IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Cornerstone Building Brands, Inc., Plaintiff, v. Berkshire Hathaway Specialty Insurance Company and Old Republic Insurance Company, Defendants.	Case No. 5:25-cv-00524-FL

<u>THE DEFENDANT INSURERS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT</u>

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Defendants Berkshire Hathaway Specialty Insurance Company ("BHSI") and Old Republic Insurance Company ("Old Republic") (the "Insurers") oppose the Motion for Partial Summary Judgment filed by Plaintiff Cornerstone Building Brands, Inc. ("Cornerstone") [ECF 26]. For the reasons detailed below and in the Insurers' Memorandum of Law in Support of their Motion for Summary Judgment ("Insurers' Brief") [ECF 33], the Insurers request that the Court deny Cornerstone's motion and grant their Motion for Summary Judgment [ECF 32].

SUMMARY OF ARGUMENT

Cornerstone seeks partial summary judgment declaring that the D&O Policies provide coverage for its payment of the legal fees and settlement incurred by a financial adviser, Centerview Partners LLC ("Centerview"), pursuant to an indemnification agreement in its Engagement Agreement with Centerview. Cornerstone's claim for coverage is limited to Insuring Clause C of the Policies. That clause provides coverage for **Loss** that Cornerstone becomes legally obligated to pay on account of a **Securities Claim** made against Cornerstone for **Wrongful Acts** by Cornerstone.

As the insured, Cornerstone has the burden to prove that its claim is within Insuring Clause C. Cornerstone does not contend that Centerview's demand that Cornerstone honor its indemnification agreement was a covered **Securities Claim** and it clearly is not. Instead, Cornerstone piggybacks its coverage claim for the indemnification it agreed to pay and ultimately paid to Centerview by arguing that the *Stockholder Litigation* was a **Securities Claim** and the indemnification was "on account of" a **Securities Claim**. As detailed below and in the Insurers' Brief in support of their cross motion for summary judgment, Cornerstone's argument is legally, logically and factually flawed.

First, while the *Stockholder Litigation* was a **Securities Claim** made against Cornerstone's directors and officers, it was never a **Securities Claim** made against non-defendant Cornerstone and therefore was not covered under Insuring Clause C. It is not enough for Cornerstone to say that the *Stockholder Litigation* was a **Securities Claim**: to trigger coverage under Insuring Clause C, Cornerstone must show that the *Stockholder Litigation* was a **Securities Claim** *made against Cornerstone* and alleged **Wrongful Acts** *by Cornerstone*. Cornerstone has not established either because the undisputed facts show otherwise.

Unable to satisfy the basic elements of the threshold to coverage, Cornerstone obfuscates: Cornerstone's assertions regarding purported admissions of coverage under Insuring Clause C by the D&O insurers are both irrelevant and inaccurate. The loss payments by the D&O insurers properly were made under Insuring Clause B (not Clause C) to reimburse Cornerstone for its indemnification obligations owed to **Insured Persons**. Centerview is not an **Insured Person** covered under Insuring Clause B, and Cornerstone cannot rewrite Insuring Clause C to expand coverage for its indemnification of an uninsured outside entity.

Second, even if there had been a **Securities Claim** made against Cornerstone, Cornerstone's indemnification of Centerview's legal fees and settlement was not paid "on account of" such claim. Cornerstone's indemnification payments were "on account of" (that is, because of) its contract to indemnify Centerview, which was independent of the **Securities Claim**. While Insuring Clause C insures Cornerstone for shareholder suits, it does not insure Cornerstone's engagement of, and business arrangements with, outside financial advisors. Fundamentally, insurance covers disputed claims for wrongful conduct, not voluntary payments of amounts due and owing under a contract and paid without question.

Third, Cornerstone wrongly contends that the absence of a contract exclusion in the Policies proves that its indemnification of Centerview is covered. But where the claimed loss is not within the coverage grant in the Policies' insuring clauses, the absence of an exclusion cannot create coverage that otherwise does not exist. If Cornerstone cannot get through the gateway of the insuring clauses, the exclusions, whatever they may be, are never reached. Further, Cornerstone's argument that the Policies should be interpreted in comparison to policies not at issue in this case is foreclosed by the parol evidence rule. And even if the comparison was appropriate, Cornerstone conflates private company D&O policies—which provide entity coverage beyond **Securities Claims** thereby necessitating a contract exclusion—with the public company policies at issue here.

Fourth, Cornerstone urges this Court to find coverage for Centerview's liabilities on the authority of a two-paragraph order in *NCI Building Systems, Inc. v. XL Specialty Insurance Co*., Cause No. 2020-75580 (District Court, Harris Cty., TX), a case it mischaracterizes as "materially identical." The *NCI* order—which provides no reasoning or analysis—is not precedential, not persuasive and merits no weight.

I. <u>RESPONSE TO CORNERSTONE'S STATEMENT OF FACTS</u>

The Insurers incorporate the Factual Background discussion in the Insurers' Brief at pp. 2-10. Pursuant to Local Rule 56.1(c), the Insurers refer the Court to the Parties' Joint Statement of Facts ("JSOF") ([ECF 28], the Joint Appendix of Exhibits [ECF 29], the Insurers' Supplemental Statement of Facts ("DSOF") [ECF 34], and the Insurers' Appendix of Exhibits [ECF 35].

