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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

FEDERAL INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, RLI INSURANCE COMPANY, ARGONAUT INSURANCE COMPANY, ALTERRA AMERICAN INSURANCE COMPANY, ALLIANZ GLOBAL RISKS US, AXIS INSURANCE COMPANY, ALLIED WORLD NATIONAL ASSURANCE COMPANY, BERKLEY INSURANCE COMPANY, FREEDOM SPECIALTY INSURANCE COMPANY, IRONSHORE INDEMNITY, INC., STARR INDEMNITY & LIABILITY CO., QBE INSURANCE CORPORATION, and U.S. SPECIALTY INSURANCE COMPANY,	)	
Plaintiffs,	)	
v.	)	
ENVISION HEALTHCARE CORPORATION,	)	
Defendant.	)	**Case No. 21-0436-BC**

MEMORANDUM AND ORDER

On September 30, 2021, the Court heard the parties' cross motions for a judgment on the pleadings filed pursuant to Tenn. R. Civ. Pro. 12.03. Plaintiffs are insurers who seek a declaratory judgment related to directors' and officers' liability policies provided to Defendant and whether a "Prior Acts Exclusion" provision bars coverage. The parties agree that the resolution of Count I of the Complaint involves a legal determination by the Court regarding the extent and effect of the insurance policies at issue. Both seek opposing declaratory relief regarding same. The Court has reviewed the parties' submissions related to these motions and the relevant caselaw, and the Court is ready to rule on Count I and issues this decision as follows.

FACTUAL CONSIDERATIONS

Summary of Dispute

This insurance coverage dispute arises from a securities class action lawsuit that was filed less than a year after the merger of several healthcare companies. On December 1, 2016, New Amethyst Corporation ("New Amethyst"), a subsidiary of AmSurg Corporation ("AmSurg"), and Envision Healthcare Holdings ("EHH") merged, with Defendant Envision Healthcare Corporation ("Envision") as the resulting entity. On August 4, 2017, a class action lawsuit was brought against the past and present officers and directors of AmSurg, EHH, and Envision (the "Securities Lawsuit"). Specifically, three putative class action lawsuits were filed in the United States District Court for the Middle District of Tennessee alleging violations of federal securities laws. These cases were consolidated on November 7, 2017 into *Bettis v. Envision Healthcare Corporation, et al.,* Case No. 3:17-cv-01112 (M.D. Tenn.). On January 26, 2018, the lead plaintiff in the Securities Lawsuit filed an amended class action complaint (the "*Bettis* Complaint," attached to Complaint as Ex. 1). The *Bettis* Complaint names as defendants eleven former directors and officers of EHH,[1] twelve former directors and officers of AmSurg,[2] and eighteen current and former officers and directors of Envision.[3] (*Bettis* Complaint ¶¶ 29-42). They are classified in the *Bettis* Complaint either through their affiliation with EHH and Envision, as a collective, or AmSurg. (*Id.*)

[1] Those directors and officers are: (1) William Sanger; (2) Randel Owen; (3) Craig Wilson; (4) Todd Zimmerman; (5) Carol Burt; (6) Mark Mactas; (7) Leonard Riggs; (8) Richard Schnall; (9) James Shelton; (10) Michael Smith; and (11) Ronald Williams. The EHH defendants are referred to in the *Bettis* Complaint as being among the "Envision Defendants" because all of them, other than Mactas, also served on the Envision Board of Directors after the Merger.
[2] Those directors and officers are: (1) Christopher Holden; (2) Claire Gulmi; (3) Kevin Eastridge; (4) Thomas Cigarran; (5) James Deal; (6) John Gawaluck; (7) Steven Geringer; (8) Henry Herr; (9) Joey Jacobs; (10) Kevin Lavender; (11) Cynthia Miller; and (12) John Popp.
[3] Those directors and officers are: (1) William Sanger; (2) Randel Owen; (3) Craig Wilson; (4) Carol Burt; (5) Leonard Riggs, Jr.; (6) Richard Schnall; (7) James Shelton; (8) Michael Smith; (9) Ronald Williams; (10) Christopher Holden; (11) Claire Gulmi; (12) Kevin Eastridge; (13) James Deal; (14) John Gawaluck; (15) Steven Geringer; (16) Joey Jacobs; (17) Kevin Lavender; and (18) Cynthia Miller.

