IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VERIZON COMMUNICATIONS INC., et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-06-048 WCC CCLD
ILLINOIS NATIONAL INSURANCE COMPANY, et al.,	)	
Defendants.	)	

Submitted: April 13, 2018
Decided: May 7, 2018

Plaintiffs' Motion for Entry of Final Judgment and Prejudgment Interest –GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

I. INTRODUCTION

Before the Court is Verizon Communications, Inc.'s ("Verizon"), Verizon Financial Services LLC's ("VFS"), and GTE Corporation ("GTE")'s (collectively the "Plaintiffs") Motion for Entry of Final Judgment and Prejudgment Interest pursuant to Rule 58(b).[1] Plaintiffs' Motion seeks to resolve the remaining post-trial issues relating to Verizon's demand for coverage of its costs in defending and settling the underlying *U.S. Bank* Action and *Coticchio* Action.[2]

After denying the parties' initial summary judgment motions in 2015, in March 2017, the Court granted summary judgment in favor of Plaintiffs and held that the *U.S. Bank* Action fell under the definition of a securities claim.[3]

Because the Court found in favor of Verizon, Illinois National, an affiliate of AIG and the issuer of the primary policy, now concedes that there is coverage under their policy and Verizon is entitled to recovery of Defense Costs. Illinois National Insurance Company ("Illinois National") also concedes that entry of final judgment is proper. Insurers XL Specialty Insurance Company ("XL Specialty"), Zurich American Insurance Company ("Zurich"), Twin City Fire Insurance Company ("Twin City") among other insurers evidenced below (collectively the "Excess

[1] *See* Pls.' Mot. Final J. and Prejudgment Interest at 2.
[2] *Id.*
[3] *See U.S. Nat'l Ass'n v. Verizon Commc'ns Inc.*, 761 F.3d. 409 (N.D. Tex. 2015).

Insurers")[4] disagree arguing that final judgment and an award of prejudgment interest are premature and improper at this time. For the reasons discussed below, Plaintiffs' Motion for Entry of Final Judgment and Prejudgment Interest pursuant to Rule 58 is **GRANTED**.

II. FACTUAL BACKGROUND

An extensive review of the facts of this litigation is set forth in the Court's March 20, 2017 Opinion. As such, the Court will limit its factual presentation simply to put the decision in context for those unfamiliar with the previous decision. This lawsuit is one of four underlying actions,[5] which arise out of Verizon's 2006 "spin-off" of its print and electronic directories business into a standalone company: Idearc, Inc. ("Idearc").[6] In November 2006, Verizon transferred the directories business to Idearc in exchange for Idearc common stock and promissory notes among other things.[7] Verizon then distributed all outstanding shares of the Idearc common stock to Verizon shareholders,[8] and transferred the Idearc notes and portion of the term loan to J.P. Morgan Ventures Corporation and Bear Stearns & Co., Inc.

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[4] The Excess Insurers and Illinois National jointly are the Defendants or the Insurers.
[5] *Talbot* Action, *Barnard* Action, *U.S. Bank* Action, and *Coticchio* Action.
[6] *See* Pls.' Mot. Final J. and Prejudgment Interest at 2.
[7] On November 17, 2006, Verizon transferred the directories business to Idearc in exchange for: (a) 146 million shares of Idearc common stock, (b) $2.85 billion in 8% senior unsecured promissory notes, and (c) a portion of a senior secured term loan facility.
[8] Hartmann Aff. ¶ 12, Ex. 5 (noting that fractional shares were sold on the open market with proceeds delivered to Verizon shareholders who would otherwise have received those shares).

(collectively, "Investment Banks") in exchange for Verizon debt securities the banks had purchased in the open market.[9] The Investment Banks then sold the Idearc debt securities to previously solicited purchasers and lenders.[10]

The four underlying actions arise from this conduct and allege that "Verizon knew that Idearc would be insolvent immediately after the divestiture and, thus, should be held liable for damages resulting from Idearc's subsequent bankruptcy."[11]

A. IDEARC INSURANCE POLICIES

In anticipation of the spin-off, Verizon and Idearc purchased primary and excess Executive and Organizational Liability Policies to protect against litigation risks and potential liabilities arising from the transactions ("Idearc Runoff Policies" or "Policies"). Defendant Illinois National issued the primary policy.[12] The excess policies incorporate the provisions of the primary policy and were issued by the insurers evidenced below.[13] Verizon also separately purchased its own Executive

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[9] *Id.* ¶ 7.

[10] *Id.* ¶¶ 13–14. Leading up to the spin, the Investment Banks apparently collaborated with future Idearc management to promote interest and locate purchasers for Idearc's anticipated debt obligations, distributing a preliminary offering memorandum for the unsecured notes and soliciting lender commitments for the secured syndicated term loan. The sale of the notes was effected pursuant to Rule 144A and Regulation S of the Securities Act of 1933.

[11] *See* Pls.' Mot. Final J. and Prejudgment Interest at 3.

[12] Hartmann Aff. Ex. 7.

[13] *Id.*, Exs. 8–10.

and Organization Liability Policies to supplement exposure to liability arising from the spin-off ("Verizon Policies").[14]

Policy Layer	Insurer	Limit of Liability
Primary	Illinois National	$15 million
First Excess	XL	$10 million
Second Excess	Zurich	$15 million
Third Excess	Twin City	$15 million
Fourth Excess	RSUI	$5 million
Fifth Excess	U.S. Specialty	$15 million
Sixth Excess	Westchester Fire	$5 million
Seventh Excess	St. Paul Mercury	$5 million
Eighth Excess	Arch	$5 million
Ninth Excess	ACE	$5 million

The Idearc Runoff Policies provide coverage for liability resulting from claims first made during the six-year policy period, which spanned from November 17, 2006, to November 17, 2012. As discussed previously, the Policies and the endorsements allowed Verizon to recover "Defense Costs"[15] only in cases where a Securities Claim is brought against both Verizon and an Insured Person and a joint defense is maintained.[16] Under such circumstances, the Insurers agreed to advance "covered Defense Costs no later than ninety (90) days after the receipt by

[14] McKenna Aff. ¶¶ 6–8, Exs. 1–2. It is Verizon's position that the Verizon Policies provide "contingent coverage" for any Securities Claim arising out of the spin-off transaction to the extent coverage is unavailable under the Idearc Runoff Policies. *Id.* ¶¶ 9–10.

