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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, v. SYNGENTA CROP PROTECTION LLC, Defendant Below, Appellee.	)	No. 135, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N19C-05-108 MMJ CCLD **PUBLIC VERSION** **SEPTEMBER 25, 2023**

APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

DATED: August 31, 2023

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NATURE OF THE PROCEEDINGS

The Nature of Proceedings is set forth in Zurich's Opening Brief.[1] *See* Zur. Op. Br. at 1-4. On August 1, 2023, Syngenta filed Syngenta Crop Protection, LLC's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

This is Zurich's Reply on Appeal and Answering Brief on Cross-Appeal.

[1] This Reply Brief on Appeal and Answering Brief on Cross-Appeal uses the same definitions and abbreviations used in Appellants' Opening Brief on Appeal. ("Zur. Op. Br.")

SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The Superior Court properly granted summary judgment in Zurich's favor on Syngenta's counterclaim for bad faith. As an insured asserting a purported bad faith claim, Syngenta bears the summary judgment burden of demonstrating at least a genuine issue of material fact as to whether Zurich lacked a reasonable justification for denying coverage for the Paraquat Actions. Under Delaware law, a reasonable justification exists if at the time of the denial, there were facts and circumstances known to it that created a *bona fide* coverage dispute. Here, Syngenta's allegations regarding Zurich's claims investigation failed to meet this burden because at the time Zurich denied coverage, the undisputed facts demonstrated that a *bona fide* coverage dispute existed as a matter of law. The Superior Court's lengthy summary judgment opinions and post-trial opinion addressing novel issues of Delaware law, complex policy interpretation issues, and numerous factual disputes raised by Zurich's denial, confirm and amply prove the existence of a *bona fide* coverage dispute requiring the dismissal of Syngenta's bad faith claim as a matter of law. Syngenta now asks this Court to adopt a novel theory of bad faith under which Zurich's reasonable justification for coverage could be

discarded as “pretextual,” which effectively would create a genuine issue of triable fact on every insured’s bad faith claim, regardless of the merits.

STATEMENT OF FACTS

The Statement of Facts pertinent to the reply and answering brief is set forth in Zurich's Opening Brief. *See* Zur. Op. Br. at 9-24.

REPLY IN SUPPORT OF ZURICH'S ARGUMENT ON APPEAL

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

Syngenta contends that the trial court's summary judgment opinions correctly ruled that the Tillery Letter is not a "claim for damages" because it does not demand a monetary payment. However, the letter made perfectly clear that Mr. Tillery's clients were seeking money from Syngenta by expressly declaring that Mr. Tillery's firm was "retained by numerous victims of Parkinson's disease in connection with ***claims they and their spouses have against Syngenta for*** personal injuries and related ***damages***." (A140 (emphasis added)) As a threshold matter, that declaration was sufficient to reflect a "claim for damages" in the letter, and there is no policy language or Delaware case law requiring the letter itself to separately demand some more specific monetary payment.

Syngenta further contends that the Tillery Letter cannot be a claim because "it did not identify a purported claimant." (Syn. Ans. Br. at 4) That is not the case. The letter expressly states it was sent on behalf of unnamed individuals who retained Mr. Tillery's firm. This affirmative representation that Mr. Tillery's firm was retained by individuals in connection with claims against Syngenta was sufficient to establish that there were actual people asserting claims against Syngenta. Syngenta

cannot point to any policy language or case law requiring that a "claim for damages" include more specific identifying information about the claimants. The Court should thus decline Syngenta's invitation to presume that Mr. Tillery's factual representations may have been false and so made in violation of his ethical obligations as an attorney. That presumption, in fairness, can have no place in determining whether the Tiller Letter is a claim for damages. If the determination of what constitutes a "claim" is found to turn on the insured's subjective belief about whether a plaintiffs' attorney is lying, it would effectively wreak havoc on "claims made" insurance trigger determinations, lead to significant litigation, and undoubtedly trials over coverage.

Finally, Syngenta ineffectively argues that the factual circumstances surrounding its receipt of the Tillery Letter are irrelevant to whether it, in conjunction with those other facts, constitute a "claim for damages" first made in 2016. These circumstances include Syngenta's communications with Mr. Tillery about the letter, Syngenta's retention of Kirkland in 2016 to respond to the allegations in the letter, Syngenta's payment of approximately $1.4 million to Kirkland in 2016 for matters billed as "Paraquat Litigation," Syngenta's history of incurring approximately $200 million in settlement and defense costs for litigation

that Mr. Tillery filed against Syngenta before Syngenta received the Tillery Letter, and Syngenta's financial disclosures that identified the Tillery Letter as a matter that "could reasonably result" in liability in excess of $5 million and $80 million. (Zur. Op. Br. at 14-15) Although the Tillery Letter on its face, in and of itself presents a "claim for damages," these additional undisputed facts are directly relevant to the 2016 "claim for damages" against Syngenta because they establish additional information about the claimants and their claims and demonstrate that Syngenta did not dismiss the letter's allegations as frivolous.

