

No. 08-1480

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IN THE  
**United States Court of Appeals for the Tenth Circuit**

LOUIS E. RIVELLI, RODNEY B. JOHNSON, STEPHEN G. BURKE,  
TERESA W. AYERS, CRAIG L. STEVENSON, and ROBERT T. HOFFMAN,

Plaintiffs-Appellants,

v.

TWIN CITY FIRE INSURANCE COMPANY,  
an Indiana corporation,

Defendant-Appellee.

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On Appeal from the  
United States District Court for the District of Colorado  
The Hon. Richard P. Matsch  
D.C. No. 08-cv-01225-RPM-MEH

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**ANSWER BRIEF OF APPELLEE**

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March 16, 2009

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**ORAL ARGUMENT IS NOT REQUESTED**

## **CORPORATE DISCLOSURE STATEMENT**

Defendant-Appellee Twin City Fire Insurance Company is an Indiana Corporation with its principal place of business in Hartford, Connecticut. It is 100% owned by Hartford Fire Insurance Company, a Connecticut corporation with its principal place of business in Hartford, Connecticut. Neither entity is publicly traded. Hartford Fire Insurance Company in turn is 100% owned by The Hartford Financial Services Group, Inc., a Delaware corporation with its principal place of business in Hartford, Connecticut. The Hartford Financial Services Group, Inc. is publicly traded.

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## **STATEMENT OF PRIOR OR RELATED APPEALS**

There are no prior or related appeals.

## **STATEMENT OF THE ISSUE**

Appellants, directors and officers of Fischer Imaging Corporation, conducted a fraudulent accounting scheme designed to artificially inflate Fischer's revenues from 2000 to late 2002. During the same time period, Fischer sought and received additional excess Directors & Officers ("D&O") insurance coverage from appellee Twin City, doubling its prior excess limits from \$2.5 million dollars to \$5 million. As a critical condition for issuance of the renewed Twin City policy and the additional \$2.5 million in coverage available under it, appellants provided a Warranty Letter as part of their application for the additional \$2.5 million in coverage, in which they represented and warranted that as of May 2002 – *i.e.*, mid-scheme – they did not know of any "act, error, omission, fact or circumstance" that could lead to a potential claim against the company.

The SEC's subsequent enforcement action – and its detailed complaints exposing appellants' knowledge of and participation in the 2000-2002 accounting fraud – triggered the terms of the Warranty Letter. Twin City paid \$2.5 million in appellants' defense costs, but declined to extend the additional \$2.5 million in coverage made available after the Warranty Letter was signed. On the parties' cross-motions for summary judgment in appellants' declaratory judgment action,

the District Court concluded that the Warranty Letter by its terms precluded appellants from seeking the additional \$2.5 million coverage increment.

The question on appeal is whether the District Court properly granted partial summary judgment in favor of Twin City when the allegations of the SEC's amended complaint in the underlying case established that appellants were precluded by the plain terms of the Warranty Letter from claiming the additional \$2.5 million in excess coverage.

## **STATEMENT OF THE FACTS**

### **Fischer Imaging and the Twin City Policy**

Fischer Imaging Corporation, a now-defunct company, manufactured and sold medical imaging systems.<sup>1</sup> As part of its insurance portfolio, Fischer carried Directors and Officers (“D&O”) insurance coverage for the benefit of the company’s directors, officers, and (in certain circumstances) employees. Fischer’s primary layer of D&O coverage – \$5 million – was supplied by Federal Insurance Company. Aple. App. 55-102.<sup>2</sup> The Federal policy, a one-year policy effective

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<sup>1</sup> Fischer Imaging filed for bankruptcy in August 2006. See App. 1 n.1.

<sup>2</sup> “Aple. App.” refers to Appellee’s Supplemental Appendix filed herewith. Appellants’ Appendix contains only incomplete portions of the Federal and Twin City Policies. The full Federal policy and all endorsements, and the full Twin City excess policy and all endorsements, can be found in the Supplemental Appendix at Aple. App. 55-102 and 103-127 respectively. Appellants’ Appendix is lacking in several other respects; among other things, it does not include the parties’ summary

Continued on next page

May 2002, provided that Federal would pay “all Loss for which the Insured Person [i.e., director or officer] is not indemnified by the Insured Organization [i.e., Fischer] and which the Insured Person becomes legally obligated to pay on account of any Claim first made against him, individually or otherwise, during the Policy Period . . . for a Wrongful Act committed, attempted, or allegedly committed or attempted by such Insured Person before or during the Policy Period.” Aple. App. 67. The Federal policy also contains language particular to securities claims, specifying that the insurer “shall pay on behalf of any Insured Organization all Loss for which it becomes legally obligated to pay on account of any Securities Claim first made against it during the Policy Period . . . for a Wrongful Act.” Aple. App. 85.<sup>3</sup>

The Federal policy expressly provides that the insurer has no duty to defend any Claim; rather, it is “the duty of the Insured Persons” – the directors and

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judgment papers or the exhibits filed in the District Court. See Burnett v. Sw. Bell Tel. Co., 2009 WL 237702, at \*2 (10th Cir. Feb. 3, 2009) (affirming district court’s grant of summary judgment to appellee and noting that appellant had “inexplicably” not included in the appendix the parties’ summary judgment papers and critical exhibits filed in the district court). Appellees’ Supplemental Appendix includes all of the documents required to be included in the Appendix and omitted from Appellants’ submission.

<sup>3</sup> The Federal policy defines (among other things) the capitalized terms “Loss,” “Insured Organization,” “Insured Person,” “Securities Claim,” and “Wrongful Act.” Aple. App. 73-74, 85-86.

officers themselves – to defend claims. Aple. App. 71. In such circumstances, the insurer advances defense costs; the insured directs the defense itself. See, e.g., Gon v. First State Ins. Co., 871 F.2d 863, 868 (9th Cir. 1989) (explaining that a policy with a duty to defend “typically contains a clause that provides that the insurer chooses the attorney and controls the strategy of the litigation” and that “[d]irectors and officers liability policies generally do not contain a duty to defend”) (cited in Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co., 926 F. Supp. 1426, 1432 (D. Colo. 1996)).

Twin City issued an excess policy effective May 2002-May 2003 that followed form to the Federal primary policy, meaning that the Twin City policy was subject to the Federal policy’s same terms and conditions, except as otherwise provided in the Twin City policy itself. Aple. App. 106; see also Radil v. Nat’l Union Fire Ins. Co., 2008 WL 4593008, at \*4 (Colo. Ct. App. Oct. 16, 2008) (“follow form” policy “adopts the terms and conditions of the primary insurer’s policy”). The Twin City policy contained a \$5 million limit of liability in excess of the \$5 million in primary coverage provided under Federal’s policy. Aple. App. 103, 110.

