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IN THE SUPREME COURT OF 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 Court below: Superior Court C.A No. N23C-07-102 SKR

APPELLEE GREAT AMERICAN INSURANCE COMPANY'S
ANSWERING BRIEF

CONNOLLY GALLAGHER LLP

Shaun Michael Kelly (#5915)
Jarrett W. Horowitz (#6421)
Sara A. Barry (#6703)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
skelly@connollygallagher.com
jhorowitz@connollygallagher.com
sbarry@connollygallagher.com

Attorneys for Defendant-Below/ Appellee Great American Insurance Company

Of Counsel:

James K. Thurston
WILSON ELSER
55 West Monroe Street, Suite 3800
Chicago, IL 60603
(312) 704-0550
james.thurston@wilsonelser.com

Daniel E. Tranen
WILSON ELSER
7777 Bonhomme Avenue, Suite 1900
St. Louis, MO 63105
(314) 930-2860
daniel.tranen@wilsonelser.com

Erik J. Tomberg
WILSON ELSER
150 Fayetteville Street, Suite 300
Raleigh, NC 27601
(984) 268-2121
erik.tomberg@wilsonelser.com

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NATURE OF PROCEEDINGS

This matter arises out of an underlying lawsuit, currently pending in the Southern District of New York (the "Underlying Lawsuit"), in which the present plaintiffs—Origis USA LLC ("Origis") and its CEO, Guy Vanderhaegen (collectively, "Plaintiffs")—were sued by former investors who allege that Plaintiffs engaged in a fraudulent scheme to acquire their interest at a grossly inadequate price. Two sets of defendant insurers provided directors and officers liability insurance to Origis for separate policy periods commencing in 2021 and 2023, respectively. Great American Insurance Company ("Great American") issued the Primary Policy for the 2021 Insurers (also referred to as the First Tower Insurers).[1] Plaintiffs seek coverage for the Underlying Lawsuit, including the reimbursement of **Costs of Defense**[2] incurred in the defense of that matter. Plaintiffs asserted two causes of action against the 2021 Insurers: declaratory judgment and breach of contract (against Great American).

[1] Great American's primary policy is followed by excess policies issued by Markel, North American Specialty Insurance Company, and Axis Insurance Company, which "follow form" to the Great American Policy. Plaintiffs' appeal against the 2023 Insurers (*i.e.*, the Second Tower Insurers) does not involve Great American and, as a result, this Brief will not address those separate issues.

[2] Bolded terms shall have the meaning ascribed to them in the Great American Policy (A00086), where they are defined.

At issue on this appeal are two rulings from the Superior Court. First, on May 9, 2024, the Superior Court ruled in favor of Great American and the 2021 Insurers that this action violates the No Action Clause in the Great American Policy (the "Policy"), concluding that the provision "precludes litigation against those insurers until Plaintiffs' payment obligation is finally determined." Ex. A[3] at 20. Second, on June 26, 2024, the Superior Court issued a bench ruling denying Plaintiffs' Motion for Clarification. Ex. B.

The Superior Court's rulings are well-reasoned, consistent with the applicable Delaware law, and should be affirmed. Guided by the principle that Delaware courts "hold freedom of contract in high—some might say, reverential—regard" (Ex. A at 11), the Superior Court enforced the No Action Clause "as it is written" (*id.* at 16), finding that "the plain language" of the provision "blocks Plaintiffs' ability to bring this coverage dispute before the Underlying Litigation concludes." *Id.* at 11. As the Superior Court noted, "Plaintiffs do not dispute that the No Action clause's plain language call for that result," so instead argue that there is "a supposed national disfavor for enforcing No Action clauses against an aggrieved insured." *See id.* As this Brief will discuss, Plaintiffs' position is based on the mistaken claim that Great American breached the Policy by denying coverage. However, Great American did not and has not denied coverage to Plaintiffs. Rather, Great American has advanced

[3] "Exhibits" refer to the exhibits attached to Plaintiffs' Opening Brief.

Costs of Defense subject to the Policy's Allocation and Advancement Provisions, as it was entitled to do—and, indeed, directed to do—under the Policy. Plaintiffs complain that the Superior Court's decision means that they may need to wait for "years" until the Underlying Lawsuit is resolved to obtain their desired amount of coverage, but Plaintiffs ignore that when they entered into the Policy, they selected the "Indemnity" Coverage and not the "Duty-to-Defend" Coverage, meaning that the duty to defend expressly fell on *Plaintiffs*—not Great American. As the Superior Court noted, courts "generally will not disturb a bargain because, in retrospect, it appears to have been a poor one." Ex. B, 24:1-25:6.

It is telling that Plaintiffs, in an implicit concession that their original arguments before the Superior Court are insufficient, now rely on *multiple* new arguments that were not raised anywhere in their original 103-page Answering Brief to Great American's Motion to Dismiss (A00932-A01047), and are therefore waived. The Superior Court already expressly rejected one such argument as waived after it was raised by Plaintiffs for the first time at oral argument: that the No Action Clause should not be enforced because it conflicts with (or renders a nullity) the insurers' advancement obligations. Ex. B at 22:18-22. Here, strikingly, Plaintiffs feature this very same argument as their *lead* argument against the 2021 Insurers. *See* OB[4] at 16 (Sec. C.1). But this is not the only new argument upon which Plaintiffs

[4] All references to "OB" shall refer to Appellants' Opening Brief.

rely in their Brief. In fact, Plaintiffs' second, third, and fourth arguments (*see* OB at Secs. C.2, C.3, and C.4) were *also* not presented to the Superior Court in Plaintiffs' Motion-to-Dismiss Answering Brief, and are therefore waived. Specifically, Plaintiffs' second argument (*id.* at 18-22) is that the No Action Clause is ambiguous, such that Delaware's "reasonable expectations" doctrine should be considered (in part based on a subsequent Superior Court decision in another case). And Plaintiffs' third argument (*id.* at 22) is that since Great American committed a material breach of the contract, it cannot enforce a condition of that contract. Both of these arguments, like the "nullity" argument, are nowhere to be found within Plaintiffs' Motion-to-Dismiss Answering Brief. Lastly, Plaintiffs also argue for the first time in their Brief that the Superior Court's interpretation of the No Action Clause conflicts with the purpose of Delaware's Declaratory Judgment Act (*id.*at 32)—which, too, is waived. In any event, this Brief will also explain that even if this Court were to consider these waived arguments, they are unavailing.

Accordingly, for the reasons stated above, and throughout this Brief, the Superior Court's rulings should be affirmed in their entirety.

SUMMARY OF ARGUMENT

1. Denied. Contrary to Plaintiffs' argument, the Superior Court was correct to enforce the No Action Clause in the Policy based on the plain language of that provision. Accordingly, Great American did not breach the Policy or deny coverage. Rather, Great American followed the Policy's Allocation and Advancement Provisions in advancing **Costs of Defense** that Great American believes to be covered until a different allocation is negotiated, arbitrated, or judicially determined. The remaining portions of Paragraph 1 pertain to the 2023 Insurers, not Great American, and so will not be addressed in this Brief.

2. Denied. The No Action Clause prohibits Plaintiffs from filing this action until Plaintiffs' 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, XI.A. Further, Plaintiffs' argument that the Superior Court's conclusion was "based, at least in part, on a mistaken belief that there was no dispute regarding the meaning of the clause's amorphous language" is wrong for two reasons. First, nowhere in their Motion-to-Dismiss Answering Brief (A00932-A01047) did Plaintiffs argue that the Policy is ambiguous; therefore, the argument is waived on appeal. Second, even if this Court were to consider the argument, the plain language of the Policy is clear and unambiguous and should be enforced as written.