The Insurers separately are filing a Response to Cornerstone's Statement of Additional Material Facts ("PSOF") [ECF 30]. In addition, the Insurers dispute the following five statements in the Background discussion in Cornerstone's Memorandum of Law in Support of Its Motion for

Partial Summary Judgment [ECF 27] ("Cornerstone Brief") (pp. 3-9), as unsupported by the factual record.

1. "Against Insureds." Cornerstone Brief p. 7 (Chart).

Insurers' Response: Cornerstone misquotes the Primary Policy in listing the elements of Insuring Clause C, by swapping the word "**Insureds**" in place of "the **Company**." *See* JSOF ¶16.

2. "The Take Private Litigation was a Securities Claim against Cornerstone and its officers and directors …," *citing* JSOF ¶¶37, 38, 41, 47, 48 and PSOF ¶¶5. Cornerstone Brief p. 7 (Chart).

Insurers' Response: The Take Private Litigation—which Cornerstone defines to mean the *Stockholder Litigation* (Cornerstone Brief p. 3)—was not a **Securities Claim** against Cornerstone because Cornerstone was never named a defendant. The record citations do not support the assertion that the *Stockholder Litigation* was against Cornerstone, and in fact, refute it. *See* JSOF ¶¶37, 38, 41; Joint App'x Exs. 18, 19, 22.

3. "For a Wrongful Act." "The Take Private Litigation alleged "Wrongful Acts" in connection with the Transaction, including Centerview's alleged aiding and abetting of breaches of fiduciary duty by Cornerstone's directors and officers," *citing* PSOF ¶¶5, 8, 9. Cornerstone Brief p. 7 (Chart).

Insurers' Response: Cornerstone misstates **Wrongful Act** as defined by the Primary Policy as relevant to Insuring Clause C, the only insuring clause under which it seeks coverage. The Primary Policy defines **Wrongful Act** to mean: "(2) *with respect to Insuring Clause C*, any actual or alleged act, error, misstatement, misleading statement, neglect, omission or breach of duty *by the **Company***" (emphasis added). JSOF ¶24. Centerview is not the **Company** and therefore its conduct is not a **Wrongful Act** under Insuring Clause C. Nor did the *Stockholder Litigation* allege **Wrongful Acts** by Cornerstone, which was not a defendant. JSOF ¶¶18, 19; Joint Appendix Exs. 18, 19, 22. Coverage under Insuring Clause C applies only to **Wrongful Acts** by Cornerstone.

4. "The fact that Cornerstone's D&O insurers, including Berkshire Hathaway (in part) have covered Cornerstone's defense costs and settlement in the Take Private Litigation confirms that each of the above elements are met," *citing* JSOF ¶¶51, 55. Cornerstone Brief p. 8.

Insurers' Response: This statement is predominantly legal argument, not factual. Moreover, JSOF ¶¶51 and 55 state generally that the underlying insurers provided coverage for the *Stockholder Litigation*, and do not support Cornerstone's assertion that payment was made under Insuring Clause C. This legal issue is addressed *infra* at Section II(A)(2).

5. "Notably, the Centerview Losses are precisely the type of costs expressly enumerated in the definition of 'Loss'—a settlement payment of $6,750,000 and $3,069,518.41 in defense costs—incurred in connection with a covered Securities Claim." (no record citation). Cornerstone Brief p. 8.

Insurers' Response: This statement is legal argument, not factual, and is unsupported by the record and disputed by the Insurers.

II. ARGUMENT

Cornerstone's Brief confirms that it seeks coverage for its indemnification payments for Centerview only under Insuring Clause C. Cornerstone Brief p. 7. Insuring Clause C of the Primary Policy states:

> The Underwriter shall pay on behalf of the **Company** all **Loss** for which the **Company** becomes legally obligated to pay on account of a **Securities Claim** first made *against the* ***Company*** during the **Policy Period** … *for a* ***Wrongful Act*** taking place before or during the **Policy Period** …

JSOF ¶16 (emphasis added).

Cornerstone acknowledges that it bears the burden to prove that its claim is within the coverage grant (Cornerstone Brief p. 9). But Cornerstone cannot show that its indemnification of Centerview is within Insuring Clause C. The D&O insurers' previous payments for Cornerstone's indemnification of **Insured Persons** under Insuring Clause B do not establish coverage under Insuring Clause C for an uninsured entity. In the absence of a **Securities Claim** against Cornerstone covered under Insuring Clause C, the absence of a contract exclusion is irrelevant.

A. Cornerstone Cannot Show That Its Indemnification Payments Are Within Insuring Clause C

Insuring Clause C does not cover Cornerstone's indemnification of Centerview. The *Stockholder Litigation* was not a claim *against Cornerstone* and it did not allege **Wrongful Acts** *by Cornerstone*. Cornerstone indemnified Centerview "on account of" the Indemnification Agreement and not any **Securities Claim** against it. Nor did Cornerstone "incur" Centerview's legal fees and settlement but in fact admits that Centerview incurred such amounts.