The Twin City policy was a renewal of a previous policy that provided Fischer only \$2.5 million in excess D&O coverage. Aple. App. 392. But when Fischer sought renewal of its excess policy coverage in early 2002, the company

sought and received an additional \$2.5 million in excess coverage – doubling its earlier limit.

In order to obtain this additional \$2.5 million in coverage, Fischer supplied Twin City with a Warranty Letter. Aple. App. 127. Signed by appellant Johnson, then Fischer’s CFO, and Gerald Knudson, then Fischer’s CEO, the Warranty Letter stated in pertinent part that “[n]o person or entity for whom this insurance is intended has any knowledge or information of any act, error, omission, fact or circumstance which may give rise to a claim which may fall within the scope of the proposed insurance detailed above.” Aple. App. 127.<sup>4</sup> The Warranty Letter also set forth – in all capital letters – the following:

IT IS AGREED THAT IF SUCH KNOWLEDGE OR INFORMATION EXISTS, ANY CLAIM ARISING THEREFROM (WHETHER OR NOT DISCLOSED HEREIN), IN ADDITION TO ANY OTHER REMEDY THE INSURER MAY HAVE, IS EXCLUDED FROM THE PROPOSED COVERAGE.

IT IS FURTHER AGREED THAT THIS LETTER SHALL BE DEEMED PART OF THE POLICY AND THE STATEMENT MADE THEREON SHALL BE DEEMED AN EXPRESS WARRANTY FOR ALL INSUREDS WHICH HAS BEEN RELIED UPON BY

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<sup>4</sup> The Warranty Letter was signed originally by Johnson, then the CFO, and Knudson. Aple. App. 127. Johnson’s signature and title later were crossed out and replaced by a signature that says “Burke,” with a notation underneath of the titles “EVP & CFO.” Aple. App. 127. Appellant Burke became Fischer’s Executive Vice President and Chief Financial Officer in October 2002. App. 20.

THE INSURER PURSUANT TO THE ISSUANCE OF  
COVERAGE. [Aple. App. 127.]

The Warranty Letter's reference to it being "an express warranty for all insureds," Aple. App. 127, means that it was non-severable; violation of its terms precluded coverage for any person otherwise insured under the policy. See Chacon v. Am. Family Mut. Ins. Co., 788 P.2d 748, 752 (Colo. 1990) (phrase "any insured" in exclusionary provisions deemed to apply to innocent co-insured under Colorado law). The Warranty Letter also makes clear that it was incorporated into the Twin City policy. See Aple. App. 127 ("It is further agreed that this letter shall be deemed part of the policy").

**Appellants' Accounting Scheme**

Johnson and Knudson signed the Warranty Letter on May 1, 2002, the day the new Twin City policy went into effect. At the time Johnson and Knudson signed that letter, a fraudulent scheme to inflate Fischer's reported revenues, implemented by Johnson and the other appellants, had been under way for over a year.

Appellants' financial fraud involved the creation of fictional revenue based on "sales" of medical equipment where customers had not yet agreed to accept delivery. When customers – pressured by Fischer sales agents offering discounts and other favorable terms, particularly at the end of quarters – signed sales agreements but were not yet ready to take delivery of the products, Fischer would

ship the products instead to third-party warehouses. App. 26. Fischer “controlled the equipment, paid to store it, and insured it.” App. 26. Equipment “often remained in storage facilities for periods of several months to over a year after Fischer had recognized revenue on the transactions.” App. 26. It was wrong under basic accounting principles to recognize revenue on Fischer products shipped to Fischer-controlled warehouses on some future (and often contingent) promise of delivery. A product must be shipped to the customer in order for a company to recognize revenue from its sale. See App. 27-28. Fischer’s scheme thus was, essentially, an equipment-based Ponzi scheme; the company recognized revenue on its books by reporting “revenue” from equipment yet to be delivered.

### **The Scheme Is Exposed**

As a result of appellants’ financial fraud, Fischer reported a dramatically improved financial outlook in 2000 and 2001 – a far cry from the company’s prior “years of reporting net losses.” App. 22. By the spring of 2002, however, Fischer’s board of directors became “increasingly concerned with Fischer’s inordinately high inventory levels.” App. 23. In August 2002 – a few months after doubling its D&O excess-liability limits under the Twin City policy – Fischer announced that its second-quarter SEC Form 10-Q would be delayed “because of an anticipated write down in inventory, among other reasons.” App. 23-24. And in October 2002, Fischer’s new controller advised the company’s outside auditors

that Fischer had recognized revenue on sales of equipment shipped to third-party warehouses. App. 24. The auditors commenced a comprehensive review. App. 24.

In April 2003, Fischer announced that it was delaying the filing of its SEC Form 10-K for 2002 and that it was likely to restate earlier financial statements issued from 2000 through the third quarter of 2002. App. 5, 24.<sup>5</sup> Shortly after that announcement, Fischer and some of its officers and directors were named as defendants in private securities class actions. App. 5. Fischer announced in July 2003 that it had been delisted from the NASDAQ National Market. App. 24. And the United States Securities and Exchange Commission (“SEC”) began to investigate the company. App. 5.

### **The SEC’s Complaints**

While the private securities class actions ultimately were dismissed, App. 5, the SEC’s investigation ripened into a cease-and-desist order against the company and a full-fledged federal court complaint. App. 6. In June 2005, the United States

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<sup>5</sup> Fischer’s audited restated financial results showed that during 2000, 2001, and the first three quarters of 2002, “Fischer recognized approximately . . . 49% of its product revenue and 38% of its total revenue one or more quarters before the equipment was installed at customer sites. Of that amount, about . . . 25% of Fischer’s product revenue and 18% of its total revenue was recognized two quarters or more before the equipment was installed.” App. 24-25 (emphases added).

Securities and Exchange Commission brought a civil enforcement action against Rivelli, Johnson, Burke, Ayers, Hoffman, and Stevenson – the appellants here. Aple. App. 128-172 (SEC’s Original Complaint). In 44 detailed pages, the SEC’s Complaint alleged that “beginning at least as early as January 1, 2000 and continuing through the filing of Fischer’s report on Form 10-Q for the quarter ended September 29, 2002, the [appellants] carried out a scheme to fraudulently inflate Fischer’s reported quarterly revenue and net income by recognizing revenue on equipment as to which customers had not yet agreed to accept delivery, and on transactions as to which there were material contingencies, including rights of return.” Aple. App. 136.

