

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
HON. BARRY R. OSTRAGER, PART 61**

XEROX CORPORATION,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,

Defendant.

Index No. 653549/2019

Motion Seq. No. ____

Oral Argument Requested

**MEMORANDUM OF LAW IN SUPPORT OF XEROX CORPORATION'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Xerox Corporation filed this action after its second excess Directors & Officers (“D&O”) liability insurer, Travelers Casualty & Surety Company of America, refused to provide \$15 million in coverage for substantial losses Xerox incurred in various lawsuits arising out of its 2018 proposed merger with Fujifilm (“Proposed Transaction”). Xerox’s losses include its \$28 million settlement payment after this Court granted Darwin Deason’s motion to preliminarily enjoin the Proposed Transaction (“*Deason* Settlement”), as well as tens of millions of dollars in defense costs Xerox incurred in defending the many lawsuits arising from the Proposed Transaction (“Underlying Litigation”).

Xerox’s primary and first excess D&O insurers for the 2018-19 policy period, Federal Insurance Company (“Chubb”) and XL Specialty Insurance Company, each paid their respective \$15 million limits after the *Deason* Settlement. Travelers led Xerox to believe that it would follow these coverage determinations and pay its \$15 million limits, too. In May 2018, Travelers told Xerox it did not object to the proposed *Deason* Settlement. While Travelers reserved rights under its 2018-19 policy (“Policy”) as to the reasonableness of the settlement, it identified no other potential coverage defense. Six weeks later, Travelers issued another reassuring letter that summarized the allegations of each of the Underlying Litigation pleadings without identifying any coverage issues raised by those allegations. Instead, the letter merely recited non-specific “we continue to reserve rights” closure language that is boilerplate in any insurance company letter.

Meanwhile, as Xerox would learn during discovery, by late April 2018 Travelers was, unbeknownst to Xerox, considering the Prior Acts Exclusion as a possible basis for denying coverage. The Prior Acts Exclusion bars coverage for “Loss on account of any Claim or Related Claims based upon, arising from, or in consequence of any fact, circumstance or Wrongful Act committed, attempted, or allegedly committed or attempted in whole or in part prior to January 1,

2017.” Travelers did not tell Xerox in its contemporaneous communications it was investigating a Prior Acts Exclusion defense, or that its own Managing Director, Anne Ottaviano, concluded that the defense was “weak.” Ottaviano’s honest assessment of the defense is hardly surprising given that Deason repeatedly testified in 2018 that he filed the litigation to enjoin the Proposed Transaction, which he alleged resulted from breaches of fiduciary duty in 2017 and 2018 by then-CEO Jeff Jacobson and certain Xerox directors. As this Court explained when granting Deason’s request for injunctive relief, “[t]he lynchpin of” the Court’s decision to preliminarily enjoin the Proposed Transaction was based on the director defendants “act[ing] in bad faith in structuring and negotiating the *proposed transaction*,” which indisputably occurred in 2017 and 2018. In particular, the Court noted that its decision “turn[ed] on the conduct of Xerox CEO Jeff Jacobson in the time frame preceding the Board’s approval of [the Proposed Transaction] . . . and the Board’s acquiescence in Jacobson’s conduct.” Thus, Ottaviano assessed Travelers’ exposure under the Policy at “100%” of its “\$15 million excess \$30 million limit,” leading Travelers Vice President and Public Company Business Unit leader Bryan Kocon to remark, “Very disappointing. *A spoiled merger costing us \$15 million excess 30, unheard of*,” and Vice President of Claims Jay Karp to reply, “*I think we agree but the defense and negotiations drove it there.*”

Against this backdrop, Travelers’ eleventh-hour decision to deny coverage a year later — only after Xerox declined to renew D&O coverage with Travelers for 2019 — came as a complete surprise. And Travelers now asks the Court to find that in *paying their \$15 million limits* Chubb and XL got it wrong. Instead, Travelers asserts that Deason filed his lawsuits not to enjoin the Proposed Transaction and to pursue claims against the Board for their role in approving it, but because of alleged concealments by Xerox before the January 1, 2017 Prior Acts Date of the so-called “crown jewel lock-up right” in the Xerox/Fuji joint venture agreements. This false narrative

contradicts the record in the Underlying Litigation, repeated admissions in Travelers' claims file that the litigation arose from the Proposed Transaction, and the testimony of Travelers' own proposed claim handling expert — a thirty-year veteran at Chubb — who definitively stated that “the reason for this [*Deason*] litigation was the proposed transaction.” As Travelers itself has argued, New York courts apply a “but for” test when construing “based upon or arising from” exclusions like the Prior Acts Exclusion — i.e., that no cause of action would exist “but for” the excluded conduct — and the “crown jewel” lock-up rights were not the “but for” cause of the Underlying Litigation. Deason has explained why he filed the *Deason* Litigation: to hold “*these directors*” accountable for setting up “a job for [Jeff] Jacobson” and “for some of [themselves]” while negotiating the Proposed Transaction on behalf of all Xerox shareholders. The Underlying Litigation arose from Wrongful Acts in the negotiation and structuring of the Proposed Transaction.

Alternatively, if the Court declines to grant summary judgment on the Prior Acts Exclusion, it should hold that Xerox gave sufficient notice to Travelers of the Underlying Litigation under a separate Run-Off Policy that covers claims based on Wrongful Acts *before* January 1, 2017 — just as Travelers argues here. Thus, the baseless nature of Travelers' belated coverage denial is even more evident given Travelers provided Xerox with “continuity of coverage” — meaning that the Wrongful Acts alleged in the Underlying Litigation must be covered by one of the two Travelers' policies. As recognized D&O insurance expert Ty Sagalow testified, if Travelers' shameless position that Xerox's claim “does not fall either on the runoff or on the ongoing” policy is really “their view, and the brokers' community knew that was their view, nobody would buy D&O insurance from Travelers again.” Faced with the reality that there must be coverage under either the Policy or Run-Off Policy, Travelers tries to dodge coverage by making the dubious argument

that Xerox's 2018 notice letters did not place Travelers on notice under the Run-Off Policy. However, Xerox's notice letters requested coverage for the Underlying Litigation under "any and all applicable policies" issued by Travelers and constitute sufficient notice under the policies and New York law.

Finally, the Court should dismiss Travelers' remaining affirmative defenses to coverage. Travelers adopted a kitchen-sink approach and submitted no evidence creating triable issues of fact on random defenses like "laches" and "unclean hands." Remarkably, even though Travelers' witnesses admitted that Travelers cannot support this laundry list of defenses, it has refused to withdraw them. Indeed, Travelers' recent letter to Xerox addressing these defenses smacks of bad faith, and Travelers even admits that "[a] jury will hear Travelers' defenses to Xerox's bad faith allegations." The Court should dispose of Travelers' kitchen-sink defenses to coverage and set this case for trial.

