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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE and LIABILITY INSURANCE COMPANY, Plaintiffs-Below/Appellants and Cross-Appellees, v. SYNGENTA CROP PROTECTION, LLC, Defendant-Below/Appellee and Cross-Appellant.	No. 135, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N19C-05-108 MMJ CCLD **PUBLIC VERSION** **Filed August 29, 2023**

SYNGENTA CROP PROTECTION, LLC'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS

This appeal concerns an insurance coverage dispute arising from the unjustifiable denial by Appellants/Cross-Appellees Zurich American Insurance Company ("ZAIC") and American Guarantee and Liability Insurance Company ("AGLIC") (together, "Zurich") of Appellee/Cross-Appellant Syngenta Crop Protection, LLC's ("Syngenta") claim for losses arising from numerous lawsuits brought by plaintiffs alleging they developed Parkinson's disease from exposure to Paraquat, a herbicide sold by Syngenta and its predecessors (the "Paraquat Actions")—allegations firmly denied by Syngenta.

Reneging on its promise to defend Syngenta in the Paraquat Actions, Zurich brought a declaratory judgment action against Syngenta regarding the 2017 primary and umbrella duty-to-defend policies it issued to Syngenta (the "Policies"), asserting that it (a) did not have a duty to defend Syngenta because a letter received by Syngenta on January 18, 2016 from attorney Stephen Tillery (the "Tillery Letter") was a "claim for damages . . . first made" in 2016, before the inception of the Policies, and (b) was excused from coverage under Section 2711 of Title 18 of the Delaware Code ("Section 2711"), based on a purported material omission in Syngenta's application for the Policies, *i.e.*, the non-mention of the Tillery Letter. These arguments were properly rejected by the trial court; Zurich has not appealed the court's rejection of its Section 2711 claim.

In its August 3, 2020 Opinion (the "2020 Opinion"), the trial court rejected Zurich's argument that a "claim for damages" was first made prior to 2017, finding that the Tillery Letter did not demand damages and lacked the requisite specificity. Following the close of discovery, in its August 24, 2022 Opinion (the "2022 Opinion"), the court reconfirmed that the Tillery Letter was not a "claim for damages," rejecting Zurich's argument that "new evidence" cited by Zurich supported its position. These rulings were consistent with the facts presented, the Policies' language and Delaware law, and should be affirmed.

On March 4, 2021, the trial court granted in part and denied in part Zurich's motion to compel the production of privileged communications between Syngenta and its outside counsel, Kirkland & Ellis LLP ("Kirkland"), ordering Syngenta to produce only factual portions of the privileged communications. Zurich appeals the court's order insofar as it denied Zurich's attempt to obtain purely privileged communications between Syngenta and Kirkland, and this part of Zurich's appeal must also be rejected.

Also before this Court is Syngenta's cross-appeal relating to the trial court's grant of Zurich's motion for summary judgment dismissing Syngenta's bad faith counterclaim. The counterclaim should have proceeded to trial, and the court erred in dismissing it.

SUMMARY OF ARGUMENTS

I. Syngenta's Answer to Zurich's Summary of Arguments on Appeal

1. **Denied.** As correctly held by the trial court, the Tillery Letter did not constitute a "claim for damages" in 2016 under the Policies for two reasons, either of which independently supports affirmance: (1) its failure to "mak[e] any actual claim for damages" (Zurich Br., Ex. 1 at 22); and (2) its "lack of specificity regarding potential claimants or plaintiffs." (*Id.* at 23).

As this Court and many others have consistently recognized, a "claim" requires an actual demand, in this case for "damages," but the Tillery Letter contained no such demand—either explicit or implicit; indeed, Mr. Tillery testified that he never made a demand to Syngenta for damages in 2016.

Furthermore, the trial court properly relied on the Tillery Letter's lack of specifics in concluding that it did not constitute a "claim for damages."

2. **Denied.** The trial court's summary judgment rulings are consistent with Delaware law and the unambiguous language in the Policies requiring, in order for there to be a claim, (1) a demand for "damages" and (2) "specifics" regarding a purported claimant and their alleged injury.

3. **Denied**. The trial court properly rejected Zurich's arguments on the grounds that the Tillery Letter lacked a demand for damages and sufficient specific information about the potential claims. At most, the Tillery Letter constituted a

threat of a *future* claim for damages, which, as courts in Delaware and throughout the country have consistently held, does not constitute an *actual* claim for damages.

Zurich cannot point to a single case where a letter that did not identify a purported claimant was deemed a "claim," much less a "claim for damages." This Court should decline Zurich's invitation to be the first court in the country to hold that a threatening letter was a claim for damages despite not having either asked for money or identified any injured parties.

4. **Denied.** Faced with the Tillery Letter's lack of a monetary demand or any specific information about any purported potential claimants, Zurich resorts to misplacing its reliance on "surrounding circumstances." Each "circumstance" is plainly irrelevant and/or confirms that Mr. Tillery did not make a "claim for damages" in 2016.

5. **Denied.** Zurich's argument that the trial court erred in refusing to order Syngenta to produce unredacted copies of its privileged communications with Kirkland regarding the Tillery Letter should also be rejected. As a preliminary matter, while Syngenta's perception of the Tillery Letter was relevant to Zurich's Section 2711 claim, it is not relevant to this appeal. But even if Syngenta's perception were relevant here, Zurich's appeal should be denied.

Because Syngenta's perception relied on *facts* regarding Mr. Tillery's communications with Kirkland that it relayed to Syngenta, the trial court ordered

Syngenta to produce all such facts, even if contained in otherwise privileged attorney-client communications. However, recognizing that Syngenta did not rely on Kirkland's advice, and thus did not put its advice "at issue," the trial court properly declined to order Syngenta to produce purely privileged communications.

By Zurich's logic, an insurer is entitled to pierce the privilege to engage in a fishing expedition in a pool of privileged communications to "test" the veracity of an insured's assertion that it did not rely on any privileged communications with defense counsel. Accepting this circular argument would eviscerate the attorney-client privilege between an insured and its defense counsel. Not only did Syngenta never use its privileged communications with Kirkland as both a sword and a shield, it purposely avoided doing that so as to avoid waiving privilege. Recognizing this, the trial court properly rejected Zurich's motion to the extent it sought purely privileged communications.

II. Syngenta's Summary of Arguments on Cross-Appeal

1. The trial court erred in dismissing Syngenta's bad faith counterclaim because it did not consider Zurich's failure to perform any investigation into the stated basis for denial before denying coverage. While an insurer's failure to investigate cannot by itself constitute bad faith under Delaware law, in this case (1) the trial court found that Syngenta's claim was covered by the Policies, (2) the record was replete with facts on which the factfinder reasonably could have found that the stated basis for Zurich's denial was pretextual, and (3) the "universe of facts" from which Zurich plucked its basis for denial was purposely limited by Zurich's refusal to investigate the relevant facts. Zurich never even bothered to ask Syngenta why it did not notify Zurich of the Tillery Letter in 2016. Permitting Zurich to rely on the "*bona fide* dispute" defense after it refused to investigate would incentivize insurers to purposely limit their investigations or even avoid performing them altogether—and, instead, rush to court as Zurich did—to insulate themselves from bad faith claims.

STATEMENT OF FACTS

A. The Policies

Zurich is the US affiliate of Syngenta's Swiss global liability insurer, Zurich Insurance Company Ltd. ("ZIC"), which was Syngenta's lead first-layer excess insurer from 2000 through 2019. (B387). For the 2017 policy year, ZIC issued to Syngenta excess liability coverage with a limit of $75 million as well as a global master policy, and arranged for Zurich to issue the underlying Policies for the US risk. (B386-88). The Policies were 95% reinsured by Syngenta's captive reinsurer. (B388). The Policies comprise a primary general liability insurance policy issued by ZAIC (the "Primary Policy"), with an aggregate limit of liability of $5 million and a $1 million self-insured retention ("SIR") (A627-768), and an umbrella liability policy issued by AGLIC (the "Umbrella Policy"), with an aggregate limit of liability of $20 million in excess of the Primary Policy. (A769-865). The Umbrella Policy generally follows the terms and conditions of the Primary Policy. (A779).

The Primary Policy requires ZAIC to pay Syngenta for sums it "becomes legally obligated to pay as damages because of 'bodily injury'. . . ." (A730). It states that Zurich has a "duty to defend" Syngenta in any "suit" seeking such damages. (A730). It also states that it will apply only if a "claim for damages" on account of bodily injury is "first made against [the] insured" during the policy period. (A730).

The Primary Policy's Definitions section does not include a definition for "claim for damages" or "claim."

B. The Tillery Letter

On January 4, 2016, Mr. Tillery emailed Alan Nadel, then Syngenta's Lead Counsel Litigation North America, about a potential new litigation against Syngenta. (B1). Mr. Nadel called Mr. Tillery, who said he intended to file cases against Syngenta alleging that Parkinson's disease was caused by exposure to Paraquat. (B621 at 49:21-50:11). Following the call, Mr. Nadel directed Kirkland, then representing Syngenta in an unrelated action against Mr. Tillery, to reach out to him for additional information. (B622 at 58:3-60:11; A168).