3. Denied. Paragraph 3 asserts two arguments that are outside the scope of this appeal. First, Plaintiffs' argument that the Superior Court's reading of the No Action Clause "cannot logically be squared" with the 2021 Insurers' advancement obligations is an attempted re-packaging of Plaintiffs' "nullity" argument that the Superior Court properly concluded was waived because Plaintiffs did not raise it in its Motion-to-Dismiss Answering Brief. Second, Plaintiffs' argument that the Superior Court's decision "is contrary to Delaware's reasonable expectations doctrine" was also not raised by Plaintiffs before the Superior Court and is therefore waived.

4. Denied. Paragraph 4 also asserts two arguments. First, Plaintiffs contend that the Superior Court erred by failing to address their argument that Great American cannot enforce the No Action Clause because it breached the insurance contract. On the contrary, however, Great American did not breach the Policy, and did not deny coverage; instead, it followed the plain language of the Allocation and Advancement Provisions. As permitted by those provisions, Great American has already advanced $225,000 in defense expenses incurred by Origis, representing the portion of **Costs of Defense** that it believes to be covered. A00614. In this manner, Great American fully complied with the Policy. Second, as discussed above in connection with Paragraph 3, the Superior Court properly concluded that Plaintiffs'

"Defense Cost advancement arguments" were waived, since they were not raised until oral argument.

5. Denied. The Superior Court properly analyzed and discussed the relevant Delaware case law, and its reading of the No Action Clause was not contrary to the Delaware Declaratory Judgment Act. Moreover, Plaintiffs' argument regarding the purpose of the Declaratory Judgment Act was also not raised before the Superior Court, and it too is waived.

6. Denied. The Superior Court's reading of the No Action Clause was not "contrary to the interpretations of virtually every other court nationwide," as demonstrated by the many cases cited in Great American's underlying motion papers and in this Brief that support enforcement of the No Action Clause. Where the Policy does not contain a "duty to defend," the Superior Court's rulings were appropriately based on the plain language of the actual policy provision, in line with established Delaware law "[i]n this singularly contractarian jurisdiction." *See* Ex. A at 1.

7. Denied. The Superior Court's decision does not violate Delaware's public policy interests "(i) in having D&O coverage disputes involving Delaware insureds adjudicated under Delaware law; and (ii) favoring settlement of disputes." As to Plaintiffs' first point, the Superior Court properly held that Delaware's strong interest in enforcing agreements between sophisticated parties is not outweighed by

any countervailing interests. Certainly, there is no reason that Delaware's interest in hearing D&O coverage disputes should negate an otherwise valid contractual basis for dismissing a claim. And Plaintiffs' second point is a red herring and simply contrary to the law, to the extent it suggests that Delaware courts should ignore the plain language of contract provisions if the result of their enforcement would somehow disincentivize settlement. It is well-established that Delaware courts enforce contract provisions between sophisticated parties regardless of whether they produce a "good" or "bad" result for the parties. Further, as the Superior Court held, its ruling "is not intended to belittle the hardship that delayed relief might impose; but when compared to the economic and societal importance of stable contractual relationships free from outside interference, the latter concern takes priority." Ex. A at 13. This is particularly true here, where Great American first filed a coverage lawsuit against Plaintiffs in Florida, and thereafter Plaintiffs filed this suit in Delaware—fully aware of the Policy's No Action Clause and the potential implications of the Superior Court's dismissal. Indeed, *tomorrow* Plaintiffs could still fully litigate their coverage dispute with the First Tower Insurers in Florida, but they prefer the Delaware venue.

8. Paragraph 8 pertains to the 2023 Insurers, not Great American, and is denied for the reasons stated by the 2023 Insurers in their Answering Brief.

9. Paragraph 9 pertains to the 2023 Insurers, not Great American, and is denied for the reasons stated by the 2023 Insurers in their Answering Brief.

10. Paragraph 10 pertains to the 2023 Insurers, not Great American, and is denied for the reasons stated by the 2023 Insurers in their Answering Brief.

STATEMENT OF FACTS

A. The Great American Policy

Great American issued a Management Liability Solution ("D&O") Insurance Policy (the "Policy") to Origis, for the policy period of June 10, 2021 to June 10, 2022, at Origis' Principal Address in Miami, Florida. A00086.

1. Origis "Elects" a Policy that is *Not* a "Duty to Defend" Policy

The Policy provided Origis with the option to purchase either "Duty-to-Defend" coverage or an "Indemnity" coverage, and Origis "elect[ed]" to purchase the "Indemnity" coverage:

Item 3.	Defense Coverage – The **Named Entity** elects the following defense coverage applicable to all **Liability Coverage Parts** designated as "Included in Policy" in Column 1. of Item 4. of the Declarations: ☐ Duty-to-Defend ☒ Indemnity
This election may not be amended after the inception of the **Policy Period** identified in Item 2.	

A00086. Because Origis elected "Indemnity" coverage, the Policy states that "it shall be the duty of the **Insured** and not the **Insurer** to defend **Claims** under any **Liability Coverage Part**…." A00108, Sec. VI.B. Accordingly, the Insureds have the duty to defend themselves in the Underlying Lawsuit.

2. The Allocation Provision

The Allocation Provision (Section V.B.) applies to any **Claim** involving "both covered and uncovered matters pursuant to this Policy." A00107. Under the Allocation Provision, had the Insureds elected "Duty-to-Defend" coverage, for any **Claim** including both covered and uncovered matters, the Insureds would have been

entitled to "one hundred percent (100%) of … **Costs of Defense** incurred…." A00107, V.A.(1). Instead, under the elected "Indemnity" coverage, the Allocation Provision provides the parties shall use their "best efforts"[5] for an allocation; however, "if there is no agreement on an allocation of **Loss**, the **Insurer** shall advance **Costs of Defense** and any other **Loss** which the **Insurer** believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined." A00107, V.B. Here, since there was no agreement on allocation, the Policy permits Great American to advance **Costs of Defense** it "believes to be covered." And Great American has done so.

3. <u>The Advancement Provision</u>

Separate from the Allocation Provision is the Policy's Advancement Provision (Section VI.B.), which governs the advancement of **Costs of Defense**. The Advancement Provision provides that "the **Insurer** shall advance **Costs of Defense** in any **Claim** prior to its final disposition," and that "[a]ny advancement shall be on the condition that

[5] "'[B]est efforts' policy language 'requires an allocation *analysis*, but not necessarily an allocation.'" *Stauth v. National Union Fire Ins. Co*., 1999 WL 420401, at *11 (9th Cir. June 24, 1999) (emphasis in original); *Safeway Stores v. National Union Fire Ins. Co*., 64 F.3d 1282, 1289 (9th Cir. 1995) (as to the "best efforts" allocation language, "the clause 'requires an allocation analysis,' but not necessarily an allocation. This reading comports better with the policy language."). Here, Great American provided the Plaintiffs with an extensive 14-page "allocation *analysis*." A00613-A00625.

> the **Insureds** and the **Insurer** have agreed upon the allocated portion of the **Costs of Defense** attributable to covered **Claims** against the **Insureds**; provided, however, if there is no agreement on an allocation of **Costs of Defense**, the **Insurer** shall advance **Costs of Defense** which the **Insurer** believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined;

A00108, VI.B.(3)(c).