[15] "Defense Costs" means "reasonable and necessary fees, costs and expenses consented to by the Insurer…resulting solely from the Investigation, adjustment, defense and/or appeal of a Claim against an Insured, but excluding any compensation of any insured Person or any Employee of an Organization." *Id.*, Ex. 7 § 2(f). *See also id.*, Ex. 7 § 2(b) (defining Claim to include a Security Claim).

[16] Hartmann Aff., Ex. 7 at End't 3. Ex. 7 at End't 7 (emphasis added).

the Insurer of such defense bills."[17] The Policies nevertheless obligated the Insureds to repay the Insurers for sums received "in the event and to the extent that any such Insured…shall not be entitled under this policy to payment of such Loss."[18]

Following the spin-off, Idearc operated as an independent company, with its stock publicly traded and its debt instruments freely tradable among qualified purchasers.[19] Idearc ultimately defaulted on the notes, and was forced to file a petition for Chapter 11 bankruptcy in March 2009. Soon thereafter, a number of suits were filed against Verizon and others alleging liability in connection with the spin-off.[20] Of most relevance here, the *U.S. Bank* Action was filed on September 15, 2010, in the U.S. District Court for the Northern District of Texas by U.S. Bank National Association ("U.S. Bank"), the entity appointed Litigation Trustee in Idearc's bankruptcy, to recover funds for the benefit of Idearc debt securities holders and other creditors.[21]

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[17] *Id.*, Ex. 7 at End't 7 § 8(a).
[18] *Id.* (obligating Insured to repay "severally according to [the Insureds'] respective interests").
[19] Compl. ¶ 50.
[20] Individual shareholder actions were filed in Texas ("*Talbot* Action") and Pennsylvania ("*Barnard* Action") alleging the transactions improperly off-loaded debt onto purchasers of Idearc stock and notes through, among other things, material misrepresentations and omissions in public filings concerning Idearc's solvency. McKenna Aff. ¶¶ 15–16, Exs. 5–6. Both the *Talbot* and *Barnard* Actions were eventually dismissed.
[21] The plan of reorganization entered by the U.S. Bankruptcy Court for the Northern District of Texas involved, among other things, the assignment of any claims arising from the spin-off to a litigation trust. It appears U.S. Bank was already serving as Indenture Trustee for the holders of the Idearc notes in connection with the spin-off.

U.S. Bank demanded approximately $14 billion in damages from Verizon, VFS, GTE, and John Diercksen ("Diercksen"), a Verizon executive and Idearc's sole director at the time of the spin-off.[22] Verizon, VFS, GTE, and Diercksen jointly defended the action for nearly five years. They sought and obtained dismissal of a number of the claims asserted against them and, following a bench trial in October 2012, judgment was entered in their favor on all remaining counts. The Texas court's ruling was later affirmed by the Fifth Circuit.[23]

In the course of successfully defending the *U.S. Bank* Action, Plaintiffs incurred significant legal expenses. In accordance with the terms of the Idearc Runoff Policies, Plaintiffs gave notice of *U.S. Bank* to the Insurers. On June 21, 2011, the claims administrator for the primary Idearc Runoff Policy issued a coverage position letter indicating, in relevant part, that Diercksen's defense costs would be covered, subject to the $7.5 million policy retention, but that the costs incurred in Verizon's defense would not be paid because "the *U.S. Bank* Complaint does not constitute a Securities Claim."[24]

U.S. Bank filed a second lawsuit arising out of the Idearc related transactions on March 29, 2013, naming Verizon and former Idearc Chief Financial Officer and Treasurer Andrew Coticchio as co-defendants (the "*Coticchio* Action"). The

[22] Hartmann Aff., Ex. 21.
[23] *Id.* at ¶¶ 39–46.
[24] *Id.* at ¶¶ 53–54, Ex. 26.

Coticchio Action sought more than $2.85 billion in damages from Verizon and Coticchio arising out of non-payment of the Idearc debt securities at issue in the *U.S. Bank* Action.[25]

B. INSTANT LITIGATION

On June 4, 2014, Plaintiffs filed the instant suit claiming, among other things, that they are entitled to $48 million in defense costs relating to the *U.S. Bank* Action and the *Coticchio* Action (Plaintiffs' "Defense Costs").[26] Plaintiffs first moved for partial summary judgment on the issue of defense costs in September 2014. The Defendants opposed summary judgment and filed a motion to allow time for discovery under Superior Court Civil Rule 56(f) and Defendants relied on the argument that U.S. Bank did not involve a "Securities Claim."[27] A hearing was held before this Court on December 4, 2014, during which Defendants conceded that, if *U.S. Bank* fit within the Policy's definition of "Securities Claim," Plaintiffs would be entitled to defense costs.[28]

Pursuant to its March 20, 2015 decision, this Court denied Plaintiffs' pre-discovery motion and granted the Defendants' Rule 56(f) motions.[29] Since the issue of whether the U.S. Bank litigation involved a "Securities Claim" was critical to

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[25] Pls.' Mot. Final J. and Prejudgment Interest at 3.
[26] *See id.* at 1.
[27] *See id.* at 7.
[28] Motions Hearing Tr. 6:4–11, Dec. 14, 2014.
[29] *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2015 WL 1756423 (Del. Super. Ct. Mar. 20, 2015).

resolve this dispute, the Court's Case Management Order broke discovery into phases.[30] Phase I was to focus on "issues of policy underwriting, drafting, interpretation and intent, so as to aid the Court in determining 'whether the underlying U.S. Bank Action fits within the definition of a securities claim[.]'"[31] Phase II "[was to][] address all remaining issues in the case after the completion of Phase I.[32] Phase II discovery shall not duplicate any discovery that was taken or could have been taken in Phase I, unless agreed to by the parties or ordered by the Court."[33]

As early as October 2014, the Excess Insurers agreed to allow Illinois National's counsel take the lead in litigation. In fact, the Excess Insurers followed form to Illinois National's arguments in all discovery disputes.[34] The Excess Insurers continued to let counsel for Illinois National take the lead in all arguments before the Court and speak on behalf of all insurers at the renewed motions for summary judgment hearing. As such, Plaintiffs allege all of Illinois National's representations

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[30] Case Management Order No. 1, Trans. ID 57184940, May 5, 2015, § I ¶ 2.
[31] *Id.*
[32] *Id.* § I ¶ 3; *see also Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2015 WL 1756423, at *8 (Del. Super. Ct. Mar. 20, 2015) (stating "Securities Claim," "since to a large degree whether the underlying action fits the definition of a securities claim will resolve the litigation.").
[33] *Id.*; Pls.' Mot. Final J. and Prejudgment Interest at 8 ("If the Court ruled against Verizon on that issue, the Court contemplated a Phase II to address whether and to what extent costs incurred would need to be allocated between Mr. Diercksen and Verizon and any other issues remaining after completion of Phase I.")
[34] Pls.' Mot. Final J. and Prejudgment Interest at 20.

including the concession that entry of final judgment is proper at this time are binding on the Excess Insurers.

