Viacom Inc. v. U.S. Specialty Ins. Co.

Decided Aug 10, 2023

C. A. N22C-06-016 SKR CCLD N22C-06-020 SKR CCLD

08-10-2023

VIACOM Inc., n/k/a PARAMOUNT GLOBAL, Plaintiff, v. U.S. SPECIALTY INSURANCE COMPANY, et al. SHARI E. REDSTONE, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, et al.

David J. Baldwin, Esquire, Peter C. McGivney, Esquire, Harry W. Shenton, Esquire, BERGER HARRIS LLP, Wilmington, Delaware, Robin L. Cohen, Esquire, Adam Ziffer, Esquire, Jillian Raines, Esquire, COHEN ZIFFER FRENCHMAN &MCKENNA LLP, New York, New York, Attorneys for Plaintiff Viacom Inc. Matthew Fischer, Esquire, Jennifer Wasson, Esquire, Jacqueline Rogers, Esquire, Carla Jones, Esquire, Brandon Harper, Esquire, POTTER ANDERSON &CORROON LLP, Wilmington, Delaware, David B. Goodwin, Esquire, COVINGTON & BURLING LLP, San Francisco, California, Neema Sahni, Esquire, COVINGTON & BURLING LLP, Los Angeles, California, Mitchell F. Dolin, Esquire, COVINGTON &BURLING LLP, Washington, DC, Attorneys for Plaintiff Shari E. Redstone Robert J. Katzenstein, Esquire, Julie M. O'Dell, Esquire, KATZENSTEIN &JENKINS LLP, Wilmington, Delaware, Attorneys for Defendant U.S. Specialty Insurance Company Robert J. Katzenstein, Esquire, Julie M. O'Dell, Esquire, KATZENSTEIN & JENKIN LLP, Wilmington, Delaware, Darius N. Kandawalla, Esquire, James M. Young, Esquire, BAILEY CAVALIERI LLC, Columbus, Ohio, Attorneys for Defendant National Casualty Company and Freedom Special Insurance Company Kurt M. Heyman, Esquire, Aaron M. Nelson, Esquire, Kelly E. Rowe, Esquire, HEYMAN ENERIO GATTUSO &HIRZEL LLP, Scott B. Schreiber, Esquire, Arthur Luk, Esquire, Matthew Bemis, Esquire, ARNOLD &PORTER KAYE SCHOLAR LLP, Washington DC, Attorneys for Defendant Illinois National Insurance Company John C. Phillips, Esquire, David A. Bilson, Esquire, PHILLIPS, MCLAUGHLIN &HALL, P.A., Wilmington, Delaware, Andrew L. Margulia, Esquire, Amber W. Locklear, Esquire, ROPERS MAJESKI PC, New York, New York, Attorneys for Defendant QBE Insurance Company Michael Busenkell, Esquire, GELLERT SCALI BUSENKELL & BROWN LLC, Wilmington, Delaware, Manuel Mungia Kr., Esquire, Matthew E. Pepping, Esquire, Chad W. Schreiber, Esquire, CHASNOFF MUNGIA VALKENAAR PEPPING &STRIBLING LLP, San Antonio, Texas, Attorneys for Defendant Endurance American Insurance Company Joanna J. Cline, Esquire, Emily L. Wheatley, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, Wilmington, Delaware, Jennifer Mathis, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, San Francisco, California, Daniel W. Cohen, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, New York, New York, Attorneys for Defendant XL Specialty Insurance Company Francis G.X. Pileggi, Esquire, Ciro Poppiti, III, Esquire, Aimee M. Czachorowski, Esquire, LEWIS BRISBOIS BISGAARD &SMITH LLP, Wilmington, Delaware, Jeffrey R. Gaylord Lewis, Esquire, BRISBOIS BISGAARD & SMITH LLP, New York, New York, Attorneys for Defendant

North American Specialty Insurance Company n/k/a Swiss Re Corporate Solutions American Insurance Corporation Marc S. Casarino, Esquire, KENNEDYS CMK LLP, Wilmington, Delaware, Attorney for Defendant Continental Casualty Company Matthew P. Donelson, Esquire, ELZUFON AUSTIN & MONDELL P.A., Wilmington, Delaware, David A. Wilford, Esquire, Anthony D. Agostino, Esquire, WILFORD LLP, Barrington, Illinois, Attorneys for Star Indemnity &Liability Company Albert H. Manwaring IV, Esquire, Barnaby Grzaslewicz, Esquire, MORRIS JAMES LLP, Wilmington, Delaware, Michael J. Hartley, Esquire, Courtney A. Palko, Esquire, BAUTE CROCHETIERE &HARTLEY LLP, Los Angeles, California, Attorneys for Defendant Old Republic Insurance Company Timothy S. Martin, Esquire, Daryll Hawthorne-Bernando, Esquire, WHITE AND WILLIAMS LLP, Wilmington, Delaware, David J. Cregan, Esquire, WHITE AND WILLIAMS LLP, Philadelphia, Pennsylvania, Attorneys for Defendant Markel American Insurance Company Curtis J. Crowther, Esquire, ROBINSON & COLE LLP, Wilmington, Delaware, Erica J. Kerstein, Esquire, ROBINSON &COLE LLP, New York, New York, Attorneys for Defendants National Liability &Fire Insurance and Axis Company James W. Semple, Esquire, R. Grant Dick IV, Esquire, COOCH AND TAYLOR P.A., Wilmington, Delaware, David F. Cutter, Esquire, BATESCAREY LLP, Chicago, Illinois, Attorneys for Defendant Berkley Insurance Company James W. Semple, Esquire, R. Grant Dick IV, Esquire, COOCH AND TAYLOR P.A., Wilmington, Delaware, Courtney E. Scott, Esquire, TRESSLER LLP, New York, New York, Attorneys for Defendant Hudson Insurance Company