The plaintiffs in the Securities Lawsuit allege that directors and officers of EHH, AmSurg, and Envision made false and misleading statements regarding EHH's, and later Envision's, allegedly illegal business practices related to out-of-network billing, and that such practices resulted in inflated revenue for EHH and Envision, which in turn caused the securities of AmSurg, EHH, and Envision to be traded at artificially high prices. (Compl. ¶¶ 43–46). Those acts included the pre-merger August 4, 2016 registration of shares for the new company in conjunction with the filing of the joint proxy statement. (*Bettis* Compl. ¶¶ 71–111). The *Bettis* Complaint further alleges that Envision's 2016 10-K, which was filed with the Securities and Exchange Commission ("SEC") post-merger on March 1, 2017, contained misleading statements. (*Id.* ¶¶ 91-93). It also alleges that in 2017, certain of Envision's officers made misleading statements to investors and analysts, assuring them that the transition to in-network services would be revenue neutral for the company. (*Id*. ¶¶ 94-110).

For post-merger acts, Envision purchased its own directors and officers policies (the "Envision Policies") from Plaintiff insurers who issued the Envision Policies (the "Plaintiff Insurers").[4] On or about June 2, 2017, Envision gave Plaintiff Insurers notice of the Securities Lawsuit pursuant to the Envision Policies for the organization's indemnification coverage for its directors and officers named therein. Notice was also given to the primary AmSurg and EHH insurers, who accepted 100% coverage for the Securities Lawsuit for their respective insureds, subject to a reservation of rights. (Compl. ¶ 50). By letter dated October 23, 2017, Plaintiff Insurer Federal denied coverage for the Securities Lawsuit under the Envision Policies finding that the

[4] The Plaintiff Insurers are: Federal Insurance Company ("Federal"), XL Specialty Insurance Company ("XL"), National Union Fire Insurance Company of Pittsburgh, Pa., RLI Insurance Company, Argonaut Insurance Company, Alterra American Insurance Company, Allianz Global Risks US Insurance Company, AXIS Insurance Company, Allied World National Assurance Company, Berkley Insurance Company, Freedom Specialty Insurance Company, Ironshore Indemnity, Inc., Starr Indemnity & Liability Co., QBE Insurance Corporation, and U.S. Specialty Insurance Company.

"Prior Acts Exclusion" precluded coverage because the wrongful acts alleged in the Securities Lawsuit had occurred, at least in part, before December 1, 2016. (Compl. ¶ 51).

As a result of Envision's re-assertion of rights to coverage under the Envision Policies, the Plaintiff Insurers filed this declaratory judgment action. Thus, the question at issue is whether a "Prior Acts Exclusion" within the Envision Policies bars coverage of the Securities Lawsuit. Of note, the parties acknowledge that the Securities Lawsuit has coverage totaling $145 million available through AmSurg's and EHH's separate policies. In defending the decision to deny coverage, Plaintiff Insurers assert that the lawsuit is a single "Claim" and its inclusion of pre-merger wrongful acts is undisputed and bars coverage. On the other hand, Envision asserts that the exclusion is not triggered because the allegations in the Securities Lawsuit are not "Wrongful Acts" as that term is defined in the Envision Policies. In particular, Envision contends that a "Wrongful Act" is defined as an act or omission by a person acting in an "Insured Capacity"—that is, as a director or officer of Envision, and that the plaintiffs in the Securities Lawsuit have not alleged violations committed by persons acting in their capacity as directors or officers of Envision prior to December 1, 2016.

Undisputed Pled Facts

Envision is an integrated medical services holding company headquartered in Nashville, Tennessee, with operations throughout the country. (Compl. ¶ 23). On June 15, 2016, EHH and AmSurg announced that they reached an "Agreement and Plan of Merger" (the "Merger Agreement"). (Compl., ¶ 41; Ans., ¶ 41). New Amethyst had been formed five days earlier, on June 10, 2016, as a wholly owned subsidiary of AmSurg, to assist with the merger. (Compl., ¶ 40; Ans., ¶ 40).