A. Syngenta Bears the Burden of Establishing that the Tillery Letter Does Not Present a "Claim for Damages"

Syngenta does not dispute that it bears the burden "of proving the 'claim for damages' for which it sought coverage was first made within the 2017 policy period. . . ." (Syn. Op. Br. at 20-21) However, to satisfy this burden, Syngenta argues it only needs to prove that the filing of the first Paraquat Action occurred during the 2017 Zurich policy period. That is not the case. It must also prove that the Tillery Letter does not present a "claim for damages" that was first made in 2016. This is because if the Tillery Letter reflects a "claim for damages" made in 2016, all of the subsequently-filed Paraquat Actions may not be "first made" during the 2017 policy period at all, but instead could be deemed made in 2016 by operation of the

policies' "claims series" provision. If so, the Paraquat Actions fall outside the coverage afforded by the Zurich Policies that first incepted in 2017.

Syngenta's contention that it only bears the burden of proving that the first Paraquat Action was filed during the 2017 Zurich policy period ignores that it bears the burden of satisfying two separate but related pre-conditions to coverage under the Zurich Policies' insuring agreement. The first provision provides that coverage under the policies "applies to 'bodily injury' . . . only if: . . . [a] claim for damages because of the 'bodily injury' . . . is ***first made*** . . . during the policy period." (A730 (emphasis added)) The second provision (the "claims series" provision) provides:

> All "occurrences" which result in a series of claims or "suits" . . . because of "bodily injury" due to a "common cause or condition" of "your products" . . . shall be deemed to be just one "occurrence" . . . . All claims or "suits" for damages from such "common cause or condition" shall be deemed to have been made at the time of the first of those claims or "suits" is made against any insured.

(A767) Accordingly, the Zurich Policies' insuring agreement affords coverage only if the Paraquat Actions were "first made" in 2017, and demonstrating that they were "first made" in 2017 requires proof that they cannot "be deemed to have been made" prior to the inception of the 2017 Zurich Policies by operation of the "claims series" provision. It is Syngenta's burden to satisfy both preconditions to coverage under the policies' insuring agreement. *See E.I. du Pont de Nemours & Co. v. Allstate Ins.*

Co., 693 A.2d 1059, 1061 (Del. 1997). To establish that the Paraquat Actions were "first made" during the 2017 Zurich policy period, it is Syngenta's burden to prove that the Tillery Letter did not present a "claim for damages" against Syngenta in 2016. If Syngenta cannot meet that burden, then the Paraquat Actions must be deemed made in 2016, when Syngenta received the Tillery Letter, and fall outside the Zurich Policies' insuring agreement.[2]

As addressed below, Syngenta cannot satisfy its burden of proving that the Tillery Letter did not present a "claim for damages" within the meaning of the Zurich Policies where the letter uses the policy's precise words, "claims…for…damages," in connection with the claimants' allegations of personal injury caused by Syngenta's Paraquat. (A140)

B. The Tillery Letter Expressly Presented a Claim for Damages Against Syngenta, Regardless of Whether the Letter Itself Specifically Demanded the Immediate Payment of Money

Syngenta contends that the Tillery Letter was not a "claim for damages" under the Zurich Policies because "it did not demand money." (Syn. Ans. Br. at 21) This

[2] The issue of whether the Paraquat Actions and the Tillery Letter arise from a "common cause or condition" is not before this Court because the trial court ruled that the Tillery Letter was not a "claim for damages" in the first instance and therefore did not address whether the Paraquat Actions are deemed made in 2016 by operation of the "claims series" provision. (Zur. Op. Br. at 20, n. 4)

ignores the first paragraph of the Tillery Letter, which expressly declared that Mr. Tillery's firm was "retained by numerous victims of Parkinson's disease in connection with ***claims they and their spouses have against Syngenta for*** personal injuries and related ***damages***." (A140 (emphasis added)) The letter's express use of the terms "claims…for…damages" obviates any need to resolve the precise meaning of "claim for damages" under the Zurich Policies because, regardless of its meaning, that meaning was incorporated into and conveyed by the letter's affirmative representation that Mr. Tillery's clients "***have***"—in the present tense—"claims…for…damages" against Syngenta. Simply, the Tillery Letter, word-for-word, uses the precise phrase that triggers coverage under claims-made policies like the Zurich Policies. *See Berry v. St. Paul Fire & Marine Ins. Co.*, 70 F.3d 981 (8th Cir. 1995) ("[T]his letter, fairly read, clearly qualifies as a 'claim.' In the first place, the letter itself refers to the 'Products Liability Claim of Ronald D. Berry.'")