Fischer already had notified its D&O insurers of the private securities class actions and of the SEC’s ongoing investigation. App. 5; see Aple. App. 173, 187 (reservation-of-rights letters noting earlier correspondence). After the SEC filed its complaint, Twin City issued a letter reserving all of the company’s “rights and defenses in connection with the SEC Action.” Aple. App. 173. Among other things, Twin City’s reservation-of-rights letter identified the Warranty Letter and noted:

[A]llegations continue to be made that Fischer and the individual defendants violated the federal securities laws by disseminating false financial information through the use of improper accounting techniques regarding revenue recognition, inventory valuation and calculation of gross profits. The complaint in the SEC Action (together with Fischer’s restatement of its financials in April 2004)

makes it clear that the financial materials relied upon by Twin City in issuing the Policy were materially misleading and that certain insureds may have had knowledge of facts or circumstances that might give rise to a claim at the time the Warranty Letter was executed. [Aple. App. 174].

Twin City accordingly reserved “all of its rights and defenses in this matter under the Policy and at law,” Aple. App. 175, including its right to argue that coverage was excluded under the policy “to the extent that Fischer or any person for whom insurance was intended had knowledge or information that falls within the scope of the Warranty Letter.” Aple. App. 174. See also Aple. App. 176 (August 3, 2005 letter adopting Federal’s views on availability of coverage and reiterating that it would “reserve all of its rights and defenses under the Policy and at law . . . in accordance with its prior coverage correspondence”).

After nearly three years of litigation, including many depositions and extensive document production in the underlying SEC case, the SEC filed a 114-paragraph, seven-count Amended Complaint in May 2008. App. 17-55. The District Court quoted large excerpts of the SEC’s Amended Complaint in its decision, see App. 12-14, and those exemplars similarly are worth setting forth here:

Beginning at least as early as January 1, 2000 and continuing through the filing of Fischer’s report on Form 10-Q for the quarter ended September 29, 2002, the Defendants carried out a scheme to fraudulently inflate Fischer’s reported quarterly revenue and net income by recognizing revenue on equipment as to which customers had not yet agreed to accept delivery,

and on transactions as to which there were material contingencies, including rights of return.” App. 25 (SEC Am. Compl. ¶ 30) (emphasis added).

\* \* \*

Rivelli was aware that when Fischer shipped orders before customers agreed to take delivery of the products, Fischer shipped them to warehouses controlled and paid for by Fischer. Rivelli was notified of specific orders Fischer was holding in storage when he received emails from a Fischer employee with lists of orders that had been shipped to Fischer controlled storage facilities. In a March 2002 email, Rivelli acknowledged that, over the preceding three years, Fischer almost always had twelve or more systems in storage and paid the storage costs for all but two orders. Moreover, Rivelli was personally involved in transactions as to which he knew or was reckless in not knowing that Fischer improperly recognized revenue, where the customers had not agreed to take delivery of the equipment and Fischer shipped the equipment to a storage facility.” App. 29 (SEC Am. Compl. ¶ 39) (emphases added).

\* \* \*

Rivelli knew that in May 2001 EPMed [one of the putative buyers of Fischer’s products] did not provide a requested delivery date or location because it had not yet entered into an agreement with a customer to buy the system or even identified what customer would buy it. Rivelli also knew that Fischer was responsible for delivering the system directly to EPMed’s customer when the customer requested delivery because EPMed never intended to take physical delivery of the equipment. Rivelli directed that Fischer ship this equipment to a Fischer controlled storage facility in May 2001 and Fischer recognized approximately \$532,000 of revenue on the equipment, which accounted for about 31% of Fischer’s net income for the quarter. App. 29 (SEC Am. Compl. ¶ 40) (emphases added).

\* \* \*

Between January 2000 and September 2002, Rivelli and Johnson were both aware of side agreements and backdated sales orders related to purported sales on which Fischer

improperly recognized revenue. Rivelli and Johnson never provided any of the side agreements to Fischer's independent auditors and never disclosed any side agreements or backdated sales orders to Fischer's independent auditors. App. 40 (SEC Am. Compl. ¶ 62) (emphasis added).

\* \* \*

Rivelli, Johnson, Burke, and Ayers each met with Fischer's external auditors in connection with their reviews or audits of Fischer's financial statements and discussed accounting and reporting issues, including Fischer's revenue recognition practices. Rivelli, Johnson, Burke and Ayers knew that Fischer recognized revenue when it shipped equipment to Fischer controlled warehouses and omitted to state this material fact to Fischer's external auditors. App. 40 (SEC Compl. ¶ 63) (emphases added).

\* \* \*

Moreover, during their tenures at Fischer, Rivelli and Johnson directed a scheme to conceal contingencies and to obtain false and misleading documents after the end of every quarter in order to hide Fischer's fraudulent revenue recognition from Fischer's auditors. Several of Fischer's employees termed the time between the end of each quarter and the date on which Fischer's auditors arrived to perform audits or quarterly reviews the "clean up period." During the "clean up period," Rivelli and Johnson directed Fischer employees to "clear" contingencies that were unresolved at the end of the quarter. If sales documents referenced contingencies, Rivelli and Johnson directed Fischer employees to "clean them up" by obtaining purchase orders or sales contracts which did not reference the contingencies that were in effect. Further, in circumstances where customers had originally submitted purchase orders or sales contracts that contained FOB Destination terms, Rivelli and Johnson directed Fischer personnel to obtain sales documentation with false FOB Factory terms. Through their involvement in Fischer's "clean up" period, Rivelli and Johnson knew about, personally directed, and participated in, Fischer's concealment of contingencies and other material facts from Fischer's auditors and Fischer's creation and provision to the

auditors of false and misleading documents. App. 41-42 (SEC Am. Compl. ¶ 68) (emphases added.)

\* \* \*

Stevenson and Hoffman used side letters to deceive Fischer's accountants and Fischer's external auditors. Stevenson withheld and failed to disclose side letters to Fischer's sales administrator and accounting department when he knew or was reckless in not knowing that the terms contained in the side agreements made it improper for Fischer to recognize revenue. Stevenson also hid side agreements because he knew that if Fischer's external auditors were aware of them, Fischer would not be permitted to recognize revenue from the transactions. On at least one occasion, Stevenson contracted with a customer to keep the existence of a contingency contained in a side letter secret to prevent Fischer's auditors from finding out about it. On at least one occasion, Hoffman failed to disclose a side letter to Fischer's sales administrator and accounting department when he knew or was reckless in not knowing that it was wrong for Fischer to recognize revenue from the transaction as a result of the terms contained in the side agreement. Hoffman knew that when he did provide side agreements to Fischer's sales administrator, they were not provided to Fischer's external auditors because the auditors would not allow Fischer to recognize revenue from the transactions if they were aware of the terms contained in the side agreements. App. 43-44 (SEC Am. Compl. ¶ 72) (emphases added).