SHELDON K. RENNIE, JUDGE

Submitted: July 17, 2023

Upon Plaintiffs' Motions for Partial Summary Judgment: GRANTED *2

David J. Baldwin, Esquire, Peter C. McGivney, Esquire, Harry W. Shenton, Esquire, BERGER HARRIS LLP, Wilmington, Delaware, Robin L. Cohen, Esquire, Adam Ziffer, Esquire, Jillian Raines, Esquire, COHEN ZIFFER FRENCHMAN &MCKENNA LLP, New York, New York, Attorneys for Plaintiff Viacom Inc.

Matthew Fischer, Esquire, Jennifer Wasson, Esquire, Jacqueline Rogers, Esquire, Carla Jones, Esquire, Brandon Harper, Esquire, POTTER ANDERSON &CORROON LLP, Wilmington, Delaware, David B. Goodwin, Esquire, COVINGTON & BURLING LLP, San Francisco, California, Neema Sahni, Esquire, COVINGTON & BURLING LLP, Los Angeles, California, Mitchell F. Dolin, Esquire, COVINGTON &BURLING LLP, Washington, DC, Attorneys for Plaintiff Shari E. Redstone

Robert J. Katzenstein, Esquire, Julie M. O'Dell, Esquire, KATZENSTEIN &JENKINS LLP, Wilmington, Delaware, Attorneys for Defendant U.S. Specialty Insurance Company

Robert J. Katzenstein, Esquire, Julie M. O'Dell, Esquire, KATZENSTEIN & JENKIN LLP, Wilmington, Delaware, Darius N. Kandawalla, Esquire, James M. Young, Esquire, BAILEY CAVALIERI LLC, Columbus, Ohio, Attorneys for Defendant National Casualty Company and Freedom Special Insurance Company

Kurt M. Heyman, Esquire, Aaron M. Nelson, Esquire, Kelly E. Rowe, Esquire, HEYMAN ENERIO GATTUSO &HIRZEL LLP, Scott B. Schreiber, Esquire, Arthur Luk, Esquire, Matthew Bemis, Esquire, ARNOLD &PORTER KAYE SCHOLAR LLP, Washington DC, Attorneys for Defendant Illinois National Insurance Company

John C. Phillips, Esquire, David A. Bilson, Esquire, PHILLIPS, MCLAUGHLIN &HALL, P.A., Wilmington, Delaware, Andrew L. Margulia, Esquire, Amber W. Locklear, Esquire, ROPERS MAJESKI PC, New York, New York, Attorneys for Defendant QBE Insurance Company

2

Michael Busenkell, Esquire, GELLERT SCALI BUSENKELL & BROWN LLC, Wilmington, Delaware, Manuel Mungia Kr., Esquire, Matthew E. Pepping, Esquire, Chad W. Schreiber, Esquire, CHASNOFF MUNGIA VALKENAAR PEPPING &STRIBLING LLP, San Antonio, Texas, Attorneys for Defendant Endurance American
3 Insurance Company *3

Joanna J. Cline, Esquire, Emily L. Wheatley, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, Wilmington, Delaware, Jennifer Mathis, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, San Francisco, California, Daniel W. Cohen, Esquire, TROUTMAN PEPPER HAMILTON SANDERS LLP, New York, New York, Attorneys for Defendant XL Specialty Insurance Company

Francis G.X. Pileggi, Esquire, Ciro Poppiti, III, Esquire, Aimee M. Czachorowski, Esquire, LEWIS BRISBOIS BISGAARD &SMITH LLP, Wilmington, Delaware, Jeffrey R. Gaylord Lewis, Esquire, BRISBOIS BISGAARD & SMITH LLP, New York, New York, Attorneys for Defendant North American Specialty Insurance Company n/k/a Swiss Re Corporate Solutions American Insurance Corporation

Marc S. Casarino, Esquire, KENNEDYS CMK LLP, Wilmington, Delaware, Attorney for Defendant Continental Casualty Company

Matthew P. Donelson, Esquire, ELZUFON AUSTIN & MONDELL P.A., Wilmington, Delaware, David A. Wilford, Esquire, Anthony D. Agostino, Esquire, WILFORD LLP, Barrington, Illinois, Attorneys for Star Indemnity &Liability Company