STATEMENT OF FACTS

A. The Proposed Transaction and Underlying Litigation

Xerox's and Fujifilm's joint venture ("Fuji Xerox") was governed by a set of agreements containing a change-in-control provision. In March 2017, Xerox's former CEO Jeff Jacobson began communications with Fujifilm about the Proposed Transaction. *See* Xerox's Statement of Uncontested Material Facts dated August 31, 2022 ("SUMF") ¶¶ 5-8. Negotiations halted temporarily in April when Fujifilm announced an investigation into inappropriate accounting practices of Fuji Xerox's New Zealand subsidiary. *Id.* ¶ 9. Two of Xerox's largest shareholders — Carl Icahn and Deason — wanted Xerox to terminate the joint venture because of the accounting improprieties, but Xerox's Board did not pursue termination. *See* Affirmation of Aleksandra Kaplun dated August 31, 2022 ("Kaplun Aff."), Exs. 27.

In June 2017, Fujifilm informed Jacobson it was still interested in a transaction. SUMF ¶ 16. In July 2017, the parties discussed an alternative transaction structure that differed from Xerox’s desired sale of 100% of Xerox in an all-cash transaction. *Id.* ¶ 17. During a May 2017 meeting, Icahn — then Xerox’s largest shareholder — expressed regret in his Xerox investment and threatened to have Jacobson fired. *Id.* ¶¶ 12-14. Over the next few months, the Xerox Board considered replacing Jacobson and formed a search committee for new CEO candidates. *Id.* ¶¶ 20-21. Threatened with the prospect of losing his job, Jacobson attended a secret meeting in October 2017 that led to Fujifilm’s ultimate no-cash offer to Xerox in November 2017. *Id.* ¶ 22.

While Xerox was considering Fujifilm’s offer, the December 11, 2017 deadline passed for Xerox shareholders to nominate a new slate of directors for the 2018 annual meeting. Icahn nominated four potential directors, but Deason did not nominate any before the deadline. *Id.* ¶ 28. On January 30, 2018, the Xerox Board held a final meeting about the Proposed Transaction, which called for Fujifilm owning a 50.1% share of Xerox and paying a \$2.5 billion dividend to Xerox shareholders. *Id.* ¶ 30. The Xerox Board unanimously approved the Proposed Transaction. *Id.* ¶ 31. The next day, Xerox publicly disclosed the Proposed Transaction and the complete terms of the JV Agreements, including the change-in-control (or “crown jewel” lock-up) provisions. *See id.* ¶ 32; Kaplun Aff., Ex. 21.

Following the announcement of the Proposed Transaction, on February 12, 2018, Icahn and Deason wrote Xerox shareholders, criticizing the Proposed Transaction and urging shareholders to “vote against the Fuji scheme to send a clear message that we will not be fooled into giving up control of our company.” SUMF ¶ 33. The next day Deason filed “*Deason I*” against Xerox, its directors who had approved the Proposed Transaction (“Director Defendants”), and Xerox’s former CEO Ursula Burns, “bring[ing] th[e] action to enjoin a change of control

transaction” “whereby Fuji will acquire majority ownership and control of Xerox, a venerable American icon, for virtually nothing.” SUMF ¶ 34; Kaplun Aff., Ex. 31. On March 2, 2018, Deason filed “*Deason II*” (together with *Deason I*, the “*Deason* Litigation”) against Xerox and the directors seeking “to immediately enjoin Defendants from enforcing [Xerox’s] advance notice bylaw deadline for the nomination of directors.” SUMF ¶ 37. Also, in February 2018, four separate Xerox shareholders filed putative class actions (“Shareholder Class Actions”) seeking to enjoin the Proposed Transaction. *Id.* ¶ 41.

Shortly after this Court preliminarily enjoined the Proposed Transaction on April 27, 2018 (“PI Order”), *see* Kaplun Aff., Ex. 17, Xerox received an initial settlement proposal from Deason and Icahn over the weekend of April 27-29, 2018. *Id.* ¶ 56. Xerox entered a final settlement with Deason and Icahn on May 13, 2018, agreeing to pay \$28,451,926 to resolve the *Deason* Litigation and dissolving the preliminary injunction. *Id.* ¶¶ 62, 66. Xerox has incurred more than \$60 million in covered Loss from the Underlying Litigation, including substantial Defense Costs. Kaplun Aff., Ex. 2, Am. Compl. ¶ 2.

B. The Policies

Travelers issued an excess “follow form” D&O policy for the January 1, 2018 to January 1, 2019 policy period that follows the terms and conditions of an underlying primary policy issued by Chubb. SUMF ¶ 84. The Policy requires Travelers to reimburse Xerox for Loss exceeding the \$30 million provided by the underlying D&O policies. *Id.* ¶ 85.

Travelers also issued a six-year run-off D&O policy to Xerox on January 1, 2017 when Xerox completed a separation of Conduent Incorporated from Xerox (“Spinoff”), which split Xerox and Conduent into separate, publicly traded companies. *Id.* ¶¶ 71, 75. Before the Spinoff, Xerox’s D&O program covered Xerox and Conduent. *Id.* ¶ 72.

In Xerox's pre-Spinoff D&O program, Chubb issued a \$15 million primary policy ("Chubb 2016-17 Policy"), XL issued a \$15 million first excess policy, and Travelers issued a \$15 million-second excess policy (collectively, with the other 2016-17 excess insurance policies, the "2016-17 Policies"). *Id.* ¶¶ 73-74. In connection with the Spinoff, Xerox placed the 2016-17 Policies into run-off effective January 1, 2017 ("Run-Off Policies"). *Id.* ¶ 75. The Run-Off Policies cover Claims made between January 1, 2017 and January 1, 2023, that allege Wrongful Acts that occurred *before* January 1, 2017. *Id.* ¶ 76.

C. The Insurers Provide Coverage for the Underlying Litigation

Xerox notified its insurers, including Travelers, of the *Deason* Litigation in February 2018 under "any and all applicable [Travelers] policies whether or not cited." SUMF ¶¶ 99-100. Xerox timely noticed subsequent underlying lawsuits the same way. *See* Kaplun Aff., Exs. 32, 56. All the insurers who received these notices had issued Xerox both run-off D&O policies and D&O policies for the 2018-19 policy period, all with the same limits. *See* SUMF ¶¶ 73, 80-81. Chubb issued a coverage position on April 30, 2018, agreeing to reimburse Xerox for defense costs and describing the *Deason* Litigation: "*Deason I* is brought against Xerox, the board of directors of Xerox, the former CEO of Xerox and Fuji *arising out of the announced merger setting forth allegations of breach of fiduciary duties against the Xerox board of directors . . . Deason II . . . is only brought against the Xerox board of directors alleging breach of fiduciary duty and seeking a preliminary injunction to enforce the advance notice bylaw deadline.*" Kaplun Aff., Ex. 62 at TRAVELERS0007837-7838 (emphases added). Even as late as December 4, 2018, Travelers agreed with Chubb's assessment of the nature of *Deason I*, noting in a claim note that "[t]his *breach of fiduciary duty case involved an attempt to stop the Fuji transaction as being unfair to shareholders*" and acknowledging the "court preliminar[il]y enjoined the Fuji transaction in an order dated April 27, 2018. Kaplun Aff., Ex. 30 at TRAVELERS0001872 (emphasis added).