After the Court issued its decision in March of 2015, the parties engaged in discovery for over a year, and on May 20, 2016, Plaintiffs filed a Renewed Motion for Partial Summary Judgment on Defense Costs and Defendant Insurers likewise filed a motion for summary judgment. At the hearing for the parties' Motions, Plaintiffs allege that "Defendants' counsel again conceded that if the Court ruled in favor of Verizon on the 'Securities Claim' issue, Verizon would be entitled to 100% of its costs."[35] The Court granted Plaintiffs' Motion for Partial Summary Judgment and denied Defendants' Motion for Summary Judgment, holding that the *U.S. Bank* Action constitutes a "Securities Claim."[36]

On March 24, 2017, Plaintiffs filed a Motion for Entry of Final Judgment and Prejudgment Interest. Plaintiffs are seeking the full amount of unreimbursed defense costs owed to Verizon for both the *U.S. Bank* Action and the subsequently filed and related *Coticchio* Action that is in excess of the Idearc Runoff Policies' $7.5 million self-insured retention, as well as prejudgment interest on that amount.[37] Plaintiffs argue that New York law should be applied, and if the Court finds that the Excess

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[35] *Id.* at 9 ("Moreover, Defendants' counsel represented to the Court that, as long as Verizon and a director are named in a "Securities Claim," "Verizon gets 100 percent of the expenses to them both.'") (McKenna Aff., Ex. 4 at 64:19-65:6 (emphasis added), 69:1-13.12).

[36] *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2017 WL1149118, at *13 (Del. Super. Ct. Mar. 2, 2017).

[37] *See* Pls.' Mot. Final J. and Prejudgment Interest at 2.

Insurers' policies have not yet been triggered, Illinois National should have to pay all prejudgment interest owed.[38] Illinois National, Zurich, XL, and Twin City each filed responses to Verizon's motion on May 4, 2017. Defendant Illinois National in its response did not oppose entry of final judgment, instead, it agreed with the Plaintiffs that there no additional issues to be litigated.[39] Illinois National, however, opposed the calculation and potential distribution of prejudgment interest. Illinois National, unlike the Excess Insurers, urges the Court to continue to use Delaware substantive law to determine the interest rate, accrual date, and whether or not the Plaintiffs can impose all of the prejudgment interest on Illinois National as consequential damages.[40] On the other end, Excess Insurers Defendants oppose both the Plaintiffs' Motion for Final Judgment as well as Prejudgment Interest. The Excess Insurers argue that there are pending issues pertaining to the defense costs Plaintiffs are seeking and Phase II of discovery is required.[41] They also assert that any award of prejudgment interest is premature as the Excess Insurers must be given the opportunity to determine if the defense costs Plaintiffs seek are reasonable—if they are not the total amount of prejudgment interest will be changed.[42]

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[38] *See id.* at 19.
[39] *See* Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 1–2.
[40] *See id.* at 19.
[41] *See* Def. Zurich's Br. in Opp'n to Pls.' Mot. Final Judgment and Prejudgment Interest at 16; *see* Def. XL's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 8; *see* Def. Twin City's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 6.
[42] *See* Def. Zurich's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 16; *see* Def. XL's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 8; *see* Def. Twin City's Br.

To date, Defendants have not paid anything towards the tens of millions of dollars in defense costs that Verizon incurred in excess of the applicable $7.5 million retention.

III. DISCUSSION

Before the Court can decide if entry of final judgment and an award of prejudgment interest are proper, it must first discuss which state—Delaware's or New York's –substantive law applies.

A. DELAWARE LAW APPLIES

None of the Idearc Runoff Policies contain a choice of law provision. Generally, the Court must apply the choice of law principles from the *Restatement (Second) of Conflict of Laws*, which identifies five main factors for deciding what law governs a contract that is silent on that issue.[43] These factors include: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties."[44]

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in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 10.

[43] *See Viking Pump, Inc., v. Century Indemnity Co., et al.*, 2009 WL 3297559, at *6 (Del. Ch. Oct. 14, 2009).

[44] *Id.* (citing Restatement (Second) of Conflicts of Laws § 188 (1971)).

However, if the Court has already applied a particular's states substantive law at one stage of the case, it may be required under law of the case doctrine to apply that same state's substantive law in subsequent stages,[45] therefore eliminating the need for a choice of law analysis. The law of the case doctrine states that "once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears."[46] The law of the case doctrine, however, is flexible and gives the court discretion when applying it.[47] Specifically, the Court of Chancery has held if applying the same substantive law may "produce[] an injustice, or should be revisited because of changed circumstances...,"[48] the court may use a different state's laws.

In the instant case, the Court finds no persuasive reason to ignore its prior decision to apply the substantive laws of Delaware.[49] The Court applied Delaware substantive law in both motions for summary judgment opinions in 2015 and in

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[45] *Taylor v. Jones*, 2006 WL 1566467, *5–6 (Del. Ch. May 25, 2006) (quoting Odyssey Partners v. Fleming Co., 1998 WL 155543, at *1 (Del. Ch. Mar. 27, 1998). See also *Hudak v. Procek*, 806 A.2d 140, 155 (Del. 2002) (following previous decisions in the same case where the facts of the litigation have remained constant); *May v. Bigmar, Inc.*, 838 A.2d 283, 288 n. 8 (Del. Ch. 2003) (holding that prior summary judgment motion determined the law of the case regarding a specific issue).

[46] *Id.*

[47] *Id.* at *6.

[48] *Id.* (citing *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000) (analogizing to doctrine of stare decisis)).

[49] *See id.*

2017.[50] The Court may have cited to New York case law in its decision but in its analysis, it relied solely on Delaware law. Significantly Plaintiffs did not object then and have provided no justification to now apply New York law other than it provides a more favorable result for them. Therefore, under the law of the case doctrine, the Court will continue to apply Delaware law.