Albert H. Manwaring IV, Esquire, Barnaby Grzaslewicz, Esquire, MORRIS JAMES LLP, Wilmington, Delaware, Michael J. Hartley, Esquire, Courtney A. Palko, Esquire, BAUTE CROCHETIERE &HARTLEY LLP, Los Angeles, California, Attorneys for Defendant Old Republic Insurance Company

Timothy S. Martin, Esquire, Daryll Hawthorne-Bernando, Esquire, WHITE AND WILLIAMS LLP, Wilmington, Delaware, David J. Cregan, Esquire, WHITE AND WILLIAMS LLP, Philadelphia, Pennsylvania, Attorneys for Defendant Markel American Insurance Company

Curtis J. Crowther, Esquire, ROBINSON & COLE LLP, Wilmington, Delaware, Erica J. Kerstein, Esquire, ROBINSON &COLE LLP, New York, New York, Attorneys for Defendants National Liability &Fire Insurance and Axis Company

James W. Semple, Esquire, R. Grant Dick IV, Esquire, COOCH AND TAYLOR P.A., Wilmington, Delaware, David F. Cutter, Esquire, BATESCAREY LLP, Chicago, Illinois, Attorneys
4 for Defendant Berkley Insurance Company *4

James W. Semple, Esquire, R. Grant Dick IV, Esquire, COOCH AND TAYLOR P.A., Wilmington, Delaware, Courtney E. Scott, Esquire, TRESSLER LLP, New York, New York, Attorneys for Defendant Hudson Insurance Company

MEMORANDUM OPINION AND ORDER

5 SHELDON K. RENNIE, JUDGE *5

I. INTRODUCTION

Plaintiffs seek insurance coverage from Insurers for settlement costs incurred from the 2019 merger of Viacom Inc. and CBS Corp. Under the insurance contract, coverage does not extend to any "bumped-up" consideration arising from the "acquisition of all or substantially all of the ownership interest in, or assets of, an entity." The main question that arises in this action is whether the merger constituted such a transaction. If so, the Insurers are not obligated to pay for the settlement costs attributable to any of the "bumped-up" consideration.

In resolving Plaintiffs' motions for partial summary judgment, it is important to recall the applicable burden-shifting framework. Plaintiffs must meet the initial burden that the insurance

claims are subject to coverage. If they can do so, the burden then shifts to the Insurers to show that any portion of those claims are properly excluded under the contract. If there is any ambiguity, it should be resolved in favor of the insured, as it is incumbent on the drafter of the insurance agreement to be unequivocally clear in carving out exclusions to coverage.

Here, the contract is ambiguous. On one hand, a merger may be "an acquisition of all or substantially all ownership interest in, or assets of, an entity," because all assets of Viacom "vest[ed] in" CBS, and CBS was the surviving corporation. On the other hand, "an acquisition of all or substantially all ownership interest in, or assets of, an entity" may be exclusive of merger transactions
6 based on *6 the reference to mergers in other provisions of the contract. Both interpretations are reasonable, and though two contrary, reasonable interpretations are generally sufficient to defeat a motion for summary judgment, here, any ambiguity is interpreted in favor of the insured. For the reasons described below, Plaintiffs' Motions for Partial Summary Judgment are **GRANTED**.

II. BACKGROUND

A. The Underlying Litigation

On December 4, 2019, Viacom Inc. n/k/a Paramount Global ("Viacom" or the "Company") merged with and into CBS Corp. ("CBS") in an all-stock transaction (the "Merger").[1] In 2019 and 2020, stockholders brought several lawsuits challenging the Merger.[2] The Court of Chancery consolidated the actions into *In re Viacom Inc. Stockholders Litigation*, C. A. No. 2019-0948-JRS (Del. Ch.) ("*In re Viacom*").[3] Stockholders asserted claims for breaches of fiduciary duty against Viacom's directors, officers and controlling stockholders for their role in negotiating and recommending the Merger.[4] Plaintiffs alleged that
7 Shari E. Redstone ("Ms. Redstone") *7 exerted her control over the controlling stockholders, directors, and officers of Viacom by causing them to approve the Merger on terms detrimental to Viacom and its stockholders.[5] The Court in *In re Viacom* found that there was a reasonable inference that several defendants violated their fiduciary duties by extracting significant governance concessions from CBS in exchange for a lower stock-for-stock exchange ratio ("Motion to Dismiss Decision").[6] Notably, in exchange for the appointment of Ms. Redstone's preferred candidate as CEO of the newly formed company, a committee of Viacom directors approved an exchange ratio, based on a valuation of Viacom that was approximately $1 billion less than was bargained for in the previous year.[7] After the Motion to Dismiss Decision, the parties conducted discovery, and on March 3, 2023, they entered into a Stipulation and Agreement of Settlement, Compromise and Release (the "Settlement").[8] The proposed Settlement includes
8 consideration of $122.5 million.[9] *8

1 Complaint ("Compl") ¶ 3 (D.I. No. 1).

2 *In re Viacom Inc. Stockholders Litigation*, C. A. No. 2019-0948; 2019-1017; 2020-0003; 20200025 (Del. Ch.).

3 Defendants' Consolidated Opposition to Plaintiffs' Motions for Partial Summary Judgment ("Def.'s Opp'n") at 4 (D.I. No. 153).

