *Wright* court disagreed, holding that "consideration of the authorities convinces this Court that a 'no action' clause in a liability policy will not prevent a defendant insured from impleading his insurer as a third-party defendant, even though no judgment has been taken against the insured." *Id*. at 253-54 (citing numerous cases nationwide and authoritative treatises). Simply put, the *Wright* court joined the vast majority of courts nationwide that, for decades, have declined to apply No Action clauses to actions brought ***by insureds***. *See* Argument Section I.C.3. below.

In its May 9 Order, the Superior Court was dismissive of *Wright*, notwithstanding that it was the ***only*** Delaware case addressing the relevant language of the No Action clause when the May 9 Order was issued. *See* Exh. A at 14 ("the

Court does not find *Wright* to be very persuasive"). The Superior Court reversibly erred in failing to attribute appropriate weight to *Wright*.

First, the Superior Court noted that no Delaware court has cited to *Wright* since it was decided. *Id*. But the fact that courts have not cited to *Wright* does not undermine its precedential value. It merely indicates that whether an insurer may invoke its No Action clause to indefinitely delay a coverage action by its own insured has not been disputed in the Delaware courts since *Wright* was decided—likely because, until this case, insurers appropriately viewed *Wright* as definitive Delaware authority in that regard. Thus, the fact that insurers have not sought to re-litigate *Wright*'s appropriately narrow interpretation of the No Action clause in the fifty-plus years since it was decided does not—as the Superior Court erroneously concluded—undermine its precedential value. Rather it is a testament to its logical and precedential soundness. *See Noranda Alum. Holding Corp. v. XL Ins. Am., Inc*., 269 A.3d 974, 981 (Del. 2021) ("the decisions of our State's trial courts … are entitled to special weight when they establish a longstanding interpretation").

Second, the Superior Court noted that *Wright*'s "value as an analogous precedent is lessened by the fact that [it] does not set forth the particular language of the at-issue clause, only concluding that it was a 'standard "no action" clause.'" Exh. A at 14. The Superior Court's analysis, however, erroneously overlooks the critical fact that the same insurer—Great American—issued the "standard" No Action

clause at issue in ***both*** *Wright* and this case. At the very least, this establishes a reasonable inference—which the Superior Court was required, but failed, to draw in the Insureds' favor—that the two clauses were substantially similar. *See* Argument Section I.B above. Notably, Great American expressly conceded that the two clauses are "likely to be similar." (A01213 at 14:9-12).

b. Declaratory Judgment Act

In addition to contravening Delaware caselaw, the Superior Court's interpretation of the No Action clause as indefinitely delaying the Insureds' declaratory judgment claims is inconsistent with the expressly stated purpose of Delaware's Declaratory Judgment Act, Del. Code Ann. tit. 10, § 6501, *et seq*. (the "DJA"). The DJA makes clear that its "purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" arising from contracts—even before a breach occurs. Del. Code Ann. tit. 10, § 6512; *see also Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 439 (Del. Super. 2002) (the DJA "provides a means for securing judicial relief in an expeditious and comprehensive manner"); *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at *21 (Oct. 11, 2006) (the DJA "enables the courts to advance the stage at which a matter traditionally would have been justiciable, allowing for the construction of a contract before or after a breach has occurred."). These purposes are particularly appliable to declaratory judgment actions seeking interpretation of

insurance policies. *See Benefytt Techs., Inc. v. Capitol Specialty Ins. Corp.*, 2022 Del. Super. LEXIS 3, at *26 (Jan. 3, 2022) ("[t]he question of liability under insurance contracts has proved to be particularly susceptible to declaratory adjudication").

The Superior Court's reading of the amorphous language of the No Action clause as applying to declaratory judgment actions by an insured—indefinitely delaying the insured's right to seek declaratory relief—defeats these stated purposes of the DJA. Courts across the country have reached precisely this conclusion with respect to other states' declaratory judgment statutes. *See, e.g., W & J Rives, Inc. v. Kemper Ins. Grp.*, 374 S.E.2d 430, 434-35 (N.C. Ct. App. 1988) (notwithstanding the No Action clause, it was "quite proper" for insured's declaratory judgment action to proceed in light of purpose and rights vested by North Carolina Declaratory Judgments Act); *Condenser Serv. & Eng'g Co. v. Am. Mut. Liab. Ins. Co.*, 131 A.2d 409, 414 (N.J. Super. Ct. App. Div. 1957) (enforcement of No Action clause "would be to render sterile the Declaratory Judgments Act in a substantial area of the insurance contract field").