Even if Syngenta is correct that a "claim for damages" means a demand for money, the Tillery Letter conveys that meaning by using the ***very words*** of the Zurich Policies. And by using those words, Mr. Tillery unmistakably informed Syngenta, in writing, that his clients were demanding money from Syngenta to redress their alleged injuries caused by exposure to Paraquat. That plainly was sufficient to

present a "claim for damages" within the meaning of the Zurich Policies. There is no additional language in the policy or Delaware case law requiring the letter itself to separately specify how, when, or in what amount Syngenta would have to pay the money that the letter affirmatively and expressly stated were being demanded by Mr. Tillery's clients.

Additionally, Syngenta fails to address all of the ordinary and usual meanings of the term "claim," which is not defined by the Zurich Policies. It is axiomatic that clear and unambiguous language in an insurance policy should be given "its ordinary and usual meaning." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).[3] Under Delaware law, the ordinary and usual meanings of "claim" include "a challenging request," "a demand for benefits or payment," and "an assertion or statement." *Lamberton v. Travelers Indem. Co.*, 325 A.2d 104, 107 (Del. Super. Ct. 1974), *aff'd*, 346 A.2d 167 (Del. 1975). The Tillery Letter incorporated all of these

[3] Both parties in this case agree that the terms "claim for damages" are clear and unambiguous. (Syn. Ans. Br. at 22) Despite acknowledging this, Syngenta improperly attempts to use a hypothetical emailed internally between two people at Zurich about a completely different matter to support its interpretation of these terms. (Syn. Ans. Br. at 22, n.5) However, this Court has "held unequivocally that extrinsic evidence is not to be used to interpret contract language where that language is plain and clear on its face." *O'Brien*, 785 A.2d at 289 (internal quotations omitted).

meanings by expressly asserting that Tillery's clients have "claims…for…damages" against Syngenta. The letter also qualifies as a "claim for damages" based on the plain and ordinary meanings of "claim" recognized in *Lamberton*. For instance, the trial court acknowledged that "[t]aken as a whole, the Tillery Letter is reasonably interpreted at most as *requesting* damages." (Zur. Op. Br., Ex. 1 at 23 (emphasis in original)) That description perfectly matches one of the usual and ordinary meanings of "claim" recognized by *Lamberton* (i.e., "a challenging request"). The Tillery Letter also plainly constitutes "an assertion or statement" for "damages," which likewise falls within one of the usual and ordinary meanings of "claim" recognized by *Lamberton*. Syngenta fails to address these alternative meanings of "claim" under Delaware law. Instead, it argues in a footnote that *Lamberton* "confirms that a claim requires a demand for money." (Syn. Ans. Br. at 22, n.4) But Syngenta fails to explain ***how*** it requires a demand for money, and instead includes only a parenthetical with an excerpt from *Lamberton* that does not provide any support for this argument. If *Lamberton* did in fact support Syngenta's argument that a "claim for damages" requires a "demand for money," Syngenta would have no cause to relegate this argument to the ditch. *See* Supreme Court Rule 14(d) ("Footnotes shall not be used for argument ordinarily included in the body of a brief. . . .").

Instead of addressing all of the usual and ordinary meanings of "claim" that have been recognized under Delaware law, Syngenta relies on inapposite Delaware case law to argue that the Tillery Letter itself must demand monetary payment to constitute a "claim for damages." For instance, Syngenta mistakenly relies on this Court's decision in *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007), which involved the interpretation of the term "Claim" that was expressly defined by the policy. (Syn. An. Br. at 22) In that case, the Court conducted a close textual analysis of the policy's definitions of "Claim" to determine whether that specific policy definition was "determinative of the number of claims presented" by the underlying actions. *AT&T*, 918 A.2d at 1108-09. The Court concluded that "each cause of action in the [underlying] lawsuits may constitute a separate 'Claim' within the meaning of the policies at issue." *AT&T*, 918 A.2d at 1109. This decision did not purport to determine the general meaning of "claim" under Delaware law where the term "claim for damages" is not defined by the policy. Moreover, the issue resolved by the Court in *AT&T* has no bearing on whether an attorney's letter expressly representing that his clients have "claims…for... damages" against an insured in fact reflects a "claim for damages" under Delaware law.

Syngenta's reliance on *Medical Depot Inc. v. RSU Indemnity Co.*, 2016 WL 5539879, at *2 (Del. Super. Ct. Sept. 29, 2016) is likewise unavailing. (Syn. Ans. Br. at 23) The trial court correctly distinguished this case on the basis that a California statute barred the claimant from seeking damages from the insured before requesting equitable relief. (Zur. Op. Br., Ex. 1 at 18-19) There was no comparable statute precluding Mr. Tillery's clients from seeking damages from Syngenta. As such, when Mr. Tillery stated in his letter that his clients have "claims…for…damages" against Syngenta, the clients' rights to seek such damages existed at the time the letter was written and clearly presented a "claim for damages" under the Zurich Policies.