On January 18, 2016, Mr. Tillery sent Mr. Nadel the Tillery Letter, which alleged that he had been retained by numerous, unidentified persons allegedly suffering from Parkinson's disease allegedly caused by exposure to Paraquat products manufactured by Syngenta and its predecessors. (A140). The letter also referenced various flawed studies, already known to Syngenta, regarding the hypothesis that Paraquat exposure may cause Parkinson's disease. (B623 at 83:17-84:16; A168).[1] The letter proposed that the "prudent approach is to pursue a few

[1] The hypothesis of an alleged causal link between Paraquat and Parkinson's disease had been circulating for many years but, as confirmed as recently as 2021 by the EPA, the weight of credible scientific evidence was and is insufficient to support the existence of a link between Paraquat exposure and Parkinson's disease. (B529).

'bellwether cases'" and execute tolling agreements with Mr. Tillery's other purported clients. (A159). The letter suggested a discussion but did not demand any payment. (A159).

C. Mr. Tillery's Communications with Kirkland in February and April 2016 and His Subsequent Silence

On February 10, 2016, Kirkland attorneys met with Mr. Tillery regarding the allegations in his letter. Kirkland summarized the meeting in an email, stating that Kirkland "pressed Tillery throughout for more information about his plaintiffs, his experts, and his plans, but he mostly refused to get specific" and that Kirkland asked him for "details about his plaintiffs' claims—who they are, how they were exposed, when they were diagnosed, their age, etc.," but Mr. Tillery gave only a very generalized description of his purported 200-300 clients, referring to them as primarily men diagnosed with Parkinson's disease in their late 50's or 60's who were allegedly exposed by applying the product or being in the vicinity of applications, and who had resided or been exposed in Madison or St. Clair Counties, Illinois. (A180-183). Kirkland also asked him to provide medical records for any proposed bellwether plaintiffs and certain documents he referenced at the meeting. (A180). Mr. Tillery said he would consider the request and get back to Kirkland. (A180). As reflected in the summary, Mr. Tillery did not make any demand for payment or provide any specific identifying information regarding his purported clients.

Syngenta and Kirkland did not hear from Mr. Tillery again until April 5, 2016, when he emailed one of the Kirkland attorneys, asking "have you thought of this any further?" (B2-3). In response, Kirkland reminded Mr. Tillery that they were waiting for his response to Kirkland's request for medical records and other documents. (B2). Mr. Tillery never responded to Kirkland's reminder email. (A170).

There were no further communications in 2016 between Mr. Tillery and either Syngenta or Kirkland. (A170-71). Eighteen months later, Syngenta was served in the first Paraquat Action. (A171).

D. Mr. Tillery's Sworn Testimony

At his deposition, Mr. Tillery testified under oath that:

- By the end of 2016, he had not provided to Kirkland or Syngenta the names of, any other specific identifying information regarding, or medical documentation for any of his purported clients. (B640 at 151:24-152:17).
- By the end of 2016, he had not made any demand for money to Kirkland or Syngenta on behalf of any purported client. (B640-41 at 152:22-153:2).
- When he met with Kirkland in February 2016, he had been retained by at most six clients—not over 200. (B634 at 83:22-84:16).
- By the end of 2016, he had not retained any experts and thus had not provided to Kirkland or Syngenta the names of any experts he had purportedly retained. (B639-41 at 153:3-9, 138:16-140:3).
- He "walk[ed] away from" the conversation with Kirkland in 2016 because he did not want to share any specific information or documents with Kirkland and Syngenta. (B636-37 at 112:3-113:8).
- He did not "get a feeling that they were in any way taking this seriously" and did not "think they viewed it as a legitimate serious threat." (B636 at 111:3-9).

- There was "no question" that Kirkland was "skeptical" about what he was saying, but for strategic reasons he chose not to provide the information they had requested. (B643 at 173:15-174:6).

E. The Filing of the First Paraquat Action in 2017

The first Paraquat Action, *Hoffmann v. Syngenta Crop Protection, LLC*, No. 17-L-517 (Ill. Cir. Ct. St. Clair Cnty.) (the "Hoffmann Action"), was filed in September 2017 in Illinois state court on behalf of 12 named plaintiffs. (A222-77). [redacted] and provided notice of the Hoffmann Action to Zurich on November 13, 2017. (B19-20; B22-23).

F. Zurich's Initial Agreement to Defend Syngenta

Following Syngenta's notice of the Hoffmann Action, Zurich initially indicated that it would honor its defense obligation. In a letter sent on June 22, 2018, [redacted]. (B29-35).

On September 14, 2018, [redacted] (B38). In response, [redacted] (B74-75; B97).

G. Zurich's Reversal in the Face of Mounting Exposure

As of January 2019, [redacted] ZIC's Risk Engineering department was recommending that ZIC stop insuring Syngenta and other agrochemical companies. (B81; B618 at 121:24-124:10).

On January 10, 2019, [redacted] (B110-12). On the next day, January 11, 2019, Zurich's claims handler, Amanu Nwaomah, sent an email to colleagues at ZIC suggesting the "[p]otential exploration of a notice issue." (B93).

On March 12, 2019, [redacted] (B509-10 at 152:21-155:13). [redacted]

Ms. Nwaomah's meeting notes reveal that Kirkland presented information about Paraquat, the Hoffmann Action and the Tillery Letter, [redacted]; she wrote that there was a "significant risk (both in [quantity] & nature of exposure)," that "Plaintiff's [letter] in 2016 suggested 200 [people]," and that

Paraquat was a particularly dangerous substance. (B511 at 158:11-160:5; B838). She also wrote "continue to follow up on the knowledge issue," which, [redacted]" (B511 at 159:25-160:5; B838).

Two days later, on March 14, 2019, Ms. Nwaomah emailed colleagues at ZIC, advising that "it appears things are moving in a different direction now." (B303).

On April 18, 2019, Syngenta notified Zurich that ten additional Paraquat Actions had been filed in California state court. (B307). On April 25, 2019, Syngenta requested a meeting with Zurich to discuss Syngenta's coverage claim. (B316). Zurich's outside counsel suggested that Zurich defer meeting with Syngenta so that Zurich could first finalize its "supplemental coverage position," which was in fact a denial of coverage. (B313).

On April 30, 2019, pursuant to a request from Zurich's counsel, Syngenta's counsel forwarded a copy of the Tillery Letter to Zurich. (B318-19). [redacted] (B628-29 at 34:10-40:11).

Instead, on May 13, 2019, less than two weeks after receiving the Tillery Letter, Zurich sent its denial letter and filed a complaint against Syngenta for a declaratory judgment of no coverage. (B321-46; A222).

H. Zurich's Response to the Glyphosate Notice

In December 2018, Syngenta sent Zurich and ZIC a "Notice of Circumstance" concerning Syngenta's products containing glyphosate, the same compound in Monsanto's Roundup products that were the subject of mass-tort litigation, including a $289 million award to a single plaintiff. (B79-80).

In a letter dated February 7, 2019, Zurich rejected the notice for "insufficient" information, stating that "at a minimum" Syngenta had to provide the following specifics to establish that an "'occurrence' has taken place or that a claim for 'bodily injury' has been made against Syngenta":

> 1) How, when and where the "occurrence" or offense took place;
> 2) The names and addresses of any injured persons and witnesses; and
> 3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

(B108-09).[2]

[2] Similarly, ZIC rejected the notice on the grounds that it lacked "detail [as to] which concrete facts make it appear likely that a specific, determinable claim by an individualized claimant will be brought against Syngenta," and that it was "not sufficient that there is a theoretical possibility that whatever claim in connection with whatever product for whatever bodily injury of any unknown third party might be made against any insured entity," particularly "given the fact that a harmful effect of glyphosate . . . is obviously far from being established." (B104; B311-12).

I. Relevant Procedural History

1. The 2020 Opinion

In its 2020 Opinion, the trial court held that Zurich owed a duty to defend Syngenta against the Paraquat Actions. (Zurich Br., Ex. 1 at 23). The court held that "the Tillery Letter cannot be construed reasonably as a claim for monetary damages" (*id.* at 21), reasoning that the Tillery Letter only

> refers in the most general way to "numerous victims." At no time prior to the January 1, 2017 policy inception was other information provided to amend the January 18, 2016 Tillery Letter. Thus, no information was provided to Syngenta which would identify any individual claimant or clarify any facts.

(*Id.*). The court noted, for example, that the Tillery Letter "provides neither timing nor duration of employment or location and identify of employer." (*Id.* at 21-22). Thus, the court held, the Tillery Letter was merely "an unclear or amorphous threat of future litigation [which] is not sufficient to constitute a claim for damages." (*Id.* at 22). The court also noted that "the letter stops short of making any actual claim for damages" and merely "suggests a bellwether process for resolving future claims." (*Id.*).

Following the court's ruling, Zurich paid Syngenta its full liability limits in reimbursement of Syngenta's incurred defense costs and filed an Amended Complaint adding, *inter alia*, a request for recoupment of the paid defense costs. (B437-484).

2. Zurich's Motion to Compel

On March 4, 2021, the trial court ruled on Zurich's motion to compel the production of communications between Syngenta and Kirkland regarding the Tillery Letter, finding that "Syngenta has basically said . . . we do not intend to, and have not asserted, that we did anything on the legal advice of our attorneys. We had them do some factual investigation, and even if they gave us some legal advice, that's not why we made that decision." (Zurich Br., Ex. 3 at 45:11-20). Based on this finding, the court ordered Syngenta to produce "the factual information obtained by the attorneys and transmitted to the client" but not "attorneys' reactions, their work product or the advice or the other privileged communication which was transmitted to the client on the basis of that factual information." (*Id.* at 51:19-52:20). Syngenta then produced, *inter alia*, Kirkland's email summarizing the February 2016 meeting with Mr. Tillery, which left unredacted all factual information Kirkland relayed to Syngenta concerning the meeting. (A180-83).