The Merger Agreement provided for a two-step transaction (the "Merger"). First, AmSurg merged with and into New Amethyst, with New Amethyst as the surviving corporation; second,

EHH merged with and into New Amethyst. (Compl. ¶ 41). Following the Merger, New Amethyst was the sole surviving corporation and renamed Envision Healthcare Corporation, i.e., Envision, owning the assets and liabilities of all three companies – EHH, AmSurg, and New Amethyst. (*Id.*). The Merger was completed on, and effective as of, December 1, 2016. (*Id.*).

Before the Merger, EHH had purchased claims-made directors and officers liability insurance of $75 million, subject to self-insured retention of $2.5 million, for the period from October 14, 2015 to October 14, 2016 (the "EHH Policies"). (*See* EHH Primary Policy, Ans., Ex. 4). The primary coverage was provided by Plaintiff Insurer XL. (*Id.*)

Likewise, before the Merger, AmSurg purchased claims-made directors and officers liability insurance of $70 million, subject to self-insured retention of $1.5 million, for the period from October 1, 2015, to October 1, 2016 (the "AmSurg Policies"). (*See* AmSurg Primary Policy, Ans., Ex. 2). The primary coverage was provided by Plaintiff Insurer Federal. (*Id.*)

In connection with the Merger, EHH and AmSurg purchased "run-off" extensions for their respective directors' and officers' policies effective December 1, 2016. The "run-off" extensions do not provide coverage for claims arising out of future acts, errors, misstatements or omissions, but instead merely extended the time period in which the insureds could report claims that arose from pre-Merger acts, errors, misstatements and omissions. (Ans., Ex. 3, 5).

For post-Merger acts, Envision purchased its own policies, the Envision Policies. The Envision Policies cover claims first made and reported during the policy period from December 1, 2016 to December 1, 2017, and they have combined limits of liability totaling $140 million. (Ans., Ex. 1). Each of the excess policies in the Envision program generally follows form to the Envision Primary Policy issued by Federal.

The Envision Primary Policy provides coverage as follows:

> The [Insurer] shall pay, on behalf of the **Organization**, **Loss** for which the **Organization** grants indemnification to an **Insured Person**, as permitted or required by law, and which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against the **Insured Person** . . . during the **Policy Period** . . . for a **Wrongful Act** committed, attempted, or allegedly committed or attempted by such **Insured Person** before or during the **Policy Period** . . . .

(*Id.* at 18) (emphasis in original).

The Envision Primary Policy definitions for terms used in this section are:

- "Organization" is defined as "Envision Healthcare Corporation and its Subsidiaries." (*Id.* at 17, 21-22).

- "Claim" means "a civil proceeding commenced by the service of a complaint or similar pleading . . . against an Insured Person for a Wrongful Act." (*Id*. at 19).

- "Insured Person" is defined, in relevant part, as "any natural person who was, now is or shall become . . . a duly elected or appointed director [or] officer . . . of any **Organization**." (*Id.* at 20).

- "Wrongful Act" means in relevant part "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an **Insured Person** in his or her **Insured Capacity**." (*Id.* at 23).

- "Insured Capacity" means, in relevant part, "the position or capacity of an **Insured Person** that causes him or her to meet the definition of **Insured Person** set forth in this coverage section. **Insured Capacity** does not include any position or capacity held by an **Insured Person** in any organization other than the **Organization** . . . ." (*Id*. at 20).

As noted above, the Envision Policies contain a "Prior Acts Exclusion," which is the provision at issue here and provides:

> In consideration of the premium charged, it is agreed that no coverage will be available under this coverage section for **Loss** on account of any **Claim** based upon, arising from, or in consequence of any **Wrongful Act** committed, attempted, or allegedly committed or attempted in whole or in part prior to December 1, 2016.

(*Id.* at 45 (emphasis in original)).

There are multiple wrongful acts alleged in the *Bettis* Complaint that cover the period both before and after the Merger, but there are two primary wrongful acts that appear to give rise to the

claims in the Securities Lawsuit—one prior to the Merger and one after. Prior to the Merger, on August 4, 2016, AmSurg and EHH filed a joint proxy statement in conjunction with the registration of new shares for the intended resulting entity (the "Registration Statement"). (*Bettis* Compl. ¶ 89).