Finally, Syngenta argues that the Superior Court's decision in *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 4130631, at *16-17 (Del. Super. Ct. Sept. 10, 2021), is "instructive." (Syn. An. Br. at 24) It is not. That case addressed a completely separate issue—whether certain attorney letters requesting information constituted a demand for non-monetary relief, which the court interpreted to include only "a remedy available in court, rather than a less technical form of reparation." *Id.* at *16. The court held that the letters did not constitute such a demand because the attorneys' clients, unlike government

agencies, could not enforce compliance in court with the letters' request for information. *Id.* Here, Mr. Tillery's clients were expressly asserting claims for personal injuries and related damages allegedly caused by their exposure to Paraquat, which, unlike the information requests in *Sycamore*, were fully enforceable in court at the time the letter was written.

The foreign cases cited Syngenta are likewise distinguishable. The majority do not address attorney letters like Tillery's with unmistakable expressions of claims for damages against the insured. (Syn. Ans. Br. at 25-26) The handful that do involve attorney letters alluding to a "claim for damages" or a "claim" are easily distinguished on their facts. (Syn. Ans. Br. at 24-25) For instance, in *Myers v. Interstate Fire & Casualty Co.*, 2008 WL 276055 (M.D. Fla. Ja. 30, 2008), the body of the attorney letter at issue stated:

> Please be advised that our firm has been retained to represent the above client in a claim for damages arising from your negligence on the above date.
>
> Please forward me copies of any statements, either written or recorded, which purport to have been taken from my client. Furthermore, pursuant to Florida Statutes, please provide me within thirty days from the receipt date of this letter, a written statement, under oath, of a corporate officer setting forth the following information, including excess or umbrella insurance:
>
> (a) The name of the insurer

(b) The name of each insured

(c) The limits of liability coverage

(d) A statement of any policy or coverage defenses which each insurer reasonably believes is available to the insurer filing the statement at the time of the filing of the statement, and

(e) A copy of the policy.

Should this insured have coverage with another liability carrier, please provide that companies [sic] name in order to correspond with them. Thank you for your time and attention.

Id. at *5. Despite the minimal information provided by this letter, and the absence of any alleged "Medical Incident" that the policy expressly required, the court nevertheless considered the coverage issue "a close case because [the attorney] letter advised that he had been retained as to a 'claim for damages.'" *Myers*, 2008 WL 276055, at *7.

The perfunctory letter at issue in *Myers* is not reasonably comparable to the 20-page Tillery Letter, which included allegations of wrongdoing by Syngenta (i.e., misrepresentations "about Paraquat droplets size and inhalation," awareness that Paraquat drift particles can enter deep into the lungs, defective product design, and failure to warn). (Zur. Op. Br. at 10-11) The letter also summarized scientific studies and other information allegedly providing evidence of the link between

Paraquat and Parkinson's, warned that public dissemination of these allegations and evidence would result in a huge number of "copycat" lawsuits, and could cost Syngenta billions in defense costs, before payment of compensatory and punitive losses. (Zur. Op. Br. at 10-12)

Moreover, *Myers* did not involve any circumstances similar to those surrounding Syngenta's receipt of the Tillery Letter, such as Syngenta's history of paying approximately $200 million in defense and settlement for other lawsuits filed by Mr. Tillery against Syngenta before it received the Tillery Letter, Syngenta's retention of Kirkland to investigate the letter and meet with Tillery (resulting in incurred costs of approximately $1.4 million in 2016 alone to investigate the letter and conduct a "litigation risk assessment" related to Paraquat), and Syngenta's disclosure of the letter to its auditor and business suitor as matters that entailed potential liability exceeding $5 million and $80 million, respectively. (Zur. Op. Br. at 12-15) Viewed in their totality, the information and allegations included in the Tillery Letter and the circumstances surrounding Syngenta's receipt of the letter easily distinguish this case from *Myers*.[4]

[4] The other two cases cited by Syngenta that involve attorney letters alluding to "claims" are substantially similar to *Myers.* (Syn. Ans. Br. at 25) The letter in *National Fire Insurance v. Bartolazo*, 27 F.3d 518, 519 & n.1 (11th Cir. 1994) was

C. The Tillery Letter Did Not Need to Contain Specific Identifying Information About the Claimants to Present a "Claim for Damages"

Syngenta insists that the trial court did not create a "novel test" to determine whether the Tillery Letter presented a "claim for damages." (Syn. Ans. Br. at 30) Yet Syngenta's brief conspicuously avoids any mention of the trial court's test, which stated that for the Tillery Letter to constitute a "claim for damages": (a) "there must be some demonstration by the potential claimant sufficient to put the potential defendant on notice that there is an *actual* person or persons who are intending to file a claim for damages" (emphasis in original); and (b) "[t]he insured must have [a] credible indication that there is at least one specific individual that is prepared to assert a claim." (Syn. Ans. Br. at 29-34; Zur. Op. Br., Ex. 1 at 21-22; Zur. Op. Br.,