Had Great American intended its No Action clause to deprive the Insureds of their fundamental entitlement under the DJA to an expeditious adjudication of their insurance policy rights, it easily could have added clarifying language stating that purpose. It did not. The Superior Court's reading of the No Action clause's

nondescript language as effectively waiving the Insured's rights under the DJA—when the language of the clause plainly says nothing in that regard—is reversibly erroneous. *See, e.g., Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 125 (Del. Ch. 2000) ("There can be no waiver of a statutory right unless that waiver is clearly and affirmatively expressed in the relevant document."). At best, the language of the No Action clause is ambiguous in that regard and should have been construed in the Insureds' favor. *See* Argument Section I.B. above.

3. The Superior Court's No Action Clause Rulings Are Contrary to Virtually Every Other Case Nationwide

As discussed above, the Superior Court concluded, with no analysis, that the No Action clause unambiguously precludes any action by the Insureds—including their claims for declaratory relief—prior to resolution of the Underlying Lawsuit. In their Superior Court briefing, the Insureds cited cases from across the country reflecting the overwhelming majority position that No Action clauses: (i) are intended to preclude injured parties from directly suing or impleading an insured tortfeasor's insurer until the injured party's claims against the insured are resolved; and (ii) are ***not*** properly interpreted to preclude actions—particularly declaratory judgment actions—***by insureds*** prior to resolution of underlying actions. (A00972-74).

For example, in *Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, the Tenth Circuit held that "***[t]he wording of the [No Action] clause itself*** supports the

conclusion that it does not apply to the insureds' claims against the insurer[,]" and went on to identify numerous reasons why doing so would be nonsensical. 664 F.2d 252, 254-55 (10th Cir. 1981); *see also Tesler*, 2002 Bankr. LEXIS 742, at *32 (No Action clause cannot be interpreted to prelude declaratory judgment action for payment of defense costs in light of insurer's express obligation to pay or advance those costs from the outset of the underlying action). Indeed, this limitation on the interpretation of No Action clauses has become so widely accepted that leading insurance treatises treat it as settled law. *See, e.g.*, Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insured,* § 8.06 n.41 (1995) (No Action clause does not bar an insured's declaratory judgment action instituted before the underlying claim is resolved); 1 *New Appleman on Insurance Law Library Edition* § 7.05 (2024) (while "it may appear that [the No Action] clause would preclude the policyholder from seeking declaratory relief before the underlying case or claim has been finally resolved," courts do not, for numerous reasons, interpret it to apply to declaratory judgment actions).

At the very least, the Superior Court's failure to meaningfully address the scores of cases nationwide that have almost uniformly reached the opposite conclusion as the Superior Court renders the soundness of its No Action clause rulings suspect. Indeed, in the single sentence the Superior Court dedicates to these cases, it incorrectly concludes that they all are based on a "national disfavor for

enforcing No Action clauses." Exh. A at 11. The actual reasoning of the non-Delaware cases is considerably broader and, in most cases, focuses on interpretation of the No Action clause language and policies favoring declaratory relief. For example:

- As discussed in this section, numerous cases hold that the language of No Action clauses cannot cogently be interpreted to apply to actions by insureds against their insurers—particularly declaratory judgment actions.
- As discussed in Argument Section I.C.2.b. above, numerous cases hold that interpretation of No Action clauses as precluding an insured's declaratory judgment action is inconsistent with declaratory judgment statutes.
- As discussed in Argument Section I.C.1. above, numerous cases hold that interpreting the No Action clause as precluding an insured's declaratory judgment action for payment of defense costs is inconsistent with an insurer's obligation to pay or advance defense costs as they are incurred. The Superior Court's recent ruling in *Pangea* declining to follow the No Action clause rulings in this action is fully aligned with these cases.
- As further discussed in Argument Section I.C.1. above, No Action clauses are not properly interpreted as precluding declaratory judgment claims where an insurer has breached its policy obligations. *See, e.g.*, *Condenser Serv. & Eng'g Co.*, 131 A.2d at 414 (No Action clause "was never intended to serve

nor can it be construed to serve, the purpose of avoiding a declaration of rights when the insurer allegedly has repudiated the contract"). The Insureds specifically plead in their Complaint that Great American has breached its duty to advance their Defense Costs.

The Superior Court's failure to substantively address—let alone seek to distinguish—the sound reasoning of the overwhelming majority of courts that have addressed this issue is reversible error.