Following the Merger, on March 1, 2017, Envision filed its 2016 10-K Form (the "2016 Annual Report"). (*Bettis* Compl., ¶¶ 91-93). Defendants Holden and Gulmi, who were officers and directors of AmSurg and New Amethyst pre-Merger and Envision post-Merger, both signed post-Merger certifications accompanying the 2016 Annual Report. (*Bettis* Mem. and Order, D.E. No. 152, pg. 4 ¶¶ 3-4).

Plaintiffs in the Securities Lawsuit allege that directors and officers of EHH, AmSurg, and Envision made false and misleading statements regarding EHH's, and later Envision's, business practices, and that such practices resulted in inflated revenue for EHH and Envision. This, in turn, caused the securities of AmSurg, EHH, and Envision to be traded at artificially high prices between February 3, 2014 and October 31, 2017. (*Bettis* Compl. ¶¶ 71–111). They name three categories of defendants – Envision Defendants, AmSurg Defendants and Clayton, Dubilier & Rice, LL Defendants. The Envision Defendants include Envision as well as officers and directors who served EHH pre-Merger and Envision post-Merger. The AmSurg Defendants are individuals who were officers and directors of AmSurg pre-Merger and, in some instances, who remained with Envision post-Merger. (*Id.* at 10-14). The AmSurg Defendants include Holden and Gulmi, who signed the 2016 Annual Report certifications on March 1, 2017. (*Id.* at 12-14).

The *Bettis* Complaint asserts eight causes of action, six of which are relevant here:

- Count I: Violations of § 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and SEC Rule 10b-5 against Envision and all Individuals;[5]

[5] In its Reply Brief, Defendant Envision contends that Count I is based on alleged misstatements by officers of EHH before the Merger, and misstatements by officers of Envision after the Merger.

- Counts II and VIII: Violations of § 20(a) of the 1934 Act against all Individuals other than a few (which do not include Holden and Gulmi);

- Count IV: Violations of § 11 of the 1933 Act against Envision and Envision Individual Defendants;

- Count V: Violations of § 12(a)(2) of the 1933 Act against Envision and Envision Individual Defendants; and

- Count VII: Violations of § 14(a) of the 1934 Act against Envision and all Individuals.[6]

(*Bettis* Compl., ¶¶ 220-300).

The Plaintiffs in the Securities Lawsuit, who are common stock purchasers of EHH or Envision between February 3, 2014 and October 31, 2017 (defined as the "Class Period" at ¶1), cite actions by the director and officer defendants that occurred pre-Merger, including the Registration Statement, and post-Merger, including the 2016 Annual Report, that allegedly supported and continued the illegal out-of-network billing scheme. Additional improper practices and wrongful acts alleged therein include:

- "systemic out-of-network billing, upcoding, improper hospital admissions and medically unnecessary procedures." (*Id.* at ¶50);

- "active[] conceal[ment] that at most hospitals, 5% or less of the bills from emergency room providers were out-of-network, while at EmCare[7] facilities over 62% of billed were out-of-network, and at some EmCare facilities 100% of the bills were out-of-network." (*Id.* at ¶55);

- "made false and misleading statements and omitted material facts necessary to make the statements made not false or misleading. . ." (*Id.* at ¶70)[8];

[6] In its Reply Brief, Defendant Envision contends that Counts III through VIII allege various pre-Merger purported misconduct and do not appear to be based on any alleged post-Merger Wrongful Acts.
[7] Defined in the *Bettis* Complaint as "an integrated facility-based physician [sic] service." (*Bettis* Compl. ¶ 2).
[8] The details of these allegations are set out in paragraphs 70-140 of the *Bettis* Complaint and include industry presentations, regulatory filings and calls with investors that pre-date and post-date the Merger.

- excess executive compensation from 2014 through 2017. (*Id.* at ¶173); and
- false assurances to analysts through March of 2017 (1Q2017). (*Id.* at ¶76).