\* \* \*

Rivelli, Johnson, Burke, Ayers, Stevenson, and Hoffman aided and abetted Fischer's violations of the books and records provisions of the federal securities laws because they knowingly or recklessly caused Fischer's books and records to be falsified. Each individual knew about and participated in Fischer's recognition of revenue from orders shipped to warehouses controlled by Fischer. App. 44-45 (SEC Am. Compl. ¶ 75) (emphasis added).

These allegations and others plainly allege that as of May 1, 2002 – when the Warranty Letter was signed – appellants knew of facts that could give rise to a claim under the Twin City policy.

Fischer’s primary insurer, Federal, advanced the costs of appellants’ defense in the private securities actions and the SEC’s enforcement action from 2003 until late 2007, when the \$5 million policy limit exhausted.<sup>6</sup> App. 6. Twin City thereafter advanced (subject to a full reservation of its rights) appellants’ defense costs up to \$2.5 million, the amount available under the policy in effect that was not subject to the Warranty Letter. Aple. App. 191.<sup>7</sup> After having spent \$7.5 million in defense costs on a case that had yet gone to trial, appellants asked Twin City to advance the additional defense expenses up to \$2.5 million. Twin City declined to advance defense costs beyond the \$2.5 million it had already expended.

As Twin City explained, it had concluded, based on its “careful review of the

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<sup>6</sup> The Federal policy specifies that defense costs “are part of and not in addition to the Limits of Liability” set forth in the policy, and that “the payment by the Company of Defense Costs reduces such Limits of Liability.” Aple. App. 71. Twin City’s policy follows form to Federal’s in this respect.

<sup>7</sup> Appellants’ suggestion that Twin City “failed to advance defense costs under a reservation of rights,” Br. 17, therefore is counterfactual. Twin City advanced \$2.5 million in defense costs under a reservation of rights. Also counterfactual is appellants’ assertion that Twin City claimed the Warranty Letter had been triggered by “matters developed in discovery in the Underlying SEC Action.” Br. 17. Twin City made clear from 2005 that its coverage defenses were based on, among others, court filings and documents, the SEC’s complaints themselves. See Aple. App. 173-175, 188-189, 226-227.

various court filings and orders, deposition transcripts and expert reports,” that “the provisions of the Warranty Letter have been triggered, in that the company and/or one or more persons for whom insurance was intended appear to have had knowledge or information of facts that gave rise to a Claim.” Aple. App. 188-189.

### **The District Court Proceedings**

Appellants filed an action against Twin City in June 2008, seeking, among other things, a declaratory judgment that Twin City had the duty to timely advance appellants’ defense costs beyond the \$2.5 million Twin City already had expended and up to the excess policy limit of \$5 million. Aple. App. 1-12. Twin City answered, Aple. App. 13-24, and quickly secured dismissal of the appellants’ claims for relief for violation of the Colorado Consumer Protection Act. See App. 7; see also Aple. App. 24.<sup>8</sup> Appellants subsequently filed a motion for partial summary judgment on their declaratory-judgment count, arguing that Twin City was obligated to advance defense expenses up to the full \$5 million. Aple. App. 25.

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<sup>8</sup> Appellants also sought a preliminary injunction requiring Twin City to advance defense costs beyond the \$2.5 million it had agreed (subject to a reservation of rights) to pay. See Aple. App. 24. The District Court stated that it would not “enter a preliminary injunction without some form of incremental security.” Aple. App. 24. Appellants did not post security; no injunction issued. See also Aple. App. 396 (noting that “Plaintiffs’ motion for preliminary injunction was denied”).

Agreeing with the appellants that the relevant facts were beyond reasonable dispute, Twin City cross-moved for summary judgment on appellants' claims. Aple. App. 332. As Twin City explained in its response to appellants' motion and in support of its own cross-motion, Twin City had no duty to advance defense costs beyond the \$2.5 million Twin City had already paid, because the plain terms of the Warranty Letter barred the appellants from accessing the additional \$2.5 million in coverage. Aple. App. 201-228, 332-336.

The Complaint and Amended Complaint in the SEC action specifically alleged that on or before May 1, 2002 – when the Warranty Letter was executed – one or more of the appellants had knowledge of or information about acts, errors, omissions, facts, or circumstances that may give rise to a claim under the Twin City policy. See Aple. App. 201, 215-218. Twin City also explained in its submissions that extrinsic evidence from the SEC's investigation and from discovery in the underlying SEC case further confirmed that the appellants knew before May 1, 2002, of facts that would give rise to a claim. See Aple. App. 223-225. The Warranty Letter accordingly barred coverage.<sup>9</sup>

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<sup>9</sup> Twin City also sought summary judgment on appellants' claim for breach of contract based on the non-payment of defense costs and on appellants' bad-faith claim. Aple. App. 335.

After a thorough hearing, Aple. App. 338-388, the District Court granted summary judgment to Twin City on appellants' declaratory-judgment claim, concluding that the Warranty Letter barred appellants from seeking additional coverage under the Twin City excess policy. App. 1-16. As the District Court explained, the SEC's original and Amended Complaints both alleged that the appellants had "directed or participated in a fraudulent scheme involving the improper recognition of revenue for sales transactions having contingent terms contained in side letters that were not disclosed to Fischer's accounting department or outside auditors, and the improper recognition of revenue for sales of equipment shipped to and stored in a Fischer-controlled warehouse." App. 9. Review of those complaints and the terms of the Warranty Letter, the court went on, "compels the conclusion that the SEC's allegations are within the exclusion of claims arising from an 'act, error, omission, fact, or circumstance' of which an insured person had prior knowledge." App. 10. After reviewing the appellants' roles at Fischer, App. 11-12, and reciting in detail multiple allegations in the SEC's amended complaint (the same excerpts repeated verbatim supra at 9-13), the District Court concluded that "[t]hese allegations and others, when read together, show that Rivelli and Johnson knew of wrongful activities at Fischer that could give rise to a claim under the Twin City Policy before May 1, 2002." App. 14.<sup>10</sup> And under the plain terms

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<sup>10</sup> The District Court concluded that Colorado law required it to determine

