IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AR CAPITAL, LLC, Plaintiff, v. XL SPECIALTY INSURANCE COMPANY, BEAZLEY INSURANCE COMPANY, EVEREST NATIONAL INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, ALTERRA AMERICA INSURANCE COMPANY, ARGONAUT INSURANCE COMPANY, QBE INSURANCE COMPANY, and CATLIN INSURANCE COMPANY, Defendants. --- VEREIT, INC., Intervenor-Plaintiff, v. AR CAPITAL, LLC, Defendant.	C.A. No.: N16C-04-154 WCC CCLD

Submitted: June 18, 2018
Decided: December 12, 2018

Upon AR Capital LLC's Motion for Partial Summary Judgment on Defense Costs – GRANTED in Part and DENIED in Part

Upon VEREIT, INC.'s Cross-Motion for Summary Judgment – DENIED

Upon VEREIT, INC.'s Partial Motion to Dismiss AR Capital LLC's First Amended Counterclaims II - VI – GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court are: (1) AR Capital LLC's ("AR Capital") Motion for Partial Summary Judgment on Defense Costs, (2) VEREIT, Inc.'s ("VEREIT") Cross-Motion for Summary Judgment, and (3) VEREIT's Partial Motion to Dismiss AR Capital LLC's First Amended Counterclaims II - VI. For the reasons set forth below, AR Capital's Motion for Partial Summary Judgment is **GRANTED** in Part and **DENIED** in Part, VEREIT's Cross-Motion for Summary Judgment is **DENIED**, and VEREIT's Partial Motion to Dismiss AR Capital, LLC's First Amended Counterclaims II - VI is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

VEREIT and AR Capital

This action stems from a dispute between VEREIT, its excess insurers, and AR Capital. On September 6, 2011, VEREIT and AR Capital entered into two agreements: an Acquisition and Capital Services Agreement and a Management Agreement (collectively, the "VEREIT Agreements").[1] AR Capital performed management and advisory services related to VEREIT's investments and operations.[2] The parties terminated the VEREIT Agreements on February 28, 2013, and January 8, 2014, respectively.[3]

[1] Pl.'s Am. Compl. ¶ 43.
[2] *Id.* ¶ 44.
[3] *Id.* ¶ 46.

On September 7, 2014, VEREIT's Board of Directors' Audit Committee began investigating certain reporting irregularities.[4] The investigation was disclosed to the public on October 29, 2014, and VEREIT released restated financial results for the first two quarters of 2014.[5] In March 2015, VEREIT issued additional financial restatements, including for 2013, while AR Capital had served as VEREIT's manager.[6]

Almost immediately after VEREIT's audit was publicly disclosed, the U.S. Securities and Exchange Commission ("SEC") got involved. On November 13, 2014, the SEC issued an Order Directing Private Investigation and Designating Officers to Take Testimony (the "SEC Order of Investigation").[7] The SEC Order of Investigation targeted VEREIT and its directors, officers, "partners, subsidiaries, and/or affiliates, and/or other persons or entities directly or indirectly" involved in VEREIT's activities. In addition to the Order of Investigation, the SEC issued a subpoena to AR Capital, demanding documents regarding AR Capital's external management of VEREIT, its knowledge with respect to VEREIT'S finances, and the services it performed in connection with VEREIT's financial filings.[8]

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[4] *Id.* ¶ 47.
[5] *Id.*
[6] Pl.'s Am. Compl. ¶ 47.
[7] *Id.* ¶ 49.
[8] *Id.* ¶ 50.

The disclosure of VEREIT's financial reporting issues also prompted litigation. VEREIT, AR Capital, and individuals associated with both entities were named as defendants in a number of lawsuits filed by shareholders alleging, among other things, that VEREIT, AR Capital, and its directors perpetuated a multi-year long accounting fraud.[9] This led to one consolidated class action[10] and at least seven opt-out actions pending in various jurisdictions.[11]

In November 2014, AR Capital and its officers and directors hired two law firms to defend against the underlying matters.[12] To date, the law firms have incurred approximately $14.5 million in defense costs.[13]

The Insurance Tower

VEREIT purchased primary and excess insurance coverage for the policy period of February 7, 2014 to February 7, 2015. Defendant XL Insurance Company ("XL"), VEREIT's primary insurer, provided $10 million in coverage, including defense costs (the "Primary Policy").[14] Seven excess insurers (the "Excess Insurers")[15]

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[9] *Id.* ¶ 48.
[10] *Id.* (identifying the class action lawsuit as *In re American Capital Realty Props., Inc. Litig.*, No. 15-mc-00040-AKH (S.D.N.Y. Aug. 24, 2017)).
[11] *Id.*
[12] Pl.'s Am. Compl. ¶¶ 53–54.
[13] *Id.*
[14] Decl. of Natasha Romagnoli, Esq. in Supp. of AR Capital, LLC's Mem. in Supp. of Mot. Partial Summ. J. on Defense Costs [hereinafter, Romagnoli Dec.]; Pl.'s Ex. A (XL's Primary Policy) [hereinafter, Primary Policy].
[15] XL and the Excess Insurers, for purposes of this opinion, will be referred to as Carriers.

issued policies above the Primary Policy, as summarized in the following chart (the "Excess Policies"):[16]

Policy Layer	Insurer	Limit of Liability
Primary	XL	$10 million
First Excess	Beazley	$10 million
Second Excess	Everest	$10 million
Third Excess	Illinois National	$10 million
Fourth Excess	Alterra	$10 million
Fifth Excess	Argonaut	$10 million
Sixth Excess	QBE	$10 million
Seventh Excess	Catlin	$10 million

The Excess Policies generally "follow form" to the Primary Policy's terms and conditions.[17] Each Excess Policy would be triggered once the immediately preceding layer was exhausted by the underlying insurer or by the insured itself.[18]

[16] *See* Romagnoli Dec., Ex. 1; Pl.'s Am. Compl., Exs. B–H [hereinafter, Excess Policies].
[17] Pl.'s Mot. Partial Summ. J. at 6.
[18] *See* Excess Policies, Ex. B at § V; Ex. C at § IV; Ex. D at Insuring Agreement; Ex. E at § I; Ex. F at § I; Ex. G at § I; and Ex. H at § IV.