In *Bettis,* the District Court judge issued a lengthy Memorandum order on November 19, 2019 in response to those defendants' motions to dismiss. (D.E. No. 152). In analyzing the adequacy of the complaint in regard to the 10(b) claims, the court reviewed the statement purporting to create liability under the Securities Act of 1934 (the "1934 Act"). A sample of the pled allegedly misleading Envision statements is set out on pages 22 and 23 of the Memorandum order, some of which cover the pre-Merger period of 2013-15 and some of which are statements in Envision's 2016 Annual Report issued on March 1, 2017. (*Id.* at 22-23). Statements by individuals on behalf of Envision, all of which are pre-Merger, are set out on pages 26-28. (*Id.* at 26-28). A separate section analyzes post-Merger statements regarding Envision's intention to transition most of its relationships to in-network. Those statements all occurred in the six months commencing in February of 2017. (*Id.* at 33-37). Although the Court did not find these statements to be misleading and thus actionable, they were part of the analysis. (*Id.* at 37).

Regarding Holden and Gulmi, the federal court declined to dismiss the claims against them on this basis:

> Holden and Gulmi became officers at Envision following the AmSurg merger on December 1, 2016, and, therefore, could only be responsible for the statements in the 2016 Annual Report filed on March 1, 2017. Although these officers were at the company for a short amount of time, even post-merger out-of-network billing accounted for $1 billion and as much as 35% of revenue and, like Sanger and Owen, Holden and Gulmi were likely aware of the general high volume of out-of-network billing. Although it is less plausible that out-of-network billing would have been considered a current "competitive strength" at this time, particularly considering that Envision was announcing the intent to transition most of its out-of-network business to in-network and that out-of-network revenue had allegedly decreased dramatically, the annual statement refers in part to historic factors supporting "organic growth" and represents that growth will continue because of these factors. Plaintiffs have stated a plausible theory of scienter that Envision continued to obscure the extent to which it relied on out-of-network billing before the transition and did so to minimize the impact of the transition announcement. Having

> considered the totality of the allegations, the Court finds Plaintiffs pleaded sufficient facts to raise a strong inference of scienter as to Holden and Gulmi with regard to the statements of "competitive strengths" in the 2016 Annual Report.

(*Id.* at 45-46). This decision appears to be *solely* based on Holden and Gulmi's post-Merger conduct as it relates to the 2016 Annual Report filed on March 1, 2017.

Regarding the Section 11 claims, the court found that even though they require a heightened pleading standard because of their fraud component, the *Bettis* plaintiffs met that requirement and the claims could continue. (*Id.* at 54-56).

LEGAL ANALYSIS

Rule 12.03 Standard

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. In reviewing a trial court's ruling on a motion for judgment on the pleadings, an appellate court must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion. *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991). In addition, "[c]onclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *Id. See also Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004).

A motion for judgment on the pleadings is effectively a motion to dismiss for failure to state a claim upon which relief can be granted. *Timmins v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009) (citing *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998)). "Such a motion admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." *Id.*

The complaint does not need to contain detailed allegations of all facts giving rise to the claims, but it "must contain sufficient factual allegations to articulate a claim for relief." *Webb v.*

Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103-104 (Tenn. 2010)). "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* (quoting *Abshure*, 325 S.W.3d at 103-104). Under Rule 12.03, the Court should "deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999).

Law Regarding Contract Interpretation

Insurance policies are at their core, contracts. *Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (citing *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508, 527 (Tenn. 2012) (Koch, J., dissenting)). As such, courts interpret insurance policies using the same tenets that guide the construction of any other contract. *Id.*; *see also Am. Justice Ins. Reciprocal v. Hutchinson*, 15 S.W.3d 811, 814 (Tenn. 2000)). The interpretation of a contract is a question of law and not a question of fact. *Mark VII Transp. Co. v. Responsive Trucking, Inc.*, 339 S.W.3d 643, 647–48 (Tenn. Ct. App. 2009); *see also Pitt v. Tyree Org., Ltd.*, 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002).