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practically identical to the one at issue in *Myers*, and the policy at issue in *Bartolazo* expressly defined the term "Claim" as "the receipt by you of a demand for money or services, naming you and alleging a medical incident." The letter at issue in *In re Ambassador Group, Inc. Litigation*, 830 F. Sup. 147, 151 (E.D.N.Y. 1993) merely advised the insurer that after the insured's bankruptcy hearing, the insured's receiver had uncovered unspecified facts "which [led] him to conclude that certain former directors and officers were guilty of acts falling within the scope of coverage afforded by . . . the policy" and was providing "notice of a claim." As in *Myers*, the rulings in *Bartolazo* and *In re Ambassador* were also premised in part on the failure to identify any alleged "medical incident" or "Wrongful Acts." *Bartolazo*, 24 F.3d at 519; *In re Ambassador*, 830 F. Supp. at 155-56. These cases are thus distinguishable for the same reasons as *Myers*, and do not support Syngenta's argument.

Ex. 2 at 8) Presumably, if these criteria for determining the existence of a "claim for damages" were not novel, as Syngenta contends, it would have cited to at least a single case from any jurisdiction applying the same or similar criteria. Yet it has not and cannot. And, at no time has Syngenta itself even attempted to argue that this novel test has any basis in Delaware law (or any state's law for that matter). This test was entirely a creation of the trial court.

There is a fundamental flaw in the trial court's criteria for determining the existence of a "claim for damages," as well as Syngenta's attempts to sustain it. They allow Syngenta to presume that Mr. Tillery may have been lying—in derogation of his ethical obligations as an attorney—when he represented that his firm was "retained by numerous victims of Parkinson's disease in connection with claims they and their spouses have against Syngenta for personal injuries and related damages." Otherwise, Mr. Tillery's representation that his firm had been retained by certain individuals would have satisfied the trial court's criteria for determining whether there was a "claim for damages," because that representation would: (1) be sufficient to put Syngenta "on notice that there is an *actual* person or persons who are intending to file a claim for damages"; and (2) provide Syngenta with a "credible

indication that there is at least one specific individual that is prepared to assert a claim." (Zur. Op. Br., Ex. 1 at 21-22 (emphasis in original))

Syngenta repeatedly implies that Mr. Tillery could have been lying about having been engaged by claimants when it refers to them as "purported claimants," "purported clients," or "individuals Mr. Tillery claimed to represent." (Syn. Ans. Br. at 4, 9, 10, 19, 29) To defeat Zurich's summary judgment motion, Syngenta went even further and declared outright that Mr. Tillery was lying in his letter when he represented that his firm had been retained by claimants. (A923 ("Mr. Tillery had given us no reason to believe that he possessed actual claimants….")) Any insured is well within its rights to be skeptical of allegations asserted against it in an attorney's letter and to demand information about that attorney's clients. However, the legal determination regarding whether attorney letters present a "claim for damages" should not be permitted to turn in the first instance on the presumption that the lawyers may be lying when they affirmatively state they have been retained by claimants. Otherwise, an insured could dismiss ***any*** attorney letter as not presenting a "claim for damages" by positing that the attorney may have been lying about his or her statement of retention, and the inquiry into whether the letter reflects a "claim for damages" will devolve into a heavily fact-dependent analysis—as it did

in the trial court proceedings—into whether the attorney provided sufficiently specific information to convince the insured that the attorney was not lying about being retained by clients. Such a rule would render "claims made" insurance trigger determinations unworkable, subject to significant litigation, and undoubtedly trials over when claims are made under an insurance policy.

There are in fact numerous reasons why a plaintiffs' attorney may be reluctant to divulge information that specifically identifies his or her clients before filing a lawsuit, including, as Mr. Tillery explained at his deposition, preventing his clients from being subjected to the "extreme disadvantage" of being investigated by Syngenta "long before the…formal discovery process would occur in the litigation." (A951-A952 at 111:10-113:8) In light of these dynamics—including both Syngenta's desire for any information it could obtain about Mr. Tillery's clients and Mr. Tillery's reticence to provide any pre-suit discovery that could prejudice his client's claims—it was unreasonable for the trial court to conclude that the existence of a "claim for damages" was contingent upon Mr. Tillery's willingness to divulge specific identifying information about his clients to Syngenta. Unsurprisingly, when Mr. Tillery was asked in his deposition in this case if there was anything inaccurate about his letter's representation that his firm had been retained by certain

individuals, he confirmed that before sending the letter he had in fact been formally retained by the six individuals whom he proposed as "bellwether" plaintiffs to Syngenta during their February 2016 meeting. (Zur. Opp. Br. at 41) This type of discovery, however, should not have even been necessary to confirm what should be presumed as a matter of law for purposes of determining whether a claim has been made—i.e., that Mr. Tillery was not lying when he represented in his letter that his firm had been retained by claimants.