B. ENTRY OF FINAL JUDGMENT

Pursuant to Superior Court Civil Rule 58, the Court may, at its discretion, enter final judgment where it determines that final judgment is in accordance with the provisions of Rule 54(b) and "there is no just reason for delay."[51] Rule 54(b) requires "(1) the action involves multiple claims or parties; (2) at least one claim or the rights and liabilities of at least one party has been finally decided; and (3) that there is no just reason for delaying an appeal."[52]

Additionally, in reviewing motions for entry of final judgment, the Court must weigh the "judicial administrative interests," against the possibility of "some

[50] After both motions, the Plaintiff did not express its opposition to the use of Delaware substantive law. In fact, it was not until this motion when it became advantageous for its prejudgment interest argument that it began to argue that New York law was proper. *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2017 WL1149118 (Del. Super. Ct. Mar. 2, 2017); *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2015 WL 1756423 (Del. Super. Ct. Mar. 20, 2015).

[51] Del. Super. Ct. Civ. R. 58 (3).

[52] Del. Super. Ct. Civ. R. 54(b).

danger of hardship or injustice which would be alleviated by immediate appeal."[53] Importantly, the Court must keep in mind "that excessive resort to [Rule 54(b)] will increase the already sizeable burden of appellate dockets..."[54] Therefore, the discretionary entry of final judgment is to be done "sparingly."[55]

To support its Motion for Final Judgment, Plaintiffs contend that the Excess Insurers' decision to jointly defend Phase I of the litigation and avoid discovery by following Illinois National's form has barred them from any further litigation to determine whether Excess Insurers had to consent to Defense Costs, if those costs were jointly incurred, and if the costs were reasonable.[56] Plaintiff argues "the Court expressly warned them that their decision to defer to [Illinois National] had consequences, and they would not later be heard to renege on that representation."[57] Plaintiffs also argue that the March 2, 2017 Opinion resolves any allocation issues because Illinois National represented to the Court that if "the U.S. Bank Action was made and maintained against both Verizon and Mr. Diercksen and constituted a 'Securities Claim' under the Idearc Runoff Policies, 100% of the costs of defending that action are covered."[58] Considering Illinois National's representation and the

[53] *Lima Delta Co., v. Global Aerospace, Inc., et al.*, 2016 WL 1169125, at *2 (Del. Super. Ct. Mar. 17, 2016).
[54] *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638, at *4 (Del. Super. Ct. Nov. 2, 2015).
[55] *See In re Tri–Star Pictures, Inc., Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989).
[56] *See* Pls.' Mot. Final J. and Prejudgment Interest at 16.
[57] Pls.' Consol. Reply Br. in Supp. of Mot. Final Judgment and Prejudgment Interest at 5.
[58] *Id.* at 6.

Court's decision in favor of the Plaintiff's Renewed Motion for Summary Judgment, the Plaintiff asserts any remaining disputes have been resolved, eliminating any need for Phase II discovery.[59]

Additionally, Plaintiffs argue that the Excess Insurers should not be allowed to challenge the reasonableness of the *U.S. Bank* Action Defense Costs because they initially shifted all responsibility of challenging claims to Illinois National. Now that Illinois National has conceded and accepted responsibility for its portion of the Defense Costs, the Excess Insurers seek to challenge Plaintiffs' invoices and right to prejudgment interest. Plaintiffs argue that their reasonableness claim against Defense Costs is unsupported as the Excess Insurers have had access to the defense cost invoices and have failed to challenge any of the costs incurred. Thus, the Excess Insurers should be now foreclosed from litigating those costs further.[60]

The Excess Insurers argue that both parties acknowledged and understood that even if the Court found in favor of Plaintiffs, there were further coverage issues to be addressed in Phase II. In fact, Defendants Zurich and Twin City cite to several filings where Plaintiff acknowledges additional discovery is required.[61] The Excess Insurers provide separate briefs regarding final judgment but each claim that all

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[59] *See* Pls.' Mot. Final J. and Prejudgment Interest at 11.
[60] *Id.* at 10–15.
[61] Zurich's Ex. 2, Pls.' Letter to Court, September, 30, 2016 ("For example, if the Court rules in Verizon's favor on the "Securities Claim" issue, the only remaining issue will be the "reasonableness" of the defense costs that Verizon incurred, which likely can be resolved on motion with minimal additional discovery.")

defense (both affirmative and not) were timely asserted and are unique to each insurer.[62] Excess Insurers argue that these defenses have merit and are not yet ripe for litigation because Phase II of discovery is required.[63] Defendant Zurich also argues that Plaintiffs failed to prove that Defendants waived the conditions precedent that the Plaintiffs must establish for coverage.[64] Such condition precedents include if the expenditures were jointly incurred and reasonable and necessary.[65]

Plaintiffs reject all of the Excess Insurers arguments and reiterate their assertions discussed above. In response to Zurich's waiver argument, Plaintiffs state that when the Excess Insurers adopted Illinois National's denial of coverage, the Excess Insurers were aware of "what they needed to know to effectuate a waiver of their right to consent: (1) Verizon sought its costs under the Idearc Runoff Policies, and (2) they were adopting AIG's blanket denial of Verizon's costs on the ground that the U.S. Bank Action was not a 'Securities Claim' under those Policies."[66] Further, that waiver requires no further "factual" knowledge.[67]

While the Court, in the July 2015 Motion to Compel hearing, did warn the Excess Insurers of its decision to let Illinois National lead this portion of the

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[62] Def.'s Zurich Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 20–21.
[63] *Id.* at 17; Def. XL's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 7; *see* Def. Twin City's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 6.
[64] Based on Twin City's and XL's adoption of Zurich's arguments, the Court has assumed they also support and adopt this argument.
[65] Def.'s Zurich Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 20–21.
[66] Pls.' Consol. Reply Br. in Supp. of Mot. Final Judgment and Prejudgment Interest at 9.
[67] *Id.*

litigation, the Plaintiffs are misinterpreting the Court's warning. The Court simply warned the Excess Insurers that if the Court found that the *U.S. Bank* Action fell under the definition of Securities Claim, they could not argue to this Court that the *U.S. Bank* Action is not within *their* definition of securities claim.[68] It did not say that Excess Insurers could not continue to litigate valid defenses they raised and preserved in their respective pleadings. However, that being said, the Court never guaranteed any of the parties a Phase II of discovery. To reiterate this Court's prior statements, the Court asked the parties to streamline discovery to help it determine the scope of Securities Claim, which this Court also suggested would likely eliminate the need for further litigation and discovery.[69] After deciding the *U.S. Bank* Action *was* a Securities Claim and reviewing the Defendants' coverage position letters, the Court believes that final judgment is proper. The Defendants were required to advance the Defense Costs, and if Defendants believe certain costs were not proper or reasonable, they could litigate such costs after payment. But instead of