3. The 2022 Opinion

On the basis of so-called "new evidence" in Kirkland's summary and Mr. Tillery's deposition, Zurich renewed its summary judgment motion on the issue of whether the Tillery Letter constituted a "claim for damages" within the meaning of the Zurich Policies. Syngenta also moved for summary judgment. On August 24, 2022, the trial court held that its prior "decision on Zurich's duty to defend Syngenta

under the Primary and Umbrella Policies, for the purposes of the Paraquat Actions, remains unchanged." (Zurich Br., Ex. 2 at 14). The court found:

> [S]till there is not specific evidence – only groups and generalized categories such as: age range, occupation, gender, and a generalized disability that is the same as common Parkinson's symptoms. The alleged 'new evidence' is still not sufficient to constitute a claim. There is no newly-discovered evidence or additional factual submission that raise ***genuine*** issues of ***material*** fact.

(*Id.* at 13). With respect to Mr. Tillery's deposition, the court found that it "still does not provide specific evidence or disclosure tied to any ***individual*** potential claimant." (*Id.*).

The trial court also granted Zurich's summary judgment motion regarding Syngenta's bad faith counterclaim, finding that "at the time coverage was denied, a *bona fide* dispute existed as a matter of law." (*Id.* at 14). The court did not address Syngenta's argument that Zurich could not avail itself of the "*bona fide* dispute" defense without having conducted an appropriate investigation.

4. <u>The Post-Trial Opinion</u>

Following a bench trial, the trial court issued a post-trial opinion on March 28, 2023 (the "Post-Trial Opinion") in which it held that Syngenta's non-mention of the Tillery Letter in its application for the Policies did not constitute a material omission preventing recovery for the Paraquat Actions under Section 2711, and denied Zurich's request for recoupment as moot. (Zurich Br., Ex. 4). Zurich has not appealed the court's post-trial decision.

APPELLEE'S ANSWERING ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE TILLERY LETTER WAS NOT A "CLAIM FOR DAMAGES" IN 2016

A. Question Presented

Was the Tillery Letter a "claim for damages" in 2016 within the meaning of the Policies?

Syngenta argued below that the Tillery Letter was not a "claim for damages." (B351-83; B395-436; B695-733; B734-69; B810-37).

B. Scope of Review

This Court reviews a summary judgment decision *de novo*. *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 511 (Del. 2016). Summary judgment may be granted only where the movant demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Super. Ct. Civ. R. 56(c). "The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party." *Enrique*, 142 A.3d at 511 (cleaned up).

C. Merits of Argument

The trial court properly denied Zurich's summary judgment motions because the Tillery Letter did not constitute a "claim for damages" as that term is used in the Policies. Contrary to Zurich's argument, the court's decisions did not rest on a "novel test" without legal basis. (Zurich Br. at 31, 43). The court's determination

that the Tillery Letter did not constitute a "claim for damages"—because it neither demanded damages nor amounted to anything more than an amorphous threat of future litigation devoid of specifics—is wholly consistent with, and supported by, the law of Delaware (and numerous other states) and the unambiguous policy language.

Zurich's reliance on the Tillery Letter's statement that Mr. Tillery represented clients with "claims . . . against Syngenta for personal injuries and related damages" is misplaced; those words do not magically turn the Tillery Letter into a "claim for damages" in the absence of the requisite components—namely, an actual demand for damages and specific information about actual claimants and their alleged injuries. The Tillery Letter merely identified some questionable studies addressing the alleged causal connection between Paraquat and Parkinson's disease, characterized his purported clients in an exceptionally generalized manner, proposed litigating bellwether cases through an undefined process, and speculated about future litigation. The trial court correctly held that these statements collectively constituted nothing more than an "unclear or amorphous threat of future litigation [which] is not sufficient to constitute a claim for damages." (Zurich Br., Ex. 1 at 22).

Zurich displays a willful ignorance of the term "claim for damages" as used in its Policies and consistently understood by courts throughout the country, including this Court. Zurich cites no Delaware case law in support of its arguments,

and the cases it does cite are plainly inapposite; in each, the attorney's letter (1) expressly demands money or at least makes clear that a monetary payment will be necessary to avoid litigation, and (2) identifies the injured party by name and presents details regarding the injury.

Zurich also presents a fantasized portrayal of the supposed "surrounding circumstances." (Zurich Br. at 37-42). While this is a distraction—either the Tillery Letter constituted a "claim for damages" or it did not—a review of the "surrounding circumstances" confirms that Mr. Tillery never made a "claim for damages" in 2016.

1. Zurich Bears the Burden of Proof

The Policies' duty to defend imposes on Zurich the heavy burden of proving that coverage for the Paraquat Actions is excluded by the Policies, a burden that it cannot meet as long as there is a "reasonable possibility of coverage." *Steadfast Ins. Co. v. DBI Servs., LLC*, 2019 WL 2613195, at *5 (Del. Super. Ct. June 24, 2019). "An insurer is relieved of the duty to defend only if there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy." *Id.* (cleaned up).

Moreover, Zurich, not Syngenta, bears the burden of proof regarding whether the Tillery Letter was a "claim for damages" made in 2016. Syngenta bears the burden only of proving the "claim for damages" for which it sought coverage was

first made within the 2017 policy period, a burden Syngenta easily satisfies because the first Paraquat Action, the Hoffmann Action, was indisputably filed in 2017. *Cox Commc'ns, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 708 F. Supp. 2d 1322, 1326 (N.D. Ga. 2010) ("claim" for which insured sought coverage was first made during the policy period because each new proceeding filed against insured satisfied policy's definition of "claim"). The burden then shifts to Zurich to prove that coverage for the Paraquat Actions was excluded by exclusionary language in the Policies, which it cannot do.

2. The Tillery Letter Was Not a Claim for Damages Because It Did Not Demand Money

At his deposition, Mr. Tillery testified that he never made a demand for money—through the Tillery Letter or any other means—in 2016:

> **Q. As of December 31, 2016, had you or anyone on your behalf demanded that Syngenta pay money to any paraquat Parkinson's claimant?**
>
> **A. No.**

(B640-41 at 152:22-153:2). He further testified that the reason he suggested bellwether cases was that he had "no idea" as to the value of the potential claims (B632-33 at 47:17-49:17; B640-41 at 151:24-153:2)—which explains why he neither demanded money nor implied that Syngenta could avoid litigation by making a settlement payment. Mr. Tillery's testimony is fatal to Zurich's case.

The Definitions section of the Policies does not contain definitions for the terms "claim" or "claim for damages," yet their meanings are clear and unambiguous.[3] As this Court explained in *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007), "[c]ourts that have addressed the meaning of the term 'Claim,' as used in liability insurance policies, generally conclude that the term is unambiguous and means a demand by a third party against the insured for money damages or other relief owed." *Id.* (cleaned up).[4] In this case, however, the term "claim for damages" is even narrower and contemplates *only* a demand for money damages, a fact acknowledged by Zurich.[5]

Where the relevant policy language requires a demand for monetary payment in order for there to be a "claim," courts in Delaware and across the country have

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[3] If this Court were to find ambiguity in the relevant policy language, it must be construed against Zurich as the drafter of the Policies. *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129-30 (Del. 1997) (when insured and insurer "offer reasonable, though problematic, interpretations of provisions," provisions are construed against insurer). This rule of interpretation is particularly applicable here, where the Policies impose a duty to defend on Zurich.

[4] *Lamberton v. Travelers Indemnity Co.*, 325 A.2d 104 (Del. Super. Ct. 1974), *aff'd*, 346 A.2d 167 (Del. 1975), cited by Zurich throughout its brief, confirms that a claim requires a demand for money. *See id.* at 107 (policy language "clearly refers to each claim that may be filed against the insured as a result of something he has done or has failed to do, which has created rights in some third party or parties to file a claim *and demand payment or compensation from the insured*" (emphasis added)).

[5] An internal Zurich email shows that it recognized that under its policies, a "claim" requires a "demand for money damages by claimant/plaintiff." (B306).

consistently refused to find a "claim" on the basis of letters that threaten potential litigation but stop short of demanding money.

Delaware law is clear that an attorney's threatening letter does not by itself constitute a "claim for damages." *Med. Depot Inc. v. RSUI Indem. Co.*, 2016 WL 5539879, at *2 (Del. Super. Ct. Sept. 29, 2016), *abrogated on other grounds by First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 274 A.3d 1006 (Del. 2022). In *Medical Depot*, the potential claimant's attorney wrote the insured a "demand letter" declaring an intent "to file a class action lawsuit if [the insured] failed to meet" certain conditions, but the letter made no demand or request for any monetary relief. *Id.* The court held that the letter did not constitute a "claim" under the policy, which—similar to the Policies here—defined "claim" as a "demand for monetary relief" (*i.e.*, damages), concluding that, while the demand letter "may have been a precursor to a lawsuit for monetary relief," and may eventually give rise to a claim, it did not "implicate the notice deadline provisions of the Policy." *Id.* at *8.