4. The Superior Court's No Action Rulings Contravene Delaware Public Policy

For all of the reasons discussed above, the Superior Court's reading of the Great American No Action clause is erroneously overbroad. In addition, it plainly contravenes important Delaware public policy.

First, Delaware courts have recognized on numerous occasions that Delaware has a particularized public interest in having coverage disputes involving D&O policies issued to Delaware-formed entities (like Origis USA) adjudicated under Delaware law. *See, e.g., RSUI Idem. Co. v. Murdock*, 248 A.3d 887, 900-01 (Del. 2021) (because Delaware law governs the duties of directors and officers of Delaware-formed entities, "corporations must assess their need for D&O coverage with reference to Delaware law"; applying a uniform body of Delaware law to D&O policies issued to Delaware insureds "advances the relevant policies of the [Delaware] forum" (citation omitted)). Inherent in this interest are that: (i) Delaware

courts are the best arbiters of Delaware law; and (ii) Delaware law assures a readily available Delaware forum for Delaware insureds to seek expeditious adjudication of their D&O insurers' coverage obligations. With respect to the latter, the intent that Delaware courts be empowered to adjudicate D&O coverage disputes at an early stage—even before a policy breach has occurred—is further reflected in the DJA and its interpreting caselaw. *See* Argument Section I.C.2.b. above.

Under the Superior Court's overly-broad interpretation of the No Action clause, this important public policy interest effectively would be nullified. As a practical matter, disputes regarding an insurer's obligation to defend or advance defense costs manifest shortly after the underlying action is tendered for coverage. Moreover, many Delaware insureds may be unable to settle underlying actions against them absent an expeditious adjudication of their D&O insurers' obligations to fund the settlements. For these insureds, waiting—possibly for years—for the underlying actions against them to be fully resolved before being permitted to obtain declaratory relief in this regard is simply untenable. As a result, many (if not most) Delaware insureds will, in all likelihood, pursue declaratory relief elsewhere—including in the vast majority of jurisdictions whose courts appropriately recognize that No Action clauses do not apply to declaratory judgment actions. Such a result would resoundingly defeat Delaware's strong public interest in having D&O

coverage disputes involving Delaware insureds adjudicated in Delaware courts under Delaware law.

Second, under the Superior Court's overly-broad reading of the No Action clause, insurers could evade their indemnity obligations for settlements altogether by simply refusing to agree to *any* proposed settlement of an underlying action. As noted above, Great American's No Action clause states, in pertinent part, that "no action shall be taken against the Insurer … until the Insured's obligation to pay has been finally determined by an adjudication against the Insured or by written agreement of the Insured, claimant ***and the Insurer***." (A00111, Section XI.A) (emphasis added). Under the Superior Court's expansive reading of this language, the insured would be precluded from seeking declaratory adjudication of its insurer's obligation to indemnify a prospective settlement to which the insurer does not consent because there has been neither an adjudication nor a settlement of the underlying action. This untenable Catch-22 effectively would force the insured to choose between: (i) taking the underlying action—which otherwise could be settled—to trial solely to preserve its indemnity coverage in light of the No Action clause (and potentially face ruinous liability in doing so); or (ii) settling without the insurer's consent, thereby permanently foregoing any ability to enforce its rights to indemnity for the settlement (because there has been no final adjudication or settlement agreed to by the insurer). Putting aside the practical absurdity of such an

outcome and the facially perverse incentives it inevitably would foster, it plainly violates Delaware public policy favoring settlements. *See, e.g.*, *BVF Partners L.P. v. New Orleans Emps. Ret. Sys. (In re Celera Corp. S'holder Litig.)*, 59 A.3d 418, 433 (Del. 2012) (Delaware public policy "favors the voluntary settlement of contested issues").

In its May 9 Order, the Superior Court posited that Delaware courts decline to apply unambiguous policy language on public policy grounds only to the extent that doing so would "vindicate a public policy even stronger than freedom of contract." Exh. A at 11-12 (internal citation omitted). As discussed in the preceding sections, Great American's No Action clause is *not* unambiguous. Likewise, while the Insureds acknowledge that adherence to contract language is a substantial guiding consideration in Delaware jurisprudence, Delaware courts have, on numerous occasions, declined to enforce contract language—including insurance policy provisions—that are inconsistent with public policy. *See, e.g.*, *Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1205 (Del. 1989) (policy exclusion for claims involving vehicle owned by insured but not listed on policy was void as against public policy disfavoring limitations on uninsured motorist coverage); *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915, 919-21 (Del. 1997) ("household exclusion" in Delaware automobile liability policy was void as against public policy favoring limitations on parental and interspousal tort immunity).