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[68] "...I'm a little hesitant to make excess people do a lot at this point in time, particularly on the representation that most of them made, that they just rely upon AIG's form, they just wrote the form and whatever AIG's liability is, they kind of followed the form. Now, I will give you that, if all of a sudden AIG is found to have some liability here and they start yelling and screaming that that's not our definitions of securities claim, it's not going to be a pleasant day for them. So, either they do it now or they do it later, but I don't particularly think I would impose that cost upon them at this point in time until the initial barrier has some liability associated with it. That's from a practical point of view. These are all companies trying to make money and I prefer not to have them do things that are just -- at the moment may not become relevant at all. So, that's just my general thought process as to the excess carriers. We need to solve the first problem first." McKenna Aff. Ex. 5, 33:23;34:1–19 (Motion to Compel July 22, 2015).

[69] *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2015 WL 1756423, at *2 (Del. Super. Ct. Mar. 20, 2015).

meeting these obligations under the Policies, the Excess Insurers beyond Illinois National simply without justification wants to prolong the litigation.

The Court has reached this conclusion because Illinois National and the Excess Insurers denied Plaintiffs' coverage based solely on the fact that the *U.S. Bank* Action was not a Securities Claim.[70] The Court found the opposite to be true in its March 2017 Opinion, and rendered this decision against the Excess Insurers and Illinois National.[71] The Defendants are now required to pay the demanded costs, because that was the sole reason given by all the carriers for their denial. While they may have reserved certain affirmative defenses in their pleadings about costs being fair and reasonable,[72] the Defendants never asserted those issues as a basis for

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[70] "Even if this were not the case, the Court cannot find Defendants' interpretation of the Policies reasonable." *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2017 WL1149118, at *12 (Del. Super. Ct. Mar. 2, 2017).

[71] The Court asked the parties for confirmation as to the exhibits in the record constituting Defendants' coverage disclaimers. The Court has reviewed the parties' responses and is still in the belief that the *only* reason for denying Plaintiffs' coverage was based on the *U.S. Bank* Action not being a Securities Claim.

[72] XL' defenses included but are not limited to: (a) exhaust the limits of liability of the Primary Policy, (b) allocate covered from uncovered loss, (c) cooperate and/or secure consent before incurring any loss, and (d) comply with the terms, exclusions, conditions and limitations of the Primary Policy and the XL Excess Policy. XL's Answer at 22–23. Similarly, Zurich's defenses include: "(a) fail[ed] to allocate covered from uncovered loss, including Defense Costs that were not jointly incurred, (b) failed to cooperate and/or secure consent before incurring any Loss, and (c) did not comply with the Runoff Policies terms, exclusions and conditions, all of which are reserved and none of which are waived." Zurich Answer at 22–23. Twin City's "affirmative defenses include: (a) Verizon's claims are barred "to the extent that the Primary and Underlying Excess insurers, as those terms are defined in the Twin City Excess Policy, have not paid the full amount of their respective liability under the Underlying Insurance, as that term is defined in the Twin City Excess Policy"; (b) Verizon's "claims are barred, in whole or in part, by [Verizon's] failure to allocate covered Loss from uncovered Loss"; (c) Verizon's "claims are barred by Endorsement No. 7, Clause 8(f) of the Illinois National Policy because an appropriate allocation of jointly incurred defense costs would not result in covered Loss exceeding the Retention of the

coverage denial, and the Court believes it would be inappropriate and unfair to allow the Excess Insurers to now dispute the fairness and reasonableness of the Defense Costs when they have failed to comply with their duty to advance costs that was affirmed by this Court's previous Opinion.

While there may be costs that are not reasonable or jointly incurred, the Primary Policy language is clear the Defendants must advance Defense Costs even if the costs cannot be agreed upon. Specifically, the Primary Policy states that:

> [u]nder Coverages A, B and C of this policy, except as hereinafter stated, the Insurer shall advance, excess of any applicable retention amount, covered Defense Costs no later than ninety (90) days after the receipt by the insurer of such defense bills. Such advance payments by the Insurer shall be repaid to the Insurer by each and every Insured or Organization, severally according to their respective interests, in the event and to the extent that any such insured or Organization shall not be entitled under this policy to payment of such Loss....[73]
>
> ...In the event that a determination as to the amount of Defense Costs to be advanced under the policy cannot be agreed to, then the insurer shall advance Defense Costs excess of any applicable retention amount which the Insurer states to be fair and proper until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law.[74]

According to this language, fair and proper Defense Costs must be paid even if there is a disagreement about the final amount. Additionally, once the final amount has

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Illinois National Policy and the attachment point of the Twin City Excess Policy"; and (d) Verizon's "claims are barred to the extent that covered Loss does not exceed the Retention of the Illinois National Policy and the attachment point of the Twin City Excess Policy." Twin City Answer at 27–29.

[73] Hartmann Aff. Ex. 7 at 10–11.

[74] *Id.*

been paid, any costs that should not have been covered by the insurers must be repaid. However, because the Excess Insurers, who have had access to Verizon's Defense Cost invoices since 2014,[75] have failed to identify even one unreasonable cost associated with defending the *U.S. Bank* and *Coticchio* actions, the Court believes it is appropriate now to grant the request to enter final judgment,[76] instead of continuing to litigate for years over what is a "fair and proper" amount. The Excess Insurers had the ability to raise a fairness and reasonableness issue when it initially denied coverage based on the Securities Claim definition as well as during the four-year period it had the Plaintiffs' Defense Cost invoices but did not do so. The Defendants' position on coverage lived and died on the issue of "Securities Claim" and to continue the litigation is not only unreasonable but would condone the Excess Insurers continual failure to comply with the insurance policies.

As a result, the Court believes that the proper and most reasonable decision is to grant final judgment and if the parties desire, let the Supreme Court decide if this Court has properly decided the Securities Claim issue. Otherwise, the Excess Insurers, who have not challenged a single invoice, would stall this litigation for years at great expense to everyone while reviewing thousands of invoices. The Court finds their right to challenge has not accrued until they comply with the Policies and

[75] Pls.' Consol. Reply Br. in Supp. of Mot. Final Judgment and Prejudgment Interest at 10.
[76] *Id.*

advance the Defense Costs. To do otherwise is simply to allow the litigation to linger without the real issue of this litigation being finally resolved.