It is well established in Tennessee that courts must interpret contracts to ascertain and give effect to the intent of the contracting parties consistent with legal principles. *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 688 (Tenn. 2019); *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 899 (Tenn. 2016); *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013). Each provision must be construed in light of the entire agreement, and the language in each provision must be given its natural and ordinary meaning. *Mark VII Transp. Co.*, 339 S.W. 3d, at 647–48 (Tenn.Ct.App.2009); *see also Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn. Ct. App. 2005)). Moreover, Tennessee courts "give primacy to the contract terms, because the words are the most reliable indicator—and the best

evidence—of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute." *Individual Healthcare Specialists, Inc*., 566 S.W.3d, at 694 (quoting Feldman, 21 Tenn. Practice § 8:14).

When terms of a contract are not ambiguous, issues of contract interpretation are regularly considered issues of law. *Strategic Acquisitions Grp., LLC v. Premier Parking of Tenn., LLC.*, No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *4 (Tenn. Ct. App. May 22, 2020) *(*citing *Bourland, Heflin, Alvarez, Minor & Matthews, PLC v. Heaton*, 393 S.W.3d 671, 674 (Tenn. Ct. App. 2012)). If the written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Id.* at *4; *see also Sutton v. First Nat'l Bank*, 620 S.W.2d 526 (Tenn. Ct. App. 1981). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc*., 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994) *(*citing *Oman Constr. Co. v. Tennessee Valley Authority*, 486 F. Supp. 375, 382 (M.D. Tenn. 1979)), nor can this Court create an ambiguity where none exists in the contract. *Strategic Acquisitions Grp., LLC v. Premier Parking of Tennessee, LLC,* No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *4 (Tenn. Ct. App. May 22, 2020) (citing *Cookeville P.C.*, 884 S.W.2d at 462).

In contrast, if the words in a contract are susceptible to more than one reasonable interpretation, the parties' intent cannot be determined by a literal interpretation of the language. *Allstate Ins. Co. v. Watson,* 195 S.W.3d 609, 611 (Tenn. 2006) (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.,* 78 S.W.3d 885, 890 (Tenn. 2002)). Contract language "is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Id.* (quoting *Farmers–Peoples Bank v. Clemmer,* 519 S.W.2d 801, 805 (Tenn. 1975)). If the contract language is found to be ambiguous, the court must apply established rules of construction

to determine the intent of the parties. *Allstate Ins. Co.*, 195 S.W.3d at 611 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002)).

Insurance contracts get particularized treatment under Tennessee law if ambiguous:

> Where language in an insurance policy is susceptible of more than one reasonable interpretation, however, it is ambiguous. If the ambiguous language limits the coverage of an insurance policy, that language must be construed against the insurance company and in favor of the insured.

American Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811, 815 (Tenn. 2000) (internal citations omitted). Thus, any ambiguity must be interpreted to provide coverage, if reasonable. Moreover, it is well settled that exceptions, exclusions and limitations in insurance policies must be construed against the insurance company and in favor of the insured. *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991) (citing *Travelers Insurance Co. v. Aetna Cas. & Sur. Co.*, 491 S.W.2d 363, 367 (Tenn. 1973)).

Analysis

At issue is whether the "Prior Acts Exclusion" bars coverage because the Securities Lawsuit is a "Claim" that is "based upon, arising from, or in consequence of any Wrongful Act committed, attempted, or allegedly committed or attempted in whole or in part prior to December 1, 2016." A "Wrongful Act" is defined in relevant part as "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an Insured Person in his or her Insured Capacity." The parties do not dispute that the claims alleged in the Securities Lawsuit arise from both pre-Merger and post-Merger acts. Thus, the issue becomes whether the alleged post-Merger acts "arose from" or are "based upon" a Wrongful Act allegedly committed pre-Merger. In other words, do the post-Merger acts relate back to an earlier date pre-Merger, barring coverage of the entire Securities Lawsuit? We think not.