1. <u>The Stockholder Litigation Is Outside Insuring Clause C</u>

Contrary to Cornerstone's assertion (Cornerstone Brief p. 7 Chart), the *Stockholder Litigation* fails four elements of Insuring Clause C.

Element	**Explanation**	**Element Met**
"made against" Cornerstone	Insuring Clause C requires that the **Securities Claim** be "*made against the **Company***." Cornerstone's Brief (Chart p. 7) impermissibly substitutes the word "**Insureds**" for the "**Company**." The definitions of **Insureds** and **Company** are different. JSOF ¶17. **Insureds** includes both Cornerstone and **Insured Persons**. However, **Company** means only Cornerstone. JSOF ¶ 18. Cornerstone was never named a defendant in the *Stockholder Litigation*. JSOF ¶¶ 37, 38, 41; DSOF ¶¶ 8, 18. The *Stockholder Litigation* therefore was not "made against the **Company**" as required by Insuring Clause C. *See also* Insurers' Brief p. 13.	No
for a **Wrongful Act**	Specific to Insuring Clause C, **Wrongful Act** means "any actual or alleged act, error, misstatement, misleading statement, neglect, omission, or breach of duty *by the **Company***." JSOF ¶24.__ Centerview's liability for the settlement and its legal fees resulted from its own conduct, rather than conduct "*by*" Cornerstone. Insuring Clause C provides coverage only for conduct *by Cornerstone*. JSOF ¶¶ 37, 38, 41; DSOF ¶¶ 8, 18; *see also* Insurers' Brief p. 16.	No

"on account of" a **Securities Claim**	Cornerstone's indemnification of Centerview was "*on account of*" its indemnification agreement with Centerview, rather than "*on account of*" a **Securities Claim** against Cornerstone. Cornerstone's indemnification obligation existed without regard to and independent of any **Securities Claim**. JSOF ¶27, Joint App'x Ex. 4. Cornerstone contracted to indemnify Centerview even in the absence of a **Securities Claim** against Cornerstone (*e.g.*, Cornerstone paid indemnity in connection with the subpoena to Cornerstone in the Appraisal Action, which is not a **Securities Claim**). Cornerstone's indemnification therefore was not "on account of" (that is, "because of") nor "but for" a **Securities Claim** against Cornerstone. *See* Insurers' Brief pp. 15-20 and *infra* at Section II(A)(3).__.	No
Loss	**Loss** means "the total amount the **Insureds** becomes legally obligated to pay on account of **Claims** made against them for **Wrongful Acts** for which coverage applies, including … **Defense Costs**." JSOF ¶22. **Defense Costs** means fees "*incurred by the **Insureds***." JSOF ¶23. Centerview's $3,069,518.41 in legal fees are not **Defense Costs** because they were not *incurred by* an **Insured**. Instead, the Cornerstone Brief admits that Centerview, not Cornerstone, "incurred" the legal fees for which it now seeks coverage. *See* Cornerstone Brief pp. 4, 11, 12, 13. *See also* Insurers' Brief pp. 20-21.	No

Cornerstone's inability to show that the *Stockholder Litigation* is within Insuring Agreement C is dispositive. The Cornerstone Brief nowhere contends that the Section 220 Action or the Appraisal Action are **Securities Claims** covered by Insuring Clause C. Nor does Cornerstone rely on any of the class action suits filed by stockholders asserting violations of Section 14 of the Securities Exchange Act based on alleged misstatements in the Proxy as the basis for its claim for coverage for Centerview's legal fees and settlement.[1] It addresses only the "Take Private Litigation," a term it defines as the "consolidated shareholder class action filed against Cornerstone's directors and officers." Cornerstone Brief p. 1; *see also id.* p. 3. By limiting argument in its opening brief to the *Stockholder Litigation,* Cornerstone has waived any contention that coverage for the Centerview indemnification claim under Insuring Clause C is triggered by those other actions. *See LP by and through JP v. Wake County Bd. of Educ.,* No. 5:20-CV-481-BO, 2021 WL 5936219, at *2 (E.D.N.C. Dec. 15, 2021) (striking new arguments made in reply brief); *see also Christ v. Depositors Ins. Co.*, 804 F. Supp. 3d 659, 665 n.9 (E.D. Va. 2025) (argument not made in opening brief on summary judgment is waived, *citing Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017)).

2. <u>The D&O Insurers' Earlier Payments Do Not Establish Coverage for Centerview's Fees and Settlement</u>

Cornerstone contends that the Excess Policies should extend coverage for Centerview's legal fees and settlement because the D&O insurers previously paid for Cornerstone's other losses in the *Stockholder Litigation*.[2] Cornerstone's theory makes an unwarranted analytical leap that bypasses the policy terms, commits legal error and is unsupported by the factual record.

First, Cornerstone was covered under Insuring Clause B (not Clause C) because the *Stockholder Litigation* named **Insured Persons** (Cornerstone's directors and officers) as

[1] Joint App'x Ex. 29 p. 1003-04. While the Section 14 actions named Cornerstone and its directors as defendants, none named Centerview as a defendant. Cornerstone has never contended that Centerview incurred legal fees in the Section 14 actions. *See, e.g.*, Cornerstone Brief p. 4.