In sum, the Superior Court's erroneously overbroad interpretation of the No Action clause would defeat at least two important Delaware public policy interests. Accordingly (and in addition to the reasons discussed in the preceding sections), this Court should reverse the Superior Court's No Action clause rulings—at the very least with respect to their application to declaratory judgment actions.

II. THE INFORMATION BREACH CLAIM IS A SEPARATE "CLAIM" AGAINST THE 2023 INSURERS THAT DOES NOT "ARISE FROM" PRE-CUT-OFF DATE ALLEGATIONS

A. Questions Presented

- Whether the Superior Court reversibly erred in holding that the Information Breach Claim is not a distinct "Claim," as defined by the Bridgeway Policy, covered by the 2023 Policies.
- If the Information Breach Claim is a "Claim," whether the Superior Court reversibly erred in holding that it is excluded from coverage by Prior Acts Exclusions in the 2023 Policies because it purportedly "arises from" pre-Cut-Off Date allegations.

(Preserved on appeal at A01017-32; A01274-300 at 75:18-101:20).

B. Scope of Review

See Argument Section I.B. above.

C. Merits

The Bridgeway Policy—to which the other 2023 Policies follow form—covers "Loss arising from a Claim [for a Wrongful Act] first made against the [Insureds] during the Policy Period …." (A00274). The Insureds established in their Superior Court briefing that the allegations in their Complaint satisfy all of these requirements. (A01009-12). Nevertheless, the 2023 Insurers asserted in their briefing that, by virtue of the Prior Acts Exclusions in their Policies, there was no reasonably conceivable basis for coverage because: (i) the UAC alleges no Claim

for Wrongful Acts occurring after the November 18, 2021 Cut-Off Date; and (ii) even if the UAC did allege such a Claim, the Wrongful Acts at issue "arise from" pre-Cut-Off Date Wrongful Acts and therefore are excluded. The 2023 Insurers indisputably bear the burden of proof in this regard. *See, e.g.*, *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 Del. Super. LEXIS 534, at *13 (July 30, 2021) (insurer bears the burden "to establish that a claim is specifically excluded" at the pleading stage (quoting *Murdock*, 248 A.3d at 906)). Despite this heavy burden, the Superior Court, with very little analysis, effectively adopted the 2023 Insurers' arguments in dismissing the Insureds' claims against them. For the reasons discussed below, it reversibly erred in doing so.

1. The Information Breach Claim Is a Distinct Covered "Claim"

The Information Breach Claim—set forth in paragraphs 158-160 of the UAC—plainly alleges post-Cut-Off Date Wrongful Acts. It states (in pertinent part):

> 2. Defendants Fail to Fulfill their SRA Obligation to Allow Plaintiffs to Investigate their Claims
>
> 158. In conjunction with the Indemnity Notice, Plaintiffs demanded access to the information from Origis necessary to carry out a complete investigation of their claims. Plaintiffs had the right to this information pursuant to Section 8.4 of the SRA.
>
> 159. Defendants produced only a small portion of the information Plaintiffs requested. …
>
> 160. The failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights

> in the SRA. But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity.

(A00702).

To be clear, the Insureds acknowledged in their briefing that many—if not most—of the Wrongful Acts alleged in the UAC are focused on fraud, misrepresentation and related conduct in inducing the Investors to enter into the SRA—all of which allegedly occurred prior to the Cut-Off Date. (A01018). However, as Paragraphs 158-160 amply demonstrate, the Information Breach Claim asserts a separate and distinct set of Wrongful Acts focused on the Insureds' alleged breach of the SRA in failing—well *after* Cut-Off Date—to provide certain post-SRA financial information requested by the Investors. These alleged Wrongful Acts plainly are distinct from the preceding Wrongful Acts alleged in the UAC because, *inter alia*, they: (i) are based in alleged breach of the SRA—as opposed to allegedly improper inducement to enter into the SRA in the first instance; (ii) allegedly occurred long after the SRA was executed; and (iii) are pled in a separate section of the UAC.