Envision argues that this provision does not apply because the Securities Lawsuit does not allege wrongdoing by an Envision officer or director pre-Merger, nor could it, as Envision did not exist as an operating entity before the Merger. Envision largely relies on the recent Delaware case of *Northrop Grumman Innovation Sys., Inc. v. Zurich Amer. Ins. Co.*, No. N18C-09-210, 2021 WL 347015 (DE Sup. Ct. Feb. 2, 2021), to support its contention. In that case, the Superior Court of Delaware analyzed the application of a prior acts exclusion policy to a newly formed company in a somewhat analogous fact situation albeit involving a different policy with some differing terms. In *Northrop*, the subject policy was issued to cover the new entity, OATK, Inc., for post-merger wrongful acts. The merger in that case resulted in two class-action lawsuits: one by former stockholders of Orbital Sciences challenging, among other things, proxy solicitation statements about the proposed merger (the "pre-merger claim"); and a second against OATK and certain of its executives regarding allegedly fraudulent post-merger financial reports about the value of OATK's business activities after the merger (the "post-merger claim"). In the ensuing coverage litigation, the insurer argued that there was no coverage for the post-merger claim against the policyholder because the alleged post-merger wrongful acts related back to misconduct alleged in the pre-merger claims, which predated the inception of the policy and, therefore, were barred by the prior acts exclusion. The *Northrop* court disagreed. In refusing to apply the prior acts exclusion, the court explained that (i) the alleged wrongdoing against the policyholder and its management team in the post-merger claim was unrelated, i.e. not "fundamentally identical" to the misconduct alleged in the pre-merger claim, and (ii) the post-merger claim could not be related to the pre-merger claim as a matter of policy interpretation because the pre-merger claim was not a "wrongful act" under the post-merger policies, as the policy limited wrongful acts to those conducted by the insureds—OATK and its personnel. *Northrop*, 2021 WL 347015, at *9. *Northrop*, of course, is not controlling in Tennessee, but it is instructive and persuasive authority, especially given the long

history of Tennessee courts looking to Delaware law for business law guidance when there is not Tennessee jurisprudence that controls.

Envision admits that the Securities Lawsuit alleges wrongful acts by some of the individual defendants both before, on and after December 1, 2016, although in different capacities. Therefore, Plaintiffs contend that the Securities Lawsuit constitutes a single "Claim" under the Envision Policy since "Claim" is defined as "a civil proceeding commenced by the service of a complaint or similar pleading," and the Securities Lawsuit includes allegations of both pre and post-Merger acts. The *Northrop* court rejected the insurer's similar argument that the one lawsuit, including allegations regarding pre- and post-merger actionable conduct, constituted one claim under the policy because it included multiple theories of liability. "A single litigation can involve multiple Claims potentially-covered even where the Claims grow from a common nucleus of misconduct." *Northrop,* 2021 WL 347015, at *11. That court held that unless the claims are fundamentally identical, they constitute multiple claims and not a single claim. The Delaware court found that claims under 14(a) and 10(b) of the 1933 Act were not identical and constituted separate claims. *Id.* The *Bettis* Complaint includes different claims under different sections of the 1934 Act against different actors in different capacities at different times. A jury could find some of the claims sustainable and some without merit. Plaintiff Insurers seek to collapse all pre- and post-Merger alleged wrongful acts together as one claim involving only pre-Merger acts. The Court does not interpret the Envision Policies as being that limited and, if there is ambiguity, is directed to interpret the Envision Policies against the Plaintiff Insurers in favor of Envision, the insured. *American Justice Ins. Reciprocal*, 15 S.W.3d at 815. Furthermore, it is well settled that exceptions, exclusions and limitations in insurance policies must be construed against the insurance company and in favor of the insured. *Watts*, 811 S.W.2d at 886 (citing *Travelers Insurance Co.*, 491 S.W.2d at 367. We do not think that construing such a provision so narrowly would encompass the parties'

intent and what Defendant bargained for when it purchased the policy and Defendant's reasonable expectation of coverage.