Xerox provided its D&O insurers frequent updates on the Underlying Litigation and *Deason* settlement negotiations. *See* SUMF ¶¶ 113-115, 118-123. As to the final *Deason* Settlement, each of the D&O insurers (including Travelers) expressly waived the settlement consent requirement in their policies, without asserting any coverage exclusions to the Underlying Litigation. *See* Kaplun Aff., Exs. 68-69. By June 2018 (Chubb) and July 2018 (XL), Chubb and XL committed their respective \$15 million policy limits to Xerox. *See* SUMF ¶¶ 116, 210.

D. Travelers Denies Coverage

Travelers refused to follow the underlying insurers and pay its \$15 million limit to Xerox. *Id.* ¶ 215. Travelers' lead D&O claims handler, Rosalie Koenig, testified she has only seen "Travelers disagree[] with the primary insurer's coverage determination" "once or twice" during her almost twenty years at Travelers. *Id.* ¶ 216.

Discovery revealed that Travelers unsuccessfully tried to persuade other insurers to deny coverage based on the Prior Acts Exclusion, even though Travelers had concluded the defense was "weak," *id.* ¶ 146, and its claims files repeatedly stated the Underlying Litigation arose from the Proposed Transaction and alleged breaches of fiduciary duty, *id.* ¶ 156. Despite Travelers' efforts, none of Xerox's other insurers asserted the Prior Acts Exclusion, or any other coverage defense. *See id.* ¶¶ 134, 211.

Travelers sent several coverage communications to Xerox in 2018, but none referenced the Prior Acts Exclusion. *See id.* ¶¶ 108, 141, 153, 161. Because the underlying layers were exhausted, Xerox submitted over \$15 million in invoices to Travelers for reimbursement in late 2018. *Id.* ¶ 194. Travelers led Xerox to believe it was reviewing these invoices for reimbursement, and its internal communications show Travelers knew the underlying policies were exhausted. *See, e.g., id.* ¶¶ 136, 126, 154, 185. For example, on November 20, 2018, Ottaviano explained to Travelers senior management responsible for the D&O liability unit and loss reserves: "We are

\$15,000,000 excess of \$30,000,000 on this PCL D&O claim which involves several litigations arising out of the sale of Xerox to Fuji[film]. The primary carrier has paid its limit and the first excess has agreed to pay its limit in the near future. *Sometime early next year we will probably have to put up our limit for the defense and settlement of the multiple claims under this policy.*” Kaplun Aff., Ex. 82 (emphasis added). Before preparing a large loss memorandum (“LLM”) to set an indemnity reserve for Xerox’s claim, Walker wanted Travelers to complete an analysis of the invoices so Travelers could review whether the invoices were all for covered loss. SUMF ¶ 178. Travelers prepared a proposed LLM recommending an increase in the indemnity and expense reserves in light of the *Deason* Settlement and over \$17 million in defense invoices incurred. *Id.* ¶ 180.

The first time Travelers mentioned the Prior Acts Exclusion to Xerox was in its January 16, 2019 letter. *Id.* ¶¶ 202-206. There, Travelers relied on allegations in the initial *Deason I* complaint, which Travelers received almost one year earlier in February 2018. *Id.* ¶¶ 206-208.

Despite arguing that coverage is barred because the Underlying Litigation arises from pre-2017 Wrongful Acts, Travelers did not evaluate coverage for Xerox’s claim under the Run-Off Policy, which does not contain any form of a Prior Acts Exclusion. *Id.* ¶ 214. Even though Xerox has continuity of coverage from Travelers, Travelers has not accepted coverage for the Underlying Litigation under the Policy or its Run-Off Policy. *See id.* ¶¶ 79, 215.

STANDARD OF REVIEW

Summary judgment is proper under CPLR 3212 when no material issues of fact exist and the undisputed facts show the movant is entitled to judgment as a matter of law. *See Long Island R.R. v. Northville*, 41 N.Y.2d 455, 461 (1977). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must prove by admissible evidence the existence of a triable issue of fact, or the motion will be granted. *Zuckerman v. City*

of *N.Y.*, 49 N.Y.2d 557, 560 (1980). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” *Id.* at 562.

STANDARD FOR INTERPRETING INSURANCE POLICIES

Insurance policies “‘must be interpreted according to common speech and consistent with the reasonable expectation of the average insured’ . . . with any ambiguities construed against the insurer and in favor of the insured.” *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 561 (2021), *reargument denied*, 37 N.Y.3d 1228 (2022) (quoting *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708 (2012)); *see also Atl. Cement Co. v. Fid. & Cas. Co. of New York*, 91 A.D.2d 412, 418 (1st Dep’t 1983), *aff’d*, 63 N.Y.2d 798 (1984) (stating courts should construe insurance policies “according to the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract.”).

The “law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds.” *Pioneer Tower Owners Ass’n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 306 (2009). Whenever an insurer wishes to exclude coverage, it must do so in “clear and unmistakable language.” *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984). Exclusions must “be accorded a strict and narrow construction.” *Id.* “It is fundamental that ambiguities in an insurance policy must be construed against the insurer” — “particularly so as to ambiguities found in an exclusionary clause.” *Atl. Cement*, 91 A.D.2d at 419 (1st Dep’t 1983) (quoting *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361 (1974)).

Travelers bears a heavy burden of proving that the Prior Acts Exclusion applies. *J.P. Morgan*, 37 N.Y.3d at 562 (citing *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218 (2002)). “[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden . . . of establishing that the exclusions . . . apply in the particular case, and that they are

subject to no other reasonable interpretation.” *J.P. Morgan*, 37 N.Y.3d at 562 (quoting *Seaboard*, 64 N.Y.2d at 311).

ARGUMENT

I. THE PRIOR ACTS EXCLUSION DOES NOT APPLY.

Nearly one year after receiving the *Deason I* complaint, and internally assessing its coverage liability at “100%,” Travelers belatedly asserted the Prior Acts Exclusion, *see* SUMF ¶¶ 99, 154, 202, which states:

[I]t is agreed that no coverage will be available under this Policy for Loss on account of any Claim or Related Claims based upon, arising from, or in consequence of any fact, circumstance or Wrongful Act committed, attempted, or allegedly committed or attempted in whole or in part prior to January 1, 2017.

Kaplun Aff., Ex. 48, Primary Policy, Endorsement 4 (TRAVELERS0012685). Travelers’ failure to raise this defense earlier, Chubb’s and XL’s commitment of their \$30 million limits without raising any coverage defenses, and Travelers’ actions suggesting it would do the same made Travelers’ denial a complete surprise. Further, the timing of Travelers’ denial has jeopardized Xerox’s millions of dollars in other excess coverage for this Claim.