4. <u>The No Action Clause</u>

The No Action Clause in the Policy provides:

> 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, XI.A.

B. <u>The Coverage Dispute</u>

On March 9, 2023, Origis provided notice of the Underlying Lawsuit to Great American. A00613. On June 9, 2023, Great American provided its coverage assessment to Origis (the "Coverage Letter"). A00624. Specifically, the Coverage Letter advised that "although Great American does not believe coverage is available under [the] Policy for the Lawsuit, pursuant to Section V.B. and VI.B … Great American shall nevertheless agree to advance 10% of the **Costs of Defense** related to the Lawsuit,[] after the date of notice of the Lawsuit was provided to Great American." A00624. The Coverage Letter also requested "the names of any law

firm(s) … who will be handling the defense of Origis and Vanderhaegen," and asked that Plaintiffs to "[p]lease also provide us with copies of all the firm(s) invoices." *Id.* Additionally, the Coverage Letter also advised that Great American had initiated a coverage action against Plaintiffs, seeking to confirm its allocation interpretation of the Policy,[6] in the U.S. District Court for the Southern District of Florida—in the same city where the Policy was issued to Origis, and just a few miles from Vanderhaegen's home residence. *See Great American Insurance Company v. Origis USA LLC, et al.*, Case No. 23-cv-22132 (S.D. Fla.) (the "Florida Action").

However, rather than litigate the Florida Action in the Plaintiffs' own backyard of Miami, five weeks later, in direct violation of the Policy's No Action Clause, Plaintiffs filed the present competing coverage lawsuit (the "Delaware Action"). While Great American had a motion to dismiss the Delaware Action based on the No Action Clause, Plaintiffs had filed their own motion to dismiss in the Florida Action. A01075. These two motions were pending at the same time. Accordingly, Plaintiffs were fully aware that the Delaware Action could be dismissed, leaving Plaintiffs with the opportunity to adjudicate the coverage dispute in the Florida venue before the Underlying Lawsuit was "finally determined."

[6] As stated above, both the Policy's Allocation and Advancement Provisions expressly state that Great American "shall advance **Costs of Defense** which the **Insurer** believes to be covered under this Policy until a different allocation is negotiated, arbitrated or *judicially* determined." A00107-A00108 (italics added).

Further, each of the other ten insurers named in the Delaware Action had agreed to submit themselves to the jurisdiction of the Florida Action. A00862. Nevertheless, Plaintiffs moved forward with their motion to dismiss the Florida Action and on November 1, 2023, the Southern District of Florida opted to abstain from hearing the Florida Action based on the presence of this Delaware Action, and dismissed the Florida Action without prejudice. A01097.

On May 9, 2024, the Superior Court in this action granted Great American's Rule 12(b)(6) Motion to Dismiss based on the No Action Clause. Ex. A. On June 26, 2024, after a hearing, the Superior Court denied Plaintiffs' Motion for Clarification. Ex. B.

ARGUMENT

I. The Superior Court Correctly Held that Plaintiffs' Action Violates the No Action Clause and Should be Dismissed

A. Question Presented

Whether the Superior Court properly concluded that this action violates the No Action Clause in the Great American Policy. (Preserved for appeal at A00933-A01047.)

B. Scope of Review

On appeal, a trial court's granting of a motion to dismiss is reviewed *de novo*. *First Solar, Inc. v. Nat'l Union First Ins. Co.*, 274 A.3d 1006, 1011 (Del. 2022). This Court also reviews a trial court's interpretation of an insurance policy *de novo*. *Id.* (citing *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011)).

In reviewing a motion to dismiss under Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof." *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). A court may properly dismiss a coverage lawsuit at the 12(b)(6) stage if the policy's provisions warrant dismissal. *See, e.g., Rodriguez v. Great Am. Ins. Co.,* 2022 WL 591762, at *10 (Del. Super. Feb. 23, 2022) (granting insurer's 12(b)(6) motion, since "[u]nder the No Action Clause, Plaintiffs cannot maintain their action"); *APX Operating Co., LLC v. HDI Global Ins. Co*., 2021 WL 5370062, at

*6-8 (Del. Super. Nov. 18, 2021) (dismissing coverage lawsuit under Rule 12(b)(6) based on provisions of insurance policy).

C. Merits of Argument

1. The No Action Clause is a "Condition Precedent" and Mandatory Contractual Obligation

As agreed to by the parties to the Policy, the No Action Clause is a "condition precedent" to coverage under the Policy. A00111, XI.A. ("no action shall be taken against the **Insurer** unless, *as a condition precedent thereto*…") (italics added). Under Delaware law, "an insured must … comply with conditions precedent set forth in the policy by the insurer in order to establish [the insurer's] contractual liability for breach of contract." *State Farm Fire & Casualty Co. v. Purcell*, 2013 WL 3354578, at *2 (Del. Super. Apr. 29, 2013) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1198 (Del. 1992)).

Consistent with the Policy's "condition precedent" language, the No Action Clause also states that "no action *shall be* taken against" Great American. A00111, XI.A. (emphasis added). The use of the word "shall" in the provision underscores that this is a mandatory requirement. *See, e.g., Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc*., 2009 WL 4895120, at *7 n.55 (Del. Ch. Dec. 10, 2009) ("In both contracts and statutes, the term 'shall' is used to make an act mandatory.").

Here, the "condition precedent" of the Policy is two-fold: no action "*shall be*" taken against Great American "*unless*" as a condition precedent: (1) "there has been

full compliance with all the terms of this Policy" ("Condition Precedent 1"); "*and*" (2) "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**" ("Condition Precedent 2").

The use of the conjunctive term "and" in this language means *both* Condition Precedent 1 *and* Condition Precedent 2 must be fully and completely satisfied. *See Arwood v. AW Site Servs., LLC*, 2022 WL 973441, at *3 (Del. Ch. Mar. 31, 2022) ("The word 'and' is conjunctive, in its commonly accepted meaning, and its presence indicates an intent to join, not to exclude.").

2. <u>As Plaintiffs' Obligations Have Not Been "Finally Determined," Condition Precedent 2 of the No Action Clause is Not Satisfied, Barring This Action</u>

There is no dispute that Plaintiffs' obligations in the Underlying Lawsuit have not been "finally determined" by adjudication or by settlement. Accordingly, Condition Precedent 2 has not been satisfied, and on this basis the No Action Clause bars this action.

Courts have previously reached this conclusion based on Condition Precedent 2 in similar policies. In *Haxton v. CNA Financial Corp*., 917 F.2d 1304, 1990 WL 169650 (6th Cir. 1990) (Table), the Sixth Circuit interpreted a substantively identical "no action" clause in a D&O policy. *With respect to Condition Precedent 2 only*, the Sixth Circuit noted, "[a]t this time, [the insured] is not legally obligated to pay

anyone and there is no judgment or settlement"; therefore "the plain language of the no action clause precludes Appellants' suit against American Casualty," and "this action is premature." *Id.* at *1.