Continued on next page

of the Warranty Letter, if any one insured person had knowledge of any such activities, “the top \$2.5 million of coverage is affected for all insured persons, even those without such personal knowledge.” App. 11. Because at least Rivelli and Johnson knew of wrongful activities at Fischer at the time of the Warranty Letter,

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whether Twin City had a duty to defend appellants, and thus the applicability of the Warranty Letter’s exclusion, based on the “four corners” of the SEC’s complaints, “without resort to extrinsic evidence” such as the deposition testimony obtained in the SEC’s enforcement action. App. 9. But Colorado law is more accommodating of extrinsic evidence than the District Court contemplated, for two reasons. First, under the policies at issue, Twin City had no duty to defend appellants. See supra at 3-4. The obligation to advance defense costs is different from the duty-to-defend obligation forming the basis for the District Court’s “four corners” decision. See Farmington Cas. Co. v. United Educators Ins. Risk Retention Group, Inc., 117 F. Supp. 2d 1022, 1027 (D. Colo. 1999) (“Decisions by judges of this Court and the Colorado Court of Appeals have specifically recognized that the duty to reimburse defense costs . . . is different from the duty to defend.”) (citing Fight Against Coercive Tactics Network, 926 F. Supp. at 1432, and Bertagnolli v. Ass’n of Trial Lawyers Assur., 934 P.2d 916, 918 (Colo. Ct. App. 1997)), aff’d, 36 Fed. Appx. 408 (10th Cir. 2002).

Second, even in pure duty-to-defend cases, Colorado law contains an exception to the four-corners rule. As this Court has explained, “an insurer should not have a duty to defend an insured when the facts alleged in the complaint ostensibly bring the case within the policy’s coverage, but other facts that are not reflected in the complaint and are unrelated to the merits of the plaintiff’s action plainly take the case outside the policy coverage.” Pompa v. Am. Family Mut. Ins. Co., 520 F.3d 1139, 1147 (10th Cir. 2008). Here, other facts “not reflected” in the SEC’s underlying complaint – to wit, appellants’ false assertions in the Warranty letter – support the conclusion under Pompa that the District Court could properly have considered the substantial extrinsic evidence related to the issues in this action. But in any event, even the District Court’s more restrictive “four corners” assessment amply bears out the conclusion that the Warranty Letter is triggered and excludes coverage.

the Warranty Letter excluded all appellants from the last \$2.5 million in coverage under Twin City's policy. App. 11.

The District Court rejected the contention offered by Rivelli's counsel at the motions hearing that Rivelli – Fischer's CEO – might merely have negligently "failed to appreciate the wrongful nature of Fischer's accounting practices." App. 14-15. As the court explained, any CEO – Rivelli included – "could not fail to appreciate the potential for liability created by activities such as recognizing income on transactions having contingencies due to disguised side agreements, or recognizing income on products held in a company-controlled warehouse, while the company paid for the storage costs." App. 15. That the SEC's Amended Complaint had phrased certain claims in the alternative – as requiring knowledge or recklessness – did not relieve appellants from the terms of the Warranty Letter given the litany of wrongful activities recited in the Amended Complaint. App. 15.<sup>11</sup>

The District Court observed that it was resolving the parties' cross-motions for summary judgment only as to appellants' declaratory-judgment claim, their

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<sup>11</sup> The District Court also rejected appellants' argument that Twin City was somehow estopped by prior conduct from relying on its Warranty Letter. As the court explained, "[u]nder Colorado law, the doctrines of waiver and estoppel cannot be used to create coverage where none previously existed under the terms of the policy." App. 15 (citing multiple cases). Appellants did not appeal this determination.

first request for relief. App. 15. But finding that the issue was important to the underlying SEC action, severable, and that there was “no just reason for delay,” the court directed that final judgment be entered under Fed. R. Civ. P. 54(b) on the first claim for relief. App. 16.

Appellants filed a timely appeal. The District Court’s judgment should be affirmed.

### **SUMMARY OF ARGUMENT**

Paragraph after paragraph in the SEC’s Amended Complaint specifically alleges that each of the appellants knew of and participated in a fraudulent accounting scheme. That scheme had been under way for over a year, and was ongoing, at the time the Warranty Letter was signed in May 2002. Under the plain terms of that Warranty Letter, one appellant’s knowledge of the scheme precluded the additional increment of \$2.5 million in coverage that was made available following the Warranty Letter. The District Court correctly concluded that given the facts alleged in the SEC’s Amended Complaint, appellants were precluded from seeking advances of that additional \$2.5 million towards future defense fees or indemnity.

Appellants understandably have nothing to say about the detailed litany of wrongdoing alleged in the SEC’s Amended Complaint. They nonetheless

challenge the District Court's judgment in Twin City's favor with a handful of arguments on appeal, all of which are meritless.

Appellants begin by offering the counterintuitive argument that Twin City was obligated under Colorado law to advance all of appellants' defense costs – even the costs appellants plainly forfeited under the Warranty Letter – and to attempt to recoup those costs only after the underlying litigation concluded. That is plainly not the law in Colorado. Multiple decisions demonstrate as much.

Appellants next argue that the Warranty Letter's language was "ambiguous," purportedly because the letter does not adequately specify whether the appropriate standard of knowledge is subjective or objective. This argument is newly minted on appeal; it was never raised below, and accordingly is waived here. The new ambiguity argument also is an irrelevant detour; the District Court's decision plainly satisfies even appellants' preferred "subjective knowledge" standard. Appellants argue at length that the District Court in one sentence somehow managed to import (without ever saying so) an "objective knowledge" standard into its inquiry. The District Court did no such thing. And even if appellants are taken at their overblown word that the court improperly strayed into "objective" territory when examining one appellant's knowledge, appellants have nothing to say about the extensive list of all of the other appellants' actual, subjective

knowledge at the time the Warranty Letter was signed of information that could give rise to a claim under the Twin City policy.

Appellants next contend that the District Court should have looked not at the facts of the underlying SEC Amended Complaint, but instead should have reviewed only the titles and elements of proof of the actual legal claims the SEC articulated at the close of its detailed pleading. Controlling Colorado case law again says otherwise. The duty-to-defend inquiry focuses on the complaint's facts, not on how the plaintiff formulates its legal claims. It is irrelevant to the inquiry that the SEC offered certain allegations in the alternative (i.e., that certain conduct was knowing or reckless), or that proof of the SEC's legal claims require something less than a showing of knowledge. What matters are the facts pled, and these facts are damning.