Even Travelers’ internal pre-denial communications confirmed Travelers: (1) knew its Prior Acts defense was “weak”; (2) intended — like Chubb and XL — to provide coverage for Xerox’s Claim; and (3) was reviewing Xerox’s defense invoices for reimbursement as Xerox requested. *See* SUMF ¶¶ 146, 136, 126, 154, 178, 18. However, after Xerox declined to renew D&O coverage with Travelers in 2019, Travelers did an about-face, asserting the Prior Acts Exclusion barred coverage because Deason’s lawsuits allegedly arose from Xerox’s alleged concealment *before* 2017 of the “crown jewel” lock-up provisions in the JV Agreements. *See id.* ¶¶ 191, 202.

To support this argument, Travelers cherry-picks allegations in the *Deason* Complaints, while ignoring others, and also ignoring Deason’s own sworn testimony that *he* filed the lawsuits to enjoin the Proposed Transaction and pursue the Director Defendants for alleged breaches of fiduciary duty. Travelers also ignores other relevant information, including: Chubb’s and XL’s failure to raise the defense and payment of their \$30 million limits; Deason’s selection of the directors he did and did *not* name as defendants; the claims in the lawsuits; this Court’s PI Order; and the *Deason* Settlement entered immediately after the PI Order. These uncontested facts prove that Travelers’ belated assertion of the Prior Acts Exclusion is meritless. While it may be true that the *Deason* Complaints accurately allege that the pre-2017 JV Agreements contained certain “crown jewel” lock-up rights, that does not mean the *Deason* Complaints *arose from* those allegations. Nor has Travelers identified any actionable Wrongful Acts alleged in the *Deason* Litigation that occurred before 2017. To the contrary, the *Deason* Litigation arose from alleged breaches of fiduciary duty committed by Jacobson and the Director Defendants in negotiating and structuring the Proposed Transaction in 2017-18 — acts which were the “lynchpin” of the PI Order. PI Order at 5.

Against this overwhelming evidence, Travelers cannot meet its heavy burden of proving the Prior Acts Exclusion applies, because it cannot prove the “but for” cause of the *Deason* Litigation was pre-2017 conduct relating to the “crown jewel” lock-up provision. Conversely, Deason repeatedly testified about why *he* brought suit. His stated goals were to (1) enjoin the Proposed Transaction, (2) replace Xerox’s directors with his own slate, and (3) obtain a finding that the Director Defendants breached their fiduciary duties to the Xerox shareholders in negotiating and structuring the Proposed Transaction.

But even if the *Deason* Litigation did arise, at least in part, from pre-2017 alleged Wrongful Acts, none of the “Loss” Xerox seeks to recover was “on account of a Claim” that arose from pre-2017 alleged Wrongful Acts. All the Loss Xerox incurred reasonably relates to defending and resolving the suits and causes of action tied to the Proposed Transaction — conduct that occurred exclusively *after* the Prior Acts Date — as evidenced by the unrefuted testimony of individuals involved in defending and settling the *Deason* Litigation.¹ So even if there were some evidence that part of Xerox’s Claim arises from pre-2017 Wrongful Acts (there is not), it is factually impossible to allocate Loss between the overwhelming number of covered Wrongful Acts occurring in 2017 and 2018 and any alleged uncovered pre-2017 Wrongful Acts. Accordingly, Travelers must cover Xerox’s Loss in full.

A. The *Deason* Complaints Did Not Arise From pre-2017 Alleged Wrongful Acts.

1. The Prior Acts Exclusion Requires Applying a “But For” Causal Relationship Test.

When used in an insurance policy *exclusion*, the words “arising from” and “based upon” are synonymous and unambiguously require a “but for” causal relationship. *Mt. Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 88 N.Y.2d 347, 350-352 (1996). Indeed, Travelers has embraced this as an accurate statement of New York law: that the “but for” test is the appropriate standard for construing similar “based upon” and “arising out of” prefatory language in policy exclusions. *See, e.g.,* Kaplun Aff., Ex. 100 at 9-13 (arguing that “New York Courts Construe the ‘Arising Out Of’ Language In Policy Exclusions Under A ‘But For’ Test”).

¹ *See* Kaplun Aff., Ex. 12, Cohen Dep. 37:18-38:1, 46:17-50:22, 58:3-61:4 (discussing Xerox’s considerations in approving *Deason* Settlement, the terms of the *Deason* Settlement which almost entirely concerned the Proposed Transaction, the proxy fight and Jacobson’s fiduciary breaches); 111:4-112:16 (discussing how the *Deason* Settlement payments and fees related to settling the fiduciary breach claims); Affidavit of Louis Pastor sworn to on August 30, 2022 (“Pastor Aff.”), ¶ 12.

“But for” causation is “[t]he cause without which the event could not have occurred.” *Burlington Ins. Co. v. NYC Transit Auth.*, 29 N.Y.3d 313, 321 (2017) (citations omitted). Thus, “whether a given claim ‘arises out of’ or is ‘based upon’ excluded conduct in a policy exclusion . . . turns on whether the claim could succeed but for the excluded conduct.” *Beazley Ins. Co., Inc. v. ACE Am. Ins. Co., et al.*, 197 F. Supp. 3d 616, 627-28 (S.D.N.Y. 2016), *aff’d sub nom.*, 880 F.3d 64 (2d Cir. 2018) (citing *Mt. Vernon*, 88 N.Y.2d at 350); *see also Country-Wide Ins. Co. v. Excelsior Ins. Co.*, 147 A.D.3d 407, 409 (1st Dep’t 2017) (recognizing that New York “adopted a ‘but for’ test” for determining “the applicability of an ‘arising out of’ exclusion”); *McGraw-Hill Educ., Inc. v. Ill. Nat’l Ins. Co.*, 178 A.D.3d 532, 532 (1st Dep’t 2019) (applying “but for” test in determining that policy exclusion for “claims arising out of a contract” did not apply). In other words, “but for” exclusions apply only “if no cause of action would exist but for the [excluded conduct].” *Mt. Vernon*, 88 N.Y.2d at 350.

Importantly, under the “but for” test, “it is the act giving rise to liability that is determinative, not the theories of liability alleged.” *U.S. Fire Ins. Co. v. N.Y. Marine & Gen. Ins. Co.*, 268 A.D.2d 19, 23 (1st Dep’t 2000). Thus, a “but for” exclusion does not apply to any cause of action that could exist without the alleged excluded conduct. *See Great Am. Ins. Co. v. Houlihan Lawrence, Inc.*, 449 F. Supp. 3d 354, 370–71 (S.D.N.Y. 2020) (holding exclusion for “any Claim . . . based on or arising out of . . . any disputes involving an Insured’s fees, commissions[,] or charges” did not apply to cause of action that “could exist even without the allegation that [underlying] Plaintiffs paid improper commissions to [underlying] Defendant”).

Xerox is entitled to “a strict and narrow construction” of the Prior Acts Exclusion. *Pioneer*, 12 N.Y.3d at 307 (quoting *Seaboard*, 64 N.Y.2d at 311). Thus, Travelers cannot prove the Prior Acts Exclusion applies merely by pointing to *factual* allegations in the *Deason* Complaints about

the “crown jewel” lock-up rights. Rather, Travelers must prove that the *Deason* Litigation “*could not have occurred*” without the pre-2017 fact allegations of the “crown jewel” lock up provisions, *see Burlington Ins.*, 29 N.Y.3d at 321 (emphasis added) — which Travelers cannot do.