Plaintiffs further contend that the statement in the 2016 Annual Report filed after the Merger, commenting on Envision's competitive strength based upon "historic factors supporting 'organic growth,'" is a continuation of the numerous pre-merger misstatements upon which the underlying 10(b) cause of action relies. Thus, Plaintiffs argue, that cause of action alleges a continuing course of conduct and misstatements made in support of a single cause of action that began prior to the merger closing. In contrast, Envision contends that the language in the Prior Acts Exclusion does not include any interrelated wrongful act language like in *Northrop* in favor of Plaintiffs' position that the wrongful acts relate back.[9] In fact, many of the cases finding that the exclusion provision applied to bar coverage for wrongful acts alleged both before and after the cut-off date relied upon an "Interrelated Wrongful Acts" clause or "relation back clause," which we do not have here.[10] *See Tile Shop Holdings, Inc. v. Allied World Nat'l Assurance Co.*, 981 F.3d 655, 658 (8th Cir. 2020) ("Of key importance here is the last sentence—what we will call the relation-back clause," and "[the] allegedly wrongful acts also occurred "prior to" August 20, 2012 or were the "same" as or "related" to pre-August-20 acts."); *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, No. CV-N18C-09-211-AML-CCLD, 2021 WL 4130631, at *11 (Del. Super. Ct. Sept. 10, 2021) ("[T]he Interrelated Claims Provision bars coverage for Claims 'arising from' Interrelated Wrongful Acts," and "Wrongful Acts are Interrelated if they 'arise out of,' 'result from,' 'are in consequence of,' or 'in any way involve,' 'the same or related ... facts,

[9] In *Northrop*, the prior acts exclusion included the following additional language: "Loss arising out of the same or related Wrongful Act shall be deemed to arise from the first such same or related Wrongful Act." *Northrop*, 2021 WL 347015, at *2.

[10] A "relation back clause" typically includes such language as "Loss arising out of the same or related Wrongful Act shall be deemed to arise from the first such same or related Wrongful Act." *Tile Shop Holdings, Inc. v. Allied World Nat'l Assurance Co.*, 981 F.3d 655, 658 (8th Cir. 2020); *see also Northrop*, 2021 WL 347015, at *2.

circumstances, situations, transactions or events.'"); *Foster v. Summit Med. Sys., Inc.*, 610 N.W.2d 350, 353 (Minn. Ct. App. 2000) ("The policies define 'Interrelated Wrongful Acts' as 'Wrongful Acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions,'" which "is broad and encompasses the acts in question.").

Here, the language in the prior acts exclusion is not as broad as those cited. Plaintiffs point to the term "arising from" as broad enough to encompass the post-Merger acts. The Court disagrees. The Tennessee Supreme Court in *Fulton Bellows, LLC v. Fed. Ins. Co.*, 662 F. Supp. 2d 976 (E.D. Tenn. 2009), discussed the limit to the extent to which causation analysis can be stretched, explaining that the Supreme Court has rejected "the contention that there can be no coverage when the chain of events leading to the ultimate harm is begun by an excluded risk, concluding instead that coverage cannot be defeated simply because excluded risks might constitute an additional cause of the injury." *Fulton Bellows, LLC*, 662 F. Supp. 2d at 988 (citing *Watts*, 811 S.W.2d at 888). Considering that Tennessee law requires that "exceptions, exclusions, and limitations in insurance policies must be construed against the insurance company and in favor of the insured," *Watts*, 811 S.W.2d at 886, and that courts interpret exclusionary clauses with a strict and narrow construction and give effect to such exclusionary language only where it is found to be specific, clear, plain, and conspicuous, *Sycamore Partners Mgmt., L.P.*, 2021 WL 4130631, at *10 (citing *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 905–06 (Del. 2021), the Court finds that the defendants in the Securities Lawsuit, to the extent they are accused of post-Merger wrongful acts – specifically the filing of the 2016 Annual Report on March 1, 2017, and their statements post-Merger allegedly to mislead investors – are covered by the Envision policies. The language in the Prior Acts Exclusion is not broad enough to collapse the pre and post-Merger Acts together so as to relate back to a pre-Merger wrongful act. In addition, the Securities Lawsuit does

not constitute one claim, but rather one lawsuit that includes multiple claims, some of which are covered and some of which are not. "Variations in timing, breed of securities violation, *mens rea*, motive, and burdens of proof, under each regulation, indicate these Claims do not involve 'the exact same subject.'" *Northrop*, 2021 WL 347015, at *11

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendant's Motion for a Judgment on the Pleadings is GRANTED and Plaintiffs' Motion for a Judgment on the Pleadings is DENIED.

All other matters included in Defendant's Counter-Claim remain for adjudication.

s/Anne C. Martin

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CHANCELLOR
BUSINESS COURT DOCKET
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