[2] *See, e.g.*, Cornerstone Brief p.8 ("The fact that Cornerstone's D&O insurers, including Berkshire Hathaway (in part), have covered Cornerstone's defense costs and settlement payment in the Take Private Litigation confirms that each of the above elements is met."); *id.* p.11 ("Cornerstone's D&O insurers agreed to provide coverage to Cornerstone for the Take Private Litigation and have already reimbursed Cornerstone for $21.3 million [sic] in Losses Cornerstone incurred in excess of the self-insured retention."); *id.* p.13 ("Cornerstone's D&O insurers admitted that the Take Private Litigation is a covered 'Securities Claim' under the Zurich Policy, which applies in full force to the follow-form policies Berkshire Hathaway and Old Republic issued.").

defendants. Under Insuring Clause B, Cornerstone was covered to the extent it indemnified **Insured Persons** for **Claims** *against them*. JSOF ¶15. Indeed, Cornerstone admits that the amounts for which it received coverage from the D&O insurers was for the **Insured Persons' Losses**:

> Cornerstone incurred $16,411,238 in defense costs and $21,037,500 to settle *the claims against the directors and officers* in the Take Private Litigation.

Cornerstone Brief p.8 (emphasis added). *See also* JSOF ¶¶44, 55. The **Insured Persons' Losses** indemnified by Cornerstone for the *Stockholder Litigation* were covered and properly paid under Insuring Clause B. The D&O insurers' earlier payments to Cornerstone are irrelevant to coverage for Centerview's legal fees and settlement, where Centerview is not an **Insured Person** and Cornerstone now seeks coverage for Centerview only under Insuring Clause C.

Second, it is not enough for Cornerstone to say that the *Stockholder Litigation* is a **Securities Claim** to trigger coverage under Insuring Clause C. The *Stockholder Litigation* was a **Securities Claim** made against **Insured Persons** and non-insured Centerview. Insuring Clause C requires that the **Securities Claim** be *made against* Cornerstone. Where Cornerstone was not a defendant, the *Stockholder Litigation* is not a **Securities Claim** made against it and therefore cannot trigger Insuring Clause C. *See* Insurers' Brief p. 13.

Third, even assuming that the earlier payments by the D&O insurers were relevant to the coverage analysis for Centerview's liabilities, Cornerstone does not and cannot truthfully assert that any insurer ever agreed or admitted that *Centerview's* liabilities are covered. No insurer did. Moreover, Cornerstone nowhere contends that Centerview's demand for indemnification is a **Securities Claim** against Cornerstone that independently triggers coverage under Insuring Clause C. It is not. *See* Insurers' Brief p.15.

Fourth, as a matter of law, the underlying insurers' coverage opinions in any event could not bind BHSI or Old Republic, who may independently analyze coverage provided by their excess policies for Cornerstone's indemnification of Centerview. *See Lineage Logistics, LLC v. National Union Fire Ins. Co.*, No. 2023 NCBC 54, 2023 WL 5155918, at *13 (N.C. Bus. Ct. Aug. 10, 2023) ("Primary and excess insurers are independent and are free to make differing assessments of liability and coverage"); *see also Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, 871 N.E. 2d 418, 429 (Mass. 2007) (excess insurer is "entitled to make a determination concerning the merits of the . . . settlement and coverage under its policy independent of that made by the" underlying insurer); *Edward E. Gillen Co. v. Ins. Co. of the State of Pa.*, No. 10-C-564, 2011 WL 1694431, at *4 (E.D. Wis. May 3, 2011) (excess insurer "is free . . . to contest coverage under its own policy"); *Pratter v. Reliance Ins. Co.*, No. 269 M.D. 2001, 2011 WL 12842614, at *7 (Pa. Commw. Ct. Mar. 25, 2011) (same). In conducting that analysis, the Insurers properly evaluate coverage for each lawsuit and each defendant separately, rather than on an all or nothing basis.

Fifth, in all events, any prior payments by the D&O insurers could not create coverage under the Policies for Centerview's uncovered legal fees and settlement under any waiver or estoppel theory. *See D&B Marine, LLC v. AIG Prop. & Cas. Co.*, 288 N.C. App. 106, 119, 885 S.E.2d 842, 851 (2023) ("the doctrines of waiver and estoppel are not available to bring within the coverage of a policy risks that are not covered by its terms or risks expressly excluded") (*citing Hunter v. Insurance Co.*, 241 N.C. 593, 595-96, 86 S.E.2d 78, 80 (1955)). Any prior payments are immaterial.

The tens of millions of dollars Cornerstone already received from the D&O insurers for its indemnification of the **Insured Persons' Defense Costs** and settlement in the *Stockholder*

Litigation has no relevance on the coverage analysis under Insuring Clause C for Centerview's legal fees and settlement.

3. Centerview's Loss Was Not "On Account of" a Securities Claim For Wrongful Acts By Cornerstone

Cornerstone argues that its indemnification of Centerview was "on account of" a **Securities Claim** because its obligation to pay was triggered by the *Stockholder Litigation*. Cornerstone asserts that "but for" the *Stockholder Litigation*, Centerview's losses would not have been incurred and Cornerstone's legal obligation to pay would not have arisen. Cornerstone Brief pp. 13-14. Cornerstone's argument does not withstand scrutiny.