Similarly, in *S&S Healthcare, Inc. v. Virginia Sur. Co*., 1998 U.S. Dist. LEXIS 21810 (W.D. Va. Dec. 21, 1998), the Western District of Virginia also interpreted a substantively identical "no action" clause. Again, *based solely on Condition Precedent 2*, the Court held that "the plain and unambiguous terms of this [no action] clause" barred the insured's coverage lawsuit against its D&O insurer:

> The explicit language of the no action clause requires that the amount of the obligation of the directors and officers of [the insured] S&S is to be "fully and finally determined" as a condition precedent to an action against Virginia Surety. The amount is fully and finally determined either by (1) a judgment against S&S after an actual trial or (2) by written agreement between the claimant, S&S, and Virginia Surety. The Court therefore finds that the no action clause prohibits S&S from bringing any action against Virginia Surety concerning the underlying [] cases until after the amount of any S&S obligation to the [underlying] plaintiffs is fully and finally determined.

Id. at *4, 6.[7]

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[7] *See also Garza v. Lu*, 2022 Cal. Super. LEXIS 28947, *7 (Cal. Super. May 17, 2022) (dismissing lawsuit because "the no action clause requirements have not been satisfied, and Plaintiff has not obtained a judgment against the insured."); *Zaborac v. American Casualty Co*., 663 F. Supp. 330, 333 (C.D. Ill. 1987) ("this [no action] clause expressly prohibits them from bringing such an action until the underlying claims have been determined."); *Piedmont Office Realty Trust, Inc. v. XL Spec. Ins. Co*., 771 S.E.2d 864, 865 (Ga. 2015) (under "the policy contains a 'no action' clause," "[insured] Piedmont failed to fulfill the contractually agreed upon condition precedent."); *Sacred Heart Health Servs. v. Mmic Ins., Inc*., 575 F. Supp. 3d 1137, 1157 (D.C.S.D. 2021) ("MMIC had no duty to defend [insured]

The most relevant precedent in Delaware on the No Action Clause is *Rodriguez v. Great Am. Ins. Co.*, 2022 WL 591762 (Del. Super. Feb. 23, 2022), a 2022 decision where the Superior Court enforced a substantively identical Great American No Action Clause in a D&O policy. In *Rodriguez*, the court enforced Condition Precedent 1, holding that the No Action Clause should be enforced because there was no evidence that the insured had complied with all terms of the policy before bringing suit. *Id.* at *10. While the Superior Court in this matter "[did] not rely heavily on *[Rodriguez]* … because a different portion of the provision was at issue," and "the application of one does not command application of the other," it noted that "[n]evertheless, *Rodriguez* at least indicates that there is no inherent presumption in Delaware law that an insured is at all times guaranteed the right to sue its insurer." Ex. A at 14-15.

Here, because Condition Precedent 2 of the No Action Clause has not been satisfied, this action was properly dismissed.

3. Great American Has Not Denied Coverage; Instead, It Has Followed the Policy's Express Allocation and Advancement Provisions

Importantly, in *Haxton*, *supra*, in reaching its conclusion that the No Action Clause barred the insured's coverage lawsuit, the Sixth Circuit distinguished three

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Avera…[the insureds] are not excused from complying with the…'no action' provision").

other courts' decisions, holding that "these cases are distinguishable in that they involved either the insurer's refusal to defend or provide coverage. No such issues exist in this case." 1990 WL 169650, at *1.[8]

Similarly, here, it is a key distinguishing fact that Great American *has not denied coverage*; rather, it has agreed to advance and has advanced **Costs of Defense** subject to the Policy's Allocation Provision, which provides that it "shall advance **Costs of Defense** and any other **Loss** which the **Insurer** believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined…." A00107, V.B. Notably, the allocation is not optional, but is a *mandatory* requirement: the Policy provides that where the **Claim** "includes both covered and uncovered matters … the **Insured** and the **Insurer** recognize *there must be* an allocation between covered **Loss** and uninsured amounts." *Id.* (italics added).[9]

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[8] For example, in one of those decisions, *Paul Holt Drilling, Inc. v. Liberty Mutual Ins. Co*., 664 F.2d 252 (10th Cir. 1981), the insurer, "Liberty Mutual… denied any obligation to defend the insureds," and the Tenth Circuit noted the no action clause did not bar suit by the insured, because the insured would need "to recover for legal expenses they bear when the insurer wrongfully refuses to defend." *Id.* at 254-55. Likewise, in the two other cases cited, the insurer had violated its duty to defend. *See, e.g.*, *Kielb v. Couch*, 374 A.2d 79, 80 (N.J. Super. 1977) ("the refusal of defendant insurance company to defend litigation against plaintiff under a professional liability policy"); *Mayfair Constr. Co. v. Security Ins. Co*., 366 N.E.2d 1020, 1024 (Ill. App. 1st Dist. 1977) ("Because defendant denied coverage under the policy, the 'no action' clause should not be used against plaintiff.")

[9] *Compare to Endurance Am. Specialty Co. v. Lance-Kashian & Co*., 2011 WL 5417103, at *25 (E.D. Cal. Nov. 8, 2011) ("Endurance and the insureds 'agree

In accordance with these provisions, Great American has already advanced $225,000 to Origis, representing the portion of **Costs of Defense** that it believed to be covered.[10] A00614. In this manner, Great American did not breach the Policy as Plaintiffs have alleged—on the contrary, Great American, like the insurer in *Haxton*, has fully complied with the terms of the Policy. Put another way, this is a case about allocation, not denial of coverage.[11]

Courts routinely enforce the insurer's right to advance what the insurer "believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined." For example, in *Seeger v. Gulf Underwriters Ins. Co*., 2005 WL 6772545, at *2 (N.D. Ill. Mar. 17, 2005):

> [T]he policies clearly state: "If there is no agreement on an allocation of Defense Costs, the Insurer shall advance on a current basis Defense Costs which the Insurer in its discretion believes to be covered under the Policy until a different allocation is negotiated, arbitrated or judicially determined." [] *Essentially, the policies allow Defendant to decide whether (and to what extent) to advance defense costs.* To date, Defendant has refused to advance any of Plaintiffs' defense costs in the

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that there must be an allocation between insured and uninsured Loss.' The allocation provision mandates an allocation under the circumstances here.").

[10] Great American, dating back to its initial coverage letter on June 9, 2023, requested defense invoices from Plaintiffs. A00624. After entering into a Confidentiality Agreement, on January 8, 2025 Plaintiffs for the first time provided Great American with some of their defense invoices, which Great American is currently reviewing as part of its evaluation of further allocated funds.

[11] *Compare to Cont'l Ins. Co. v. Honeywell Int'l, Inc*., 2016 WL 3909530, at *21 (N.J. App. July 20, 2016) ("Overwhelmingly this is a case about nothing more than allocation. This is not a case about denial of coverage.").

> New York action. [] Invoking the language authorizing the judicial allocation of defense costs, Plaintiffs now ask the Court to order Defendant to advance Plaintiffs' costs.
> …
> *The policy provisions vesting Defendant with the discretion to decide whether to advance defense costs are clear and unambiguous.* … It is not the Court's place to question the wisdom of this arrangement. The Court must simply "ascertain and give effect to the intentions of the parties as expressed by the [policies]." []

(emphasis added; citations omitted). *See also Daileader v. Certain Underwriters at Lloyd's, London*, 670 F. Supp. 3d 12, 43 (S.D.N.Y. 2023) ("[The insurer] is required to advance only fees and costs it 'believes to be covered under [its] policy until a different allocation is negotiated, arbitrated, or judicially determined.'"), *aff'd* 2023 WL 7648381(2d Cir. 2023); *Mancha Dev. Co., LLC v. Houston Cas. Co*., 2019 WL 6703541, at *7 (C.D. Cal. July 9, 2019) ("HCC was within its rights to pay the amount [10%] it believed was appropriate"); *Commer. Capital Bankcorp, Inc. v. St. Paul Mercury Ins. Co*., 419 F. Supp. 2d 1173, 1185 (C.D. Cal. 2006) ("[The insurer] need only advance on a current basis [that loss] it believes to be covered under the [] Policy until a different allocation is negotiated, arbitrated, or judicially determined.").