The trial court deemed *Medical Depot* distinguishable on the basis that under California law, as a condition to seeking damages, the claimant first had to request equitable relief from the insured. (Zurich Br., Ex. 1 at 18-19). But this fact does not make *Medical Depot*'s analysis or holding any less relevant to this case. Whereas in *Medical Depot*, the claimant's attorney was precluded by statute from demanding damages in his initial letter, in this case Mr. Tillery purposely chose not to ask for a

monetary payment because, as he testified, he had "no idea" how to value any potential claims. (B632-33 at 47:17-49:17; B640-41 at 151:24-153:2). The result here should be the same as the result in *Medical Depot*: a finding that an attorney's representation that he represents a claimant who might make a demand for money in the future does not constitute a demand for damages or monetary relief.

Also instructive is the decision in *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 4130631, at *17 (Del. Super. Ct. Sept. 10, 2021), where the court rejected the insurers' argument that because attorney letters "were 'threatening,' asked that records be preserved, and suggested the possibility of future litigation," they satisfied the policies' definition of "Claim." The court explained that because the policy language required a demand, "identifying a wrongdoing, without demanding relief, [] is not a Claim," and that "raising the prospect of litigation, even in an ominous tone, necessarily is not equivalent with requesting in advance the act or asset that prospective litigation would be designed to award." *Id.* at *18.

Moreover, an attorney's statement in a letter that they represent a purportedly injured person with a "claim" or "claim for damages" does not by itself magically transform the letter itself into a "claim" for insurance coverage purposes. *See, e.g.*, *Myers v. Interstate Fire & Cas. Co.*, 2008 WL 276055, at *7 (M.D. Fla. Jan. 30, 2008) (letter not a "claim" because it made "no demand for money"; attorney's

"statement that he was retained to represent Matthews in 'a claim for damages' was merely a notice of a potential claim"); *Nat'l Fire Ins. v. Bartolazo*, 27 F.3d 518, 519 (11th Cir. 1994) (letter to physician on behalf of named patient with a "claim for medical malpractice" against him was not a "claim" under the policy because it "made no demand for money or services" and "merely requested [her] medical records and alluded to a claim for malpractice"); *In re Ambassador Grp., Inc. Litig.*, 830 F. Supp. 147, 154-55 (E.D.N.Y. 1993) (explaining "a claim is not merely a contention that some wrongdoing occurred" but, rather, "a demand for specific relief," and holding that while letters "may indicate the likelihood, if not inevitability, of some future claim, they do not constitute a 'claim made' within the meaning of the policy" despite "declaration in [a] letter that the letter constitutes notice of a claim").

These holdings are consistent with numerous other decisions from courts throughout the country ruling that where policy language requires a claim for damages or monetary relief, a demand or request for monetary payment is the *sine qua non* of the claim. *See, e.g.*, *Emp'rs Ins. of Wausau, Inc. v. Bodi-Wachs Aviation Ins. Agency*, 39 F.3d 138, 142 (7th Cir. 1994) (letter threatening future litigation did not "constitute a clear demand for damages but merely notice that a demand may be made in the future"); *MGIC Indem. Corp. v. Home State Sav. Ass'n*, 797 F.2d 285, 288 (6th Cir. 1986) ("claim" under policy required a demand "for some discrete

amount of money owed to the claimant on account of the alleged wrongdoing" and that "a mere potential for such claims is not enough to meet the condition imposed by the policy"); *MHM Corr. Servs., Inc. v. Evanston Ins. Co.*, 2023 WL 4743754, at *3, *9 (Ill. App. Ct. July 25, 2023) (affirming trial court's determination that letter from Attorney General was not a "Claim" because it did not demand the type of "monetary damages" covered by the policy); *Klein v. Fid. & Deposit Co. of Am.*, 700 A.2d 262, 270-75 (Md. Ct. Spec. App. 1997) (letters threatening potential litigation were not "claims" because they "at most, simply warn[ed] that claims were likely to be filed" and did not "explicitly or implicitly, demand money"); *Harris Thermal Transfer Prods., Inc. v. James River Ins. Co.,* 2010 WL 2942611, at *2, *6-7 (D. Or. July 19, 2010) (letter not a "Claim" under policy because it "did not contain any 'demand' for money damages"), *aff'd*, 457 F. App'x 660 (9th Cir. 2011).[6]

[6] *Cf. SNL Fin., LC v. Philadelphia Indem. Ins. Co*., 455 F. App'x 363, 368 (4th Cir. 2011) (letters referring to "discriminatory conduct" and requesting meeting to discuss an "amicable resolution" did "not include a 'demand' for any relief, either monetary or non-monetary" and thus did not contain a "claim" as defined in the policy); *Clarendon Nat'l Ins. Co. v. Muller*, 237 F. App'x 451, 452 (11th Cir. 2007) (notice of claim ineffective because it did not indicate that claimant "had made any present demand," only a potential future demand for money or services); *Fla. Dep't of Fin. Servs. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 WL 760606, at *3–4 (N.D. Fla. Mar. 7, 2012) (letter stating it was company's "intention" to assert claims against former officers, directors and shareholders for wrongful acts was "not a claim as defined by the policy" because "[i]t makes no present demand for any action").

Zurich's cases, on the other hand, are inapposite. Zurich relies heavily on *Berry v. St. Paul Fire & Marine Insurance Co.*, 70 F. 3d 981 (8th Cir. 1995), but *Berry* is plainly distinguishable. First, the policy in *Berry* did not require a demand *for* damages or monetary relief; rather, it defined "claim" as a "demand in which damages are alleged." *Id.* at 982. Second, the letter actually identified the allegedly injured person and the specific model number of the product that allegedly caused his injury. *Id.* Third, the letter demanded that the insured forward the letter to its insurer. *Id.* Fourth, the letter implicitly demanded the payment of money to avoid litigation. *Id.* at 983. In this case, by contrast: (1) the Policies require not merely a "demand" and some allegation of damages suffered but, rather, a demand "for damages"; (2) the Tillery Letter provided no specific information about any potential claimants or how or where they were allegedly injured; (3) Mr. Tillery did not ask Syngenta to forward his letter to its insurers; and (4) he did not say or even hint that a settlement payment would avoid litigation—and that was because, as he testified, he wanted to litigate bellwether cases because he had "no idea" as to the value of the potential claims. (B632-33 at 47:17-49:17; B640-41 at 151:24-153:2).

Thus, the *Berry* court's determination that the letter there met the policy's definition of "claim" because it was "sufficiently demanding in tone and substance," 70 F.3d at 982, has no bearing here, where there was no demand for anything—much less damages. Indeed, as explained by the court in *Sycamore Partners*, *supra*,

"raising the prospect of litigation, even in an ominous tone, necessarily is not equivalent with requesting in advance the act or asset that prospective litigation would be designed to award." 2021 WL 4130631 at *18.[7]

The remaining cases cited by Zurich are inapplicable because, unlike here, they involved letters either demanding money or implicitly demanding a settlement payment by requesting that the letter be forwarded to the insured's insurer. *See Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co.*, 78 Cal. Rptr. 3d 264, 267-69 (Cal. Ct. App. 2008) (letter demanded insured "rectify the harm caused to Bette in a confidential and discreet manner," *i.e.*, pay "compensation by way of settlement in lieu of litigation"); *Precis, Inc. v. Fed. Ins. Co.*, 184 F. App'x 439, 441 (5th Cir. 2006) (one claimant demanded $75,000 settlement payment and second claimant alleged damages exceeding $1.5 million and demanded settlement payment); *Carosella & Ferry, P.C. v. TIG Ins. Co.*, 189 F. Supp. 2d 249, 253-54 (E.D. Pa. 2001) (letter alleged damages amounting, at a minimum, to the cost of claimants' legal fees and demanded letter be sent to insured's insurer); *Paradigm Ins. Co. v. P & C Ins. Sys., Inc.*, 747 So. 2d 1040, 1041 (Fla. Dist. Ct. App. 2000) (letter identified damages of $2 million and requested letter be sent to insured's insurer); *Herron v.*

[7] *See also Klein*, 700 A.2d at 275 (distinguishing *Berry* because it involved different policy language and "the letters here at issue do not, either explicitly or implicitly, demand money of appellants").

Schutz Foss Architects, 935 P.2d 1104, 1109 (Mont. 1997) (letter requesting insured contact his insurer was a "claim" whereas prior letter lacking such request was not a "claim").[8]

As to Zurich's argument that it is "absurd" that a letter stating an intent to file prolific litigation would not constitute a "demand for damages" (Zurich Br. at 37), Syngenta's response is this: either a letter contains a demand for damages—as required by the Policies—or it does not. Here, it is clear from the face of the Tillery Letter that it did not contain a demand for damages. Moreover, Mr. Tillery has testified that he did not make a demand for damages either in the letter or at any other time in 2016.

3. The Tillery Letter Was Not a Claim for Damages Because It Contained No Specificity About Any Potential Claimants

In addition to confirming that he never demanded money in the Tillery Letter or at any other time in 2016, Mr. Tillery also testified that he never gave Syngenta any specific information about any purported claimants in 2016:

> **Q. As of December 31, 2016, had you or anyone on your behalf provided to Syngenta or its counsel the name of any paraquat Parkinson's claimant?**
>
> **A. No.**

[8] The final case cited by Zurich, *Pine Management, Inc. v. Colony Insurance Co.*, 2023 WL 2575082, at *3 (S.D.N.Y. Mar. 20, 2023), is inapposite because the policy there defined "claim" as "a written demand received by [Pine] for monetary, nonmonetary, or injunctive relief," and the letter explicitly requested nonmonetary relief: an accounting.