First, Cornerstone fails to grapple with the requirement in Insuring Clause C that the loss be caused by a **Securities Claim** "for" **Wrongful Acts** by Cornerstone. With respect to Insuring Clause C, **Wrongful Act** is defined to mean only conduct "by the **Company**." JSOF ¶24. Centerview is not the **Company**, and its legal fees and the settlement resulted from its own alleged misconduct. Centerview's losses therefore were not "on account of" a **Wrongful Act** by Cornerstone, as required by Insuring Clause C. *See* Insurers' Brief pp. 15-16.

Second, Cornerstone's "but for" causation argument has the analysis backwards. Cornerstone's indemnification obligation to Centerview was "on account of" and "because of" the Indemnification Agreement, and not because of any **Securities Claim**. Had Cornerstone not contracted to indemnify Centerview, it would have had no obligation to pay for any of Centerview's fees, costs or other loss, in any matter.

Further, Cornerstone's indemnification was not "but for" the *Stockholder Litigation* because the obligation applied even in the absence of a **Securities Claim** alleging **Wrongful Acts** by Cornerstone. In the Indemnification Agreement, Cornerstone agreed to indemnify Centerview for "any pending or threatened action, claim, suit, investigation or proceeding *brought by or* *against any person…*" Joint App'x Ex. 4 ¶2 (p.111) (emphasis added). Cornerstone's indemnification included Centerview's legal fees in the Appraisal Action, which was not a **Securities Claim**. Insurers' Brief pp. 13-14. Cornerstone's payments for Centerview therefore were "directly caused by [an] independent act or intervening cause wholly disassociated from, independent of, and [removed] from the conduct defined in the policy." *Affinity Living Grp., LLC v. StarStone Specialty Ins. Co.*, 959 F.3d 634, 642 (4th Cir. 2020) (citation omitted). Cornerstone's independent act in signing the Indemnification Agreement severed any purported causal connection between its payments and the risks insured against under the D&O Policies—that is, coverage for **Wrongful Acts** by Cornerstone in **Securities Claims** made against Cornerstone. *See* Insurers' Brief pp. 16-20.

Finally, even assuming Cornerstone had based its claim for coverage on the Section 14 class actions in which it was a named defendant, its indemnification of Centerview was not "on account of" those actions. Centerview was not a defendant in any Section 14 action and Cornerstone has never contended that Centerview incurred legal fees in any Section 14 action. No causal connection exists between Cornerstone's indemnification of Centerview and the Section 14 actions. Cornerstone cannot indiscriminately lump together all the stockholder suits challenging some aspect of the take-private transaction to bootstrap its coverage claim for Centerview's legal fees and settlement incurred in the *Stockholder Litigation*. *See Lesmir Corp. v. Houston Cas. Co.*, No. 2:25-cv-462-RSL, 2026 WL 1251650, at *6 (W.D. Wash. May 7, 2026) (claim aggregation provisions in a D&O policy "serve a specific and limited function: they determine when a claim is deemed made for purposes of identifying the applicable policy period and avoiding duplicative retentions. They do not define the substantive scope of coverage for any particular demand or proceeding…."). Here too, Zurich's handling of the stockholder lawsuits as a "single claim" all deemed first made in the 2021-2022 policy period and subject to one retention (Joint App'x Ex. 29 p. 1009) does not establish the requisite causal connection between Cornerstone's indemnification of Centerview and a **Securities Claim** made against Cornerstone.

Cornerstone's indemnification of Centerview therefore was not "on account of" a **Securities Claim** against Cornerstone alleging **Wrongful Acts** by Cornerstone.

4. Cornerstone's Legal Obligation to Pay Centerview Is A Business Debt, Not An Insured Risk

Cornerstone argues that it was "legally obligated to pay" Centerview's legal fees and settlement in the *Stockholder Litigation*. The Insurers do not dispute that Cornerstone and Centerview entered into a contract pursuant to which Cornerstone prospectively agreed to indemnify Centerview as a term of Centerview's engagement in October 2021. The Insurers also do not dispute that Cornerstone would have been legally obligated to pay under the Indemnification Agreement unless the exception for willful misconduct, bad faith or gross negligence by Centerview applied. Joint App'x Ex. 4 (p.111). Centerview demanded payment and Cornerstone paid it without question and without involving the D&O insurers, just like it handles any other corporate expense. Cornerstone's satisfaction of its supposed legal obligation to pay Centerview was not on account of a **Securities Claim** against Cornerstone and was not on account of a **Wrongful Act** allegedly committed by Cornerstone. Cornerstone is legally obligated to pay all of the professionals, vendors, and other service providers it hires. That legal obligation does not make the Insurers guarantors of Cornerstone's contractual obligations. Cornerstone's "legally obligated to pay" argument is, quite simply, a non-issue.

Moreover, the existence of Cornerstone's engagement agreement with Centerview, and its business decision to provide indemnification without regard to the possible application of the willful misconduct exception, demonstrates a different point. As Cornerstone notes:

> If Cornerstone had refused to pay, Centerview would have had a cause of action against Cornerstone for breach of contract and a remedy in the form of damages…. Thus, Cornerstone was "legally obligated to pay" the Centerview Losses.