4 Compl. ¶ 7.

5 Viacom Inc. n/k/a/ Paramount Global's Opening Brief in Support of its Motion for Partial Summary Judgment ("Pl.'s Motion"), Exhibit B (*In re Viacom* Complaint) ¶¶ 230-44.

6 *In re Viacom Inc. S'holders Litig.,* 2020 WL 7711128, at *4, 18 (Del. Ch. Dec. 29, 2020), *as corrected* (Dec. 30, 2020).

7 *Id*. at 5.

[8] *In re Viacom Inc. Stockholders Litigation*, C. A. No. 2019-0948 (Del. Ch. March 28, 2023), Stipulation and Agreement of Settlement, Compromise and Release (D.I. No. 354).

[9] Def.'s Opp'n at 12.

B. The Parties

Plaintiffs are Viacom and Ms. Redstone. Prior to the Merger, Viacom was incorporated in Delaware and headquartered in New York.[10] It was a mass media entity involved in film, television, direct-to-consumer streaming, digital media, and live events.[11] Ms. Redstone served on the board of Viacom before the Merger and was an alleged indirect controlling stockholder of Viacom through her ownership of interests in non-parties National Amusements, Inc. and NAI Entertainment Holdings LLC.[12]

[10] Compl. ¶ 16.

[11] *Id.* ¶ 2.

[12] *Redstone v. Ace American Insurance Company, et al.*, Complaint ("Redstone Compl.") ¶ 9 (D.I. No. 1) (N22C-06-020-SKR CCLD); *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *5.

Defendants are insurance companies which issued director and officer ("D&O") liability insurance policies to Viacom for the 2019-2020 period
9 ("Defendants" or "Insurers").[13] *9

[13] Defendants include Markel American Insurance Company ("Markel"), XL Specialty Insurance Company ("XL Specialty"), Old Republic Insurance Company ("Old Republic"), National Casualty Company ("National Casualty"), Freedom Specialty Insurance Company ("Freedom"), Endurance American Insurance Company ("Endurance"), Illinois National Insurance Company ("AIG"), Starr Indemnity & Liability Company ("Starr"), Swiss Re Corporate Solutions America Insurance Corporation, f/k/a North American Specialty Insurance Company ("Swiss Re"), Continental Casualty Company ("CNA"), QBE Insurance Corporation ("QBE"), National Liability & Fire Insurance ("National Liability & Fire"), Berkley Insurance Company ("Berkley"), AXIS Insurance Company ("AXIS"), and Hudson Insurance Company ("Hudson"). Claims against U.S. Specialty Insurance Company ("USSIC"), Zurich American Insurance Company ("Zurich") (Order (D.I. Nos. 115 and 134)), Travelers Casualty and Surety Company of America ("Travelers") (Order (D.I. Nos. 180)) and primary insurer ACE American Insurance Company ("Chubb") have been dismissed. Order (D.I. No. 57) (N22C-06-020-SKR CCLD).

C. Structure of the Merger

On December 4, 2019, pursuant to the Merger agreement, Viacom's "separate corporate existence" ceased, and upon the Merger, all "assets, rights, privileges, powers and franchises of [Viacom] and [CBS] [vested] in the Surviving Corporation," *i.e.*, CBS.[14] All Viacom shares were automatically converted into CBS common stock at an exchange ratio of .59625 of CBS common stock, and upon such conversion, all Viacom shares were cancelled.[15] CBS was renamed ViacomCBS Inc. ("ViacomCBS"),[16] and consisted of CBS shareholders owning approximately 61% of ViacomCBS and former Viacom shareholders approximately 39%.[17]

[14] Merger Agreement §§ 1.01, 1.04.

[15] *Id.* § 1.07(b).

[16] *Id.* § 1.05. ViacomCBS has since been renamed "Paramount Global." Compl. at 2 n.1.

[17] *Id.* ¶ 59.

D. The Policies

Viacom purchased D&O liability insurance policies for the 2019-2020 policy period.[18] The $200 million insurance program consisted of a primary D&O policy, followed by a series of excess policies from other insurers which would pay once the primary D&O policy's limits of liability were exhausted (the "Excess Policies").[19] Non-party Chubb issued the primary D&O policy (the "Policy") of which the Excess Policies followed form, *i.e.*, incorporated the Policy's terms and conditions.[20]

[18] Pl.'s Motion at 8.

[19] *Id.*

[20] *Id.*, Ex. E ("Policy").

1. "Loss"

Under the Policy, Insurers agreed to pay for certain losses on behalf of Viacom, its directors, officers, and employees for claims made during the relevant policy period involving certain wrongful acts.[21] Specifically, the Policy provides that:

[21] *Id.* §§ I. A, B, C.

> Insurers are required to pay all "Loss" for which the "Insured Persons have become legally obligated to pay by reason of a Claim first made against the Insured Persons during the Policy Period ... for any Wrongful Acts taking place prior to the end of the Policy Period."[22]

[22] *Id.* §§ I.A and B.