Q. As of December 31, 2016, had you or anyone on your behalf provided to Syngenta or its counsel any other specific identifying information regarding any paraquat Parkinson's claimant?

A. No.

Q. As of December 31, 2016, had you or anyone on your behalf provided to Syngenta or its counsel any medical documentation regarding any paraquat Parkinson's claimant?

A. No.

(B640 at 151:24-152:17).

The trial court, noting that in the Tillery Letter "no information was provided to Syngenta which would identify any individual claimant or clarify any facts," found that its "lack of specificity regarding potential claimants or plaintiffs prevents this Court from finding that the Tillery Letter is a 'Claim for Damages.'" (Zurich Br., Ex. 1 at 21, 23). This holding was correct and not based on a "novel test."

It cannot be reasonably disputed that a "claim" under a liability insurance policy always requires specificity. As the Fifth Circuit remarked in noting that the terms "specified" and "claim" would be redundant if used together, "we cannot envision an *unspecified* claim." *McCullough v. Fid. & Deposit Co.*, 2 F.3d 110, 112 (5th Cir. 1993) (alteration in original).

The Policies themselves expressly require that for notice of a claim to be given, the "specifics" of the claim must be known. (A741). Those "specifics"

include: "(1) How, when and where the 'occurrence' or offense took place; (2) The names and addresses of any injured persons and witnesses; and (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense." (A741).

Zurich has not only acknowledged that such "specifics" must be provided in order to give notice of claim—it has insisted on it. In February 2019, Zurich rejected Syngenta's December 2018 notice relating to potential litigation involving Syngenta's glyphosate-containing products, stating:

> If, and when, Syngenta is made aware of information indicating that an "occurrence" has taken place or that a claim for "bodily injury" has been made against Syngenta, please advise Zurich as soon as possible. In doing so, please make sure to provide, at a minimum, the following, as set forth in Section IV of the Zurich Policy:[9]
>
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

(B109).

Based on the contents of the Tillery Letter and Mr. Tillery's oral statements to Kirkland lawyers, in 2016 Syngenta did not have, and could not have provided to Zurich, *any* of these necessary specifics.

[9] Section IV of the 2018 primary policy issued by ZAIC is identical to Section IV of the 2017 Primary Policy.

As noted by the trial court in its 2020 Opinion:

> [T]he Tillery Letter implies the existence of "numerous" claimants *and* their spouses, but omits information on age; lists a range of occupations, but provides neither timing nor duration of employment or location and identity of employer; and mentions unspecified injuries and unquantified damages relating to Paraquat exposure that *could* lead to litigation.

(Zurich Br., Ex. 1 at 21-22). And as noted by the court in the 2022 Opinion, none of the additional statements made by Mr. Tillery to Kirkland in 2016 transformed the Tillery Letter into a claim because those statements—that his clients were "primarily men" who were "diagnosed in their 50s and 60s," "severely disabled by PD; many can no longer walk and are in nursing homes," "exposed and/or live in Madison or St. Clair counties," "either mixing/applying the product or were in the vicinity while it was applied," and "relatively sophisticated about the application process and use of paraquat" (Zurich Br. at 38-39)—provided any "specific evidence" regarding any potential claimants, "only groups and generalized categories such as: age range, occupation, gender, and a generalized disability that is the same as common Parkinson's symptoms." (Zurich Br., Ex. 2 at 13).

The trial court was correct: Zurich was and is unable to point to any evidence that Mr. Tillery provided in 2016, for any potential claim, the claimant's: (1) name; (2) age; (3) employer(s); (4) location(s) of exposure; (5) timing of exposure; (6) duration of exposure; (7) date of diagnosis; (8) specific injuries/symptoms; or (9)

specific damages suffered or claimed. Rather, for the individuals Mr. Tillery claimed to represent, Syngenta was told only that they: (a) were farmers *or* farm workers; (b) were exposed to Paraquat while applying *or* mixing it *or* by being in the vicinity when someone else applied *or* mixed it; (c) were exposed to Paraquat sometime after its introduction in the US in 1964; (d) either lived *or* were exposed in either Madison County *or* St. Clair County; (e) were diagnosed in their late 50s *or* early 60s; and (f) in many cases had difficulty walking.

In each case cited by Zurich, the letter at issue identified the claimant by name and provided specific information relating to their injury. There does not appear to be a single case in Delaware or any other jurisdiction in which a court held that a letter sent on behalf of an anonymous unidentifiable claimant constituted a "claim"—much less a claim for damages or monetary relief. Zurich asks this Court to be the first to do so.

In *Chatz v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 372 B.R. 368 (N.D. Ill. 2007), which addressed whether a letter contained information sufficiently specific to constitute an "anticipated claim," the court explained that the policy's notice requirement could not be satisfied with vague statements, and held that the letter did not provide the "full particulars as to the *dates, persons and entities involved*" as the policy required for giving notice of anticipated claims, because it provided no specific information regarding dates or potential

claimants. *Id.* at 372-73. In response to the insurers' argument that the letter need not "list all claimants that would file claims," the court explained that it did "not hold that such specific facts are required, but it is clear that the minimal information provided in the [] Letter failed to provide any meaningful information concerning persons involved in claims." *Id.* at 373.

Here, likewise, Syngenta is not suggesting it was necessary to provide the names of all of Mr. Tillery's supposed clients for his letter to be a "claim." But it is clear that due to their utter lack of specificity, the Tillery Letter and his oral statements "failed to provide any meaningful information" about any potential claimants, including any potential bellwether plaintiffs, and gave Syngenta none of the "specifics" that the Policies require in order for there to be a "claim." Mr. Tillery testified not only that he did not give Syngenta any "specific identifying information regarding any paraquat Parkinson's claimant" in 2016 but, further, that he deliberately withheld such information despite being asked therefor. (B636-37 at 112:3-113:8, B640 at 151:24-152:17).

4. The "Surrounding Circumstances" Did Not Turn the Tillery Letter Into a Claim for Damages

Faced with the absence from the Tillery Letter of a demand for damages or any specific information relating to any identifiable claimants, Zurich presents what it calls "the circumstances surrounding Syngenta's receipt of the letters" in a last-ditch effort to convert the Tillery Letter into a "claim." (Zurich Br. at 24-26).

Because the Tillery Letter on its face was not a "claim for damages," as properly held by the trial court, there is no need to examine any additional evidence. But in any event, none of these "circumstances" breathes life into Zurich's appeal as none provides what is necessary under the Policies and Delaware law for there to be a claim: a demand for damages and "specifics" about any actual claims.

First, Zurich invokes Mr. Tillery's prior litigation against and settlement with Syngenta and cites the trial court's statement in the Post-Trial Opinion that "Syngenta could not reasonably pass off any possibility of future litigation involving Tillery as a purely frivolous threat." (*Id.* at 37-38, 43). This conflates the issue on appeal with the issue—not on appeal—of whether Syngenta should have expected Mr. Tillery to follow through on his threats such that the Tillery Letter should be deemed an "occurrence" as that term was used in an application submitted to ZIC. Indeed, the quoted statement from the Post-Trial Opinion was made in connection with the trial court's analysis of whether the Tillery Letter constituted an "occurrence" for purposes of Zurich's Section 2711 claim—not whether it was a "claim for damages" under the Policies.[10] The court ultimately held that the Tillery

[10] The Policies treat an "occurrence" and a "claim" as different concepts, stating that an "occurrence"—defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (A747)—"may result in a claim." (A741).

Letter was not an "occurrence" (Zurich Br., Ex. 4 at 16-17), and Zurich has *not* appealed that decision.

Zurich also cites certain statements made by Mr. Tillery to Kirkland attorneys in early 2016 regarding his alleged clients. (Zurich Br. at 38-39). As discussed on pages 16-17 above, the trial court addressed these statements in the 2022 Opinion and found that they were "still not sufficient to constitute a claim" because they did not provide any specific details regarding any claimants. (Zurich Br., Ex. 2 at 13-14).

Zurich also cites Mr. Tillery's January 25, 2016 litigation hold letter. (Zurich Br. at 39). The trial court properly found that this letter was a "request [] for preservation of materials that *could* be discoverable in litigation that has not yet been initiated" and thus was "a litigation hold letter, and not a claim for damages." (Zurich Br., Ex. 1 at 23); *see also Colony Ins. Co. v. Chesapeake Energy Corp.*, 215 F. Supp. 3d 1190, 1195 (W.D. Okla. 2016) (litigation hold letter was not a claim because it "contains no demand for damages" and "[a]t most, it communicates . . . a duty to preserve documents in connection with potential litigation against an unnamed party").

Zurich additionally cites a 2016 Kirkland memorandum referring to a "Paraquat Litigation Team" and Kirkland invoices that bear the heading "Paraquat Litigation." (Zurich Br. at 39-40). The fact that litigators referred to themselves as

such, on their own accord, has nothing to do with whether the Tillery Letter constitutes a "claim for damages."

Relatedly, Zurich points out that Kirkland billed Syngenta approximately $1.3 million in 2016 for its work relating to Paraquat and notes that Syngenta's appointed claims adjuster referred to these fees as part of Syngenta's "total legal defense expenditure incurred from first receipt of a notice of a potential litigation from the Korein Tillery law firm in January 2016," which Zurich argues is inconsistent with Syngenta's witnesses' statements that these fees were incurred in connection with Kirkland's engagement to meet with Mr. Tillery and "evaluate potential legal liabilities Syngenta might face in the future because of Paraquat."[11] (*Id.*; A170). There is no inconsistency; Syngenta's claims adjuster characterized the Tillery Letter as a "notice of potential litigation," which supports Syngenta's position—not Zurich's.[12] Moreover, the amount billed by Kirkland in 2016 is irrelevant to the question of whether the Tillery Letter was a claim for damages.