2. The “But For” Cause of *Deason I* Was the 2018 Proposed Transaction.

Deason I would not exist “but for” Wrongful Acts that occurred *after* January 1, 2017. Further, *Deason I* could have been filed without allegations of pre-2017 conduct. So, the exclusion cannot apply. *See Great Am. Ins. Co.*, 449 F. Supp. 3d at 370-71.

It is undisputed the Director Defendants’ consideration and approval of the Proposed Transaction and its subsequent public announcement all occurred *after* January 1, 2017. While Travelers now argues *Deason* would not have filed his litigation but for the pre-2017 “crown jewel” lock-up rights, the very first sentence of the *Deason I* Complaint states that the purpose of the litigation was “to enjoin a change of control transaction . . . whereby Fuji will acquire majority ownership and control of Xerox,” i.e., the Proposed Transaction. *Deason I* Compl. ¶ 1. Indeed, the day before filing *Deason I*, Deason and Icahn publicly criticized the Proposed Transaction and pleaded with their “fellow shareholders” to “[v]ote against the Fuji scheme to send a clear message that we will not be fooled into giving up control of our company for \$9.80 in cash.” SUMF ¶ 33. Deason filed *Deason I* and simultaneously moved to enjoin the Proposed Transaction. He testified that he filed *Deason I* “to enjoin the transaction” and “to stop the shareholders from voting.” Kaplun Aff., Ex. 16, PI Hearing Tr. 425:23-426:7. Everyone — Xerox and its insurers — understood that halting the Proposed Transaction was the remedy Deason sought and achieved.

Furthermore, as one of Travelers’ proposed experts conceded, “the best source of anything about” why Deason filed the *Deason* Litigation is (not surprisingly) Deason himself. Kaplun Aff., Ex. 14, Kendall Dep. 153:11-18. Deason testified in the *Deason* Litigation:

“[T]he directors are the ones that I am really, really upset about, because they had the opportunity to do something about this. . . . And the shareholders, before they vote on this transaction, if there is to be a transaction to be voted on, they need to know what has gone on, they need to know what these directors did, they need to know how self-serving Jacobson has been, how self-serving some of these directors have been, in my opinion, then they can decide.”

Kaplun Aff., Ex. 18, Deason Dep. 122:10-125:15 (emphases added). Deason added that he “started thinking about and then filed this lawsuit” because the Director Defendants breached their fiduciary duties when they negotiated a transaction that set up “a job for Mr. Jacobson” and a “job for some of [themselves]”; *“that’s why this lawsuit is here.”* *Id.* at 119:3-13 (emphasis added). These alleged Wrongful Acts occurred after January 1, 2017.

Deason’s choice of whom to sue in *Deason I* — “these directors” whom he believed “screwed [him] and “should pay,” *id.* at 132:16-17 — further underscores when the Wrongful Acts that motivated his lawsuit occurred. Besides Xerox, he named (1) the Xerox directors at the time the Board approved the Proposed Transaction in January 2018 (i.e., the Director Defendants) (2) plus one former director (also former CEO), Ursula Burns, based on her signing Xerox’s 10-K on February 27, 2017. *See* Kaplun Aff., Ex. 33, *Deason I* Am. Compl. ¶¶ 50, 283; Ex. 104. Deason did not sue any Xerox directors who had left the Board before February 27, 2017. Several Director Defendants, including Jacobson, did not even join the Xerox Board until 2017, so they could not have committed any breaches of fiduciary duty or fraud prior to January 1, 2017. *See Deason I* Am. Compl. ¶¶ 16-18, 21; Kendall Dep. 123:19-124:10 (Travelers’ expert admitting it is “legally impossible” for an individual to have fiduciary liability before joining the Board).

More importantly, *it is undisputed that Fujifilm did not approach Xerox about what would become the Proposed Transaction until March 2017.* *See* SUMF ¶¶ 5-6; Kendall Dep. 156:3-8 (concurring no structuring or negotiating of the Proposed Transaction occurred before March 2017). And after taking extensive discovery on the negotiation of the Proposed Transaction, the

Deason I Amended Complaint declared that discovery had “uncovered a day-by-day picture of additional alarming and unlawful behavior by the Director Defendants from the inception of the negotiation process in March 2017 through the announcement of the Transaction on January 31, 2018.” *Deason I* Am. Compl. ¶ 3. Then, “[i]n July 2017, the Xerox Board unanimously determined that Jacobson was not the right leader for Xerox and initiated a search for his replacement” following which “the beleaguered CEO abandoned a value-maximizing all cash transaction with Fuji and threw a ‘Hail Mary’ by proposing to Fuji the current deal.” *Id.* ¶ 7. These facts explain why even Travelers’ proposed expert volunteered that “[t]he genesis of” and “reason for” the Underlying Litigation was “the transaction.” *Kaplun Aff.*, Ex. 13, Carson Dep. 174:24-175:4.

Indeed, even *after* Travelers denied coverage in January 2019, it internally maintained a “75% or greater certainty assessment” for coverage, because it recognized the Underlying Litigation was “for breach of fiduciary duty regarding proposed merger between Xerox and Fuji” — in these assessments there are *no* references to the alleged pre-2017 “crown jewel” lock-up rights or concealment. SUMF ¶ 197; *Kaplun Aff.*, Ex. 73. Further, the Director Defendants did not even know about the alleged accounting issues that formed the potential basis to terminate the JV Agreements until April 2017. SUMF ¶ 9.

Travelers’ current focus on a handful of the untethered statements in the *Deason I* Complaint about years of failing to disclose the “crown jewel” lock up provisions is also unavailing. Deason tied his concealment allegations to post-January 1, 2017 conduct by Xerox and the Board in “mak[ing] the conscious decision not to disclose” the “crown jewel” lock-up provisions “*during the negotiation of the [Proposed] Transaction and prior to the announcement of the [Proposed] Transaction*” and “strategiz[ing], prior to the announcement of the [Proposed]

Transaction, how best to avoid disclosure of” these provisions. *Deason I* Am. Compl. ¶ 35 (emphasis added). His “crown jewel” lock-up argument focused on the non-disclosures during the negotiation of the Proposed Transaction, all of which occurred in 2017 or later. For example, he argued the “Director Defendants clearly knew that the lock-up negatively impacted Xerox’s ability to undergo a deal with anyone but Fuji” but “failed to reveal this material fact to Xerox shareholder at that time and in Xerox’s upcoming proxy filings *for the 2018 annual shareholder meetings*” and also “strategized how best to avoid disclosure of the ‘crown jewel’ lock-up terms . . . *prior to the announcement of the [Proposed] Transaction.*” Kaplun Aff., Ex. 101 at 35-36 (emphases added). Therefore, *Deason I* could have existed with no alleged pre-2017 conduct. Accordingly, all the relevant “act[s] giving rise to liability” in *Deason I* occurred after January 1, 2017, and there is no alleged pre-2017 conduct “without which . . . [*Deason I*] could not have occurred.” *U.S. Fire Ins.*, 268 A.D.2d at 23; *Burlington Ins.*, 29 N.Y.3d at 321.