Cornerstone Brief p.12. But had Centerview sued Cornerstone for breach of the Engagement Agreement, Cornerstone would not have been insured for the unpaid indemnification because such claim would not have been a **Securities Claim** under Insuring Clause C. Cornerstone nevertheless demands that the Insurers pay an uncovered corporate obligation by appending it to the *Stockholder Litigation* filed against its directors and officers. That Cornerstone may have had a "legal obligation to pay" does not transform that uncovered claim into a risk covered by the Policies that would make the D&O Insurers co-obligors under the Engagement Agreement.

Finally, Cornerstone provides no factual support for the assertion that it "reasonably expected" coverage for its indemnification of Centerview. Cornerstone Brief p. 15-16. The plain and unambiguous language of the Policies controls and may not be rewritten to expand coverage for the losses of an uninsured entity. *See N.C. Farm Bur. Mut. Ins. Co. v. Fowler ex rel. Rudisill*, 162 N.C. App. 100, 105, 589 S.E.2d 911, 914 (2004). Contrary to Cornerstone's assertion, the phrase "legally obligated to pay" cannot be read in isolation but must be read together with the defined words **Loss**, **Securities Claim**, and **Wrongful Act**.[3] Read as a whole, the Policies unambiguously do not cover Centerview. *See* Insurers' Brief pp. 23-26. Had Cornerstone actually expected the Policies to cover Centerview, it would not have waited over two years from the time

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[3] Cornerstone cites *Ingram v. Nationwide Mutual Insurance Co*., 258 N.C. 632, 635-36, 129 S.E.2d 222, 226 (1963), for its overbroad argument that an indemnification obligation is an amount an insured is "legally obligated to pay as damages." But in *Ingram*, the insured had no indemnification agreement with his co-tortfeasor. The Court held that the insured's automobile policy provided coverage to the co-tortfeasor because the obligation to indemnify arose from the insured's own negligence. Here, by contrast, the indemnification was solely contractual and owed irrespective of Cornerstone's conduct. Moreover, Centerview as indemnitee incurred legal fees and the settlement based on its own actions.

it received Centerview's first indemnification demand in October 2022 until the eve of the mediation in November 2024 to seek payment from the D&O insurers. JSOF ¶56.

B. <u>The Absence of a Contract Exclusion Cannot Create Coverage</u>

Cornerstone's contention that the absence of a contract exclusion in the Policies proves that its indemnification of Centerview is covered is wrong as a matter of law. Where the claimed loss is not within the Policies' insuring clauses, no exclusion can expand the scope of the coverage grant. In other words, the presence or absence of an exclusion does not create coverage that otherwise does not exist. Further, the parol evidence rule prohibits an interpretation of the Policies by reference to extrinsic evidence, such as other policies not at issue in this case.

First, insurance policies are structured such that if the claimed loss is not within the coverage grant of the insuring clause, exclusions to coverage are irrelevant.

> In an insurance policy, an exclusion is a provision which eliminates coverage *where were it not for the exclusion, coverage would have existed*.... By definition, an exclusion *limits the extent of the coverage set forth in an insurance policy*.

Fowler, 162 N.C. App. at 104, 589 S.E.2d at 914-15 (emphasis added) (cleaned up). For this reason, the policyholder has the threshold burden to show that the loss is within the insuring clause:

> A party seeking benefits under an insurance contract has the burden of showing coverage. Until a *prima facie* case of coverage is shown, the insurer has no burden to prove a policy exclusion.

Fortune Ins. Co. v. Owens, 351 N.C. 424, 430, 526 S.E.2d 463, 467 (2000) (citations omitted). If the policyholder fails to show loss within the coverage grant, application of any exclusion is irrelevant. *See Hobson Constr. Co., Inc. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984) (where policyholder "failed to show that the loss complained of is embraced within the insuring language … we need not reach the issue of whether the complained of injury is excepted from coverage…"). An exclusion—or absence thereof—cannot create coverage that is not provided by the insuring clause. *See Bryan Bros. Inc. v. Cont'l Cas. Co.*, 660 F.3d 827, 831

(4th Cir. 2011) (Virginia law) ("[i]t is elemental that exclusions and exceptions in an insurance policy cannot expand the scope of agreed coverage"). Because Cornerstone cannot prove coverage within Insuring Clause C, the absence of a contract exclusion is immaterial.

Second, the parol evidence rule forecloses consideration of extrinsic evidence to construe unambiguous contracts. "Parol evidence as to the parties' intent and other extrinsic matters will not be considered if the language of the contract is not susceptible to differing interpretations." *First-Citizens Bank & Tr. Co. v. 4325 Park Rd. Assocs., Ltd.*, 133 N.C. App. 153, 156, 515 S.E.2d 51, 54 (1999); *see also Galloway v. Snell*, 384 N.C. 285, 288, 885 S.E.2d 834, 836 (2023) (citation omitted) (terms of clear and unambiguous contract "may not be contradicted by parol or extrinsic evidence"); *Brown v. Scism*, 50 N.C. App. 619, 624, 274 S.E.2d 897, 900 (1981) ("A party may not use parol evidence to create ambiguity where the terms of the contract are clear.").