It is the Court's opinion that it is simply time to stop this litigation Ferris wheel. In spite of the assertions by the Defendants to the contrary, the litigation will end only when either the parties accept this Court's prior decision or it is affirmed or reversed by the Delaware Supreme Court. Granting final judgment will allow this path to occur. The Court finds the requirements of Rule 54(b) have been established. The litigation includes multiple parties, the rights and liabilities of at least one party, in this case Illinois National, has been finally decided and clearly there is no just reason to delay the appeal of the only real central issue in this case, whether the defended actions were securities claims. Thus, Plaintiffs' Motion for Entry of Final Judgment under Rule 58 is hereby **GRANTED**.

C. PREJUDGMENT INTEREST

Based on the Court's decision to grant entry of final judgment and to continue to use Delaware substantive law, the Court holds that an award of prejudgment interest is also appropriate. Before the Court discusses its specific findings, it makes the following determinations. First, the prejudgment interest rate will be set by Delaware law as well as the accrual date of such interest. Second, the Excess Insurers' obligation to pay prejudgment interest is triggered by the demand made at

mediation and will accrue from that date in spite of the Policies having not yet been exhausted; and finally, that the Court will not require Illinois National to pay all of the prejudgment interest as an element of consequential damages. The Court will not discuss in detail Plaintiffs' consequential damages argument, as it is moot because all Defendants will be obligated to pay prejudgment interest to the extent their individual policies are implicated in the Defense Costs at issue. The Court will first discuss the appropriate interest rate and accrual date for Plaintiffs' prejudgment interest and then discuss the exhaustion requirement.

1. PREJUDGMENT INTEREST RATE & ACCRUAL DATE

Delaware law sets the prejudgment interest at a rate of five percent over the Federal Reserve Discount Rate.[77] "[T]he rate of interest is calculated according to the Federal Reserve discount rate as of the date of commencement of interest liability and it remains fixed at that rate."[78] This is because Delaware Courts have "traditionally disfavored the practice of compounding interest ...."[79] "In accordance with that distaste, Delaware's legal rate of interest statute, 6 Del. C . § 2301(a), has been interpreted as providing for simple interest only."[80]

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[77] 6 Del. C. § 2301(a); *Stonewall Ins. Co., v. E.I. Du Pont De Nemours & Co.*, 996 A. 2d 1254, 1262 (Del. 2010).
[78] *Rexnord Indus., LLC v. RHI Holdings, Inc.*, 2009 WL 377180, at *9 (Del. Super. Ct. Feb. 13, 2009).
[79] *Brandin v. Gottlieb,* 2000 WL 1005954, * 28 (Del. Ch. July 13, 2000).
[80] *Id.*

Additionally, "[a]s a general rule, [prejudgment] interest accumulates from the date payment was due to a party."[81] For insurance claims, however, interest accumulates from the date a party actually demands payment.[82] A demand for payment under Delaware law can only be accomplished by sending an explicit request for payment, sending different types of notice is not sufficient.[83] Where it is difficult to determine to a reasonable degree of certainty when an insured demanded payment, the Court can rely on the date that the insured filed the complaint.[84]

In the instant case, the parties do not dispute Plaintiffs' entitlement to prejudgment interest; rather, the Defendants question on what date interest should have begun to accrue and who must actually pay it. Plaintiffs argue that prejudgment interest rate should be calculated using New York law and its mandated rate of 9%.[85] If Delaware law applies, Plaintiffs alternatively argue that the proper interest rate is variable and fluctuates with the Federal Reserve Discount Rate over time.[86] Specifically, Plaintiffs' proposed expert Adam T. Finn, identified four different interest rates of 5.75%, 6.00%, 6.25%, and 6.50% required to calculate interest from the date of the first cost incurred, June 22, 2010, thru March 16, 2017.[87] However,

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[81] *Stonewall Ins. Co.*, 996 A. 2d at 1262.
[82] *Hercules v. AUI Ins. Co.*, 784 A.2d 481, 508.
[83] *Id.*
[84] *Stonewall Ins. Co.*, 996 A. 2d at 1262 (citing *Citrin v. Int'l Airport Centers LLC*, 922 A.2d 1164, 1167 (Del. Ch. 2006)).
[85] Finn Aff. at 4–5.
[86] *Id.* at 4–5.
[87] Finn Aff. at 5–8.

because this Court is using Delaware substantive law, only the disputed Delaware interest rate is relevant at this time. Illinois National disagrees with Plaintiffs and asserts the interest rate, which is 5% over the Federal Reserve discount rate, must be fixed from the date of commencement of interest liability.[88] More specifically, based on the demand date of January 9, 2014, discussed in detail below, the Federal Reserve discount rate was 0.75%, making the proper interest rate 5.75% for the entire prejudgment interest period.[89]

The Plaintiffs also argue that prejudgment interest begins to accrue against all Defendants under Delaware law as the costs were incurred.[90] Plaintiffs assert that Verizon began to pay defense invoices as early as June 2010, and submitted its first invoice to Illinois National in July 2012.[91] Plaintiffs, therefore, contend the period of prejudgment interest should begin on June 22, 2010, and end March 24, 2017, when the instant Motion was filed.[92] In addition, Plaintiffs argue that the Excess Insurers are obligated to pay prejudgment interest regardless of whether the

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[88] *See* Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 15; *see Valeant Pharmaceuticals International v. Jerney*, 921 A.2d 732, 756 (Del. Ch. 2007).
[89] *See* Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 15.
[90] Plaintiff suggests in a footnote that Delaware law follows the same accrual date. "Delaware law is to the same effect. *See Lamourine v. Mazda Motor of Am., Inc.*, 2009 WL 2707387, at *3 (Del. Aug. 28, 2009) ("Pre-judgment interest accrues from the time the obligation to pay arises"); *Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC*, 2014 WL 897223, at *33 (Del. Ch. Mar. 5) (awarding "prejudgment interest on [] compensatory damages from the date they accrued"), judgment entered, (Del. Ch. July 1, 2014)." Pls.' Mot. Final J. and Prejudgment Interest at 16.
[91] Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 17.
[92] Pls.' Mot. Final J. and Prejudgment Interest at 13; *see* Finn Aff. at ¶7.