The District Court's judgment should be affirmed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Both parties below moved for summary judgment on appellants' declaratory judgment count, and both parties asserted that the relevant facts were not in dispute and that the District Court could enter judgment as a matter of law. The District Court's grant of summary judgment is reviewed de novo. Pompa v. Am. Family

Mut. Ins. Co., 520 F.3d 1139, 1142 (10th Cir. 2008) (affirming grant of summary judgment in favor of insurer).

**II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE WARRANTY LETTER BARS COVERAGE FOR THE LAST \$2.5 MILLION OF TWIN CITY’S EXCESS POLICY.**

An insurer’s duty to pay defense costs is contractual, and as with any contract, courts use basic contract interpretation principles to interpret insurance policies.<sup>12</sup> See Thompson v. Md. Cas. Co., 84 P.3d 496, 501 (Colo. 2004). To determine whether the duty to defend exists, Colorado courts consider whether the factual allegations in the underlying complaint trigger coverage under an insurance policy’s terms. Id. at 502; see also Zurich Am. Ins. Co. v. O’Hara Reg’l Ctr. for Rehab., 529 F.3d 916, 921 (10th Cir. 2008). There is no duty to defend absent a factual or legal basis on which the insurer might have a duty to indemnify. Thompson, 84 P.3d at 502 n.6 (citations omitted). And “[i]f there is no duty to defend, then there is no duty to indemnify.” Zurich, 529 F.3d at 920 (citing Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003)); see also

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<sup>12</sup> As explained above, the duty Twin City assumed to Fischer’s directors and officers was a duty to advance defense costs – not a duty to defend. See supra at 17-18 n.10. But for these purposes, Twin City will assume, as it did below, that the legal standard for determining the existence vel non of a duty to advance defense costs is the same as that governing the duty to defend.

TerraMatrix, Inc. v. U.S. Fire Ins. Co., 939 P.2d 483, 486 (Colo. Ct. App. 1997) (same).

The initial burden is on the insured to prove that the suit arguably comes within the scope of the policy's coverage. Cyprus Amax Minerals Co., 74 P.3d at 301. If the insured meets that burden, the insurer has the burden of establishing that the claims asserted in the complaint are "solely and entirely within the exclusions in the insurance policy" and the exclusions "are not subject to any other reasonable interpretations." Miller v. Hartford Cas. Ins. Co., 160 P.3d 408, 410 (Colo. App. 2007) (internal quotations omitted); see also TerraMatrix, 939 P.2d at 486. As this Court recently explained in Zurich, "[t]he facts alleged in the complaint, not the legal claims asserted by the plaintiff, determine the insurer's duty." 529 F.3d at 921 (citing Gerrity Co. v. CIGNA Prop. & Cas. Ins. Co., 860 P.2d 606, 607 (Colo. Ct. App. 1993)).

**A. Twin City Had No Obligation To Advance Defense Costs Pending Resolution Of The Underlying Complaint.**

Appellants' lead-off argument on appeal is the argument that despite the plain terms of the Warranty Letter barring appellants from seeking advances of their defense costs, Twin City should have advanced to appellants all defense costs under the policy anyway. See Br. 16. That argument is meritless.

To begin with, appellants neglect to mention the \$2.5 million in defense costs Twin City did advance under a reservation of rights. See Aple. App. 191.

Where Twin City drew the line was in advancing the additional increment of defense costs above \$2.5 million, in light of the plain application of the Warranty Letter. Twin City's approach was in perfect keeping with Colorado law; courts regularly approve and affirm summary judgments in favor of insurers finding no duty to defend where insurers have – as here – declined to advance defense costs. See, e.g., Thompson, 84 P.3d at 502; Miller, 160 P.3d at 410; TerraMatrix, 939 P.2d at 486 (all affirming summary judgment for insurers in cases where insurers disclaimed a duty to defend while the underlying lawsuit was still in litigation, without advancing defense costs under reservation of rights).<sup>13</sup>

Appellants' contention that the "proper course of action" would have been for Twin City to advance costs now and seek to recover them later, Br. 16, springs from the Colorado Supreme Court's suggestion that the "appropriate" course of action for an insurer that believes it has no duty to defend is to defend under reservation and seek reimbursement later. See Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1089 (Colo. 1991). But as subsequent courts and commentators have explained, Hecla does not force insurers into only that "one choice" when

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<sup>13</sup> See also, e.g., Pike v. Am. States Preferred Ins. Co., 55 P.3d 212, 213-14 (Colo. Ct. App. 2002) (insurer investigated claim and refused to defend; held: no duty to defend); Fire Ins. Exch. v. Bentley, 953 P.2d 1297, 1299 (Colo. Ct. App. 1998) (insurer refused to defend and filed declaratory judgment action against insured; held: no duty to defend).

confronted with the question whether to defend an insured. Flannery v. Allstate Ins. Co., 49 F. Supp. 2d 1223, 1228 (D. Colo. 1999) (characterizing Hecla's recommendation as dicta). As the district court explained in Flannery, Hecla “[f]airly read” permits an insurer who believes that it is under no obligation to defend to “(1) provide a defense to the insured under a reservation of its rights to seek reimbursement should the facts at trial of the underlying litigation prove that the incident resulting in liability was not covered by the policy; or (2) file a declaratory judgment action after the underlying litigation has been adjudicated.” Id. at 1228-29. See also Stewart McNab, The Duty to Defend in Colorado After Hecla Mining, 20 Colo. Law. 2095, 2097 (1991) (observing that under Hecla, “[i]n cases where the existence of coverage is uncertain, the insurer can choose to defend but can hope to get its money back only after further litigation. Alternatively, the insurer can choose not to defend.” (emphasis added).

Appellants also appear to contend that Twin City’s decision to decline to advance defense costs constrained Twin City to prove the coverage exclusion from the “four corners” of the underlying operative SEC complaint, rather than any extrinsic evidence. See Br. 16-17. The one case appellants cite for this proposition, Cotter Corp. v. American Employers Surplus Lines Ins. Co., 90 P.3d 814, 827-28 (Colo. 2004), involved the duty to defend – not the duty to advance defense costs, which we have explained is a qualitatively different obligation. See

supra at 17-18 n.10 (citing cases). In any event, appellants' argument about four-corners versus extrinsic evidence is a sideshow. The District Court found that the facts alleged in the SEC's Amended Complaint alone – wholly aside from the substantial additional extrinsic evidence marshaled by Twin City below – plainly bar coverage. See App. 12-14, 15-16.