Likewise, the proper interpretation of the Policies in this case must be based solely on their wording and cannot be altered or interpreted by comparison to other insurance policies. "The terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy." *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967); *Liberty Ins. Underwriters Inc. v. GuideOne Specialty Mut. Ins. Co.*, 623 F. Supp. 3d 635, 642 (E.D.N.C. 2022) (same); *see also Duke Univ. v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640, 386 S.E.2d 762, 765 (1990) ("The fact that coverage may exist under another policy does not affect our interpretation of the exclusion at issue in this case"). For its part, Cornerstone nowhere contends that the Policies are ambiguous, nor does it cite any case law that would permit resorting to extrinsic evidence to construe their meaning.

Third, even assuming that consideration of extrinsic evidence was permissible (it is not), Cornerstone's assertion that the Insurers "must add contractual liability exclusions to their policies" to avoid coverage for contractual indemnification obligations (Cornerstone Brief p. 14) has no merit. The form of the D&O policy issued to Cornerstone before the take-private transaction was drafted for *publicly traded* companies. By its terms, the only claims against an insured **Company** covered under Insuring Clause C are **Securities Claims**. **Securities Claim** in turn is defined as:

> any **Claim** alleging a violation of any statutory or common law which in whole or in part is: (1) brought by one or more securities holders of the **Company**, in their capacity as such, or (ii) based upon, arising out of or attributable to the purchase or sale of, or offer or solicitation of an offer to purchase or sell, any securities issued by the **Company**, whether such purchase, sale, offer or solicitation involves a transaction with the **Company** or occurs in the open market (including without limitation any such **Claim** brought by the Securities and Exchange Commission or any other claimant). **Securities Claim** for purposes of Insuring Clause C shall not include any employment-related claim brought by any **Insured Person** or other actual, alleged or prospective employee of the **Company**.

JSOF ¶21. **Securities Claims** are limited to a subset of **Claims** alleging a violation of any statutory or common law brought by securities holders of the **Company** or based upon the purchase or sale of securities. A contractual indemnification claim against the **Company** by an outside vendor by definition is outside the scope and not covered. The Cornerstone Brief concedes as much by not contending that Centerview's indemnification claim is a **Securities Claim** for a **Wrongful Act**. *See* Insurers' Brief p. 15. No contract exclusion is needed where the indemnification claim against the **Company** is not a **Securities Claim**.

Cornerstone's reliance on other forms of policies that have contract exclusions is misplaced. The Old Republic D&O policy form cited by Cornerstone (Plaintiff's Appendix Ex. 1) is—as stated in its title—a "private company" form. Unlike the Zurich Primary Policy, Insuring Clause C in the Old Republic form does not confine entity coverage to "Securities Claims."[4]

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[4] Old Republic's "traditional" public company D&O form is like Zurich's public company form: Insuring Clause C provides coverage to the entity only for Securities Liabilities and the form does not include a contract exclusion. *See* Directors & Officers | D&O Products | Old Republic

Moreover, of the five decisions addressing contract exclusions cited by Cornerstone, three do not involve D&O policies at all, and the other two do not involve D&O policies that limited entity coverage to Securities Claims.[5] D&O policies issued to publicly traded companies with insuring clauses providing only coverage for Securities Claims are materially different from other insurance policies, including other D&O policies, with insuring agreements that provide broader coverage for claims against the entity thereby necessitating a contract exclusion.

Nor do the two treatises cited by Cornerstone that describe contract exclusions as "typical" or "common" support its contention that D&O policies must cover contract obligations absent an exclusion. Cornerstone Brief p. 14. Neither treatise addresses that insuring agreements in D&O policies vary depending on the form of insured business entity. In fact, the national edition of the New Appleman treatise contradicts Cornerstone's assertion that D&O policies cover contract obligations unless excluded:

> D&O policies are not intended to afford coverage for breach of contract claims, although some D&O policies expressly provide coverage for costs and expenses incurred in defending those claims. … Even in cases in which a D&O policy does not contain an exclusion for contractual liability, courts have upheld an insurer's denial of coverage for these claims on the basis that there is no "wrongful act" or "loss" given that the insured is merely honoring its obligation under the contract.

ProfessionalDirectors & Officers | D&O Products | Old Republic Professional (last visited July 10, 2026).

[5] *See Glob. Travel Int'l, Inc. v. Mount Vernon Fire Ins. Co.*, No. 22-10227, 2022 WL 16753564, at * 1 (11th Cir. Nov. 8, 2022) (construing professional liability errors and omissions policy (not D&O policy)); *Madgett Law LLC v. Pravati Capital, LLC*, 706 F. Supp. 3d 831, 832 (D. Minn. 2023) (interpreting contract exclusion in a lawyers' malpractice policy); *TrialCard Inc. v Travelers Cas. & Sur. Co. of Am.*, No. 5:19-cv-368-BO, 2020 WL 1609483, at *2 (E.D.N.C. Apr. 1, 2020) (coverage dispute under D&O policy for TCPA claim); *N.C. Mut. Wholesale Drug Co. v. Fed. Ins. Co.*, 687 F. Supp. 3d 689, 691 (M.D.N.C. 2023) (insured was a member owned cooperative and parties agreed that opioid suits were within general coverage provisions of D&O policy); *Westchester Surplus Lines Ins. Co. v. Clancy & Theys Constr. Co.*, No. 5:12-CV-636-BR, 2015 WL 12803654, at *1-2 (E.D.N.C. June 18, 2015) (construing professional liability endorsement in an environmental insurance policy (not D&O policy)).