In the absence of any case law support for the trial court's novel test, and in an attempt to bolster its argument that no "claim for damages" was made against it in 2016, Syngenta invokes insurance policy "discovery" conditions having nothing whatsoever to do with the requirement in the Zurich Policies' insuring agreement that a "claim for damages" must be "first made" during the 2017 policy period. These "discovery" conditions allow an insured to trigger a policy after it expires if, during the policy period, the insured is put on notice of circumstances/ "occurrences"/offenses short of an actual claim that might result in a future claim, provided that the information requested by the condition is given to the insured. *See, e.g.*, *Cont'l Cas. Co. v. Coregis Ins. Co.*, 738 N.E.2d 509, 518 (Ill. App. Ct. 2000), *opinion modified on denial of reh'g* (Nov. 15, 2000); *Landry v. Intermed Ins. Co.*,

292 S.W.3d 352, 357 (Mo. Ct. App. 2009). Cases addressing whether these "discovery" conditions have been satisfied have nothing to do with whether an actual "claim for damages" has been made within the Zurich Policies' insuring agreement. As such, Syngenta's attempt to invoke the provision in the Zurich Policies' "discovery" condition and cases construing similar conditions, are inapplicable.

For instance, Syngenta wrongly relies the Zurich Policies' notice of "occurrence" or offense "discovery" condition. (Syn. Ans. Br. at 30) This condition, on its face, relates to an insured's ***pre-claim*** notice of facts "which may result in a claim":

> a. You must see to it that we are notified as soon as practicable of ***an "occurrence" or offense which may result in a claim. To the extent possible***, notice should 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.
>
> Notice of an "occurrence" or offense is not a notice of a claim.
>
> b. If a claim is received by any insured, you must:

(1) Immediately record the specifics of the claim and the date received; and

(2) Notify us as soon as practicable.

(A741 (emphasis added))

Whether an insured has satisfied Zurich's notice of "occurrence" or offense condition has nothing to do with whether a "claim for damages" is made within the policy's insuring agreement. Additionally, Syngenta's quotation of this condition conspicuously leaves out the that the information requested by subparagraphs a.(1)-(3) "should" only be provided "to the extent possible." Accordingly, even if this notice condition could be considered tangentially relevant to the very different issue of what constitutes a "claim for damages" under the policy's insuring agreement (it is not), the condition makes clear that a notice may be sufficient to preserve coverage for future claims made under this condition without providing the information enumerated by subparagraphs a.(1)-(3), to the extent it was not possible to provide such information.

Syngenta does not cite any Delaware case supporting its argument that the Zurich policy's notice condition is applicable to the entirely separate and distinct "claim for damages" provision in the policies' insuring agreement. The one foreign case relied on by Syngenta in an attempt to support this argument, *Chatz v. National*

Union Fire Insurance Company of Pittsburgh, Pennsylvania, 372 B.R. 368 (N.D. Ill. 2007), is not only irrelevant to the issue, but also easily distinguished. (Syn. Ans. Br. at 33-34) The notice of circumstance condition in *Chatz* expressly required that any such notice include "full particulars as to the dates, persons and entities involved." 372 B.R. at 372 (emphasis in original). The notice of "occurrence" or offense condition in the Zurich Policies is obviously different, as it provides that the particulars enumerated in subparagraphs a.(1)-(3) "should" be provided in any notice of "occurrence" or offense which may result in a claim, only "[t]o the extent" it is possible to provide them.

Syngenta likewise relies on an inapposite Fifth Circuit decision that analyzed a notice of potential claims condition (another "discovery" provision) and concluded the precise language of the condition required the insured to provide notice of "specified wrongful acts to trigger coverage." *McCullough v. Fid. & Deposit Co.*, 2 F.3d 110, 112 (5th Cir. 1993). (Syn. Ans. Br. at 30) That is an entirely different issue than the one on appeal and provides no support for Syngenta's argument.

In a further attempt to bolster its flawed argument regarding the Zurich policy's notice condition, Syngenta improperly relies on extrinsic evidence to construe the meaning of the Zurich Policies' "claims for damages" provision. (Syn.

Ans. Br. at 31) This Court has "held unequivocally that extrinsic evidence is not to be used to interpret contract language where that language is plain and clear on its face." *O'Brien*, 785 A.2d at 289 (internal quotations omitted). The policy's notice condition is clear and unambiguous. Syngenta does not contend otherwise. As such, the Court should reject Syngenta's attempt to inject extrinsic evidence to construe the policy's notice condition.