3. *Deason II* Does Not Meet the “But For” Test Either.

Likewise, *Deason II* depends solely on post-January 1, 2017 conduct, without which there would be no suit. *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 623, n.15 (2d Cir. 2001). At the time of the PI Hearing and the *Deason* Settlement, Xerox was not even a party to that action. See Kaplun Aff., Ex. 34, *Deason II* Am. Compl., n. 1. *Deason II* focused on the Xerox Board’s March 1, 2018 rejection of Deason’s February 26, 2018 request to waive the December 11, 2017 advance notice deadline to nominate a new slate of directors for consideration at the 2018 Annual Meeting, which Deason claimed he was entitled to because of “the numerous highly material and radical changes in circumstances *since* December 11, 2017,” namely, the Board’s approval of the Proposed Transaction, and the January 31, 2018 announcement and disclosure of the entire content of the JV Agreements. *Id.* ¶¶ 3-4, 55-56.

Thus, the only “but for” cause of *Deason II* was the Board’s March 1, 2018 refusal to allow Deason to submit director nominations after the advance notice deadline. Had the Board granted his request in 2018, there would have been no basis for *Deason II*, as Deason testified:

And that’s why I’m suing to get a new slate of directors. These directors have failed. They have failed enormously in doing their job, as I understand what the job of directors are of a public company. And I would suggest you can go to any set of experts in this arena and you’ll find that out.

Deason Dep. 133:4-33:10 (emphases added). He also explained:

It’s a major thing to file a suit. We asked, of course, first. We asked Xerox if they would allow us to name a slate...and [Xerox] told us no. And so then I had to decide whether I really wanted to file a suit. I’m so angry about this and shocked, I decided to file a suit. And I think it is the fair thing to do for these shareholders.

Id. at 119:14-23 (emphases added).

Furthermore, as Deason told this Court, he filed *Deason II* “to be able to ask for a slate of directors” after he “saw the terms of” the Proposed Transaction on January 31, 2018, and “felt like [he] had to do something” to replace the Xerox directors who “had unanimously approved, unbelievably, this outrageous transaction” — conduct which occurred between March 2017 and January 2018. PI Hearing Tr. 421:15-427:25. The but for cause for *Deason II* was the Director Defendants’ March 1, 2018 refusal to allow Deason to submit director nominations after the advance notice deadline.

While the *Deason* Litigation could not have proceeded without the post-January 1, 2017 Proposed Transaction conduct, it could have proceeded *without* allegations of pre-2017 conduct, as Travelers’ purported expert, Michael Kendall, admitted:

Q: So Mr. Deason could have brought a lawsuit for breach of fiduciary duty in connection with the [P]roposed [T]ransaction even if the JV [A]greements had been fully disclosed, correct?

A: Yes. He could have.

Kendall Dep. 134:23-135:2; 136:18-137:14 (admitting possibility that claim arose from Proposed Transaction negotiation even if JV Agreements had already been fully disclosed). Thus, the Proposed Transaction was the only “but for” cause of the *Deason* Litigation.

B. Travelers Cannot Prove Any “Loss” Xerox Incurred is “on Account of” Wrongful Acts that Occurred Before 2017.

The Prior Acts Exclusion only applies to “Loss on account of any Claim or Related Claim” that arises out of a pre-January 1, 2017 Wrongful Act. Primary Policy at Endorsement 4 (TRAVELERS0012685) (emphasis added). “Loss” is “the amount which [Xerox] becomes legally obligated to pay as a result of any ‘Claim,’” including “settlements.” *Id.* at 13, Endorsement 25 (TRAVELERS0012673, 12715). “Loss” also includes “that portion of any settlement which represents claimant’s attorneys’ fees.” *Id.* The *Deason* Litigation was resolved by a “settlement” where Xerox paid \$28,451,926.60. SUMF ¶ 66. Thus, that payment is, by definition, covered “Loss.” Further, Travelers cannot meet its burden to prove that any portion of this settlement payment is “on account of” Loss excluded by the Prior Acts Exclusion.

Travelers’ use of the words “Loss on account of” in the Exclusion means that even if the *Deason* Litigation arose, in part, from pre-2017 Wrongful Acts, the Exclusion still does not apply to Loss “on account of” the alleged 2017-18 Proposed Transaction Wrongful Acts. The words “Loss on account of” must be given effect, and here they narrow the circumstances in which the Exclusion may apply. *See Bretton v. Mut. of Omaha Ins. Co.*, 110 A.D.2d 46, 50 (1st Dep’t), *aff’d*, 66 N.Y.2d 1020 (1985) (“a policy’s terms should not be assumed to be superfluous or to have been idly inserted”). If Travelers had wanted the Prior Acts Exclusion to bar coverage for any *Claim* alleging a prior Wrongful Act — not just the portion of the Loss attributable to the prior Wrongful Act — it could have easily drafted the language accordingly:

[I]t is agreed that no coverage will be available under this Policy for [~~Loss on account of~~] any Claim or Related Claims based upon, arising from, or in consequence of any fact, circumstance or Wrongful Act committed, attempted, or allegedly committed or attempted in whole or in part prior to January 1, 2017.

Travelers cannot re-write the Exclusion to suit its argument when doing so renders four words superfluous.

Travelers has not met, and cannot meet, its burden of proving that Xerox incurred any Loss attributable solely to pre-2017 Wrongful Acts. Indeed, the PI Order contained no findings about the *Deason I* Fraud Count. PI Order 17, n. 3. The PI Order was the catalyst for the *Deason* Settlement, Pastor Aff., ¶¶ 11-12, and thus the amount Xerox paid to settle the issues decided in the PI Order constitute only “Loss on account of” Wrongful Acts in negotiating and structuring the Proposed Transaction; no portion of the *Deason* Settlement is “on account of” pre-2017 Wrongful Acts.²

Additionally, Xerox’s evidence that it attributed all value in the *Deason* Settlement to the breach of fiduciary duty count stands unrebutted. *See* Cohen Dep. 112:12-16; Pastor Aff., ¶ 12. This makes sense, given that the Court did not even consider the *Deason I* Fraud Count in reaching the findings in its PI Order, PI Order at 17 n.3, and that any plaintiff in Deason’s position would likely face an uphill battle to prove the difficult detrimental reliance element of the *Deason I* Fraud Count. *See* Deason Dep. 36:8-13, 37:6-10 (admitting he assumed his lawyers in the ACS-Xerox

² Likewise, the proposed settlement of the Shareholder Class Actions shows the *Deason* Settlement arose only from the Proposed Transaction. The class plaintiffs defined their class as “persons and entities who (i) held Xerox common stock as of January 31, 2018 and/or (ii) purchased or otherwise acquired Xerox common stock between January 31 [announcement of the Proposed Transaction] and May 13, 2018 [*Deason* Settlement date] (inclusive).” Kaplun Aff., Ex. 102 at 14; Ex. 103 at 12. They made the same allegations found in Deason’s breach of fiduciary duty count, and they excluded shareholders who sold their Xerox shares before January 1, 2018 from their proposed class. Their certification briefing lacks any allegations about pre-2017 conduct. Instead, the “Class Plaintiffs wanted unconflicted decision-makers to ultimately decide whether Xerox should enter into a change-of-control transaction and the terms of any such transaction.” *Id.* at 8.

transaction had discussions about the arrangements between Fuji Xerox and Fuji and could not answer whether his lawyers had access to the JV Agreements).