"Insured Persons" include former and current directors, officers, or employees of Viacom.[23] "Claim" means "a civil.proceeding.commenced by.service of a complaint."[24] A "Wrongful Act" includes "any error, misstatement, misleading statement, act, omission, neglect, breach of duty.. .actually or allegedly committed or attempted by an Insured Person.."[25]

[23] *Id.* § II.J.

[24] *Id.* § II.E.

[25] *Id.* § II.X.

Loss includes "damages, judgments, any award of pre-judgment and post-judgment interest, settlements" as well as claimant's attorneys' fees as part of a settlement.[26] It does not, however, include the following:

[26] *Id.* § II.M.

> any amount representing the amount by which the price of or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in, or assets of, an entity, including a Company, was inadequate or effectively increased. However, this paragraph shall not apply to Defense Costs..

(the "Bump-Up" Provision).[27] "Acquisition" is not a defined term in the Policy, and "Company" is defined in part as a "Named Insured," which is Viacom, and any "Subsidiary."[28]

[27] *Id.* § II.M.4.

[28] *Id.* § II.F., Decls.

2. Merger Objection Claim and Material Changes in Conditions Provision

Other provisions in the Policy track the "acquisition" language in the Bump Up Provision. For example, a Merger Objection Claim is:

> [a] Claim based upon, arising from, or in consequence of *any proposed or actual acquisition of a Company, or of all or substantially all of the Company's assets by another entity*, or the merger or consolidation of

> the Company into or with another entity such that the Company is not the surviving entity, or the obtaining by any person, entity or affiliated group of persons or entities of the right to elect, appoint or designate more than 50% of the directors, management committee members, or members of the management board of the Company or similar transaction.[29] (emphasis added).

[29] *Id.* § II.N.

This term appears in an Endorsement appended to the Policy, in which the Insurers may modify the retention amount for choice of counsel based on whether a Merger Objection Claim is asserted.[30] The Merger Objection Claim tracks the language of the "acquisition of all or substantially all... assets of an entity" in the Bump-Up Provision,[31] and, unlike the Bump-Up Provision, it refers to merger transactions -" *merger or consolidation of the Company into or with another entity such that the Company is not the surviving entity*."[32]

[30] *Id.* END. 11.

[31] *Id.* § II.N; *cf.*, *id.* § II.M.

[32] *Id.* § II.N.

The Section titled "Material Changes in Conditions" also tracks the "acquisition" language in the Bump-Up Provision.[33] Like the Merger Objection Claim, it references acquisitions by merger, and in this case, modifies coverage based on certain wrongful acts.[34] Section XIV.B provides
13 that: *13

[33] *Id.* § XIV.

[34] *Id.*

> If. .any of the following events occurs:
>
> 1. The *acquisition of the Named Insured, or of all or substantially all of its assets, by another entity*, or the merger or consolidation of the Named Insured into or with another entity such that the Named Insured is not the surviving entity;
>
> or
>
> 2. The obtaining by any person, entity or affiliated group of persons or entities of the right to elect, appoint or designate at least 50% of the directors of the Named Insured;
>
> Then coverage under this Policy will continue in full force and effect until termination of this Policy, but only with respect to Claims for Wrongful Acts taking place before such event. (emphasis added).

(the "Material Changes in Condition Provision").[35]

[35] *Id.*

E. Procedural History

After Viacom provided notice of *In re Viacom* to Insurers, certain Insurers denied that the claims asserted were subject to coverage.[36] In correspondence sent to Viacom, the Insurers denied providing coverage on the basis that (1) Ms. Redstone did not act in an insured capacity, *i.e.*, as a Viacom director, (2) and "Loss" excluded "any amount representing the amount by which the price of or consideration paid for the acquisition or completion of the acquisition of all
14 or substantially all of the *14 ownership in, or assets of, an entity, including a Company, was inadequate or effectively increased.. .."[37]

[36] *See* Pl.'s Motion, Exs. G - M.

[37] *See, e.g., id.*, Exs. H, L.

On June 2, 2022, Plaintiffs initiated this action by filing separate complaints against the Insurers and asserted anticipatory breach of contract and seeking declaratory relief.[38] Certain Insurers

moved to dismiss the Complaint under 12(b)(1), [39] which the Court denied.[40] On September 28, 2022, Viacom moved for partial summary judgment that the Bump-Up Provision did not bar coverage for a settlement or judgment in the underlying action. On March 23, 2023, Ms. Redstone filed a motion for partial summary judgment on similar grounds.[41] Defendants filed a consolidated opposition to Plaintiffs' motions for partial summary judgment on April 6, 2023. Viacom and Redstone filed their respective reply briefs on May 2, 2023.[42] Oral Argument was heard on July 17, 2023. *15

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38 Compl. ¶¶ 77 - 95; Redstone Compl. ¶¶ 90 - 130.

39 Zurich, and Defendants Markel, XL Specialty, Travelers, National Casualty Insurance Company, and Freedom. Defendant Starr later joined, and USSIC submitted a partial joinder. Motions to Dismiss and Partial Joinder (D.I. Nos. 64-66). Defendants National Liability & Fire, Berkley, AXIS, and Hudson filed separate Motions to Dismiss. Motion to Dismiss (D.I. Nos. 67 and 68).