Moreover, even if this extrinsic evidence could be considered (which it cannot), the facts are so different that it has no bearing on whether the Tillery Letter presents a "claim for damages." That 2018 notice involved a Glyphosate verdict entered against Monsanto, a completely different company not insured under Syngenta's policy. (AR9) Syngenta was not a party to that Glyphosate lawsuit or any other lawsuit alleging similar claims, but Syngenta nevertheless provided a notice of the verdict after Zurich proposed adding a Glyphosate exclusion to the Zurich Policies effective in 2019, in an attempt to preserve coverage under the expiring 2018 policies. (AR2, AR6) Unlike the Tillery Letter, which contained allegations asserted by multiple individuals represented by Mr. Tillery's firm who directly and expressly alleged claims against Syngenta for personal injury and related damages caused by exposure to Paraquat, and which included numerous

theories of causation and allegations of liability, Syngenta's Glyphosate notice merely provided information about the Monsanto verdict and did not include any information reflecting any contact with any attorney or claimant regarding a claim for damages caused by Syngenta's Glyphosate products. (B79, AR9)

D. The Undisputed Evidence of Other 2016 Events Confirms the "Claim for Damages" Reflected by the Letter

Zurich agrees in part with Syngenta that there is no need to review any additional evidence beyond the Tillery Letter to determine whether it presents a "claim for damages" under the Zurich Policy. (Syn. Ans. Br. at 35) However, this is because the Tillery Letter itself presents a "claim for damages"—using those exact words—and there is thus no need to consider the additional undisputed evidence of other 2016 events (pre-dating the inception of the 2017 Zurich Policy). Nevertheless, there is no rule barring this Court from considering such evidence, and Syngenta does not contend otherwise. As such, these surrounding circumstances should be considered and are relevant for the following reasons.

- Syngenta's communications with Mr. Tillery in 2016 about the Tillery Letter provided additional information about the number of claimants he represented, the claimants' age at the time of their diagnosis, where the claimants were exposed to Paraquat or lived, the severity and nature of the

claimants' injuries, further details about the proposed "bellwether actions," including where they likely would be filed, and the size of the verdicts Mr. Tillery expected to win on behalf of the claimants. (Zur. Op. Br. at 38-39) Although Syngenta argues that not even this additional information is specific enough for the Tillery Letter to present a "claim for damages" (Syn. Ans. Br. at 36), there is no policy language or case law requiring specific details about the claim or claimants, as addressed above. (*See supra* pp. 18-25) In totality, all of the information provided by the letter itself and in Tillery's other communications with Syngenta in 2016 provides ample specific detail about the "claim for damages" presented by the Tillery Letter.

- Syngenta's retention of Kirkland to respond to the allegations in the Tillery Letter is evidence that Syngenta did not view those allegations as they were depicted by the trial court—i.e., as "an unclear or amorphous threat of future litigation [which] is not sufficient to constitute a claim for damages." (Zur. Op. Br., Ex. 1 at 22) For instance, immediately after Syngenta retained Kirkland to investigate the allegations in the Tillery Letter, it formed a "Paraquat Litigation Team" that included accomplished trial lawyers who billed all of their time to a matter described as "Paraquat Litigation." (A175;

A180; A216-A220; A564-A622) Then in 2018, *before* Zurich denied coverage for the Paraquat Actions, Syngenta's claims agent characterized the approximately $1.4 million in fees billed by Kirkland in 2016 as Syngenta's "legal defense expenditures incurred from the first receipt of a notice of potential litigation from the Korein Tillery law firm in January 2016." (A175; A180; A216-A220; A170; A625) These facts are particularly revealing because Syngenta has not cited to any contemporaneous evidence from 2016 reflecting its purported subjective belief in 2016 that the Tillery Letter "amounted to nothing but a vague threat by counsel" and that "Mr. Tillery did not possess actual claimants. . . ." (A923)

- Syngenta's history with Mr. Tillery, before its receipt of the Tillery Letter, reflects that Syngenta did not dismiss the allegations in the Tillery Letter as purely frivolous. For instance, before Syngenta's receipt of the Tillery Letter, Syngenta had already paid $105 million in 2012 to settle two lawsuits brought by Mr. Tillery regarding the chemical Atrazine. It also incurred $80 million defending those cases and [redacted]. (Zur. Op. Br. at 37-38)

- In 2016, Syngenta disclosed the Tillery Letter to its auditor and business suitor as matters that could result in liability in excess of $5 million and $80 million, respectively. (Zur. Op. Br. at 40) Syngenta's estimate of its potential liability if Mr. Tillery proceeded with litigation seems extremely high based on Syngenta's purported belief in 2016 that his letter was lying about being retained by any actual claimants. (A923)

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

Before even addressing the merits of this issue, Syngenta argues that Zurich's appeal from the trial court's denial of its motion to compel privileged communications under the "at issue" doctrine is "pointless" because "nothing that Zurich sought through its motion . . . 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.'" (Syn. Ans. Br. at 42) However, several of the trial court's ruling squarely placed Syngenta's subjective perception of the Tillery Letter at issue.