For these reasons, this Court should follow the reasoning in *Seeger* and other authority and conclude that Great American was entitled under the terms of the Policy to decide the extent of **Costs of Defense** to advance, based on its allocation determination between covered and non-covered allegations. *See also* 2 LIABILITY

OF CORPORATE OFFICERS AND DIRECTORS § 21.01 (2024) ("It is now beyond dispute that a D&O insurer is entitled to allocate loss between covered and non-covered parties and between covered and non-covered allegations. Such allocation is both established by law and a recognized practice of the insurance industry.").[12]

Finally, it must be underscored that Origis "elect[ed]" to purchase the Item 3 "Indemnity" coverage, and *not* the "Duty-to-Defend" coverage. A00086. Had Origis purchased the "Duty-to-Defend" coverage, *the Policy expressly obligates Great American to pay "one hundred percent (100%)" of the* ***Costs of Defense***. A00107, V.A. However, Origis did not purchase the "Duty-to-Defend" coverage, and therefore was aware when it contracted with Great American that it would be subject to the "Indemnity" coverage provisions, which permit Great American to allocate between covered and uncovered amounts. Once again, Delaware law dictates that this Court should not disturb the plain language of contracts freely entered into by sophisticated parties. For these reasons, Plaintiffs' reading of the

[12] "Allocation of loss is typically required in two situations: *Covered vs. Uncovered Parties* [and] *Covered vs. Uncovered Allegations*." 2 Liability of Corporate Officers and Directors § 21.01 (2024) (emphasis in original). Here, the Underlying Lawsuit includes both. As to "Covered vs. Uncovered *Parties*," four of the six defendants are *not* "Insureds." A00086. As to "Covered vs. Uncovered *Allegations*," the Policy expressly excludes any "Loss … arising out of any Claim alleging that the Company *paid an inadequate price* … for the purchase of any securities." A00118. Here, as noted in Great American's initial letter, the Underlying Lawsuit is replete with allegations of Defendants' "fraudulent scheme to acquire Plaintiffs' shares at a grossly *inadequate price.*" A00618.

Policy, which relies upon non-binding authority from other jurisdictions over the actual terms of the agreement, is unavailing, and does not support reversal of the Superior Court's ruling.

4. The Superior Court Properly Denied Plaintiffs' Motion for Clarification and Rejected Plaintiffs' "Nullity" Argument

In their Motion for Reconsideration, Plaintiffs argued for the *first time* that even if the No Action Clause applied to the insurers' obligation to indemnify Plaintiffs for any judgments or settlements, it should not apply to any current obligation of the insurers to advance **Costs of Defense**—because otherwise, the Advancement Provision would be a "nullity." A01325; Ex. B at 21-22. On appeal, Plaintiffs attempt to re-frame this argument as "the No Action Clause Is In Direct Conflict with the 2021 Insurers' Express Defense Costs Advancement Obligation." OB at 16. For multiple reasons, the Superior Court's bench ruling on June 26, 2024, which rejected Plaintiffs' arguments, should be affirmed.

i. Plaintiffs' "Nullity" Argument is Waived

As a preliminary matter, the Superior Court correctly noted that Plaintiffs "failed to raise this issue in their briefing on the motion to dismiss and only raised it during oral argument, and under well-established case law, the issue is deemed waived." Ex. B at 22:18-22. Indeed, Plaintiffs' motion *did not cite any portion of their 103-page Motion-to-Dismiss Answering Brief* in support of their contention that this Court overlooked its "nullity" argument, instead citing only to *the oral*

argument. AO1328, ¶4. That's because Plaintiffs' "nullity" argument *was first made during oral argument and therefore is waived*. *See Knott v. LVNV Funding, LLC*, 95 A.3d 13, 20 (Del. 2014) ("[The appellant] waived any argument … by failing to present that argument to the Superior Court."); *Saunders v. Preholding Hampstead, LLC*, 2012 WL 1995838, at *3 (Del. Super. May 23, 2012) ("[I]ssues not addressed in briefing, and raised for the first time during oral argument, are deemed waived."). At oral argument on the Motion to Dismiss, Great American's counsel expressly objected to Plaintiffs' Nullity Argument as "not in Origis's Brief," and the Superior Court agreed:

> MR. TOMBERG: I just want to note that…several of the arguments raised by Origis today were not in Origis's brief, including that the 'No Action' clause is a nullity…
> THE COURT: I thought -- I looked again. I thought maybe I missed it, but I didn't see it either.

Ex. B, at 108-09.

Now, on appeal, Plaintiffs' make much of their "nullity" argument—re-casting it as their opening argument (*see* OB at 16)—but they cannot circumvent the simple fact that the argument was waived. *See* Supr. Ct. R. 8 ("only questions fairly presented to the trial court may be presented for review"). In their Brief, Plaintiffs are forced to contend that the argument was not waived because of certain allegations in their Complaint; it was *mentioned* within two cases they cited in their briefing; and it was raised in their Motion for Reconsideration and during oral argument.

See OB at 23. The Court can easily dispose of these arguments—otherwise, the waiver doctrine would be meaningless. Moreover, the allegations that Plaintiffs cite from their Complaint only generally allege that Defendants refused to honor their obligations—there is nothing specific about the No Action Clause or how it conflicts with these obligations. *See id.* (citing Complaint, A00067-69, ¶¶3-6; A00077, ¶¶36-38; A00078-82, ¶¶41-57). The Superior Court's ruling on this issue should be affirmed.

ii. The Superior Court Correctly Ruled that the No Action Clause is Not in Conflict With the Insurers' Advancement Obligation

Even if this Court opted to consider Plaintiffs' "nullity" argument, it should still affirm the Superior Court's conclusion that "[e]ven if the issue had been properly raised in the briefs, the arguments therein are still unavailing." Ex. B, 22:22-23:1. The Superior Court then summarized its reasoning:

> The primary policy conditions all advancements of defense costs on an agreement between insureds and insurer as to the allocated portion of the defense costs.
>
> Otherwise, the primary policy provides that the insurer need only advance those defense cost that the insurer believes to be covered under the primary policy until another allocation is determined by a negotiation, arbitration, or judicial determination.
>
> Neither the primary policy nor the decision provides any basis for Plaintiffs to believe that the advancement of defense costs they describe is excepted from the No Action clause.

> Consistent with the No Action clause, Plaintiffs require a final determination of the obligation to pay to file an action against Great American and any Defendants whose policies follow the primary policy.
>
> Delaware law seeks to ensure freedom of contract and allow parties to enforce their bargains in our courts. Plaintiffs and Defendants are sophisticated parties who could have negotiated for different language in the primary policy and the excess policies.
>
> The Court generally will not disturb a bargain because, in retrospect, it appears to have been a poor one. Hence, for the foregoing reasons, Plaintiffs' motion is denied.

Ex. B, 24:1-25:6.