**B. Appellants Did Not Raise Their “Ambiguity” Argument Below.**

Appellants next argue that “[t]he prior knowledge exclusion on which Twin City relies is ambiguous on its face.” Br. 17. According to appellants, the Warranty Letter's language does not adequately “specify” whether the requisite knowledge or information be “actual subjective knowledge, and whether the knowledge or information need relate both to the facts and circumstances, and that the facts and circumstances could give rise to a claim.” Id. at 17-18.

The threshold problem with this argument (in addition to its utter lack of merit) is that it was never raised below. This Court will look in vain through appellants' motion below for an argument that the Warranty Letter provision was “ambiguous.”<sup>14</sup> Appellants may not now raise this new contention. As this Court

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<sup>14</sup> The only “ambiguity” argument appellants offered below was their contention in a footnote that the Warranty Letter did not operate to exclude coverage for any “innocent insureds.” See Aple. App. 46-47 n.8. The District Court rejected this contention, App. 11 (“The Warranty Letter explicitly states that the exclusion is non-severable”), and appellants have not repeated the same contention here.

explained in Sewell v. Great Northern Insurance Co., 535 F.3d 1166 (10th Cir. 2009), “[w]e normally do not pass on arguments not raised below, and we will not address these arguments here for that reason. Particularly on an appeal from the grant of summary judgment, we are reluctant to entertain new arguments because they have not been considered by the trial court.” Id. at 1170 n.2 (citing Tele-Comm., Inc. v. Comm’r of Internal Revenue, 104 F.3d 1229, 1232-33 (10th Cir. 1997)).

Appellants’ “ambiguity” contention is, in any event, irrelevant. For as we next discuss, the District Court’s decision satisfies even appellants’ preferred “subjective knowledge” standard. See Br. 19.

**C. The Facts Alleged In The SEC’s Amended Complaint Reveal Multiple Appellants’ Actual Knowledge Of Wrongdoing.**

As this Court recently explained, the inquiry on whether a duty to defend exists turns on “[t]he facts alleged in the complaint, not the legal claims asserted by the plaintiff” in the underlying case. Zurich, 529 F.3d at 921 (citing Gerrity, 860 P.2d at 607); see also Thompson, 84 P.3d at 508 (looking to factual allegations in underlying amended complaint to conclude on summary judgment that insured knowingly made false statements).

The District Court correctly concluded that the SEC’s Amended Complaint is rife with facts showing at least one appellant’s knowledge of facts or circumstances that could give rise to a claim under the Twin City policy. See App.

12-14.<sup>15</sup> The District Court recited verbatim in its opinion some (but not all) of the relevant paragraphs bearing on its determination; those paragraphs are excerpted above, see supra at 9-13, and they need not be repeated again here. Suffice to say that, as the excerpts above indicate, at least one appellant – Rivelli, or Johnson, or Burke, or Stevenson, or Hoffman, or Ayers – “knew about, personally directed, and participated in, Fischer’s concealment of contingencies and other material facts from Fischer’s auditors and Fischer’s creation and provision to the auditors of false and misleading documents.” App. 18.

Appellants never address this litany of facts. Instead they home in on one statement the District Court made in response to appellants’ risible contention that Rivelli, Fischer’s CEO, might merely have negligently overlooked basic accounting principles in directing the company’s lengthy accounting fraud.

Rejecting that suggestion, the District Court observed that “[a]nyone” holding the position of CEO or CFO of a publicly traded company “could not fail to appreciate

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<sup>15</sup> Appellants appear to have cured on appeal their tendency to cite the SEC’s Original Complaint and ignore its Amended Complaint. See Aple. App. 214-15 (discussing the fact that plaintiffs’ briefing referenced only the first SEC Complaint). The distinction between the SEC’s first complaint and its amended complaint hardly mattered for these purposes in any case; the allegations of appellants’ knowledge in the SEC’s first complaint were substantial in themselves. But in any event, the operative complaint for these purposes, as appellants apparently now recognize, is the SEC’s Amended Complaint. See Cyprus Amax Minerals Co., 74 P.3d at 301 (“the first step [in a coverage analysis] must be the final version of the complaint”) (emphasis added).

the potential for liability created by activities such as recognizing income on transactions having contingencies due to disguised side agreements, or recognizing income on products held in a company-controlled warehouse, while the company paid for the storage costs.” App. 15.

Appellants take this comment to be an improper (in their view<sup>16</sup>) foray into an “objective” test for knowledge under Colorado law, and they proceed to engage in a lengthy dissertation about the District Court’s purported error. Br. 20-23.

Appellants are quite wrong. The District Court did not resort to an objective test for knowledge nowhere else mentioned in the course of his decision. The court simply found Rivelli’s contentions beyond belief, not to mention belied by the plain facts of the Complaint. See Thompson, 84 P.3d at 508 (concluding that the facts alleged in the underlying “complaint as a whole . . . fairly allege[d]” that the insured knew the subject statement was false).<sup>17</sup> Appellants’ close focus on the

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<sup>16</sup> But see Adolph Coors Co. v. Truck Ins. Exch., 960 A.2d 617, 624-25 (D.C. App. 2008) (citing Cotter, 90 P.3d at 823, and Bentley, 953 P.2d at 1301, and suggesting that objective standard applies under Colorado law).

<sup>17</sup> Clearone Communications, Inc. v. National Union Fire Ins. Co., 494 F.3d 1238 (10th Cir. 2007), upon which appellants heavily rely in their foray into the “objective” test the court purportedly applied here, is irrelevant for two reasons. First, the Clearone court applied Utah law, not Colorado law. Second, the Clearone court concluded that the underlying complaint in that case did not supply sufficient allegations to satisfy that state’s standard for rescission of an insurance agreement. The SEC’s thorough complaint here amply satisfies the correct standard under the correct state’s law.

District Court's "anyone" statement regarding Rivelli's purported lack of accounting knowledge also ignores that Rivelli and all of the other appellants are alleged multiple times in the SEC's Amended Complaint to have "kn[own] about, personally directed, and participated in" Fischer's fraud. App. 18 (SEC Am. Compl. ¶ 3); see also App. 29-30 (SEC Am. Compl. ¶¶ 39, 40, 41) (referring to Rivelli's knowledge of storage and revenue deferral practices); App. 31 (SEC Am. Compl. ¶ 43) (referring to CFO and Warranty Letter signatory Johnson's being "aware that when Fischer shipped and recognized revenue from orders before customers were ready to accept delivery, Fischer stored the equipment in Fischer controlled warehouses" and his knowledge of Fischer's "policy of recognizing revenue upon shipment from its factory"); App. 33 (SEC Am. Compl. ¶ 46) (referring to CPA Burke's knowledge "early in his tenure . . . that it was Fischer's practice to recognize revenue on products shipped to storage facilities"); App. 34 (SEC Am. Compl. ¶ 50) (referring to CPA Ayers's knowledge that Fischer products were shipped to third party warehouses but recognized as revenues); App. 35-39 (SEC Am. Compl. ¶¶ 54-61) (referring to Stevenson and Hoffman's knowledge of and participation in creating side agreements committing Fischer to bear the risk of loss for equipment in exchange for customers issuing purchase orders with false or misleading terms).