40 D.I. No. 132.

41 Plaintiff Shari E. Redstone's Motion for Partial Summary Judgment Regarding the "Bump-Up" Exclusion ("Pl. Redstone's Motion) (D.I. No. 167) (N22C-06-020-SKR CCLD).

42 Viacom Inc. n/k/a Paramount Global's Reply Brief in Support of its Motion for Partial Summary Judgment ("Pl.'s Reply") (D.I. No. 159) (N22C-06-016-SKR CCLD); Plaintiff's Reply Brief In Support of Her Motion for Partial Summary Judgment Regarding the "Bump-Up Exclusion" ("Pl. Redstone's Reply") (D.I. No. 184) (N22C-06-020-SKR CCLD).

III. PARTIES' CONTENTIONS

A. Plaintiffs

Plaintiffs contend the Bump-Up Provision's exclusion of Loss relating to the acquisition of all or substantially all of the ownership interest in, or assets of, an entity does not encompass loss relating to the Merger. To Plaintiffs, "acquisition," and merger represent two "different business transactions."[43] Because the BumpUp Provision does not refer to the type of transaction that describes the Merger, Plaintiffs say any loss representing the "bumped-up" consideration paid for in connection with a merger should be covered under the policy.[44] There are three main arguments Plaintiffs propose as to why the Bump-Up Provision does not apply here.

43 Pl.'s Motion at 2.

44 *Id*. at 2.

First, Plaintiffs argue that "acquisition" refers to certain types of acquisitions such as a take-over acquisition.[45] Though the caselaw is mixed, Plaintiffs point to cases in Delaware and other jurisdictions that support this interpretation.[46] Plaintiffs say the phrase "acquisition of all or completion of the acquisition of all or substantially all the ownership interest in, or assets of," an entity refers to a specific type of acquisition.[47] That acquisition is a "takeover transaction, in which both *16 entities survive, with one owning the other."[48] In the Merger, both entities did not survive. Thus, according to Plaintiffs, the Merger was not an "acquisition," and the Policy does not exclude coverage for loss representing the "bumped-up" consideration paid for in the Merger.[49]

16

45 *Id*. at 3, 20-21.

46 *Id*. at 2-3, 20-23.

47 *Id*. at 3, 20-21.

48 *Id*. at 3, 20.

49 *Id*.

Second, and as a corollary to the point in the preceding paragraph, Plaintiffs argue that while an "acquisition" can be commonly understood as a "takeover acquisition," the acquisitions referred to in the Bump-Up Provision refer to two types of acquisitions, none of which apply here - (1) an acquisition of stockholder shares resulting in a change of control, or (2) an asset sale under § 271 of the Delaware General Corporation Law ("DGCL").[50] According to Plaintiffs, under (1), the acquisition must involve a change of control and involve the acquisition of the shares of the acquired entity.[51] Alternatively, under provision (2) above, "acquisition" can refer to an asset sale because the phrase "all or substantially all" tracks the language used for an asset sale under § 271.[52] Under this interpretation, Plaintiffs argue there was no acquisition of Viacom's shares because
17 Viacom ceased to exist and its shares *17 were canceled.[53] Additionally, there was no asset sale under § 271 because Viacom's assets were acquired not by CBS, but the newly combined ViacomCBS.[54]

50 Pl.'s Reply at 3, 10-13.

51 *Id.*

52 *Id.* at 10-11.

53 *Id.* at 11-12.

54 *Id.* at 2, 12.

Third, Plaintiffs identify other provisions in the Policy to show that the Policy makes a meaningful distinction between an "acquisition" and merger.[55] For example, a Merger Objection Claim and the Material Changes in Condition Provision distinguish the "acquisition" of an entity or its assets, and "the merger or consolidation of the Company into or with another entity such that the Company is not the surviving entity."[56] Plaintiffs contend that the absence of a reference to "merger" in the Bump-Up Provision but its presence elsewhere in the Agreement mean the Merger is not covered under the Bump-Up Provision.[57]

55 Pl.'s Motion at 2, 18-19; Pl.'s Reply at 5-7.

56 Pl.'s Motion at 17-18.

57 Reply at 7.

B. Insurers

The Insurers contend that the Bump-Up Provision applies for Loss by way of a merger.[58] According to Insurers, the Bump Up Provision applies where the acquisition of all or substantially all the ownership interest in, or assets of an entity, including Viacom, occurs.[59] Insurers allege that occurred here because CBS *18 acquired all of
18 Viacom's assets, including its ownership interest in its subsidiaries by issuing stock as consideration.[60] Thus, according to the Insurers, they are not obligated to pay for any Loss that represents the "bumped-up" consideration for the Merger.

58 Def.'s Opp'n at 2-4.

59 *Id.* at 21-25.

60 *Id.* at 21-23.

IV. STANDARD OF REVIEW [61]

61 Both parties also rely on extrinsic evidence such as how the parties described the transaction in media, and SEC filings. The court need not review those materials to reach its decision.