underlying policies have actually paid out and exhausted their limits.[93] This is because the Excess Insurers breached their obligations to advance costs when it denied coverage based on the scope of a "Securities Claim" and failed to pay any costs after the Court's March 2017 Order which held the opposite to be true.[94] Plaintiffs further assert the exhaustion requirement should be ignored because the Excess Insurers when issuing their coverage positions did not argue as one of their reasons for denial that the underlying coverage had not yet been exhausted.[95]

While all of the Defendants argue that Plaintiffs' alleged accrual date is improper, they all agree that the proper accrual date is ninety days from the date when payment was demanded. Additionally, the Defendants argue that any semblance of a demand for payment cannot be identified until 2014 around the time when the parties participated in mediation.[96] Illinois National, the primary insurer, argues that the date when Plaintiffs invoked mediation, January 9, 2014, is the clearest demand for payment and therefore the proper accrual date.[97] It disputes

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[93] Pls.' Mot. Final J. and Prejudgment Interest at 13–15.

[94] *Id.* at 21. Plaintiffs cite New York case law which supports a decision to impose prejudgment interest on an excess insurer before their liability attached or where the insurer claimed that payment was not yet due. Plaintiffs did not simultaneously cite Delaware case law doing the same. *See* Pls.' Mot. Final J. and Prejudgment Interest at 16.

[95] Pls.' Consol. Reply Br. in Supp. of Mot. Final Judgment and Prejudgment Interest at 27–28.

[96] *See* Def. Zurich's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 32; *see* Def. XL's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 6; *see* Def. Twin City's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 13.

[97] Illinois National provides an alternative analysis that discusses a different accrual date based on receipt of Plaintiffs' invoices but it continually asserts this is the proper demand date.

Plaintiffs efforts to convince the Court that the invoices sent for allocation to Illinois National were also a demand for payment. The Excess Insurers contend, as an alternative to their exhaustion argument discussed below, that prejudgment interest cannot begin to accrue against them until after Plaintiffs made a demand for payment and provided invoices specific to each Excess Insurer.[98] They argue this did not happen until March 19, 2014 for Zurich, March 18, 2014 for XL, and April 4, 2014 for Twin City.[99]

The Court has determined that the Plaintiffs' calculations and methodology under Delaware law are flawed. As the Defendants correctly identified in their briefs under Delaware law, prejudgment interest begins to accrue with insurance claims after payment has been demanded. This demand must be explicit, sending "various forms of notice" is insufficient. Therefore, in the instant case, the proper accrual date for Plaintiffs' prejudgment interest against Illinois National and the Excess Insurers must be ninety days[100] from when there was a clear demand for payment and not simply when Plaintiffs began sending invoices of costs incurred or when Plaintiffs sought coverage positions. This date is January 9, 2014, when Verizon invoked mediation. Despite the Plaintiffs' best efforts to convince this Court that the invoices

[98] Zurich Letter, at 3, April 13, 2018.
[99] *See* Def. Zurich's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 32; *see* Def. XL's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 6; *see* Def. Twin City's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 15.
[100] This 90-day delay stems from the policy language itself. Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 17.

sent for allocation to Illinois National were also a demand for payment,[101] the Court does not believe these correspondences present a clear demand for payment. Similarly, the Court does not believe that the email between Verizon and the Excess Insurers on June 25, 2013, seeking their coverage positions[102] is even a demand for payment.[103] The Court similarly rejects the Excess Insurers position about their proper accrual date. There can be no dispute that at the time of mediation a clear demand was made for payment. The assertion that this date should be delayed due to the distribution of invoices is simply unpersuasive.

Further, the Court also finds under Delaware law that the interest rate to calculate prejudgment interest is fixed from the date of commencement of interest liability, and it does not fluctuate with the Federal Reserve rate.[104] Thus, the proper interest rate for the entire prejudgment interest period is 5.75%.

2. EXHAUSTION OF PRIMARY POLICY

The Defendants also disagree if Excess Insurers and Illinois National both have to pay prejudgment interest. Illinois National takes the position that all

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[101] Def. Ill. Nat'l's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 14–16.
[102] Hartmann Aff. Ex. 34.
[103] This Court has previously held that a coverage position and demand for payment are separate requests. *Homeland Insurance Company of New York v. CorVel Corporation*, 2018 WL 317283, at *15 (Del. Super. Ct. Jan. 5, 2018).
[104] The court found that it "has broad discretion, subject to principles of fairness, in fixing the [interest] rate to be applied." *Valeant Pharmaceuticals International v. Jerney*, 921 A.2d 732, 756 (Del. Ch. 2007).

Defendants must pay prejudgment interest and in the chance that Excess Insurers do not have too, Illinois National under Delaware law, cannot be required to pay the entire prejudgment interest as consequential damages.[105] Excess Insurers, on the other hand, assert that because Illinois National's policy has yet to be exhausted, there is no obligation for the Excess Insurers to pay prejudgment interest.[106] Such an exhaustion requirement comes from each of the Excess Insurers policies which state that coverage does not attach until all underlying insurers "shall have paid the full amount of their respective liability."[107] The Excess Insurers also assert that because no actual payments have been made, the Excess Insurers have not breached their respective policies.[108]

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[105] The Court agrees with Illinois National that it must only pay prejudgment interest based on its policy limit. While Plaintiff included boilerplate language about prejudgment interest, the Court is not convinced that this is enough to meet the particularity requirement under Superior Court Rule 9(b). Further, the Court finds that similar to President Judge Jurden's holding under New York law in *TIAA-CREF v. Illinois National Ins. Co., et al.*, 2017 WL 5197860, at *9 (Del. Super. Ct. Oct. 23, 2017), an award of prejudgment interest as consequential damages is limited to bad faith claims. And as Defendant Illinois National has pointed out, there is no evidence of bad faith as the determination for the *U.S. Bank* Action was a close call.

[106] All Excess Insurers responded to the Plaintiffs' assertions, Defendants XL and Twin City, however, "adopt[ed] and incorporate[ed] by reference, the arguments set forth in Zurich's Opposition to Verizon's request for pre-judgment interest"[106] instead of repeating Zurich's detailed argument in its own briefs.

[107] Hartmann Aff., Ex. 10, at § II.A.