The Superior Court's discussion ably identifies the flaws in Plaintiffs' argument. Plaintiffs are "sophisticated parties" who entered into insurance contracts with $20 million in liability coverage, and with a No Action Clause that is clear and unambiguous. There are no exceptions to the Policy's "condition precedent" language that might allow for an early adjudication of the payment of **Costs of Defense**, and none should be *added* by this Court. *See USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 360 (Del. 2020) ("[I]f the language of an insurance contract is clear and unambiguous[,] a Delaware court will not destroy or twist the words under the guise of construing them."). Otherwise, Plaintiffs' proposed interpretation of the Policy would effectively read out the No Action Clause—a result clearly disfavored by Delaware courts, which "have consistently held that an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would

result in a conclusion that some terms are uselessly repetitive." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

As to Great American's advancement obligations under the "Indemnity" coverage selected by the Plaintiffs, Plaintiffs fixate on the policy language stating that Great American "shall advance **Costs of Defense** in any **Claim** *prior to its final disposition*, provided such **Claim** is covered by this Policy.'" A00107, VI.B.(3)(c) (italics added); *see* OB at 3. It is telling, however, that Plaintiffs ignore another provision of the Policy that is ill-suited to its desired result: the Advancement Provision, which states that the "**Insurer** shall advance **Costs of Defense** *which the* ***Insurer*** *believes to be covered under this Policy*…." A00108, VI.B.(3)(c) (italics added). Indeed, even if Plaintiffs somehow overlooked this language, the Allocation Provision reiterates this exact point: "if there is no agreement on an allocation of **Loss**, *the* ***Insurer*** *shall advance* ***Costs of Defense*** *and any other* ***Loss*** *which the* ***Insurer*** *believes to be covered under this Policy until a different allocation is* negotiated, arbitrated or judicially determined." A00107, V.B. (italics added).

Plaintiffs' own Complaint and Brief have readily acknowledged that Great American agreed to advance 10% of Plaintiffs' defense costs,[13] and Great American

[13] *See* Complaint, A0078, ¶41 ("Great American proposes in its June 9 Letter that it would pay only ten percent (10%) of the Defense Costs associated with the Underlying Lawsuit excess of its applicable retention"); OB at 11 (noting Great American "would advance … ten percent (10%)" of "the Insureds' Defense Costs").

has in fact made that advancement of that 10% in the amount of $225,000.[14] Great American's actions have therefore been completely consistent with the plain language of the Policy's Advancement and Allocation Provisions. *See, e.g., Daileader*, 670 F. Supp. 3d at 43 ("[The insurer] is required to advance only [the loss] it 'believes to be covered under [its] policy until a different allocation is negotiated, arbitrated, or judicially determined.'").

Plaintiffs also complain that the Superior Court's reading of the No Action Clause renders the insurer's advancement obligation "unenforceable until the Underlying Lawsuit is resolved—which could be years after the obligation is triggered." OB at 17. Again, however, as the Superior Court acknowledged, Plaintiffs are "sophisticated parties" and could have bargained for a different agreement. Ex. A at 11; *see Seeger*, 2005 WL 6772545, at *3 ("It is not the Court's place to question the wisdom of this arrangement."). This principle was also endorsed by the Superior Court in this matter, which noted that "in Delaware, '[p]arties have a right to enter into good and bad contracts, the law enforces both.'" Ex. A at 12 (citations omitted); *see also Acme Mkts., Inc. v. Oekos Kirkwood, LLC*,

[14] Plaintiffs' Brief misstates the facts. Despite Great American's advancement of $225,000, Plaintiffs nevertheless incorrectly state: "The Insureds have incurred millions of dollars in Defense Costs to date, none of which have been paid by the Insurers." OB at 16. Great American will file proof of the payment upon the Court's request. Further, as noted, Plaintiffs provided Great American with some of their defense invoices on January 8, 2025 for the first time, which Great American is currently reviewing as part of its evaluation of further allocated funds.

2023 WL 4873317, at *7 (Del. Ch. July 31, 2023) (quoting *Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021)) ("[U]nder Delaware law, sophisticated parties are bound by the terms of their agreement. Even if the bargain they strike ends up a bad deal for one or both parties, the court's role is to enforce the agreement as written."). And indeed, the Superior Court addressed Plaintiffs' concerns about delayed coverage head-on in its Motion-to-Dismiss ruling, when it stated:

> Plaintiffs freely assented to this provision. If they thought the potential delay in coverage it risked was unacceptable, they should not have accepted it. The Court is fully confident that representatives of this billion-dollar company were well-equipped to understand the policy language and negotiate necessary changes. Not having done so, Plaintiffs cannot use this litigation to reopen negotiations.

Ex. A at 12.

Further, the notion that the Plaintiffs lack a remedy to adjudicate the coverage dispute until years after the obligation is triggered is misleading. *Tomorrow* Plaintiffs are free to litigate their entire coverage dispute with the First Tower Insurers in the Florida Action, but apparently Plaintiffs prefer to seek adjudication in Delaware. Just as Plaintiffs "elected" the "Indemnity" coverage (versus the "Duty-to-Defend" coverage), Plaintiffs have also "elected" their forum—but in Delaware, unlike Florida, Plaintiff must wait until their "obligation to pay has been finally determined," as mandated by the No Action Clause. For these reasons, Plaintiffs' argument that the No Action Clause creates an irreconcilable conflict with

the Advancement Provision is unavailing, and the Superior Court's rulings should be affirmed.

5. The Cases Relied Upon by Plaintiffs to Challenge the Plain Language of the No Action Clause are Distinguishable

Unlike here, none of the No Action Clause cases cited by Plaintiffs involve a *non*-"Duty-to-Defend" policy: (i) with an Advancement and Allocation Provisions – selected by the insured – that expressly allows the insurer to advance the amount of defense expenses it "believes to be covered under this Policy"; and (ii) the insured's rejection of a venue (*i.e.*, the Florida Action) that is fully capable of deciding the coverage issues. Indeed, had Plaintiffs simply elected the "Duty-to-Defend" coverage (instead of the "Indemnity" coverage), Plaintiffs would have been entitled to payment of "one hundred percent (100%)" of their defense expenses and *the No Action Clause would be irrelevant* because the only dispute over coverage would have been *after* Plaintiffs' "obligation to pay has been finally determined." Accordingly, each of Plaintiffs' "duty-to-defend" and "denial" cases are readily distinguishable.

i. Delaware Case Law

As discussed above in Sec. C.2, the Superior Court's decision in *Rodriguez v. Great Am. Ins. Co.*, 2022 WL 591762 (Del. Super. Feb. 23, 2022), is the closest analogue to this matter, and militates in favor of enforcing the No Action Clause. Plaintiffs do not dispute that in *Rodriguez*, the policy was also a Great American

D&O Policy with a substantively identical No Action Clause language—and the "Condition Precedent 1" language was expressly enforced by the Superior Court. Plaintiffs have failed to explain why the "Condition Precedent 1" language was enforced in *Rodriguez*, *yet the "Condition Precedent 2" language should not be enforced here*. This Court should follow *Rodriguez*, particularly here, where unlike any other No Action Clause case cited, it is undisputed that Plaintiffs have the additional Second Tower with "$20 million in limits," which is implicated in this action, and that Tower has not raised any No Action argument.[15]

Instead, Plaintiffs rely primarily upon a single Delaware Superior Court case from over fifty years ago—*Wright Construction Company v. St. Lawrence Fluorspar, Inc.*, 254 A.2d 252 (Del. Super. 1969)—to argue that Great American's No Action Clause argument should be rejected. *Wright*, however, involved different circumstances than the present matter. Indeed, the language of the "no action" clause is not even set forth in *Wright*, such that there is no way to compare it to the language at issue here. As the Superior Court concluded, *Wright* should be given little weight. Ex. A at 14 ("the Court does not find *Wright* to be very persuasive").