This Court will grant summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law."[62] In considering a motion for summary judgment, the Court must construe the record "in the light most favorable to the non-moving party."[63] The movant bears the initial burden of demonstrating its motion is supported by undisputed material facts.[64] If that burden is met, then the non-moving party must show "there is a genuine issue for trial."[65]

62 Del. Super. Ct. Civ. R. 56(c).

63 *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

64 *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

65 Del. Super. Ct. Civ. R. 56(e).

Although the Policy does not indicate whether Delaware law applies, Delaware law governs.[66] Under Delaware law, insurance contracts "are
19 construed *19 as a whole, to give effect to the intentions of the parties."[67] Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning.[68]Where the language is ambiguous, the contract is to be construed most strongly against the insurance company that drafted it.[69] A contract "is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[70]

66 *See RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 900-01 (Del. 2021) ("[I]n the vast majority of cases, Delaware law governs the duties of the directors and officers of Delaware corporation to the corporation, its stockholders and its investors. As such corporations must assess their need for D&O coverage with reference to Delaware law.") (internal citations omitted).

67 *AT & T Corp. v. Faraday Cap. Ltd.*, 918 A.2d 1104, 1108 (Del. 2007) (citation omitted).

68 *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

69 *Id.* at *69.

70 *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1131 (Del. 2020) (citation omitted).

Insurance contracts should be interpreted to provide broad coverage in order to protect an insured's reasonable expectations.[71] As applied to this action, Plaintiffs bear the burden of proving that a claim is covered by an insurance policy, and then the burden shifts to the Insurers to prove that any of the claim is excluded under the Policy.[72] Courts will interpret exclusionary clauses with "a strict and narrow construction ... [and] give effect to such exclusionary language [only] where it is
20 *20 found to be 'specific,' 'clear,' 'plain,' 'conspicuous,' and 'not contrary to public policy.'"[73]

71 *RSUI Indem. Co.*, 248 A.3d at 906.

72 *See Virtual Bus. Enterprises, LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super. Ct. Apr. 9, 2010).

73 *RSUI Indem. Co.*, 248 A.3d at 906.

V. ANALYSIS

The underlying claims are subject to coverage, and the Bump-Up Provision operates as an exclusion. Therefore, the Bump-Up Provision is construed narrowly and any ambiguity in the Bump-Up Provision will be interpreted in favor of the insured.

Here, the language in the Policy is ambiguous. On the one hand, the Merger may be "an acquisition of all or substantially all ownership interest in, or assets of, an entity," because all assets of Viacom "vest[ed] in" CBS. On the other hand, the Merger Objection Claim and Material Changes in Condition Provision suggest that "an acquisition of all or substantially all ownership interest in, or assets of, an entity," exclude merger transactions, such as the Merger. Because the Bump-Up Provision is subject to two, contrary reasonable interpretations, ambiguity should be resolved in
21 favor of Plaintiffs. *21

A. The Claims in *In re Viacom* Are Subject to Coverage

The claims are subject to coverage. The parties do not dispute that Plaintiffs seek coverage for claims that on their face are subject to coverage.[74] Under the Policy, the Insurers agreed to pay for losses on behalf of the Company or Insured Person for claims made during the policy period for certain wrongful acts.[75] Insured Persons include former directors, and officers of Viacom, and the claims asserted in the underlying litigation are against former directors and officers.[76] The parties also do not dispute that the claims are for underlying conduct that occurred during the relevant policy period, and based on certain Wrongful Acts that include "...acts, omissions, neglect or breach of duty.. .actually or allegedly committed or attempted by" the Insured Persons.[77] The complaint alleges as much: former directors and officers of Viacom negotiated and approved the Merger based on terms that were detrimental to Viacom and its stockholders and in violation of their fiduciary duties.

74 The Court does not reach the issue of whether Ms. Redstone operated in her capacity as a director or not.

75 Policy § I.A-D.

76 *Id.* § II.J.

77 *Id.* § II.X.

B. The "Bump-Up" Provision Is an Exclusion

The Bump-Up Provision is an exclusion. Although the "Bump-Up Provision" is in the defined terms section, rather than in the section enumerating
22 exclusions, it *22 operates as an exclusion based on its exclusionary effect.[78] Therefore, the Insurers have the burden to prove that the Bump-Up Provision excludes coverage for the sought-after loss.

78 *See Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *19 (Del. Super. Ct. Feb. 2, 2021), *cert. denied*, 2021 WL 772312 (Del. Super. Ct. Mar. 1, 2021), and *appeal refused sub nom. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Northrop Grumman Innovation Sys., Inc.*, 248 A.3d 922 (Del. 2021) (treating bump-up provision as exclusion where it was in policies' definition of loss); *CVR Ref., LP v. XL Specialty Ins. Co.*, 2021 WL 5492671, at *4 (Del. Super. Ct. Nov. 23, 2021) (recognizing the definition of "Loss" containing certain exclusions and placing on insurer burden to show allegations of complaint fall under "specific and unambiguous exclusions from coverage").

C. The Interpretation that the Bump-Up Provision Applies to Loss Relating to the Merger is Reasonable

Under one reading, there are two categories of transactions under the Bump Up Provision for which Loss is not covered - that which relates to the acquisition of all or substantially all of the (1) "ownership interest in" or (2) "assets of, an entity, including a Company." Under this interpretation, the Merger may fall under both categories.