The relevant portions of the Primary Policy state the insurer will pay: (a) Loss for which a Company is required or permitted to indemnify an Insured Person resulting from a Claim made during the policy period for a Wrongful Act ("Side B Coverage"); and (b) Loss suffered directly by a Company resulting from a Securities Claim made during the policy period for a Company Wrongful Act ("Side C Coverage").[19] AR Capital is included in the amended definition of "Company" but limited to the time that it externally managed VEREIT and/or its Subsidiaries.[20] Additionally, AR Capital's Directors are included in the Primary Policy's definition of "Insured Person."[21]

The policies differentiate between "Wrongful Acts" and "Company Wrongful Acts." "Wrongful Act" is defined to include "any actual or alleged" "act, error, omission, misstatement, misleading statement, neglect, or breach of duty by an Insured Person acting in their role with the Company."[22] A "Company Wrongful Act" refers to similar conduct by a Company in connection with a Securities Claim.[23]

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[19] Primary Policy, End't 52 at §§ I (B) – (C).
[20] *See id.* at § II. Critical here, Endorsement 52 does not mention the term "Company Wrongful Acts."
[21] *Id.* at § II(J) (Insured Person includes "any past, present or future director or officer, or member of the Board of Managers of the Company[.]"). AR Capital's Directors were Scott J. Bowman, Peter M. Budko, Brian D. Jones, William M. Kahane, Edward M. Weil, and Nicholas Radesca. *See* Pl.'s Mot. Partial Summ. J. at 7.
[22] Primary Policy, End't 52 at § II (S).
[23] *Id.* at § II (E).

A "Claim" has multiple definitions, including:

- a written demand for monetary or non-monetary relief;[24]
- a civil action or proceeding;[25]
- an investigation of the Company for a Company Wrongful Act by the SEC or similar agency commenced by subpoena;[26]
- an investigation of an Insured Person commenced by subpoena even if the Insured Person has not been identified as someone against whom a claim will ultimately be made;[27] and
- any informal regulatory or administrative investigation of an Insured Person for a Wrongful Act.[28]

"Securities Claim" is defined to include a Claim made against any Insured[29] for any actual or alleged violation of any federal, state or local regulation, statute or rule in connection with the purchase or sale of or offer to purchase or sell securities, which is brought either: (1) by any person in any way involving the purchase or sale or offer to purchase or sell securities of a Company, or (2) by a security holder of a Company with respect to that security holder's interest in the securities.[30] "Securities Claim" also includes any administrative or regulatory investigation of a Company,

[24] *Id.* at § II (C)(1).
[25] *Id.* at (C)(2).
[26] *Id.*; Primary Policy, End't 27 ¶ (5).
[27] Primary Policy, End't 52 at § II (C)(4); Primary Policy, End't 33.
[28] *Id.*; Primary Policy, End't 41 §¶ (2).
[29] *See id.* § II (I) ("Insured means the Insured Persons and the Company.").
[30] *Id.*, End't 54.

but only if and while such investigation is also continuously maintained against an Insured Person.[31]

"Loss" covered under the Primary Policy includes "Defense Expenses," which are defined as "reasonable legal fees and expenses incurred in the defense of any Claim."[32] Defense costs are to be to be paid immediately as they are incurred upon the Insured's written request.[33] The Insurers could recoup amounts paid towards defense fees "if it is subsequently determined by a final, non-appealable adjudication" that the Loss is not covered under the policy.[34] Notably, the Insurers expressly disclaimed the duty to defend.[35]

In November 2014, AR Capital notified XL that it had been sued in the Underlying Matters.[36] On April 15, 2015, XL acknowledged AR Capital's defense costs and began providing coverage on behalf of six officers and directors of AR Capital. However, XL denied coverage as to the corporate entity, asserting that there was no securities claim as defined by the policy.

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[31] *Id.*
[32] Primary Policy, End't 52 § II (F).
[33] *Id.*; Primary Policy, End't 50.
[34] Primary Policy, End't 50 (C).
[35] Primary Policy, End't 52 § V (A) ("It shall be the duty of the Insured and not the duty of the Insurer to defend any Claim under this Policy.").
[36] Pl.'s Am. Compl. ¶ 71.

On or about May 7, 2015, AR Capital demanded coverage from all Insurers.[37] Then, on May 19, 2015, AR Capital requested indemnification from VEREIT.[38] Since the policy that covered AR Capital was purchased by VEREIT, defense invoices would be initially submitted and reviewed by VEREIT and, upon approval, forwarded to the carrier for payment. In fact, the Court was provided several emails from December of 2015 where invoices for AR Capital's defense were approved by VEREIT. Since both VEREIT and AR Capital were looking to the same policies for coverage, this process was less than ideal. It appears that, sometime in early 2016, counsel for AR Capital learned that VEREIT had failed to submit additional AR Capital defense invoices for payment. Instead, VEREIT had submitted invoices for their defense costs and had substantially utilized the policy limits of the XL and Beazley coverage.

VEREIT, in discussing its own coverage with the Insurers, purportedly informed the Insurers that it spoke on behalf of all insureds, including AR Capital. Based off this representation, the Insurers began paying the defense costs submitted by VEREIT. One excess carrier, Beazley, tendered its entire policy limits to VEREIT, allegedly to AR Capital's detriment.[39] On April 15, 2016, AR Capital notified the

[37] *Id.* ¶ 65, Ex. N (Email from Robin Cohen, Esquire to Insurers).
[38] Pl.'s Am. Compl. ¶ 59.
[39] *Id.* ¶ 65.

Insurers that VEREIT did not speak for AR Capital, and demanded the Insurers copy AR Capital on all correspondence with VEREIT.[40]

As a result of the foregoing, AR Capital initiated the instant litigation against the Insurers in April 2016, seeking a declaration that it was entitled to be treated fairly and equitably under the Primary and Excess Policies. According to AR Capital, the Insurers favored VEREIT over AR Capital, leaving AR Capital exposed to catastrophic losses.

The Insurers moved to dismiss AR Capital's claim for failure to add VEREIT as a necessary party on May 31, 2016. On June 9, 2016, AR Capital moved for partial summary judgment on the issue of defense costs. Then, in October 2016, before the Court had decided the pending motions, VEREIT moved to intervene. As a result, the Insurers' pending Motion to Dismiss was rendered moot.

On October 19, 2016, VEREIT filed a Complaint for Declaratory Relief against AR Capital.[41] In particular, VEREIT requests a determination by this Court that, to the extent both VEREIT and AR Capital are entitled to coverage for Defense Costs in connection with the Claims and/or Underlying Matters under the Policies:

> (i) AR Capital must first seek coverage under its own liability insurance program, (ii) AR Capital is only entitled to reasonable and necessary defense costs from the Defendants subject to the terms, conditions, limitations and exclusions contained in the Policies, and (iii) any remaining

[40] *Id.* ¶ 68.