To evade the plain language of the No Action Clause and shoehorn this case into the one sentence "analysis" of *Wright*, Plaintiffs argue that *Wright* was the only

[15] The primary Bridgeway policy in the Second Tower has a No Action Clause that is substantively different from Great American's language here and at issue in *Rodriguez*, *supra*. A00267.

Delaware case addressing "the relevant language" of the No Action Clause. OB at 25. However, the arguments in *Wright* were different than those here. In *Wright*, unlike here, the policy at issue was a property damage liability policy, and the question before the court was whether the insurer could be "*impleaded* as a third-party defendant *by its insured*," despite an apparent "no action" clause. *See Wright*, 254 A.2d at 253 (emphasis added). As noted above, the court in *Wright* did not offer details regarding the language in the "no action" clause, so any comparison to the No Action Clause in the present Policy is impossible—and certainly, therefore, the *Wright* case does not address "the relevant language." The *Wright* Court simply referenced four cases from other jurisdictions—all of which are inapposite—to explain why it was "convince[d]" that that the no-action clause did not apply.[16]

[16] Significantly, those four cases appear to involve "duty to defend" D&O policies, and each case involved the insurer rejecting its duty to defend or to provide coverage altogether—unlike here, where Great American agreed to advance **Costs of Defense**.

For example, in *Jordan v. Stephens*, 7 F.R.D. 140, 142 (W.D. Mo. 1945), the insurer had "refused to defend the defendants or third-party plaintiffs and has declined to meet the expenses contemplated by its contract" and, therefore, the court held "[u]nder such circumstances it should not be permitted to interpose contractual provisions of a contract it has repudiated." *See also Irvin v. United States*, 148 F. Supp. 25, 31 (D.S.D. 1957) ("The insurer maintains that the United States does not qualify as an 'insured.'"); *Vaughn v. United States*, 225 F. Supp. 890, 891 (W.D. Tenn. 1964) ("The insurance company has denied coverage to the United States"); *Purcell v. United States*, 242 F. Supp. 789, 790 (D. Minn. 1965) ("[T]he United States is not a person or organization covered in the policy.").

Plaintiffs also suggests that since *Wright* too involved Great American, the Superior Court should have assumed "that the two clauses were substantially similar." OB at 27. Although it is not possible to determine from the *Wright* opinion what the language of a "standard" "no action" clause consists of, here Great American and Origis created a "contractually agreed upon condition precedent"[17] to coverage. *See* A00111, XI.A ("no action shall be taken against the **Insurer** unless, *as a condition precedent thereto*…") (italics added). There is no evidence that the "no action" clause in *Wright* contained these same terms, which alone denote a legally enforceable obligation. *See Rhone-Poulenc*, 616 A.2d at 1198 ("In order for an insured to establish the contractual liability of an insurer for breach of an insurance contract, the insured must show that he has complied with all conditions precedent to the insurer's performance…."). Likewise, *Wright* may not have contained the "shall" language, nor the Condition Precedent 1, nor the additional language in the Condition Precedent 2 ("or by written agreement of the Insured, claimant and the Insurer"), as such language is referenced nowhere in the court's one-sentence analysis. Here, since Plaintiffs do not dispute that their obligation to pay has not been "finally determined," their "contractually agreed upon condition

[17] *See Game Truck Ga., LLC v. Atl. Specialty Ins. Co.*, 849 F. App'x 233, 237 (11th Cir. 2021) ("a 'no action' clause, which establishes a 'contractually agreed upon condition precedent' to filing suit").

precedent" with Great American should be enforced as written without regard to the unknowns that might have been considered by the *Wright* court 50 years ago.

In sum, the only Delaware case cited by Plaintiffs deals with different circumstances and potentially different policy language, and requires the Court to speculate to draw any definitive conclusions. By contrast, in the far more recent case of *Rodriguez, supra*, the Superior Court enforced the No Action Clause and dismissed that action based on the insured's failure to comply with the provision. Like *Rodriguez* and other cases, this Court should similarly examine and apply the plain language of the No Action Clause and dismiss this case. *See Haxton*, 917 F.2d 1304, 1990 WL 169650 at *4 (enforcing the "the plain language of the no action clause" and recognizing the validity of such clauses); *Batsakis v. Federal Deposit Ins. Corp*., 670 F. Supp. 749, 759 (W.D. Mich. 1987) (enforcing "the plain language of the policy, as a matter of contract, precludes the initiation of this [coverage] action … until such time as the liability of the insured has been determined.").

ii. Non-Delaware Case Law

Similarly unavailing is Plaintiffs' argument that the Superior Court's ruling is "Contrary to Virtually Every Other Case Nationwide" (OB at 29), which according to Plaintiffs hold that "no action" clauses do not preclude the insured from pursuing claims against its own insurer—or claims for declaratory relief (like this action)—

prior to resolution of the underlying matter. This conclusion is belied by the case law.

For example, in *Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252 (10th Cir. 1981), the Tenth Circuit found that "the no action clause does not apply to a suit the insured brings for breach of the insurer's obligation to defend." *Id.* at 254. As discussed above, Plaintiffs themselves "elected" to bear the duty to defend in their Policy, *not Great American*. In *Haxton*, the Sixth Circuit distinguished cases that "involved either the insurer's refusal to defend or provide coverage." 1990 WL 169650, at *1. Here, likewise, since Great American: (i) did not have the duty to defend; (ii) has not denied coverage; and (iii) is affirmatively advancing defense expenses, *Paul Holt* and other cases cited by Plaintiffs—which involved the withholding of the insurer's duty to defend—do not apply. *See, e.g., Hawkins, Ash, Baptie & Co., LLP v. Charter Oak Fire Ins. Co*., 2001 WL 34381113, at *2 (W.D. Wis. June 13, 2001) (each insurer "denied coverage and rejected the tender of defense"); *Duke Univ. v. St. Paul Mercury Ins. Co.*, 384 S.E.2d 36, 41 (N.C. Ct. App. 1989) ("St. Paul informed Duke it had no coverage, and thus St. Paul refused to provide legal defense in the underlying suit," and that "the 'no action' clause does not apply to a direct suit brought by the insured against the insurer for breach of the insurer's obligation to defend."); *Fight Against Coercive Tactics Network v. Coregis Ins. Co.*, 926 F. Supp. 1426, 1435 (D. Colo. 1996) (insurer argued "it has no duty to

defend and, moreover, has no duty of interim funding of Plaintiffs' defense"); *McNally v. Providence Wash. Ins. Co*., 698 A.2d 543, 546 (N.J. Super. App. Div. 1997) (suit against insurer for "wrongfully refused to defend and indemnify the plaintiffs as per the terms of the umbrella policy and the comprehensive liability policy"); *W & J Rives, Inc. v. Kemper Ins. Grp*., 374 S.E.2d 430, 432 (N.C. Ct. App. 1988) ("Aetna notified Rives that its excess policy did not cover the loss of the Polo shirts…. Aetna further refused to defend Polo's action against Rives.").