The Bridgeway Policy defines a triggering "Claim," in pertinent part here, as a "[w]ritten demand first received by an Insured for monetary, non-monetary, declaratory or injunctive relief … against an Insured for a Wrongful Act …." (A00276, Section VI.A). The Superior Court appropriately acknowledged that the Information Breach Claim at least possibly alleges one or more Wrongful Acts after

the Cut-Off Date. Exh. A at 18. Yet it nonetheless concluded that the Information Breach Claim was not a separate Claim—*i.e.*, distinct from the alleged pre-Cut-Off Date Wrongful Acts—because:

> The Underlying Litigation does not seek any relief for th[e] purported breach. In context with the rest of the Underlying Complaint, Paragraphs 158 through 160 reflect that the Investors merely wished to explain that there could be additional information that would support their action.

Id. This conclusion is incorrect and reversibly erroneous.

This Court aptly recognizes that a single lawsuit may be—and often is—comprised of multiple independent "Claims" against an insured. *AT&T Corp. v. Faraday Cap. Ltd*., 918 A.2d 1104, 1108-09 (Del. 2007). The Superior Court's conclusion that the Information Breach Claim is not a distinct Claim because it does not "seek any relief" arising the Insureds' alleged breaches of the SRA is not supported by the UAC's broadly-pled Prayer for Relief—which is far from clear in that regard. The Prayer for Relief includes, for example, demands for: (i) attorneys' fees and (ii) "such other relief as the Court deems just and proper"—neither of which is tied to any particular claims. (A00728-29). As such, the Investors at least conceivably may be entitled to, *inter alia*: (i) money damages arising from the Insureds' alleged impairment of their ability to effectively prosecute their claims; (ii) an award of attorneys' fees for their additional legal costs in obtaining information the Insured's allegedly failed to produce in breach of the SRA; and

(iii) non-monetary relief in the form of a court order requiring such production. (A00728-29; A01031-32).

In determining whether the Information Breach Claim is a stand-alone Claim, the Superior Court was required to: (i) draw all reasonable inferences from the UAC in favor of the Insureds as the non-moving parties; and (ii) grant dismissal only if the UAC provides no reasonably conceivable basis to conclude that the Investors "seek any relief"—monetary or non-monetary—in connection with the Information Breach Claim. *See* Argument Section I.B. above. In summarily concluding that the UAC does not seek any relief, the Superior Court reversibly erred in failing to draw all reasonable inferences in favor of the Insureds from the UAC's broadly-pled Prayer for Relief. Likewise, the Superior Court's speculative conclusion that the Investors "merely wished to explain that there could be additional information that would support their action" suffers from the same defect—particularly given that federal notice pleading standards applicable to the Underlying Lawsuit neither require nor encourage litigants to plead purely evidentiary allegations. *See, generally,* Fed. R. Civ. Pro. 8(a). Rather than infer—favorably for the Insureds, as was required—that the Investors' allegations were intended to support some form of relief sought in the UAC, the Superior Court reversibly erred in inferring precisely the opposite.

2. The Information Breach Claim Does Not "Arise From" Pre-Cut-Off Date Wrongful Acts

The Superior Court further erred in concluding that, even if the Information Breach Claim is a distinct "Claim," it is excluded by the 2023 Insurers' Prior Acts Exclusions because it "arises from"—*i.e.*, is "related to"—pre-Cut-Off Date Wrongful Acts alleged in the UAC. Exh. A at 18-19. The only grounds articulated by the Superior Court for its relatedness finding are that: (i) the Information Breach Claim is asserted in the same lawsuit as the alleged pre-Cut-Off Date Wrongful Acts; and (ii) the Information Breach Claim alleges a "cover-up" of the alleged pre-Cut-Off Date Wrongful Acts, and therefore is "predicated on [the] initial wrong." *Id*. Both of these grounds are incorrect and reversibly erroneous.

First, the mere fact that the Information Breach Claim is alleged in the same lawsuit as the pre-Cut-Off Date Wrongful Acts is not even indicative—let alone determinative—of relatedness. As discussed in Argument Section II.C.1. above, this Court and other Delaware courts recognize that distinct Claims often arise from a single lawsuit. Delaware courts also have concluded that distinct Claims ***within the same lawsuit are not related***. *See e.g.*, *Northrop Grumman Innovation Sys. v. Zurich Am. Ins. Co.,* 2021 Del. Super. LEXIS 92, at *27-28 (Feb. 2, 2021) (Wrongful Acts "pertaining to pre-merger proxy solicitation misstatements … calculated to coerce stockholder approval of a transaction saddled with low-return prospects" alleged ***in the same lawsuit*** as Wrongful Acts involving "post-merger financial reporting that