[41] This mooted the Insurers' Motion to Dismiss.

> costs must be reimbursed on a first come first served basis as invoices are submitted to the Defendants, as opposed to some other scheme of priority.[42]

On November 7, 2016, VEREIT filed its opposition to AR Capital's Motion for Partial Summary Judgment and filed a Cross-Motion for Summary Judgment on the pending question of defense costs.[43] Since oral argument on the Motions, AR Capital settled with XL, the primary insurance carrier, and Beazley, the umbrella carrier which sits above the primary insurer in this matter.[44] Additionally, on February 10, 2017, AR Capital filed a First Amended Answer and Counterclaims in response to VEREIT's Complaint.[45] Unfortunately, the counterclaims filed by AR Capital have exploded the litigation beyond any reasonable common sense. As such, what should be cooperative litigation by two companies to maximize insurance coverage has turned into a fight between them (or at least their counsel), with coverage of legal fees still not provided. VEREIT moved to dismiss AR Capital's Amended Counterclaims II-VI on March 20, 2017. The Court was scheduled to hear argument on VEREIT's Motion to Dismiss on July 14, 2017; however, due to a family emergency of counsel, the hearing was postponed. The Court delayed its decision regarding the parties cross-

[42] Intervenor Pl.'s Compl. for Declaratory Relief ¶ 28.
[43] VEREIT filed its reply on December 2, 2016.
[44] *See* Tr. ID 60076556 and Tr. ID 60194205.
[45] AR Capital filed its Answer to VEREIT's Complaint and Counterclaims on November 9, 2016. VEREIT moved to dismiss AR Capital's Counterclaims on December 29, 2016. AR Capital's First Amended Counterclaims rendered VEREIT's pending Motion to Dismiss moot. *See* Court's Order dated March 16, 2017.

motions for summary judgment to hear the Motion to Dismiss. Thus, this decision resolves all pending motions.

II. DISCUSSION

There is no dispute that AR Capital's status as an "insured" depends upon its own and its directors' status as parties to the Underlying Matters. As mentioned above, there are two types of coverage applicable to this lawsuit: Side B and Side C. Side B coverage involves claims based upon Wrongful Acts by an Insured Person. Side C coverage pertains to claims alleging Company Wrongful Acts.

The parties all agree that AR Capital may be entitled to Side B coverage for claims prior to the date VEREIT became self-managed. The parties disagree, however, as to whether AR Capital is entitled to Side C coverage at all. The Court will examine whether AR Capital is entitled to Side C coverage first before examining the Insurers' duty to advance defense costs in the Underlying Actions.

A. Side C Coverage

VEREIT intervened in this lawsuit to protect its interest in the finite amount of available insurance proceeds. VEREIT's motion seeks a summary judgment ruling that AR Capital is not entitled to indemnification or defense costs, which is covered under Side C coverage for Company Wrongful Acts. In support of this position, VEREIT argues Endorsement 52 expressly limits AR Capital's coverage to Side B

coverage, which covers losses resulting from Claims of Wrongful Acts. Unsurprisingly, AR Capital rejects VEREIT's construction of the Policies and insists it is entitled to entity coverage under Side C, as well as Side B coverage.

Delaware contract law is well-settled. Clear and unambiguous policy language is read according to its plain and ordinary meaning.[46] Absent some ambiguity, Delaware courts will not disrupt or rewrite policy language under the guise of contract interpretation.[47] When the terms of an insurance contract are clear and unequivocal, the parties will remain bound by the plain meaning of the policy—as creating an ambiguity where none exists can, in effect, establish new contract rights, liabilities and duties to which the parties had not assented.[48] Further, "[u]nder general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."[49] Thus,"[c]ontractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."[50]

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[46] *See Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).
[47] *See id.*
[88] *See Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982).
[49] *Sonitrol Hldg. Co. v. Marceau Investissements,* 607 A.2d 1177, 1183 (Del. 1992).
[50] *Nama Hldgs., LLC v. World Market Center Venture, LLC,* 948 A.2d 411, 419 (Del. Ch. 2007).

It is true that contractual silence does not always make a contract unclear.[51] Delaware Courts have held that provisions not included in an agreement are not equivalent to ambiguous terms. However, the parties' course of performance "may be used to aid a court in interpretation of an ambiguous contract, [or] it may also be used to supply an omitted term when a contract is silent on an issue."[52]

Considering these contract principles, the Court finds that Endorsement 52 and the definitions set forth in the policy created an ambiguity that can be easily resolved by the conduct of the parties and their insurers. Currently as written, Side C coverage pertains exclusively to "Company Wrongful Acts," a term the Policies explicitly distinguish from the separately defined "Wrongful Acts." Endorsement 52 states that AR Capital was added as a covered entity under the definition of Company, but if the intent as argued by VEREIT was to only add AR Capital as a Company to ensure coverage of its officers and directors, the remaining and disputed portion of Endorsement 52 would not be needed and would be surplusage. Simply stating that

[51] *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (N.Y. 2004). "Silence is capable of creating a gap that requires the court to construe the terms in light of the parties' intentions. This is an expression of the broader rule that "the understanding of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Rowe v. Great Atlantic & Pac. Tea Co., Inc.*, 46 N.Y.2d 62, 69 (N.Y. 1978) (quoting 5 WILLISTON ON CONTRACTS § 1293 (rev. ed.1937)).

[52] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *16 n. 195 (Del. Ch. 2013).

AR Capital is within the definition of Company would be all that is necessary to ensure this coverage.[53]

Thus, the Court finds that the only way to logically read Endorsement 52 is to find that AR Capital is entitled to Side C coverage. In Endorsement 52, under the "Amend[ed] Definition of Company," AR Capital is included in the umbrella definition of Company.[54] The Court finds the remaining portion of the Endorsement was clearly intended to ensure that insurance coverage would only relate to the time they were acting as external managers for VEREIT. This would be critical to the insurers and at the time would be inconsequential to VEREIT. If the parties to this insurance policy wanted to exclude AR Capital from Side C coverage, distinguishing it from other "Company" entities, they could have simply stated so in the Endorsement. Even a non-lawyer with elementary comprehension of the English language could have created such an exception. To suggest the language in Endorsement 52 does so now is nothing more than a lawyer-created assertion that the Court rejects.