Zurich additionally seeks to rely on the fact that Syngenta disclosed the Tillery Letter in letters sent to its auditor, KPMG, and its potential acquirer, ChemChina, in

[11] This was not the first time Syngenta had asked a law firm to perform a Paraquat risk assessment. Fulbright & Jaworski L.L.P. had performed one starting in or around 2010. (B624 at 157:13-24).

[12] Furthermore, the record shows that Syngenta never sought reimbursement from Zurich for any pre-Hoffmann Action "defense costs." (A170-171; B41-46).

early 2016 before Kirkland's meeting with Mr. Tillery. (Zurich Br. at 40). These letters do not help Zurich because they merely called the Tillery Letter a "threatened litigation" and neutrally described its contents. (A187; A200). The reason Syngenta disclosed the Tillery Letter in those letters was that they called for the disclosure of *threatened* litigation. The ABA Policy Statement and GAAP principles cited by Zurich below in connection with the KPMG letter called for the disclosure of "*overtly threatened or pending litigation*." (B875 (alteration in original)). Likewise, for the ChemChina letter, Syngenta was asked to identify "Actions . . . threatened against Syngenta." (A199).

Zurich also cites Mr. Tillery's testimony that [redacted] (Zurich Br. at 41), but even if that uncorroborated testimony is true, Mr. Tillery never provided any evidence of that to Syngenta in 2016 and, in fact, refused to provide any information relating to any potential bellwether plaintiffs or any other potential claimants.

Zurich additionally cites Mr. Tillery's testimony that he did not respond to Syngenta's request for medical information for his proposed bellwether plaintiffs because it would have put him at a tactical disadvantage. (*Id*.). This testimony merely confirms that Mr. Tillery purposely chose not to provide any specific information about his alleged clients.

Zurich's argument that Syngenta did not prove it was skeptical of Mr. Tillery's threats in 2016 (Zurich Br. at 41-42) is misplaced and unavailing. Zurich again conflates the issue on appeal with issues that were tried and not appealed; the extent to which Syngenta was skeptical of Mr. Tillery's threats has nothing to do with whether the Tillery Letter was a claim for damages. Nonetheless, the evidence proved that Syngenta was indeed skeptical; Mr. Tillery testified that he believed Syngenta and Kirkland were skeptical. (B643 at 173:15-174:6). And the evidence proved that Syngenta was right to be skeptical; Mr. Tillery conceded that he did not have 200 or more clients in 2016 and that he was not ready to bring an action against Syngenta in 2016 because it was difficult to find and retain experts. (B634 at 83:1-84:16; B638 at 129:20-130:21).

Similarly, Zurich falsely asserts that the trial court found in its Post-Trial Opinion that Syngenta—in Zurich's words—"reasonably anticipated in 2016 that the Tillery Letter could lead to indemnity and defense costs exceeding $2 million." (Zurich Br. at 44). The court found no such thing. In examining whether the Tillery Letter could be deemed an "occurrence" as that term was used in a policy application, the court stated that "Syngenta could not reasonably pass off any possibility of future litigation involving Tillery as a purely frivolous threat"—not that Syngenta did or should have reasonably anticipated such litigation—and that "it would have been reasonable to anticipate that indemnity and defense costs could

exceed $2 million for future Paraquat Actions" *if* Mr. Tillery were to actually commence litigation. (Zurich Br., Ex. 4 at 14). In any event, questions regarding whether Syngenta should have anticipated future claims and, if so, how it should have valued them are irrelevant to the issue of whether the Tillery Letter was a "claim for damages" under the Policies.

Finally, Zurich points out that numerous Paraquat Actions were ultimately filed against Syngenta, that Syngenta has incurred substantial defense costs, and that Syngenta ultimately settled with claimants represented by Mr. Tillery. (Zurich Br. at 42). But these developments in and after 2017 have no bearing on whether the Tillery Letter was a "claim for damages" in 2016.

II. THE TRIAL COURT CORRECTLY DENIED ZURICH'S MOTION TO COMPEL THE PRODUCTION OF PRIVILEGED COMMUNICATIONS UNDER THE "AT ISSUE" DOCTRINE

A. Question Presented

Was the trial court's denial of Zurich's motion to compel the production of privileged communications under the "at issue" doctrine correct, given that Syngenta never relied on any privileged communications or injected into the litigation a position that could only be tested through the examination of privileged documents?

Syngenta argued below that Zurich was not entitled to Syngenta's privileged communications with Kirkland. (B494-506).

B. Scope of Review

Discovery rulings are reviewed for abuse of discretion. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010). Under this standard, factual findings are reviewed "with a high level of deference" and as long as the court "committed no legal error, its factual findings will not be set aside on appeal unless they are clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005). In other words, "the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his [or her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

C. Merits of Argument

Zurich's appeal of the trial court's ruling on its motion to compel the production of Syngenta's privileged communications with Kirkland regarding the Tillery Letter is as baseless as it is pointless.

As an initial matter, Zurich's appeal of the court's ruling on its motion is a fool's errand; nothing that Zurich sought through its motion, or could obtain through its appeal, regarding Syngenta's subjective perception of the Tillery Letter could have any relevance to the issue of whether the Tillery Letter constituted a "claim for damages."

Moreover, the trial court's ruling was proper. To determine whether the "at issue" exception to the attorney-client privilege applies, courts must look at whether "(1) a party injects the privileged communications themselves into the litigation, or (2) a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential communications." *Alaska Elec. Pension Fund*, 988 A.2d at 419. Delaware courts have conservatively applied the "at issue" exception, because "an unfettered and careless application would destroy the underlying historical rationale for the privileges and could lead to a wholesale general discovery of an opponent's documents." *Cont'l Cas. Co. v. Gen. Battery Corp.*, 1994 WL 682320, at *8-9 (Del. Super. Ct. Nov. 16, 1994).

The first prong of the "at issue" exception, implicated when a party has injected privileged communications into a litigation, is inapplicable here, as Syngenta has not relied on any privileged communications. Syngenta did not produce or rely on any privileged documents because, as explained by Syngenta's counsel, it did not "want to open the can of worms, because [it did not] want to try to use privilege as a sword and a shield." (Zurich Br., Ex. 3 at 50:20-51:11).

The second prong is also inapplicable, because Syngenta never relied on the advice of counsel in the litigation below. That prong is implicated when a party has injected an issue into the litigation it "can only prove by examining confidential communications, and then attempt[s] to shield those communications from discovery as privileged." *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3-4 (Del. Ch. Apr. 10, 2013). Here, the trial court properly found that Syngenta did not inject an issue into the litigation that required examination of privileged communications, noting: "Syngenta has basically said . . . we do not intend to, and have not asserted, that we did anything on the legal advice of our attorneys. We had them do some factual investigation, and even if they gave us some legal advice, that's not why we made that decision." (Zurich Br., Ex. 3 at 45:11-20).

Based on this finding, the court ruled that Syngenta was required to produce only "the factual information obtained by the attorneys and transmitted to the client" but not "the attorneys' reactions, their work product or the advice or the other

privileged communication which was transmitted to the client on the basis of that factual information." (*Id.* at 51:19-52:20). This ruling was proper and consistent with Delaware law. *See SerVaas v. Ford Smart Mobility LLC*, 2021 WL 5226487, at *6 (Del. Ch. Nov. 9, 2021) ("factual aspects of the investigation [conducted by counsel] are not privileged" but where "defendants have not placed at issue the legal advice rendered during that investigation" such legal advice is properly withheld); *In re Quest Software Inc. S'holders Litig.*, 2013 WL 3356034, at *3 (Del. Ch. July 3, 2013) (examination of privileged communications not required where parties "merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications" (cleaned up)).

In accordance with the court's ruling, Syngenta produced, *inter alia*, a redacted version of Kirkland's summary of the February 2016 meeting with Mr. Tillery that left unredacted all factual information Kirkland relayed to Syngenta concerning the meeting. (A180-83). Thus, Zurich was able to test the veracity of Syngenta's stated positions by examining the factual portions of the privileged communications upon which Syngenta relied.

Zurich was further able to test the veracity of Syngenta's positions by deposing Syngenta witnesses including, *inter alia*, Mr. Nadel and Kirkland partner Bradley Weidenhammer. *In re ISN Software Corp. Appraisal Litig.*, 2014 WL 1394362, at *3 (Del. Ch. Apr. 10, 2014) (disclosure not required where assertions

could be tested at depositions); *In re Quest Software*, 2013 WL 3356034, at *3 (disclosure not required where defendants were amenable to depositions).

In these circumstances, Zurich cannot meet the high bar required to pierce the attorney-client privilege. *Alaska Elec. Pension Fund*, 988 A.2d at 419 (affirming conclusion of lower court that although "examinations of the communications would undoubtedly be helpful," "access to such communications cannot be said to be required in order to achieve a truthful resolution of the [issue]" (cleaned up)); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 415 (D. Del. 1992) ("The Court cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant.").