defrauded investors" were distinct and therefore different Claims). Moreover, Delaware courts have found that relatedness of Claims is a factual issue for trial rather than a legal issue. *See, e.g., AT&T Corp. v. Clarendon Am. Ins. Co.*, 2008 Del. Super. LEXIS 35, at *5-6 (Jan. 17, 2008) (number of distinct Claims within each of two lawsuits was a fact issue for trial). As such, the Superior Court reversibly erred in inferring relatedness on a motion to dismiss merely because there is a single lawsuit at issue—particularly where, as here, any inferences it drew were required to favor the Insureds.

Second, notwithstanding the Superior Court's acknowledgement that relatedness analyses often entail "a complex task requiring the careful weighing of several factors," its relatedness analysis in the May 9 Order is limited to a single paragraph that fails to address the salient facts of this case or the considerable body of Delaware caselaw addressing the relatedness issue. Exh. A at 19. In particular, the Superior Court failed to address that: (i) the alleged Information Breach Wrongful Acts are substantively different conduct than the alleged pre-Cut-Off Date Wrongful Acts; (ii) the Wrongful Acts are temporally remote from each other; and (iii) the Information Beach Claim is pled in a separate section of the UAC. Exh. A at 16-19.

Simply put, there is no logical basis on which these significant distinctions could result in a finding of relatedness under the "fundamentally identical" test

applied by the majority of Delaware courts. (A01022-29) (citing, *inter alia*, *Northrop Grumman*, 2021 Del. Super. LEXIS 92, at *26-27 (where "insurer invokes an exclusion resting on the 'relatedness' of Wrongful Acts, coverage … will be 'precluded only where the two underlying claims are fundamentally identical'"—meaning that "they are 'the exact same' and do not merely share 'thematic similarities.'" (citations omitted))). Likewise, even under the "some meaningful linkage" test advocated by the 2023 Insurers, Delaware courts have found no relatedness in cases with facts analogous to this case. (A01025-29). For example, in *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 Del. Super. LEXIS 584, at *36-37 (Sept. 10, 2021)—a case cited ***by the 2023 Insurers***—the court found ***no*** meaningful linkage between two sets of "Claims simply because they share background facts in common[.]" *Id*. at 36. Rather, they must share "a ***meaningful*** link that connects the factual circumstances underpinning the alleged Wrongful Acts" in each set of Claims. *Id*. (emphasis in original). While both sets of Claims sharing a common transaction "might, at a high level of abstraction, illustrate a 'link[,]' … that link is not meaningful enough to trigger the [policy exclusions at issue]." *Id*. at 37. In order to share a meaningful link, one set of Wrongful Acts must be "the basis" of the other. *Id*.

Precisely the same reasoning applies here. While the SRA may be a common factor "at a high level of abstraction" in all of the Wrongful Acts alleged in the UAC,

that is the ***only*** common link between the pre-Cut-Off Date Wrongful Acts and the Information Breach Claim. The pre-Cut-Off Date Wrongful Acts are focused on allegedly deceitful conduct by the Insureds prior to the Cut-Off Date in inducing the Investors to enter into the SRA. The Information Breach Claim, on the other hand, is focused exclusively on the Insureds' alleged breaches of the SRA—more than a year after it was executed—by failing to produce information responsive to the Investors' Indemnity Notice.

Third, the Superior Court's summary conclusion that the Information Breach Claim is related to the pre-Cut-Off Date Wrongful Acts because the former alleges a "cover-up" of the latter is a blatant assumption that is unsupported by the express allegations in the Information Breach Claim. At best, the Superior Court's "cover-up" characterization is based on its own inference—notwithstanding that any such inferences it drew were required to be ***favorable*** to the Insureds as the non-moving parties. The Superior Court reversibly erred in inferring precisely the opposite.

CONCLUSION

For the reasons set forth above, this Court should reverse the Superior Court's dismissal of this action as to both the 2021 Insurers and the 2023 Insurers and remand this matter for further proceedings on the merits.

Dated: December 19, 2024

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1. This brief complies with the typeface requirement of Supr. Ct. R. 13(a)) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office 2016 Word.

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CERTIFICATE OF SERVICE

I, Anne M. Steadman, hereby certify that on December 26, 2024, a copy of the foregoing document was served via File & Serve*Xpress* on the following counsel of record:

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