The intervenor, VEREIT, asks the Court to read this amendment outlining Wrongful Acts to be an exclusion. Specifically, because the amended definition of Company is silent on Company Wrongful Acts, AR Capital is not entitled to receive

[53] Pl. Ex. 1, Management Liability and Company Reimbursement Insurance Policy Declarations. Item 1, at 1. *See also* Pl. Ex. 1 Pt. 2, End't 52, at 2–3.
[54] Pl. Ex. 1 Pt. 2, End't 52, at 1.

such coverage—thus eliminating any right to Side C coverage. VEREIT suggests that the exclusion of Company Wrongful Acts from the amended definition was intentional and clearly prevents AR Capital from receiving such financial coverage.

The Court does not agree with VEREIT's interpretation and finds such a conclusion to be flawed. The absence of a phrase does not automatically suggest an exclusion,[55] especially when the Policy states that "all other terms, conditions and limitations of this Policy shall remain unchanged."[56] Thus if the parties previously intended and agreed that AR Capital would be entitled to Side C coverage, this decision would remain unchanged. Looking at the parties' intent, as the Court did in *Sonitrol*,[57] the Court finds no evidence to suggest that Endorsement 52 was drafted to prohibit AR Capital from receiving Side C coverage. In fact, the purpose of Endorsement 52 was to "cover these entities [including AR Capital] for acts prior to internalization (1/8/2014) or better yet during the time that they were involved with managing."[58] Considering the documented purpose of Endorsement 52 with the admissions and eventual payments of Side C coverage from VEREIT Excess Insurers and supported by VEREIT itself prior to the present Motions, the Court finds VEREIT's interpretation to be "a futile attempt to frustrate the meaning, purpose, and

[55] *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979).
[56] Pl. Ex. 1 Pt. 2; End't 52, at 1.
[57] *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).
[58] Pl. Ex. 2 (Email between Michael Cavallaro and Matthew Connell).

intent of the parties' agreement."[59] Additionally, the Court finds the endorsement to be simply a sloppily and poorly written statement of the true intent of the parties and their insurers.

The Court cannot reconcile why Endorsement 52 would have included AR Capital in the definition of Company and then limit coverage to only directors and officers of AR Capital and not the entity. When drafting this Policy, the parties expressly created two types of coverage and there is nothing to suggest that these policies were specifically written to provide Side C coverage only to VEREIT entities.[60]

VEREIT also argues "[e]ven assuming that the Policies provided AR Capital with Side C coverage, AR Capital would still not be entitled to coverage because it has no securities that are involved in the Underlying Matters, a requirement for Securities Claim coverage in this case."[61] VEREIT claims that AR Capital cannot prove the Underlying Matters are covered under the definition of "Securities Claim."

> "Securities Claim" is defined in Endorsement 54 as a claim for:
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> ...(1) any actual or alleged violation of any federal, state, local regulation, statute or rule (whether statutory or common law) regulating securities, including but not limited to actual or alleged violations of the foregoing in connection with the purchase or sale of, or offer to purchase or sell, securities which is:

[59] *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).
[60] Pl. Ex. 1 Pt. 2; End't 38; End't 39.
[61] Intervenor's Cross-Mot. Partial Summ. J. at 16.

> (a) brought by any person or entity based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the purchase or sale of, or offer to purchase or sell, securities of the Company; or
> (b) brought by a security holder of a Company with respect to such security holder's interest in securities of such Company; or
> (2) brought derivatively on behalf of the Company by a security holder of such Company.
>
> Notwithstanding the foregoing, the term 'Securities Claim' shall include administrative or regulatory investigations of, a Company, but only if and only during the time that such investigation is also commenced and continuously maintained against an Insured Person.[62]

VEREIT asserts that "the Underlying Matters do not relate to the purchase or sale of AR Capital securities, a security holder's interest in AR Capital securities, or a derivative claim brought on behalf of AR Capital by a security holder of AR Capital."[63] AR Capital argues that VEREIT has misinterpreted the definition, and a Securities Claim need not be specifically related to AR Capital securities, which do not exist. The Court agrees.

To trigger a Securities Claim, the matter must simply be "brought by a security holder of a Company with respect to such security holder's interest in securities of such Company," or more significantly be a federal, state or local investigation related to securities and an alleged violation of the regulation, statute or rule.[64] The

[62] End't 54 (emphasis added).
[63] Pl.'s Answering Br. in Opp'n. Intervenor's Cross-Mot. Partial Summ. J. at 24.
[64] *Id.*

allegations of the SEC investigation clearly would be encompassed under this definition. However, common sense would suggest that VEREIT's position is simply incorrect. This was a policy purchased by VEREIT which provided coverage for conduct occurring during AR Capital's management of VEREIT. As such, if there was fraudulent, misleading or perhaps illegal conduct relating to AR Capital management, the effect would be on the value of VEREIT securities and how AR Capital's conduct affected those securities.

The bottom line is that AR Capital is entitled to Side C Coverage to the extent the provisions of the Policy are met. Therefore, AR Capital is to be paid for their claims up to the same amount VEREIT has already been paid by the excess insurers. Thereafter, AR Capital and VEREIT shall be paid its defense costs as they are incurred and submitted (first in, first out). AR Capital's Motion for Partial Summary Judgment on Defense Costs is granted.

B. Duty to Advance Defense Costs

The parties also disagree as to the proper standard for determining the Insurers' obligation to pay defense costs. AR Capital maintains that an insurer must provide a complete defense so long as any of the allegations in the underlying complaint potentially fall within the coverage of the policy.[65] This determination is made, AR

[65] Pl.'s Mot. Partial Summ. J. at 16–17.

Capital contends, based on the facts alleged in the underlying complaint, as opposed to how the causes of action are labeled therein.[66]

Under Delaware law, where an insurer assumes a duty to defend, that duty is triggered if "the factual allegations in the underlying complaint potentially support a covered claim."[67] Here, however, it is clear that the Insurers disclaimed any "duty to defend." Rather, the Policies expressly obligate *the Insureds* to "defend and contest any Claim made against them,"[68] with the Insurers agreeing only to advance Defense Expenses upon written notice from the Insured "before the disposition of the Claim for which this Policy provides coverage."[69] Defense Expenses are defined as "reasonable legal fees and expenses incurred in the defense of any Claim."[70]

The Court recognizes that a number of jurisdictions, including New York, distinguish between an insurer's duty to defend and its duty to pay defense costs.[71]

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[66] *Id.*

[67] *See Virtual Bus. Enters., LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super. Ct. 2010).

[68] Primary Policy § V (A).

[69] *Id.*, End't 50.

[70] *Id.* § II (F).