[108] Def. Zurich's Br. in Opp'n to Pls.' Mot. Final J. and Prejudgment Interest at 27. Defendant Zurich specifically asserts that the express language in its policy, as well as the other excess insurer's policies, requires the Court to find that the Excess Insurer's obligation to pay prejudgment interest has not been triggered. Specifically, Zurich identifies contractual language which states: "[c]overage under this policy shall attach only after all of the Limit(s) of Liability of Underlying Insurance has been exhausted by the actual payment of loss(es)." Zurich Policy § III.B ("In the event and only in the event of the reduction or exhaustion of the Limit(s) of Liability of the Underlying Insurance solely as the result of actual payment of loss covered thereunder…"). Excess Insurer Zurich argues that the New York Courts have had a consistent

In response, Plaintiffs contend that "[a]llowing the Excess Insurers to avoid prejudgment interest on amounts they denied any obligation to pay on substantive coverage grounds, not merely a lack of exhaustion, would violate the bedrock reason for mandatory prejudgment interest in a contract action: to make Verizon whole."[109] Plaintiffs go on to suggest such a ruling by the Court would make it so an insured would never be able to recover prejudgment interest where the "primary carrier refuses to pay and its losses reach beyond the primary layer of coverage, regardless of how long monies are withheld."[110] Plaintiffs, in supplemental briefings, also argue to the Court that both New York and Delaware case law supports their position that exhaustion of the primary policy is not required and the Excess Insurers must pay prejudgment interest now.[111]

The Court has reviewed the Delaware cases Plaintiffs cite and finds that many of these cases, although factually distinguishable, follow a Delaware District Court decision which held for public policy reasons that:

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reading of similar policy language and held "the actual payment of loss by the underlying insurers before an excess insurers' coverage is triggered." *Forest Labs., Inc. v. Arch Ins. Co.*, 953 N.Y.S.2d 460, 465–66 (N.Y. Sup. Ct. 2012). It does not cite to any Delaware law.

[109] Pls.' Consol. Reply Br. in Supp. of Mot. Final Judgment and Prejudgment Interest at 28.

[110] *See id.*

[111] After President Judge Jurden issued the *TIAA-CREF v. Illinois National Ins. Co., et al.* opinion, the Court allowed the parties to submit letters about its applicability to the instant motion. Plaintiff in its letter to the Court cited *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444–45 (Del. 2005); *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *9–10 (Del. Super. Ct. Nov. 5, 2010); and *HLTH Corp. v. Agriculture Excess & Surplus Ins. Co.*, 2008 WL 3413327 (Del. Super. Ct. July 31, 2008).

> [t]o require an absolute collection of the primary insurance to its full limits would in many, if not most, cases involve delay, promote litigation, and prevent an adjustment of disputes which is both convenient and commendable. A result harmful to the insured, and of no rational advantage to the insurer, ought only to be reached when the terms of the contract demand it.[112]

Unlike the Plaintiffs in *Dunlap v. State Farm Fire*, *Mills Ltd. Partnership v. Liberty Mutual*, *HLTH Corporation v. Agriculture Excess & Surplus*, and even in *Stargatt v. Fidelity*, the Plaintiffs in the instant case have not settled with any of the Defendants nor have any of its Defense Costs been advanced.[113] Despite, these factual differences, the public policy underpinnings of *Stargatt* continue to ring true. In fact, the Court believes this public policy should be extended to the instant case, because to require absolute exhaustion of the prior excess policy before the next Excess Insurer's obligation for prejudgment interest begins to run would continue to promote litigation and essentially punish Plaintiffs for having to sue to obtain their rights under the Idearc Runoff Policies.

Specifically, the Court believes because its summary judgment decision was rendered against all Defendants,[114] that prejudgment interest should be a shared

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[112] *Stargatt v. Fidelity & Cas. Co. of New York*, 67 F.R.D 698, 691 (D. Del. 1975).

[113] *Id. See also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444–45 (Del. 2005); *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *9–10 (Del. Super. Ct. Nov. 5, 2010); and *HLTH Corp. v. Agriculture Excess & Surplus Ins. Co.*, 2008 WL 3413327 (Del. Super. Ct. July 31, 2008).

[114] "Even if this were not the case, the Court cannot find Defendants' interpretation of the Policies reasonable." *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2017 WL1149118, at *12 (Del. Super. Ct. Mar. 2, 2017).

burden among the Defendants. It is also clear from the Defense Cost invoices provided to the Defendants the amount Verizon asserts was paid to defend the *U.S. Bank* and *Coticchio* Actions. As such, the Excess Insurers would know if their policies were at risk and still did not pay as mandated by their policies. This conduct justifies that all Excess Insurers whose policy encompasses the losses claimed should have to pay prejudgment interest. Based on the demand date, the Court finds all the Excess Insurers are obligated to pay prejudgment interest from January 9, 2014 until March 24, 2017 at a fixed interest rate of 5.75% on the amount of their policy encompassing Verizon's Defense Costs.[115]

As a result, Illinois National would first pay its full $15,000,000 in policy limits plus prejudgment interest.[116] After such payment, the Excess Insurers would pay to the extent their policy is encompassed by Verizon's Defense Costs plus the prejudgment interest set forth above in the order established by the coverage tower.

[115] The Court accepts Illinois National's calculation of prejudgment interest. Interest will be "...calculated on the full Policy Limit of $15,000,000 beginning on January 9, 2014. January 9, 2014, is the date used to calculate the number of days for which each expense has been outstanding through March 24, 2017. The number of days is converted to years by dividing by 365.25 (the quarter day reflecting the average impact of leap years). Next, the number of years is multiplied by the simple interest rate of 5.75% per year times the amount of the Policy Limit to calculate the total interest." Adams Aff. Ex. 1.

[116] The Court attempted to calculate the prejudgment interest for Illinois National and believes the proper interest rate amount is $2,762,833.67, but because the Court does not have access to all of the invoices for costs, it cannot be certain this is the proper amount.

IV. CONCLUSION

Like the previous Motion before this Court, this was not an easy decision. The Court finds despite Defendants best efforts, final judgment is proper and there is nothing further to be litigated. If the Excess Insurers believe that they will overpay the Plaintiffs' Defense Costs, now is not the time to address that concern. This litigation has been pending for many years and even after concluding that the *U.S. Bank* Action is a Securities Claim, Plaintiffs have still not been advanced their costs. This is true in spite of the requirement to advance Defense Costs, and any reasonable review of the Policies issued by the Excess Insurers would clearly encompass coverage by most in the insurance tower. Thus, Plaintiffs' Motion for Entry of Final Judgment and Prejudgment Interest is **Granted**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.