Any one of these appellants' knowledge of their bad acts precludes coverage for all Fischer directors and officers under the plain terms of the Warranty Letter – a point that appellants do not contest on appeal. The SEC's Amended Complaint plainly satisfies that standard for not just one, but all of the appellants. Appellants' feverish dissection of the District Court's single "anyone" sentence regarding CEO Rivelli, Br. 20-23, therefore is beside the point.

**D. The Elements Of The Underlying Claims – And The SEC's Lesser-Included Allegations Of "Recklessness" – Are Not Relevant To The Duty-To-Defend Inquiry.**

Appellants next argue at length that because the SEC's claims "can be proved by recklessness" under Tenth Circuit law, the prior-knowledge exclusion is not triggered. Br. 23. As appellants would have it, because the SEC framed its claims as alternatively susceptible to proof of either knowing or reckless conduct, those alternative formulations vitiate any finding that the terms of the Warranty Letter are triggered. Id. at 24-33.

Appellants' arguments once again are beside the point. Again, the duty-to-defend inquiry looks to the factual allegations of the complaint – not at how the plaintiff in the underlying case chooses to formulate its legal claims – to determine whether an exclusion exists. See Zurich, 529 F.3d at 921; Thompson, 84 P.3d at 507 n.16 & 508; Gerrity, 860 P.2d at 607. The SEC's Amended Complaint is

riddled with factual allegations showing knowledge or awareness of facts that might give rise to a claim under Twin City's policy.

Scienter may be relevant to some of the SEC's causes of action; it is not determinative of coverage. It accordingly is of no moment under Colorado law that the elements of some of its claims do not require proof of knowledge to find the claim satisfied. See Thompson, 84 P.3d at 508 (finding that underlying complaint alleged facts showing that insured knew of his false statement, despite claim in underlying complaint requiring only lesser proof). Appellants cannot avoid this conclusion by arguing that the Amended Complaint's alternative references to recklessness mean that the allegations of the Amended Complaint are not "solely" or "entirely" within the exclusion. See Br. 25. The Amended Complaint repeatedly alleges that each appellant here knew and was aware of the fraudulent scheme. Those allegations by their own terms trigger the Warranty Letter as to at least one (actually, all) insured, and those allegations swallow any alternative allegations of recklessness or any lesser scienter standard.

Appellants also cannot escape the uniform array of Colorado cases on this point by arguing that the word "claim" in the Warranty Policy is ambiguous and that "it could be construed to have a more narrow meaning" than the one the District Court accorded it. Br. 26. (citing as support one district court case from Pennsylvania applying Pennsylvania law). To begin with, appellants (again) made

no such argument below, precluding them from offering it here. See supra at 27-28. More important, appellants' frolic and detour about the meaning of "Claim" in the Federal policy, versus "claim" as used in one sentence of the Warranty Letter, is irrelevant. Br. 26-28. To be clear: The Warranty Letter "is part of the policy." App. 11. The word "claim" is defined in the Federal Policy effective from May 1, 2002 to May 1, 2003. Twin City's policy follows form to Federal's. There is no other definition of "claim."<sup>18</sup> See Aple. App. 6 (Rivelli et al.'s complaint) (alleging that the SEC Complaint's claims "are 'covered claims under both D&O policies").

Appellants' unpreserved argument about the ambiguity of the word "claim" in the Warranty Letter devolves, expectedly, into a reprise of their argument that the District Court should have looked not to the factual allegations of the SEC's Amended Complaint, but to the specific titles and elements of the Claims For Relief articulated therein, some of which do not require knowledge as an element of proof. See Br. 29-32. This argument, in turn, is again forestalled by this

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<sup>18</sup> Even if there were no definition of claim in the policy, moreover, the commonly accepted meaning of that term is "a demand for something as a right." Nat'l Cas. Co. v. Great Sw. Fire Ins. Co., 833 P.2d 741, 744 (Colo. 1992); see also Combs v. Shelter Mut. Ins. Co., 551 F.3d 991, 998 (10th Cir. Okla. 2008). This common definition is far broader than the narrow definition of claim asserted by appellants – that a "claim" under the Warranty Letter refers to a "claim for relief" or a specific cause of action asserted in a suit. Thus, even if the definition contained in the Federal policy were not to apply, the dictionary definition of a "claim" leads to the same inescapable result as that reached by the District Court.

Court's decision in Zurich and the decision of the Colorado Supreme Court in Thompson – to name just two of the many decisions teaching that courts look to a complaint's factual allegations, not the titles of its legal claims, to assess the applicability of a coverage exclusion. See supra at 23-25.

**E. Summary Judgment Was Properly Granted For Twin City.**

Appellants close their brief with a short request that this Court not only reverse the District Court's grant of summary judgment to Twin City, but grant summary judgment in their favor on their declaratory-judgment claim. Br. 33. The District Court properly granted judgment to Twin City on appellants' declaratory-judgment claim, for all of the reasons explained above. Appellants' plea should be rejected.

**CONCLUSION**

For the foregoing reasons, the District Court's judgment should be affirmed.

**STATEMENT REGARDING ORAL ARGUMENT**

Appellants have not requested oral argument. Appellee Twin City likewise agrees that this Court can dispense with oral argument. The issues in this case are governed by clear-cut principles that the District Court faithfully applied.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **8,861** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point type.

Dated: March 16, 2009.

*S/L. Michael Brooks, Jr.*

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**CERTIFICATE OF DIGITAL SUBMISSION**

**CERTIFICATION OF DIGITAL SUBMISSIONS**

Undersigned counsel certifies that:

- (1) No privacy redactions were necessary, and every document submitted in Digital Form is an exact copy of the written document filed with the Clerk (except that the original and copies filed with the Clerk bears an original signature of the undersigned, while the electronically submitted copy contains an “s/ signature” only) and;
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*S/L. Michael Brooks, Jr.*

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## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, two copies of the foregoing Answer Brief of Appellee were served by first-class mail on, postage prepaid, and was sent by electronic mail to, the following:

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