[71] *See QBE Americas Inc. v. ACE Am. Ins. Co.*, 2014 WL 4250089, at *7 n.7 (Sup. Ct. N.Y. Cty. Aug. 27, 2014) (citing *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397 (N.Y. App. Div. 2005) ("The obligation to defend is readily understood and its requirement is clear.... The obligation to pay defense expenses, on the other hand, is not as easily defined or applied. Under this type of defense coverage, the insurer is entitled to differentiate between covered and non-covered claims.")). *See also In re Viking Pump, Inc.*, 2016 WL 4771312, at *25 n.163 (Del. 2016) (providing Delaware Supreme Court's belief "that, under New York law, an insurer's duty to pay defense costs and its duty to defend are separate and distinct" and that "the New York Court of Appeals, like the courts of other jurisdictions, would embrace this notion.") (citing *In re WorldCom, Inc. Sec. Litig.*, 354 F.Supp.2d 455, 464 n.11 (S.D.N.Y. 2005)).

These courts characterize the duty to defend as the broader of the two, requiring advancement of defense costs, even when only a portion of underlying litigation concerns "covered claims."[72] Where an insurer is obligated not to defend the policy holder but only to advance defense expenses, courts generally have acknowledged that the insurer is entitled to "differentiate between covered and non-covered claims."[73] Nevertheless, the Courts generally recognize that both duties arise "whenever the underlying complaint alleges facts that fall within the scope of coverage" and construe both duties "broadly in favor of the policyholder."[74]

Where defense costs are concerned, the Court must look to the allegations made in the underlying complaints in order to determine whether a given action presents a claim covered by the policy.[75] However, "[t]he Court is not bound by the narrow language in a complaint filed against an insured," nor is its examination "limited to the plaintiff's unilateral characterization of the nature of [its] claims."[76] Rather, the test is whether the allegations of the complaint, when read as a whole,

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[72] *See QBE Americas Inc.*, 2014 WL 4250089, *5–6 (citing *Kozlowski*, 792 N.Y.S.2d at 402–04).
[73] *See id. See also Kozlowski*, 792 N.Y.S.2d at 403 ("[T]he insurer is entitled to differentiate between covered and non-covered claims, despite the fact that a promise to pay defense costs has been construed to require contemporaneous payment.").
[74] *See Kozlowski*, 792 N.Y.S.2d at 401–03.
[75] *See Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974).
[76] *See Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, 2011 WL 1598575, at *2 (Del. Super. Ct. 2011) ("The Court may review the complaint as a whole, considering all reasonable inferences that may be drawn from the alleged facts."), *aff'd,* 29 A.3d 245 (Del. 2011).

assert "a risk within the coverage of the policy."[77] Once established, the insurer is obligated to pay defense costs under the policy subject to a later crawl back of any uncovered expenses.

AR Capital contends there are four categories of Underlying Actions which the Insurers must cover: (1) the VEREIT Class Action, (2) a number of opt-out actions filed throughout the country, (3) the SEC Order of Investigation, and (4) VEREIT's own internal audit. The Court must examine whether AR Capital's proffered proof ostensibly triggered the Insurers' duty to advance defense costs with respect to each category of Underlying Action.

1. The *In re ARCP Litigation* Class Action

Currently, a class action lawsuit is pending against VEREIT and AR Capital. The Class proclaims to represent "those who purchased or otherwise acquired ARCP [VEREIT] securities, including ARCP common stock, preferred stock and debt securities . . . between September 7, 2011, and October 29, 2014."[78] The Class Action

[77] *See Cont'l Cas. Co.,* 317 A.2d at 103, 105 ("We do not suggest that the plaintiff necessarily must have couched his claim in the technical verbiage peculiar to an action for defamation in order to bring it within the purview of the policy, but we are convinced that his complaint, read as a whole, does not charge any offense insured against under the terms of the policy.").

[78] Affidavit of Bryan W. Petrilla in Support of Defs.' Joint Ans. Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. on Defense Costs (hereinafter "Petrilla Aff."), Ex. G. (Second Amended Class Action Complaint for Violations of the Federal Securities Laws, ¶¶ 1, 20).

Complaint sets forth allegations against AR Capital as well as several Individual Insureds who allegedly operated AR Capital during the Class Period.[79]

The Class Action Complaint seeks to hold AR Capital and its Directors liable for violations of § 20 of the Securities and Exchange Commission Act of 1934.[80] The Class claims that the Directors controlled AR Capital and, therefore, controlled VEREIT's actions throughout the Class Period. The Class Action Complaint further alleges that "AR Capital is wholly owned by [its Directors]" and that, "[f]rom December 27, 2012, until the end of the Class Period, AR Capital owned and possessed the power to control, and did control, directly and/or indirectly, the actions of ARC Advisors, which . . . exerted day-to-day control over [VEREIT's] affairs."[81]

The crux of the Class Action ostensibly suggests AR Capital and its Directors are liable for damages caused by AR Capital's external management of VEREIT and this affected the value of their investment in ARCP securities. The Court finds it difficult to imagine a complaint that would more clearly implicate the coverage obligations of the Defendants. As discussed above, "Wrongful Act" is defined to

[79] *See id.* ¶ 27 ("Throughout the Class Period, [Edward] Weil took the actions and/or made the statements detailed herein in his capacity as an officer, member and director of . . . AR Capital[.]"); *id.* ¶ 28 ("During the Class Period, [Peter] Budko served and/or continues to serve as an officer and/or director at numerous ARCP-related entities, including: AR Capital"; *id.* ¶ 32 ("Throughout the Class Period, [William] Kahane acted and/or made the statements detailed herein in his capacity as an officer, member and/or director of . . . AR Capital[.]").
[80] *See id.* ¶¶ 121, 123.
[81] *Id.* ¶ 125.

include "any actual or alleged" "act, error, omission, misstatement, misleading statement, neglect, or breach of duty by an Insured Person acting in their role with the Company."[82] The Court finds it reasonable that, reading the Class Action Complaint as a whole, one or more of AR Capital's directors or officers committed an actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty acting in his or her role within AR Capital and the management of VEREIT. This squarely falls within the Policy's Side B coverage.[83] The Class Action also clearly makes written demand for monetary relief for violating the security laws that affected one's sale or purchase of security of VEREIT. The reasonable inference from the allegation is Side C coverage for AR Capital is also implicated. Thus, the Court finds that the Insurers would be obligated to advance defense costs to AR Capital with respect to the Class Action.