In light of the foregoing, this Court should apply the plain language of the No-Action clause, which as a "condition precedent" prohibits Plaintiffs from filing suit against Great American until their obligation to pay is "finally determined." The Sixth Circuit emphasized "the plain language" of a substantively identical "no action" clause in a D&O policy in concluding that the coverage action was premature. *See Haxton*, 1990 WL 169650 at *2; *see also S&S Healthcare, Inc. v. Virginia Sur. Co*., 1998 U.S. Dist. LEXIS 21810, at *4 (W.D. Va. Dec. 21, 1998) (noting "the explicit language" and "the plain and unambiguous terms of [the "no action"] clause," and enforcing the provision). Accordingly, case law from outside Delaware does not compel a reversal of the Superior Court's rulings.

6. Plaintiffs Waived the Argument that the Policy is Ambiguous By Not Raising it Before the Superior Court; But, In Any Event, the Policy is Not Ambiguous

Throughout their Brief, Plaintiffs seek to weave in an argument that the No Action Clause is ambiguous, based in part on a subsequent ruling from Judge Meghan Adams in *Pangea Equity Partners, LP v. Great Am. Ins. Group*, No. N23C-12-060 MAA CCLD. The Court should decline to entertain Plaintiffs' argument that the No Action Clause is "ambiguous" for multiple reasons.

First, as a threshold matter, the issue of whether the No Action Clause is ambiguous is not properly before this Court, since Origis did not raise the issue in its Complaint, nor in its 103-page response to Great American's Motion to Dismiss, and therefore the argument is waived on appeal. *See Knott*, 95 A.3d at 20 ("[The appellant] waived any argument … by failing to present that argument to the Superior Court."). Indeed, nowhere in its Motion-to-Dismiss Answering Brief (A00932-A01047) did Plaintiffs argue that the Policy is ambiguous.[18] *See King v. VeriFone Hldgs., Inc.*, 994 A.2d 354, 360 n.21 (Del. Ch. 2010), *rev'd on other grounds*, 12 A.3d 1140 (Del. 2011) ("A party's failure to raise an argument in its answering brief constitutes a waiver of that argument.").

[18] The word "ambiguous" (or any form thereof) does not appear in Plaintiffs' Motion-to-Dismiss Answering Brief (or Plaintiffs' Complaint).

Plaintiffs' related argument that the Superior Court's decision "is contrary to Delaware's reasonable expectations doctrine" was also not raised in the underlying proceedings and is therefore waived. While Plaintiffs' 103-page Motion-to-Dismiss Answering Brief references the "reasonable expectations" doctrine in its general "Rules Applicable to Insurance Policy Interpretation" section (A00967), Plaintiffs only refer to the doctrine in the context of their "Prior Acts Exclusion" arguments (A01025), which pertain to the 2023 Insurers and not Great American. Therefore, Plaintiffs arguments as to ambiguity and the reasonable expectations doctrine should both be deemed waived too.

Second, even if the Court considers Plaintiffs' argument, it should conclude that the No Action Clause is not ambiguous, and that there is thus no basis for looking to the reasonable expectations of the insured. Plaintiffs contend that the Superior Court's conclusion was "based, at least in part, on a mistaken belief that there was no dispute regarding the meaning of the clause's amorphous language…." OB at 3. However, simply because Plaintiffs disagree with Great American as to the proper construction of the clause does not render it ambiguous. *See Conagra Foods*, 21 A.3d at 69 ("An insurance contract is not ambiguous simply because the parties do not agree on its proper construction.") (citing *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010)). Similarly, any argument that the No Action Clause is ambiguous because the Superior Court's decision conflicts with

other courts' opinions is unavailing: this Court has held that "[a] mere split in the case law concerning the meaning of a term does not render that meaning ambiguous in the Delaware courts." *O'Brien*, 785 A.2d at 289. In any event, the No Action Clause does not render the Advancement Provision ambiguous, and the Superior Court determined that the plain language of the No Action Clause was clear and enforceable as written—which this Court should affirm.

Third, Judge Adams' ruling in *Pangea* is readily distinguishable from this matter. Most importantly, as the portion of the transcript cited by Plaintiffs demonstrates, *Pangea* dealt with a policy where the duty to defend was on the insurer, not the insured—which is in stark contrast to the present matter, where the duty to defend is on the *insured*, as expressly "elected" by Plaintiffs. When Judge Adams noted that the Court was "struggl[ing] … with squaring the policy language *of the duty to defend* with this No Action clause" (Ex. D at 34:19-20) (emphasis added), the Court underscored this critical distinction. For this reason, *Pangea* is inapposite and should not influence this Court's analysis.

7. Plaintiffs' Additional Arguments Are Also Waived

Similar to the "ambiguity" argument, Plaintiffs' contention that a "party who first commits a material breach of a contract cannot enforce the contract going forward" (*id.* at 22) is also waived. As with other arguments, this was not presented to the Superior Court anywhere in Plaintiffs' 103-page Motion-to-Dismiss

Answering Brief, and is not saved by its passing inclusion in Plaintiffs' Motion for Clarification (A01330). In any event, however, as discussed throughout this Brief, Great American did not breach the Policy, but rather followed its Allocation and Advancement Provisions as it was compelled to do under the Policy's terms, and it has advanced $225,000 to Plaintiffs.

Lastly, Plaintiffs also argue for the *first time* in their present Brief that the Superior Court's interpretation of the No Action Clause conflicts with the "expressly stated purpose" of Delaware's Declaratory Judgment Act (OB at 27)—which too is waived. Again, though, the argument can be readily disposed of even if considered. Plaintiffs suggest that the Superior Court's rulings are incompatible with the state purpose of the DJA "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Id.* (citing Del. Code Ann. tit. 10, § 6512). As discussed above, Plaintiffs' complaint that they may need to wait for "years" until the Underlying Lawsuit is resolved ignores the plain language of the "Indemnity" coverage they selected, as well as their refusal to litigate *now* before the Florida court, abdicating Plaintiffs of any responsibility for the consequences of their own decisions. As the Superior Court noted, courts "generally will not disturb a bargain because, in retrospect, it appears to have been a poor one." Ex. B, 24:1-25:6. Here, Plaintiffs do not get to redo their decisions in their contracting with

Great American because the circumstances now suggest a different decision would have been better for them.

CONCLUSION

For the foregoing reasons, the Superior Court's rulings should be affirmed in their entirety.

CONNOLLY GALLAGHER LLP

/s/ Shaun Michael Kelly
Shaun Michael Kelly (#5915)
Jarrett W. Horowitz (#6421)
Sara A. Barry (#6703)
1201 North Market Street, 20th Floor
Wilmington, DE 19801
(302) 757-7300
skelly@connollygallagher.com
jhorowitz@connollygallagher.com
sbarry@connollygallagher.com

Attorneys for Defendant-Below/ Appellee Great American Insurance Company

Of Counsel:

James K. Thurston
WILSON ELSER
55 West Monroe Street, Suite 3800
Chicago, IL 60603
(312) 704-0550
james.thurston@wilsonelser.com

Daniel E. Tranen
WILSON ELSER
7777 Bonhomme Avenue, Suite 1900
St. Louis, MO 63105
(314) 930-2860
daniel.tranen@wilsonelser.com

Erik J. Tomberg
WILSON ELSER
150 Fayetteville Street, Suite 300
Raleigh, NC 27601
(984) 268-2121
erik.tomberg@wilsonelser.com

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