Accordingly, the uncontroverted record shows that Xerox's payment under the *Deason* Settlement was based on the 2017-18 Proposed Transaction Wrongful Acts and resulting PI Order.

II. IN THE ALTERNATIVE, XEROX'S NOTICE TRIGGERED RUN-OFF COVERAGE.

Even if the Prior Acts Exclusion applied — and it does not — Xerox's claim would then trigger Travelers' obligations under the Run-Off Policy. *See also* [NYSCEF Doc. No. 285](#), Xerox's Mot. for Leave to Amend Br. 10-11, 19-20. To escape this obligation, Travelers contends that "Xerox never made a claim under the Run-Off Policy requiring Travelers to evaluate coverage under same, and therefore, Travelers did not evaluate coverage for Xerox's claim under the Run Off Policy." Kaplun Aff., Ex. 3, Answer ¶ 92. This argument fails, and the Court should hold that Xerox's notice under the Run-Off Policy was sufficient.

The notice provision in the Run-Off Policy follows form to the notice provision in the Run-Off Endorsement to the Chubb 2016-17 Policy: "The Insureds shall, as a condition precedent to exercising any right to coverage under this Policy, give to the Company written notice of any Claim as soon as practicable." Kaplun Aff., Ex. 40, Chubb 2016-17 Policy at Section VI(A). The "Reporting" provision of the Chubb 2016-17 Policy merely states Xerox's notice should provide "a description of the Claim . . . the nature of any alleged Wrongful Acts, the nature of the alleged or potential damage and the names of all actual or potential defendants." *Id.* at Section VI(C). The "Notice" provision requires that "[a]ll notices to the Company under this Policy of a Claim . . . shall be given in writing." *Id.* at Section XVII. Each of Xerox's relevant Claim Notices reported the Claim under the Policy and "under any and all applicable policies whether or not cited." Kaplun Aff., Exs. 31-32, 56. The Run-Off Policy does not state that Xerox's notice must identify

the Run-Off Policy number or policy period for a notice to be effective. Thus, Xerox's notifications satisfied the Run-Off Policy's notice requirements.

Furthermore, "[n]otice requirements are to be liberally construed in favor of the insured, with substantial, rather than strict, compliance being adequate." *Greenburgh Eleven Union Free Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 304 A.D.2d 334, 335-36 (1st Dep't 2003). Unless the policy specifically provides otherwise, no form of notice is required other than that adequate to enable an insurer to consider its rights and liabilities. *See Metro. Prop. & Liab. Ins. Co. v. Torcivia*, 90 A.D.2d 811, 811 (2d Dep't 1982). Thus, courts have rejected technical arguments (like Travelers' here) where notices "did not denote the insured's policy number or the effective and expiration dates of the policy" so long as the insurer could not "reasonably assert that it was unable to locate the policy in its files based upon the data which it was given." *Allstate Ins. Co. v. Patrylo*, 144 A.D.2d 243, 247 (1st Dep't 1988) (noting also that the insurer "fail[ed] to submit any legal authority whatever in support of the proposition that a notice of claim is not valid unless the policy number and effective and expiration dates are included"); *see also* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 4.02[a] (20th Ed. 2020) (recognizing that "the purpose of all notice provisions is to enable insurers to adequately investigate and respond to claims"). Courts also have recognized that an insured can "give notice under multiple policies at the same time," rejecting arguments Travelers has tried to make before that a notice letter must identify every policy period potentially implicated. *Travelers Indem. Co. v. Northrup Grumman Corp.*, No. 16 CIV. 8778 (LGS), 2020 WL 1469550, at *5, n.6 (S.D.N.Y. Mar. 26, 2020).

Finally, Travelers' own claims handlers admitted that the first few paragraphs alone of the *Deason I* Complaint that was noticed to Travelers in February 2018 justify Travelers' Prior Acts

defense. *See* Kaplun Aff., Ex. 7, Walker Dep. 313:8-314:13. If it was so obvious that the Complaint asserted pre-2017 Wrongful Acts, then Travelers had everything it needed in February 2018 to consider whether the Run-Off Policy covered the Claim, instead of the 2018-19 program that Xerox's other D&O insurers thought applied. Travelers' refusal to consider coverage under either policy is yet another illustration of Travelers placing its own financial interests ahead of its insured's in contravention of its duties under the law and its own internal claims guidelines. *See* SUMF ¶ 101. Regardless, Travelers' contrived inadequate notice position fails because Travelers had timely adequate notice and knew that it had a potential \$15 million exposure for Losses from the Underlying Litigation. Whether that exposure falls under the \$15 million Run-Off Policy *or* Policy is of no consequence. Accordingly, if the Court does not grant summary judgment for Xerox on the Prior Acts Exclusion, the Court should rule that Xerox's notices were sufficient under the Run-Off Policy.

III. TRAVELERS' REMAINING AFFIRMATIVE DEFENSES SHOULD BE DISMISSED.

Travelers asserted *twenty-three affirmative defenses* even though Travelers' witnesses testified that Travelers is really pursuing only two: the Prior Acts Exclusion and the reasonableness of the *Deason* Settlement. SUMF ¶ 225. Xerox asked Travelers to withdraw the other frivolous, unsupported defenses that the record does not support. Kaplun Aff., Ex. 98. In response, Travelers stated that a "jury will hear Travelers' defenses to Xerox's bad faith allegations," but it refused to withdraw its remaining defenses, without identifying evidence supporting them. Kaplun Aff., Ex. 99. The Court should strike these defenses now.

Travelers' first affirmative defense contends "Xerox fails to state causes of action upon which relief can be granted." But the time to move to dismiss has passed, and courts have held that the bare assertion "that the complaint fails to state a cause of action . . . is not a proper subject

for an affirmative defense” and should be dismissed on summary judgment. *Dwyer v. First Unum Life Ins. Co.*, 14 Misc. 3d 1202(A), at *3 (Sup. Ct., N.Y. Cnty. 2006), *aff’d as modified*, 41 A.D.3d 115 (1st Dep’t 2007).