2. The Opt-Out Actions

At least eight opt-out actions have been filed against AR Capital and VEREIT.[84] Seven of them have been filed in the U.S. District Court for the Southern District of New York and include (a) *Twin Securities, Inc. et al. v. American Realty Capital Properties, Inc., et al.*; (b) *HG Vora Special Opportunities Master Fund, Ltd.*

[82] Primary Policy § I (E).
[83] *Id.* §§ I (A), (B).
[84] *See* Romagnoli Dec., Ex. 4; Petrilla Aff., Ex. J; *See also* Declaration of Natasha Romagnoli in Support of AR Capital, LLC's Reply Br. in further Supp. of its Mot. for Partial Summ. J. on Defense Costs ("Romagnoli Reply Dec."), Exs. 8–14.

v. American Realty Capital Properties, Inc., et al.; (c) *Pentwater Equity Opportunities Master Fund Ltd., et al. v. American Realty Capital Properties, Inc., et al.;* (d) *PIMCO Funds, et al. v. American Realty Capital Properties, Inc., et al.*; (e) *Black Rock ACS U.S. Equity Tracker Fund, et al. v. American Realty Capital Properties, Inc., et al.*; (f) *Clear Line Capital Partners Master Fund LLP v. American Realty Capital Properties, Inc., et al.*; and (g) *IRA FBO John Esposito v. American Realty Capital Properties, Inc., et al.* The eighth action, *Vanguard Specialty Funds, et al. v. VEREIT, Inc., et al.,* was filed in the U.S. District Court in Arizona. Since six of the eight actions listed above were filed by the same law firm, it is not surprising that the allegations relating to VEREIT and AR Capital are similar in nature for each of those matters. In essence, they all relate to the misconduct of the officers and directors of VEREIT and AR Capital, which is imputed to the corporate entities by the security violations they are alleged to have committed. In simple terms, all the Plaintiffs in these actions assert that the fraudulent statements as to the economic well-being of VEREIT led the particular plaintiffs to purchase securities and, when the fraud was uncovered, they suffered significant damages. Since AR Capital was the entity providing management services to VEREIT during the critical time period set forth in these actions, not only are the officers and directors implicated, but the corporate entity itself as it relates to various alleged violations of the security act. As

an example of the consistent pleadings, the following is set forth in the *Twin Securities*, *HG Vora*, *PIMCO* and *Pentwater* litigations:

> AR Capital possessed the power to control, and did control, directly and/or indirectly, the actions of American Realty during the Relevant Period. AR Capital is wholly owned by Schorsch, Kahane, Weil, Budko, and Block. From December 27, 2012 until the end of the Relevant Period, AR Capital owned and possessed the power to control, and did control, directly and/or indirectly, the actions of ARC Advisors, which was the external manager of American Realty and exerted day-to-day control over American Realty's affairs. The resources of AR Capital played a pivotal role in American Realty's business and growth strategies, including American Realty's numerous acquisitions. American Realty itself has acknowledged that AR Capital (as one of ARC Advisors' parent companies) have "the power to direct the activities of [ARCP] through advisory/management agreements."
>
> Defendant AR Capital exercised control directly and indirectly over the actions of American Realty in connection with its violations of Section 11 of the 1933 Act as described above. By reason of such conduct, this Defendant is liable to Plaintiffs pursuant to Section 15 of the 1933 Act.[85]

Consistent with the statements above, the litigations alleged:

In the *Clearline* Litigation:

> AR Capital and RCS Capital possessed the power to control, and did control, directly and/or indirectly,

[85] *See* Romagnoli Reply Dec., Ex. 11 at ¶¶ 60, 62.

the actions of American Realty during the Relevant Period. American Realty did not have any employees at the time of its IPO in September 2011 and continued to have no employees until sometime in 2014. Instead, American Realty was externally managed by RCS Capital, LLC until December 27, 2012 and AR Capital, LLC thereafter. RCS Capital and AR Capital managed American Realty's activities on a day-to-day basis, provided American Realty with its management team and support personnel, employed American Realty's CEO, President, CIO and other executive officers, and also supplied the compensation for American Realty's executive officers. American Realty consistently stated in SEC filings that it was "completely reliant" on RCS Capital and AR Capital, who had "the power to direct the activities of [ARCP] through advisory/management agreements." ...

According to American Realty, RCS Capital and AR Capital have "the power to direct the activities of [ARCP] through advisory/management agreements." The resources of these two companies were vital to the implementation and execution of American Realty's business and growth strategies, including the acquisition of American Realty's numerous properties. Therefore, RCS Capital possessed the power to control, and did control American Realty. The beneficial owners of RCS Capital were Schorsch and Block. After the December Reorganization, AR Capital assumed the role that RCS Capital previously held. Thereafter, AR Capital possessed the power to control, and did control, American Realty. Like RCS Capital, AR Capital was wholly-owned by Schorsch and Block.

Throughout the Relevant Period, Schorsch and Block each signed SEC filings which contained false

> and misleading information as set forth above, demonstrating that they possessed the power to control, and did control, the contents of those filings.
>
> Defendants Schorsch, Block, AR Capital and RCS Capital exercised control directly and indirectly over the actions of American Realty in connection with its violations of § 10(b) of the 1934 Act and SEC Rule 10b-5 promulgated thereunder. By reason of such conduct, these Defendants are liable pursuant to Section 20(a) of the 1934 Act.[86]

In the *Esposito* Litigation:

> Plaintiff and members of the class who held shares of ARCT IV as of November 15, 2013 allege that the defendants ARCP, Schorsch, Weil, Kahane, Michelson, Rendell, Bowman, Budko, Block, Beeson, AR Capital, Radesca, Stanley and Wenzel prepared, reviewed and/or omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading as detailed below...
>
> At all times relevant to the dissemination of the materially false and/or misleading ARCT IV Registration Statement/Proxy, ARCP, Schorsch, Weil, Kahane, Michelson, Rendell, Bowman, Budko, Block, Beeson, AR Capital, Radesca, Stanley and Wenzel had access to the true facts. Thus, as a direct and proximate result of the dissemination of the false and/or misleading ARCT IV Registration Statement/Proxy used to obtain shareholder approval of the ARCT IV Merger, plaintiff and the Class suffered damages and actual

[86] *See id.*, Ex. 12 at ¶¶ 186, 188-90.

> economic losses in an amount to be determined at trial.[87]

In the *Vanguard* Litigation:

> Plaintiffs have suffered consequence and proximate injury in that, in reliance on the integrity of the market, Plaintiffs paid artificially inflated prices for ARCP common stock. But for Defendants' repeated material misrepresentations, Plaintiffs would not have made purchases of ARCP shares at the quantities, or at the prices, at which they in fact did....
>
> The Operating Partnership, the Schorsch-Controlled Defendants, and Executive Defendants acted as controlling persons of ARCP within the meaning of Section 20(a) of the Exchange Act. By reason of their positions as officers or directors of, or their ownership interests in, ARCP and the Operating Partnership, the Operating Partnership, the Schorsch-Controlled Defendants, and the Executive Defendants had the power and authority to cause these entities to engage in the wrongful conduct complained of herein....
>
> The Operating Partnership, The Schorsch-Controlled Defendants, and the Executive Defendants each had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of ARCP, including the contents of the Registration Statements and Prospectuses for the Cole Merger.[88]

[87] *See id.*, Ex. 13 at ¶¶ 145, 153.
[88] *See id.*, Ex. 14 at ¶¶ 274, 298, 320.