3 *New Appleman Law of Liability Insurance* §22.06, at 2(k) (2026) (Exhibit A).[6]

Cornerstone's argument that the coverage analysis turns on the absence of an exclusion fails as a matter of law and is contrary to commercial practice. Because its claim for coverage is outside Insuring Clause C, the absence of a contract exclusion is meaningless.

C. The NCI Order Is Neither Precedential Nor Persuasive

Cornerstone claims that the Court is not writing on a blank slate and should conclude that Centerview's losses are covered on the authority of a summary order issued in *NCI Building Systems, Inc. v. XL Specialty Insurance Co*., Cause No. 2020-75580 (District Court, Harris Cty., TX) ("*NCI*"). Cornerstone Brief pp. 1, 16-17 & Ex. A. The *NCI* order is not precedential, not persuasive and not indicative of the "practices of other states."

NCI is a two-paragraph order that appears to conclude that a different insurer was liable to pay legal fees incurred by a third-party consultant in discovery in a shareholder derivative suit against NCI. The order is not reported and not available on Westlaw or Lexis. The order is not accompanied by a reasoned opinion. The order does not identify the law governing the dispute. The order cites no case law. The order contains no explanation of the facts. While the order quotes certain phrases from a D&O policy's insuring agreement, it does not re-state the entire clause. The order states in conclusory fashion that the consultant's costs are covered Loss "as amounts … that the Insured is obligated to pay"— "on account of any Securities Claim." The order does not address any other terms or definitions in the policy, such as the definitions of Wrongful Act, Insured or Loss. The order provides no analysis.

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[6] One of the treatises cited by Cornerstone notes that contract exclusions bar coverage for liabilities "assumed by the insured through contract or agreement." Cornerstone Brief p. 14 (*citing* 1 *New Appleman North Carolina Insurance Law* § 6.04 (2026)). The Primary Policy here bars coverage for any "assumed contractual obligation" agreed to without the Insurers' consent, such as Cornerstone's contractual indemnification obligation to Centerview at issue here. *See* Insurers' Brief pp. 21-22.

Cornerstone nevertheless asserts that the *NCI* "appl[ied] materially identical policy language to materially identical circumstances." Cornerstone goes so far as to call the *NCI* action the "Prior Coverage Action" (Cornerstone Brief p. 1), as if the dispute before this Court should be understood as a continuation of the *NCI* action involving the same parties and policies. But other than its say-so—Cornerstone has provided no information or documents to show *NCI* is "materially identical."

That's because it is not. The *NCI* action is not a predecessor of this action and is unrelated. BHSI and Old Republic were not involved in the *NCI* action. Cornerstone conspicuously does *not* say that *NCI* construed the same Zurich policy form. Neither the order in *NCI* nor the Cornerstone Brief offers any information about the existence, much less the terms, of any indemnification agreement between NCI and the consultant. Moreover, *NCI* cannot be "materially identical" if the consultant in that case was not investigated and sued by *NCI*'s shareholders for its own misconduct, like Centerview was. And the underlying derivative suit in *NCI*, which (probably) named NCI as a nominal defendant, on its face cannot be "materially identical" to the *Stockholder Litigation*, a direct shareholder class action that did not name Cornerstone as a defendant.

Under the circumstances, the *NCI* order is neither precedential nor persuasive authority. Nor is it indicative of "the practices of other states" as Cornerstone claims. *NCI* merits no weight in this Court's coverage analysis.

D. <u>The Insurers' Additional Arguments Against Coverage</u>

The Insurers oppose Cornerstone's summary judgment motion for additional reasons addressed in their opening brief: (1) Centerview's legal fees are not **Defense Costs** as defined by the Primary Policy (Insurers' Brief p. 20-21); (2) Cornerstone's indemnification of Centerview is not covered because Cornerstone "assumed [a] contractual obligation" without the Insurers' consent, contrary to the Policies (Insurers' Brief pp. 21-22); and (3) reading the Primary Policy as a whole confirms that Centerview's legal fees and settlement are not covered (Insurers' Brief pp. 23-26). Because the Cornerstone Brief is silent on these issues, the Insurers incorporate their opening brief rather than repeat the discussion here.

III. CONCLUSION

For the reasons stated above and in the Insurers' Brief, the Policies do not provide coverage for the legal fees and settlement incurred by an uninsured third party. Cornerstone has not and cannot sustain its burden to show that payments made pursuant to its indemnification agreement with Centerview are within the Policies' coverage grant.

The Insurers respectfully request that the Court: (i) deny Cornerstone's Motion for Partial Summary Judgment with prejudice; (ii) grant the Insurers' Motion for Summary Judgment; and (iii) dismiss Cornerstone's complaint against the Insurers with prejudice.

Date: July 10, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Josey L. Newman, hereby certify that on this 10th day of July, 2026, the foregoing document was electronically served on all counsel of record via the Court's CM/ECF system.

/s/ Josey L. Newman
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