In addition to asserting that it should have been permitted to test the veracity of Syngenta's assertions regarding its perception of Mr. Tillery's threats, Zurich complains that it was unfairly prevented from testing the veracity of Syngenta's assertion that it did not rely on any advice provided by Kirkland. (Zurich Br. at 48). By this logic, any time a litigant represents that it did not rely on the advice of counsel, its adversary would be permitted to pierce the attorney-client privilege to test whether the litigant actually relied on the advice of counsel. This makes no sense. Moreover, "[i]t is not enough to contend that a general principle of fairness

requires waiver in order to determine the truth of the insured's statements." *Remington Arms*, 142 F.R.D. at 416 n.7.

Accordingly, the trial court clearly did not abuse its discretion in its ruling on the motion to compel as its ruling was not the result of "capriciousness or arbitrariness," *Coleman*, 902 A.2d at 1106, and there was no clear "legal error." *Montgomery Cellular*, 880 A.2d at 219.

CROSS-APPELLANT'S OPENING ARGUMENT

III. THE TRIAL COURT ERRED IN GRANTING ZURICH'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO SYNGENTA'S BAD FAITH COUNTERCLAIM

A. Question Presented

Did the trial court err in granting Zurich's motion for summary judgment with respect to Syngenta's bad faith counterclaim, in light of Zurich's failure to conduct an investigation concerning the stated basis for its denial of Syngenta's insurance claim and the evidence in the record upon which a reasonable factfinder could have concluded that the stated basis for Zurich's denial was pretextual?

Syngenta argued below that Zurich's failure to conduct an investigation and other facts in the record compelled the denial of Zurich's motion. (B770-809).

B. Scope of Review

As discussed above, this Court reviews a summary judgment decision *de novo*. *See* Section I.B of Appellee's Answering Argument, *supra*.

C. Merits of Argument

1. Delaware Law Requires an Assessment of the Insurer's Intent at the Time of Denial, Which is a Factual Inquiry

A bad faith claim lies "when the insurer refuses to honor its obligations under the policy and clearly lacks reasonable justification for doing so.'" *RSUI Indem. Co. v. Murdock,* 248 A.3d 887, 910 (Del. 2021). A "reasonable justification" exists where, "at the time the insurer denied liability, there existed a set of facts or

circumstances known to the insurer which created a bona fide dispute and therefore a meritorious defense to the insurer's liability." *Id.* An insured does not need to "come forward with a smoking gun" to survive summary judgment; "inferences from facts can lead to a triable bad faith claim." *Enrique*, 142 A.3d at 516.

A bad faith analysis, by its very nature, "requires an inquiry into the insurer's motives." *Powell v. AmGuard Ins. Co*., 2019 WL 4509165, at *4 (Del. Super. Ct. Sept. 19, 2019). "Where a litigant's state of mind is an element of a claim, summary judgment is frequently inappropriate because of its fact-intensive nature." *Moyer v. Am. Zurich Ins. Co.*, 2021 WL 1663578, at *4, *6 (Del. Super. Ct. Apr. 28, 2021) (denying summary judgment because "a reasonable jury may conclude based upon the totality of the evidence that [insurer] handled this claim with an 'I don't care' attitude"); *see also MPM Holdings Inc. v. Fed. Ins. Co.*, 2022 WL 811170, at *6 (Del. Super. Ct. Mar. 17, 2022) (explaining that "[b]ad-faith claims involve issues of fact," and denying summary judgment where policyholder alleged, *inter alia*, that insurer "failed to timely and adequately investigate the claim").

The trial court erred by failing to draw inferences from the available evidence in the light most favorable to Syngenta. The record was replete with evidence that Zurich lacked a reasonable justification for denial and that Zurich and its affiliate, ZIC, wanted to avoid their exposure to increasing liabilities as Paraquat lawsuits multiplied. Moreover, the record proved—but the court failed to note—that Zurich

failed to investigate the stated basis for its coverage denial (Syngenta's non-mention of the Tillery Letter in 2016), thereby deliberately manufacturing a pretextual basis for the denial. Allowing Zurich to rely on the "*bona fide* dispute" standard unsupported by a proper investigation would incentivize insurers to halt their investigations before they might obtain information supporting a finding of coverage—or avoid conducting them altogether. Insurers would be encouraged to cherry-pick their own factual records and construct a basis for denial, and virtually no bad faith claims would ever make it to trial.

2. Zurich Lacked a Reasonable Justification for Denial

Zurich did not have a reasonable justification to deny coverage. Rather, the evidence in the record shows that Zurich's stated excuse for denying coverage was pretextual; that Zurich deceived Syngenta about the full purpose of a meeting between its claims handler, Amanu Nwaomah, and Syngenta's defense counsel and then improperly relied on information provided at that meeting; that Zurich purposely failed to conduct a reasonable investigation regarding the Tillery Letter and Syngenta's non-mention to Zurich thereof, so as not to disturb its predetermined no-coverage position; and that Zurich improperly and brazenly placed the interests of itself and its affiliate, ZIC, above the interests of its insured.

No insurer should be permitted to intentionally create a record to justify denial of a claim by purposely failing to conduct even a rudimentary investigation. To rule

otherwise would create an incentive for insurers to purposely avoid conducting investigations into policyholders' claims, lest that investigation reveal facts which destroy the insurer's stated justification for a denial. But that is precisely what Zurich did in this case.

At the very least, the evidentiary record, viewed in the light most favorable to Syngenta, certainly would allow a factfinder to infer that Zurich and its employees acted in bad faith in handling and denying Syngenta's claim.

a. Zurich's Defenses Were Meritless

First and foremost, Zurich's coverage defenses proved to be meritless; as discussed on pages 15-17 above, the trial court ruled against Zurich on both. (Zurich Br., Exs. 1-2, 4).

Moreover, Zurich denied coverage in order to avoid the mounting exposure even though it knew or should have known that its defenses lacked merit. Indeed, Zurich has acknowledged that under its policies, a "claim" requires a "demand for money damages by claimant/plaintiff," which was clearly absent from the Tillery Letter. (B306). Likewise, its rejection of Syngenta's glyphosate notice confirms Zurich's belief that a "claim" requires "specifics," including details regarding claimants and their alleged injuries. (B109).

But Zurich was more concerned with protecting its bottom line than fulfilling its obligation to Syngenta under the Policies.

b. The Reason Given for Zurich's Denial Was Pretextual

Zurich's stated reason for denial—[redacted]—does not withstand scrutiny in the context of the surrounding circumstances. Indeed, the chronological record shows that Zurich was [redacted] The record is replete with facts from which a factfinder could reasonably infer that Zurich planned to deny Syngenta's claim well before receiving the Tillery Letter, including the following:

- On July 20, 2018, ZIC's Olivier Godet expressed his concern via email to Ms. Nwaomah that the first Paraquat Action might "one day evolve into a bigger matter, quickly exhausting the [underlying] limits and threatening to pierce into the XS layers," the first of which included ZIC's $75 million coverage. (B26).

- By January 2019, [redacted] ZIC's Risk Engineering department had recommended that ZIC stop insuring agrochemical companies—or, at the very least, Syngenta and the next four largest agrochemical companies. (B81; B618 at 121:24-124:10).

- On January 10, 2019, [redacted] (B110-12).

- On January 11, 2019, Ms. Nwaomah emailed ZIC colleagues about the "potential exploration of a notice issue," presumably based on the Tillery Letter, which she had learned about on June 27, 2018. (B93; B24).

- On March 12, 2019, Ms. Nwaomah attended a meeting with Syngenta and Kirkland so that Zurich, which had agreed to defend Syngenta, could learn more about the defense of the Paraquat litigation. [redacted] Ms. Nwaomah's meeting notes

indicate she was told details about the claims brought against Syngenta and the Tillery Letter. Her notes also indicate that what [redacted] and that Zurich should "continue to follow up on the knowledge issue." (B509-11 at 152:21-155:13, 158:11-160:5; B838).

- On or around March 14, 2019, Ms. Nwaomah shared her concern with her ZIC colleagues and told them that "it appears things are moving in a different direction now." (B303).

- On April 18, 2019, Syngenta gave notice to Zurich of an additional 10 Paraquat Actions. (B307).

- On April 25, 2019, Ms. Nwaomah told her colleagues at Zurich and ZIC that Zurich's coverage counsel had recommended that Zurich provide a pretextual reason to delay a proposed meeting with Syngenta, so that Zurich could first finalize its "supplemental coverage position." (B313).

- [redacted] (B607-10).

- After receiving the Tillery Letter on April 30, 2019, Zurich *took no action whatsoever* that might have interfered with its preordained decision to deny coverage and commence litigation. For example, Zurich did nothing to learn what Syngenta did after receiving the Tillery Letter to elicit information regarding Mr. Tillery's alleged clients or whether Syngenta received any additional information from Mr. Tillery before the first Paraquat Action was filed in 2017. Zurich did not ask whether Mr. Tillery had ever made a demand for damages in 2016. Zurich never even asked Syngenta why it did not tell Zurich about the Tillery Letter in 2016. And Zurich never contacted Mr. Tillery to discuss the letter. (B628-29 at 34:10-40:11).

- Rather than performing any investigation, within two weeks of receiving the Tillery Letter, Zurich completed and sent its "supplemental coverage position" letter (*i.e.*, the denial letter) and completed and filed the complaint that commenced this action. (B607-10; B628-29 at 34:10-40:11, B321-46; A222).

- In contravention of Zurich's claims handling guidelines, its denial letter did not advise Syngenta that Zurich would reevaluate its coverage position

upon the presentation of additional material and information. (B321-46; B9).