Plaintiffs in these actions also make allegations against insured persons (*i.e.*, the AR Capital Directors and Officers) based upon wrongdoings allegedly committed in connection with their roles at AR Capital. As illustrative of the general claims:

> The *HG Vora* Plaintiffs allege that:
>
> > Defendant Edward M. Weil ("Weil") . . . is currently President and COO at AR Capital under the name "Michael Weil" and a beneficial owner of AR Capital. Weil was the Executive Vice President of ARC Advisors from November 2010 until at least January 2014. . . . Weil signed American Realty's 2011 and 2012 Forms 10-K; American Realty's 2012 and 2013 Shelf Registration Statements used for the July 2013 Offering, the December 2013 Offerings and the May 2014 Offering; the ARCT IV and the Cole Merger Registration Statements[.] Throughout the Relevant Period, Weil took the actions and/or made the statements detailed herein in his capacity as an officer, member and director of American Realty, AR Capital, ARC Advisors, RCAP, ARCT III, and ARCT IV.
>
> > Peter M. Budko ("Budko"), [d]uring the Relevant Period, served and/or continues to serve as an officer and/or director at numerous American Realty-related entities, including: AR Capital (CIO and Executive Vice President from December 2012 until the end of the Relevant Period and a beneficial owner of that entity); Budko signed the Registration Statements, which incorporated the false financial statements, for the ARCT IV and Cole Mergers and permitted American Realty to use his name to solicit proxies for those mergers. Throughout the Relevant Period, Budko acted and/or made the statements detailed herein in his capacity as an officer, member and/or director of American Realty, AR Capital, RCAP, ARC Advisors, ARCT III and/or ARCT IV, as well as the other American

> Realty-related entities in which he held ownership, executive and/or director positions.[89]

The consistent theme to the opt-out litigation is that the fraudulent and misleading conduct of the Officers and Directors of AR Capital during the time they managed VEREIT led to financial losses for these Plaintiffs. This conduct squarely fits within the wrongful act requirements of the policies and allegations of securities violations which would also reasonably require coverage of the entities. These findings, although time-consuming to review the voluminous opt-out filings, were not difficult to make and any reasonable review would clearly conclude that coverage for defense costs should have been provided for both Side B and C claims.

3. The SEC Order of Investigation

On November 13, 2014, the SEC issued a subpoena to AR Capital[90] demanding production of any documentation related to VEREIT's SEC filings. In particular, the subpoena mandated that AR Capital produce "[a]ll Documents concerning calculations of [VEREIT's] adjusted funds from operations for possible inclusion in [VEREIT's] quarterly reports on Form 10-Q for the first and second quarters of 2014."[91] Further, the subpoena required AR Capital to disclose information regarding

[89] *Id.*, Ex. 8 at ¶¶ 17, 18. *See also* Petrilla Aff., Ex. J. at ¶¶ 22, 23.
[90] *See* Romagnoli Dec., Ex. 5.
[91] *Id.* at § III, p. 5.

the "personnel of [VEREIT's] affiliated entities, including any entity directly or indirectly controlled by . . . William M. Kahane."[92]

AR Capital argues that its compliance with the SEC investigation constitutes a claim for which coverage is available through multiple avenues under the Policies: (1) as an investigation of a Company for a Company Wrongful Act by the SEC;[93] (2) as an investigation of an Insured Person commenced by subpoena;[94] and/or (3) as an administrative investigation of an Insured Person.[95]

Having read the multiple opt-out complaints as well as the class action litigation, it is not difficult to determine the interest of the SEC in the conduct of both AR Capital and VEREIT. The Court believes, if the allegations are true, the conduct of these companies and their Officers and Directors represents the very worst in corporate greed and deception and is the type of conduct the SEC and the Justice Department should prosecute to the fullest extent possible. The conduct would fit the definition of a securities claim as a federal investigation for violations of the securities law by misleading investors in the filing of fraudulent and misleading financial statements. It also implicates the Officers and Directors who are Insured Persons under the policy and as defined by "claim" under the policy. In spite of the

[92] *Id.* at p. 6.
[93] Primary Policy, End't 52.
[94] *Id.*, End't 33.
[95] *Id.* § II (C)(4).

Court's distaste for the outrageous conduct here, it must find that defense coverage should have been provided.

4. Internal Audit

Last, AR Capital contends VEREIT's *own* internal audit constitutes a Claim for which AR Capital is entitled to defense costs under the Policies. As the party seeking defense costs, AR Capital bears the burden of showing coverage under the Policies. At this point, however, AR Capital has failed to allege how the internal audit could be classified as a covered Claim. In toto, AR Capital's claim based on the audit provides that:

> On September 7, 2014, the Audit Committee of VEREIT's Board of Directors began an investigation with the assistance of its advisors Weil, Gotshal & Manges LLP and Ernst & Young into certain reporting irregularities. That Audit Investigation was disclosed on October 29[, 2014], when VEREIT announced certain restated financial results for the first and second quarters of 2014. Then, in March 2015, VEREIT announced additional financial restatements for certain years, including 2013, during which AR Capital had served under the VEREIT Agreements as VEREIT's Manager.[96]

These allegations fail to meet the definition of a Claim under the Policy. While the audit may have led to others filing litigation and an investigation by the SEC, these are covered in the Court's earlier decisions and do not form independent grounds for

[96] Pl.'s Am. Compl. ¶ 32.

coverage. Without a more developed record, the Court cannot determine whether coverage exists and must therefore deny summary judgment on this issue.

C. VEREIT's Motion to Dismiss

In February 2017, AR Capital filed an amended answer and counterclaims ("Amended Counterclaims") to Intervenor-Plaintiff VEREIT, Inc.'s Complaint for Declaratory Relief. In its Amended Counterclaims, AR Capital alleged six causes of action including: declaratory judgment, fraud, tortious interference, breach of the obligation of good faith and fair dealing, unjust enrichment, and negligence.[97] VEREIT has moved to dismiss AR Capital's Amended Counterclaims II-VI on March 20, 2017, and AR Capital opposed dismissal.