Travelers’ second (failure to mitigate damages), third (waiver and estoppel), and fourth (laches and unclean hands) defenses fail, too. “[A] party is entitled to summary judgment when there are no material issues of fact to be tried,” *2386 Creston Ave. Realty, LLC v. M-P-M Mgmt. Corp.*, 58 A.D.3d 158, 162 (1st Dep’t 2008) (citing CPLR 3212), and defenses that “consist of bare legal conclusions” should be dismissed on summary judgment, *Carlyle, LLC v. Beekman Garage LLC*, 133 A.D.3d 510, 511 (1st Dep’t 2015). In discovery, Travelers failed to articulate the basis for these defenses or identify documents that might support them. *See* Kaplun Aff., Ex. 105, Travelers’ Answers to Xerox Interrog. Nos. 13-15; Walker Dep. 350:19-352:5, 387:20-388:14. Additionally, the laches defense is unavailable where, as here, “the action at law has been commenced within the period set forth by the statute of limitations.” *Foley Inc. v. Helix Grp., Inc.*, 29 Misc. 3d 1210(A), at *5 (Sup. Ct., N.Y. Cnty. 2010). Because Travelers has come forward with no evidence to raise a triable issue of fact on failure to mitigate damages,³ waiver and estoppel, or laches and unclean hands,⁴ the Court should dismiss these defenses.

³ Travelers’ reliance on the \$28 million *Deason* settlement payment to support its failure to mitigate defense, *see* Kaplun Aff., Ex. 99, is merely an “unsubstantiated and speculative assertion” that “is insufficient to” sustain the defense. *Bank of Am., N.A. v. J.P.T. Auto., Inc.*, 52 A.D.3d 553, 555 (1st Dep’t 2008).

⁴ Travelers contends Xerox’s non-disclosure of the “crown jewel” lock-up rights demonstrates Xerox’s unclean hands, *see* Kaplun Aff., Ex. 99, but that defense “is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct.” *Bd. of Managers of Park Ave. Ct. Condo. v. Sandler*, 48 Misc. 3d 1230(A), at *2 (Sup. Ct., N.Y. Cnty. 2015) (quoting *Nat’l Distillers & Chem. Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16 (1966)). There is no such evidence here.

Travelers' fifth defense — the “known loss doctrine” — requires “consideration of whether, at the time the insured bought the policy (or the policy incepted), the loss, as opposed to the risk of loss, was known.” *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Xerox Corp.*, 6 Misc.3d 763, 778-79 (Sup. Ct., N.Y. Cnty. 2004) (citation omitted), *aff'd sub nom.*, 25 A.D.3d 309 (1st Dep't 2006). The “doctrine does not apply where an insured merely knows there is a risk of loss, as knowledge of a risk is the very purpose of acquiring insurance.” *Id.* at 779. Xerox could not have known about the Loss before Policy inception on January 1, 2018 because Xerox had not yet even approved the Proposed Transaction and the Underlying Litigation began the following month.

Travelers' sixth defense — coverage is barred by unidentified “terms, definitions, conditions, and limitations” in the Primary Policy — is baseless because, other than the Prior Acts Exclusion, Travelers has identified no other terms that might apply. Travelers ignored Xerox's explicit request that Travelers identify the policy terms to which this defense refers. *See* Kaplun Aff., Ex. 99.

Travelers' eleventh (coverage for payments to Icahn) and fifteenth⁵ (coverage for payments made by uninsureds) defenses fail because Xerox paid the Loss, and Xerox's Loss exceeds Travelers' policy limits by more than the \$3,051,828.09 paid to Icahn,⁶ which renders these defenses moot. *See* SUMF ¶ 70. It also remains unclear why Travelers asserts its thirteenth and fourteenth defenses that coverage is barred “to the extent that any amount sought falls outside the

⁵ Travelers identified the “fees claimed by Icahn” as a basis for its fifteenth affirmative defense, Kaplun Aff., Ex. 99, which alleges coverage is barred “to the extent that it seeks payment for or on behalf of any person other than an Insured.” Answer, Affirm. Def. 15. The payment to Icahn was made by an Insured, Xerox. SUMF ¶ 70.

⁶ Xerox maintains that payments made to Icahn under the *Deason* Settlement are covered Loss, but even assuming they are not, these defenses still have no merit.

definition of Loss” and “because Xerox cannot allocate between covered Loss and uncovered loss”; Travelers’ August 9, 2022 letter ignored Xerox’s request for an explanation.

Travelers’ sixteenth defense (underlying actions are not “Securities Claims”) fails, because none of Travelers’ witnesses articulated this defense as a basis for denying coverage, and the defense conflicts with the nature of the claims against Xerox and the broad “Securities Claim” definition in the Primary Policy. See Primary Policy at 14, Endorsement 1 (TRAVELERS0012674, 12680).

As for defenses seventeen (prior notice), eighteen (conduct exclusion), and nineteen (related claims exclusion), Travelers has never identified a prior noticed Claim; Travelers has admitted that there was no finding of fraud in any final adjudication of the Underlying Litigation and that the conduct exclusion does not apply to the *Deason* Settlement, see, e.g., Walker Dep. 365:17-20, 385:13-386:22; and Travelers has not identified related Claims in prior policy periods to which the *Deason* Litigation is allegedly interrelated.

Walker claimed Travelers’ twentieth defense (failure to cooperate) is based on Xerox’s delay in providing information to substantiate the *Deason* Settlement amount in 2018. See Walker Dep. 353:11-354:14. Even if there were a delay, which Xerox disputes, Travelers cannot meet its “heavy” burden of proving lack of cooperation because there is no evidence that any purported delays were “deliberate,” and “[m]ere inaction by the insured is not a sufficient basis for a disclaimer.” *City of N.Y. v. Cont’l Cas. Co.*, 27 A.D.3d 28, 31-32 (1st Dep’t 2005).

Finally, Travelers’ twenty-third affirmative defense should be dismissed because a “catch-all reservation is not an appropriate affirmative defense.” *TSFV Holdings, LLC v. Mulberry Development, LLC*, No. 652865/2016, 2021 WL 4307240, at *11 (Sup. Ct., N.Y. Cnty. Sep. 20, 2021).

Accordingly, the Court should dismiss Affirmative Defenses Nos. 1-6, 11-20, and 23.

CONCLUSION

For all these reasons, this Court should grant Xerox's motion and find that: (i) the Prior Acts Exclusion does not bar coverage; (ii) Xerox provided sufficient notice under the Run-Off Policy; (iii) Travelers' Affirmative Defenses Nos. 1-6, 11-20, and 23 fail; and (iv) for such other relief as may be deemed just and proper.

Dated: New York, New York
August 31, 2022

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CERTIFICATION OF WORD COUNT

I, ALEKSANDRA KAPLUN, an attorney duly licensed to practice law in the State of New York, hereby certify under penalty of perjury pursuant to CPLR 2106 that the annexed Memorandum of Law in Support of Xerox’s Motion for Partial Summary Judgment complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court of the State of New York. The word count of the annexed Memorandum of Law, excluding the caption, table of contents, table of authorities, and signature block, is 8,967 words, calculated by the word-processing system used to prepare the document.

Dated: New York, New York
August 31, 2022

Respectfully submitted,

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