It would be reasonable for a factfinder, confronted with this mountain of evidence, to infer that Zurich had decided to deny coverage before reviewing the Tillery Letter—and that Zurich did not perform even a perfunctory investigation lest it discover facts militating against a denial.

Moreover, even based on the Tillery Letter alone, Zurich knew or should have known that it did not constitute a "claim for damages" because it neither demanded damages nor provided any "specifics."

c. Zurich Improperly Failed to "Split the File"

Zurich's failure to separate its investigation of potential coverage defenses from its investigation of the underlying Paraquat Actions—and its improper use of confidential information obtained as a result of that failure—is further conduct from which a jury can infer bad faith.

Courts have permitted bad faith claims to proceed to trial upon a showing that the insurer failed to properly "split the file" in such a way and leveraged information learned during the liability investigation to build a coverage defense. *See, e.g.*, *Specialty Surplus Ins. Co. v. Second Chance, Inc.*, 2006 WL 2459092, at *16-17 (W.D. Wash. Aug. 22, 2006) (denying summary judgment where claim file reflected strategy to allow underlying lawsuit to go to trial, rather than settling, because insurer would be able to disclaim coverage at the end); *Vermont Mut. Ins. Co. v.*

Parsons Hill P'ship, 1 A.3d 1016, 1025 (Vt. 2010) (relevant inquiry is whether the insurer could "have obtained from defense counsel any information that could have any effect on whether coverage existed").

The practice of "splitting the file" is widely acknowledged within the insurance industry as the most appropriate method for avoiding conflicts of interest. (B650, B657-58). As explained by Syngenta's claim handling expert, Jim Schratz, [redacted] (B657). Zurich's expert, Bernd Heinze, [redacted] (B689). His conclusion is contradicted by documentary evidence and Zurich's own admissions.

The record shows that Ms. Nwaomah sought information from Syngenta and its counsel, under the guise of a liability investigation, that Zurich then used to form the basis of Zurich's coverage denial. Shortly after raising the "potential . . . notice issue" with her colleagues in January 2019, Ms. Nwaomah requested confidential work product from Syngenta's defense counsel without disclosing that she was pursuing a coverage investigation. (B105). Ms. Nwaomah then attended the March 12, 2019 meeting with Kirkland, supposedly as part of her liability investigation,

again without specifically informing Syngenta that she was also investigating a coverage defense. This conduct was akin to being a [redacted] (B694 at 86:2-3). As Zurich has admitted in a discovery response, [redacted]. (B610).

A factfinder could conclude from the facts presented above that by failing to split the file and [redacted] (B689), Zurich failed to [redacted] (B647), and therefore acted in bad faith.

d. Zurich Cannot Manufacture a "*Bona Fide* Dispute" by Failing to Conduct a Proper Investigation

The "*bona fide* dispute" standard should not be reflexively applied to cases where, as here, the insurer purposely limited the scope of its investigation in order to maintain that a dispute exists. Zurich's failure to investigate the full set of facts surrounding the Tillery Letter—together with the fact that Zurich's grounds for denial were unsupportable—should be reason enough to allow Syngenta's bad faith claim to reach trial.

Zurich had several opportunities to investigate the circumstances surrounding the Tillery Letter, but it never asked Syngenta or Mr. Tillery about their

communications and never asked Syngenta why it did not tell Zurich about the Tillery Letter in 2016.

Zurich first learned of the Tillery Letter on June 27, 2018. (B24). But Zurich did not request a copy of it until January 28, 2019—and even then did not inquire regarding Syngenta's response to it or contact Mr. Tillery. (B105, B628-29 at 34:10-40:11).

Nor did Zurich make any such inquiries during or following the March 12, 2019 meeting with Kirkland. Even after Zurich received a copy of the Tillery Letter on April 30, 2019, it made no attempt to clarify anything with Syngenta or Mr. Tillery before sending its denial letter and commencing this action on May 13, 2019. (B628-29 at 34:10-40:11).

Had Zurich conducted even a perfunctory investigation after receiving the Tillery Letter, including speaking with Syngenta and/or Mr. Tillery,[13] it would have learned any or all of the following:

- Although the Tillery Letter asserted that Mr. Tillery had been retained by over 200 clients as of January 2016, he had been retained by—at most—six clients at the time (which Syngenta would have had no reason to know). (B634 at 83:22-84:16).

- Although the Tillery Letter asserted that Mr. Tillery had retained scientific experts on the alleged connection between Paraquat and Parkinson's disease, he actually had not retained any testifying experts by the end of

[13] Mr. Tillery testified that [redacted]. (B642 at 169:24-171:4).

2016 and thus was not prepared to file any claim in 2016. (B638-39 at 130:6-21, 138:16-140:3; B641 at 153:3-8).

- Mr. Tillery made no demand for damages to Syngenta on anyone's behalf in 2016. (B640-41 at 150:22-153:9).

- Although Kirkland had pushed Mr. Tillery to provide details about his purported clients in 2016, he refused to provide any specific identifying information. (B635-37 at 108:7-113:8; B488-93 at 73:15-77:18, 81:4-82:15, 91:12-92:18, 110:18-111:7; B625 at 197:25-198:10).

- It appeared to Mr. Tillery in 2016 that Kirkland and Syngenta were skeptical of his allegations. (B643 at 173:15-175:19).

- Syngenta did not accept Mr. Tillery's representations and threats at face value in 2016 given empty threats he had previously made in connection with an unrelated product and his refusal to substantiate his allegations or provide medical information or details about his purported clients. (A169-70).

- There were no communications with Mr. Tillery in 2016 after April, when a Kirkland attorney reminded Mr. Tillery that Kirkland was still awaiting the documentation that had been requested. (B632 at 46:8-24; B635-36 at 108:7-110:17; B492 at 91:20-92:18; B625 at 197:25-198:10).

All of these facts would have revealed the lack of support for the conclusion that the Tillery Letter was a "claim for damages" first made in 2016. By failing to conduct a proper investigation, Zurich intentionally manufactured a reason to deny coverage.

Delaware courts have repeatedly denied summary judgment to insurers on bad faith claims where there is evidence that an investigation was curtailed to create a basis for denial of coverage. In *Swetland v. Allstate Insurance Co.*, 1987 WL 16730 (Del. Super. Ct. July 27, 1987), summary judgment was denied because evidence that the insurer "withheld [certain] records from the physician selected to accomplish

the evaluation" of the insured created a "reasonable inference that [the insurer] did not have any reasonable grounds for relying upon its asserted dispute as a defense to its liability." *Id.* at *2-3.[14]

Similarly, in *Powell*, *supra*, summary judgment was denied where the insurer delayed paying out disability benefits based on outlandish theories, but had not actually investigated those theories before making its coverage determination. 2019 WL 4509165, at *1-2. The Court allowed the insured's bad faith claim to proceed to trial, noting that the insurer's suspicions could have been cleared up quickly with a timely investigation. *Id.* at *5.[15]

As discussed above, the record is replete with facts from which a factfinder could reasonably infer that Zurich planned to deny Syngenta's claim well before receiving the Tillery Letter, because of its and ZIC's concerns of mounting exposure. The record is also replete with evidence showing that Zurich had no reasonable

[14] The *Swetland* court cited with approval a California case wherein the court noted that "reasonable inferences may be drawn that defendant (insurer) purposely ignored the great bulk of the medical information it had and . . . sought only to justify its predetermined course of discontinuing disability benefit payments justly due plaintiff under the policy." *Little v. Stuyvesant Life Ins. Co.*, 67 Cal. App. 3d 451, 462 (Cal. Ct. App. 1977). The record here shows that Zurich, like the insurers in *Swetland* and *Little*, reached a predetermined coverage determination based on a purposely restricted record.

[15] *See also Playtex, Inc. v. Columbia Cas.*, 1993 WL 83343, at *2-3 (Del. Super. Ct. Mar. 10, 1993) (denying summary judgment because "there clearly is an issue of fact as to whether the investigation of policy defenses . . . was sufficient to provide a reasonable basis for denying coverage").

justification for denying coverage on the grounds that it identified. Syngenta is entitled to have a factfinder weigh this considerable evidence which at the very least creates a reasonable inference that Zurich did not have reasonable grounds to deny coverage.

In sum, a factfinder could have reasonably "conclude[d] that [Zurich's] assertion and prolonged continuation of an ultimately meritless coverage dispute reflected bad faith," where "the evidence readily supports [Syngenta's] contention that [Zurich] was far more interested in denying coverage than defending its insured against" the Paraquat Actions. *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 29-32 (Ky. 2017) (affirming trial court's rejection of insurer's motion for directed verdict on bad faith claim, although coverage defense presented issue of first impression, where evidence showed, *inter alia*, that insured had failed to conduct a proper investigation and maintained defense through trial based on "speculation and conjecture" rather than "factual justification").

CONCLUSION

Defendant-Below, Appellee/Cross-Appellant Syngenta respectfully requests that this Court (1) affirm the trial court's conclusion in its August 3, 2020 and August 24, 2022 Opinions that the Tillery Letter was not a "claim for damages" made in 2016, (2) affirm the trial court's March 4, 2021 denial of Zurich's motion to compel the production of privileged communications, and (3) reverse the trial court's August 24, 2022 order granting Zurich's summary judgment with respect to Syngenta's bad faith counterclaim.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2023, a copy of the foregoing document was caused to be served by File & Serve*Xpress* upon the following counsel of record.

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