In considering the Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), the Court must assume the truthfulness of the Complaint's well-pleaded allegations,[98] and afford plaintiffs "the benefit of all reasonable inferences that can be drawn from [their] pleading."[99] Certain documents that are "integral to a

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[97] AR Capital First Am. Answ. and Countercls. at [hereinafter Am. Countercls.].

[98] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996). *See also VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under "Delaware's judicial system of notice pleading, a plaintiff need not plead evidence" but must "only allege facts that, if true, state a claim upon which relief can be granted").

[99] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (noting, however, that the Court is not required to blindly accept all allegations or draw all inferences in a plaintiff's favor).

plaintiff's claims…may be incorporated by reference without converting the motion to a summary judgment."[100] At this stage, dismissal will be granted only when the Court is able to determine with "reasonable certainty" that Plaintiffs would not be entitled to relief "under any set of facts that could be proven to support the claims asserted" in the Complaint.[101] VEREIT contends AR Capital has failed to plead with particularity the elements for fraud as well as the necessary elements for each of its tort-based counterclaims.[102] Even if this were not the case, VEREIT argues Counterclaims III-VI are barred by the economic loss doctrine.[103]

While the counterclaims set forth in Counts II through VI assert separate legal theories for relief, they are in reality simply five different ways for AR Capital to assert that the conduct of VEREIT prevented them from appropriately being paid under the XL and Beazley policies. Even if the basis of these claims could be established, they all would require AR Capital to show they have suffered damages as a result of VEREIT's fraud, breach, enrichment or negligence. It is in this vein the Court finds the counterclaims lacking.

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[100] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. 2014).
[101] *See id.* (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[102] VEREIT's Mot. To Dismiss at 4-5.
[103] *Id.* at 32.

To withstand a motion to dismiss their counterclaim, a plaintiff must "allege legally cognizable damages that can be attributed to the conduct of the other party.[104] "[T]he damages allegations may not simply 'rehash' the damages allegedly caused by the breach of contract."[105]

VEREIT asserts that AR Capital cannot establish that the amounts it currently seeks would exceed the remaining limits of the Policies.[106] However, AR Capital argues that in paragraph 100 of the Amended Counterclaims, it asserts cognizable damages. Specifically, it states "that had Beazley been aware [of VEREIT's misrepresentations]…Beazley would not have paid VEREIT its $10 million in limits without further investigating the dispute between AR Capital, the Individuals and VEREIT."[107] AR Capital asserts that a reasonable jury could conclude but for VEREIT's misrepresentations and concealments, AR Capital would have received payment from the Beazley policy.[108] AR Capital also asserts that a jury could

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[104] *Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *8 (Del. Super. Ct. 2011); see also *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch.), aff'd, 825 A.2d 239 (Del. 2003) (dismissing fraud claim because damages theory "amounts to speculation founded upon uncertainty").

[105] *ITW Global Investments Inc. v. American Industrial Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *5 (Del. Super. Ct. June 24, 2015).

[106] VEREIT's Mot. to Dismiss at 22.

[107] AR Capital's Br. in Opp'n to VEREIT's Mot. to Dismiss at 24.

[108] *Id.* at 25.

conclude from the misrepresentations discussed above that VEREIT wrongfully intervened to divert the Beazley policy.[109]

Even assuming AR Capital's arguments to be true, the Court finds there are no additional cognizable damages as a result of VEREIT's alleged misconduct. While the Beazley policy has been exhausted and VEREIT received payments before AR Capital, there is excess coverage available for AR Capital to remedy the alleged misconduct by VEREIT. The Court simply cannot find that there are cognizable damages when there is sufficient coverage remaining because AR Capital believes it should have been paid first. Nor can the Court grant punitive damages against VEREIT, as AR Capital suggested in the hearing, when AR Capital, based on this Court's decision, will be entitled to payment for the Kellogg Huber costs and Side C Coverage.[110]

Since the Court has ruled that AR Capital must be paid for defense billing in an amount equivalent to that previously paid to VEREIT and when that balance has occurred, the insurers are to pay subsequent claims based on a first in first out invoice process, whatever harm has occurred to AR Capital has been rendered moot by this Court's decision. This is particularly true when there is nothing to suggest there are not sufficient funds to allow the equalization to occur. In essence, AR Capital has

[109] *Id.*

[110] *See* Trial Tr. Sept. 20, 2017 22:1–23; 23:1–23.

achieved its equal status with VEREIT and to assert more is simply legal posturing in an attempt to gain victory by counsel. The intent here is to be fair and just and create an even playing field, which the Court has done by its ruling. The Court appreciates that AR Capital believes it has been treated unfairly by VEREIT and based upon arguments made before the Court, it cannot say those beliefs are totally unjustified. But the personal animosity between counsel or between the parties and the tit-for-tat litigation asserts a Hunger Games mentality that is clearly unwelcome and undermines counsels' professional credibility with the Court. AR Capital and VEREIT should be partners joined together in an attempt to obtain maximum benefits under the policies that are still in effect and stop their internal battles. As a result, the Court will dismiss AR Capital's counterclaims set forth in Counts II through VI.

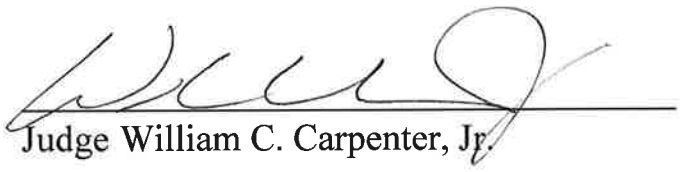
III. CONCLUSION

For the reasons discussed above, AR Capital LLC's Motion for Partial Summary Judgment on Defense Costs is **GRANTED** in Part and **DENIED** in Part, VEREIT, Inc.'s Cross-Motion for Summary Judgment is **DENIED**, and VEREIT Inc.'s Partial Motion to Dismiss AR Capital LLC's First Amended Counterclaims II - VI is **GRANTED**.

For the litigation which the Court has found there is coverage, the insurers should immediately pay the legal bills that have been submitted by AR Capital in

accordance with this Opinion. As in this Court's decision in *Verizon*, payment of these costs has been pending for years, and the insurers are obligated to advance these costs.[111] If there are claims for which coverage is subsequently determined to be inappropriate, AR Capital would be obligated to repay those expenses. However, the insurance companies obligated themselves to pay these claims up front and there is no reason now to delay payment further.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.

[111] *See Verizon Commc'ns Inc. v. Ill. Nat'l Ins. Co.*, 2018 WL 2317821, (Del. Super. Ct. May 16, 2018).