1. The Merger may be an Acquisition of Assets of an Entity

Pursuant to the Merger Agreement, Viacom merged with and into CBS, and thereafter ceased to exist.[79] As part of the Merger, CBS issued stock to the Viacom stockholders at a specified exchange ratio for each Viacom stock, which was ultimately cancelled.[80] In return, "all assets, rights,
23 privileges, powers and franchises *23 of [Viacom] and [CBS] shall vest in the Surviving Corporation."[81] CBS was the Surviving Corporation.[82]

79 Merger Agreement § 1.01.

80 *Id.* § 1.07(b).

81 *Id.* § 1.04.

82 *Id.* § 1.01.

When all assets "vest[ed] in" CBS, "an acquisition of all or substantially all of the... assets of, an entity, including a Company" may have taken place. "Vest" connotes possession. According to *Merriam Webster's Dictionary*, to "vest" means to "grant or endow with a particular authority, right or property; to place or give into the possession or discretion of some person or authority."[83] Further, in describing the legal effects of a two-way merger such as this one, Section 259 of the Delaware General Corporation Law ("DGCL") states that all of the property of the acquired company becomes the property of the surviving entity.[84] Section 259 states in relevant part that:

> "all... rights, privileges and franchises of each of said corporations, and all property...as well as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger....and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporation.."[85]

24 *24

Thus, one reading of the Bump-Up Provision is that "an acquisition of all or substantially all of the ...assets of" Viacom occurred, because CBS gained possession, or acquired Viacom's "assets, rights, privileges, powers and franchises" upon the Merger.

2. The Merger May Also Be An Acquisition of Ownership Interest in An Entity

The Merger may also be an acquisition of all or substantially all of the ownership interest in an entity, including a Company. Ownership interest in a "Company" includes the ownership interest in Viacom's subsidiaries, because a "Company" is defined to include Viacom's subsidiaries.[86] Moreover, all "assets" vested in CBS, which includes Viacom's ownership interest in its subsidiaries.[87]Thus, an acquisition of all or substantially all of the ownership interest in an entity may have occurred when Viacom merged into CBS. To be clear, it is not possible for there to be an acquisition of ownership interest in *Viacom* - only Viacom's subsidiaries - because Viacom ceased to exist upon the merger.[88] *25

25

D. The Contrary Interpretation that the Bump-Up Provision Excludes Mergers is Reasonable

The Merger Objection Claim and Material Changes in Condition Provision suggest that mergers were excluded in the Bump-Up Provision. The Merger Objection Claim states that acquisitions can occur by (1) actual acquisition of a Company, (2) acquisition of a Company's assets by another entity, (3) *the merger or consolidation of the Company into or with another entity such that the Company is not the surviving entity*, or (4) by acquiring majority voting power of a Company.[89]The Material Changes in Conditions Provision includes substantively identical language.[90] These provisions suggest that an acquisition of a Company's assets, which tracks the language in the Bump-Up Provision, is fundamentally different from an acquisition by merger such that the Company is not the surviving entity. Viacom merged with CBS and ceased to exist, and thus constitutes a transaction as

83 *Vest*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/vest (last visited July 2023).

84 8 *Del. C.* § 259.

85 *Id.*

86 Policy § II.F., Decls.

87 Merger Agreement § 1.01.

88 *Id.*

contemplated by provision (3) above. The presence of language referring to merger transactions in the Merger Objection Claim and Material Changes in Conditions Provision, and their corresponding absence in the Bump-Up Provision raise the reasonable inference that the Bump-Up Provision does not encompass the
26 Merger.[91] *26

89 Policy § II.N.

90 *Id*. § XIV.

91 Viacom in further support of its position relies on cases in this Court and other jurisdictions that interpreted similar language under those policies' "Bump-Up" Provisions. Plaintiff's Motion at 23, 20-23. But the insurance policies in those cases were either interpreted under non-Delaware law, (*see, e.g.*, *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 67 F.4th 648, 653 (4th Cir. 2023)), or concerned different types of merger transactions than the one now before this Court. *See, e.g.*, *Northrop Grumman Innovation Sys., Inc.*, 2021 WL 347015, at *4, 21. For example, in *Northrop*, the transaction at issue was a reverse triangular merger, whereas here the transaction is a two-way merger, in which CBS acquired Viacom through the merger of Viacom into CBS, with CBS as the surviving corporation. In a reverse triangular merger, the target company merges with a subsidiary of the acquirer and the target company survives. *See* R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 9.8. There, the assets, rights, and obligations are not vested in or transferred in the surviving company, but rather remain with the target company. *See id.* The parent company gains control of the target company when the target company merges with the subsidiary of the acquirer, but the question of whether a company gains control of another company is a separate question than whether an "an acquisition of the ownership interest in, or assets" of an entity occurred.

VI. CONCLUSION

Because the Bump-Up Provision is subject to two contrary, reasonable interpretations, ambiguity should be resolved in favor of Plaintiffs. Therefore, Plaintiffs' Motions for Partial Summary Judgment are **GRANTED.**

IT IS SO ORDERED.