For example, the trial court ruled that a "claim for damages" requires "some demonstration by the potential claimant sufficient to put the potential defendant on notice that there is an *actual* person or persons who are intending to file a claim for damages." (Zur. Op. Br., Ex. 1 at 21-22) (emphasis in original)) The trial court also placed Syngenta's subjective perception of the Tillery Letter at issue by ruling that a "claim for damages" requires "a ***credible*** indication that there is at least one specific individual that is prepared to assert a claim." (Zur. Op. Br., Ex. 1 at 21-22 (emphasis added))

To defeat Zurich's motion for summary judgment that the Tillery Letter was a "claim for damages," Syngenta itself also placed its subjective perception of the Tillery Letter at issue. For instance, Syngenta relied on its purported subjective belief in 2016 that the Tillery Letter "amounted to nothing but a vague threat by counsel." (A923) Syngenta likewise relied on its purported subjective belief in 2016 "that Mr. Tillery did not possess actual claimants…," which Syngenta allegedly arrived at after it requested Kirkland to meet with Tillery "to ascertain whether he had an actual claim." (A923)

As such, Syngenta's privileged communications with Kirkland and its in-house counsel during 2016 are relevant to Syngenta's purported subjective beliefs that Mr. Tillery did not actually represent any clients, and to potentially prove, consistent with the criteria established by the trial court, that the Tillery Letter and the circumstances surrounding Syngenta's receipt of the letter were sufficient to put Syngenta "on notice" that Mr. Tillery represented "an *actual* person or persons who are intending to file a claim for damages" and that Syngenta had a "a credible indication" at least one of Mr. Tillery's clients was "prepared to assert a claim."

On the merits of Zurich's appeal on this issue, Syngenta argues that the trial court correctly refused to apply the "at issue" doctrine because Syngenta did not

inject privileged communications into the coverage litigation. (Syn. Ans. Br. at 43) That is not accurate. After Zurich moved for summary judgment that the Tillery Letter presented a "claim for damages," Syngenta's opposition brief injected its privileged communications into the litigation by relying on the declaration of its in-house counsel, Alan Nadel, who testified that Kirkland met with Tillery in early 2016 "to evaluate the likelihood of the various assertions therein," and that, based on this meeting, Mr. Nadel concluded "that Mr. Tillery had given us no reason to believe that he possessed actual claimants or was about to file any lawsuit against Syngenta at that time." (A169-A170) Syngenta likewise put these privileged communications "at issue" by basing its purported belief that the Tillery Letter "amounted to nothing but a vague threat by counsel" on the opinion of its in-house counsel, Mr. Nadel. (A923)

Syngenta further argues that the trial court correctly refused to apply the "at issue" doctrine because Syngenta "never relied on the advice of counsel in the litigation below." (Syn. Ans. Br. at 43) Yet Syngenta did rely on the opinion of its in-house counsel, Mr. Nadel, who purportedly concluded that Mr. Tillery had not been retained by any "actual claimants." (A169-A170; A923) And Mr. Nadel's opinion was necessarily informed by his privileged communications with Kirkland

about Tillery. (A923) It defies belief that Syngenta would have retained Kirkland to "ascertain whether [Tillery] had an actual claim" and "evaluate the likelihood of the various assertions" in the Tillery Letter just to ignore Kirkland's advice on those same issues.

The trial court thus incorrectly ruled that Zurich was not entitled to Syngenta's privileged communication with its in-house counsel and Kirkland under the "at issue" doctrine. *See, e.g.*, *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania*, 623 A.2d 1118, 1122 (Del. Super. Ct. 1992) (holding "at issue" exception required disclosure of otherwise-privileged communications between insured and its counsel in the underlying action, where insured put at issue its compliance with its duties of cooperation and good faith and fair dealing); *Arch Ins. Co. v. Murdock*, No. N16C-01-104 EMD CCLD (Del. Sup. Ct. Apr. 11, 2018) (holding "at issue" exception required disclosure of privileged communications between insured and its counsel in the underlying action, where insurer alleged that insured breached the policy's consent to settle condition, and insured responded by arguing that its settlement was "reasonable").

As addressed above in Section I, the issue of whether the Tillery Letter presents a "claim for damages" can be resolved on the face of the letter itself, without

resorting to any inquiry into Syngenta's purported subjective beliefs about the credibility of the representations made in the Tillery Letter. However, the trial court's novel test for determining whether the Tillery Letter was a "claim for damages" placed Syngenta's subjective perception of the Tillery Letter squarely at issue. If the Court concludes that the trial court properly considered Syngenta's purported subjective beliefs about the credibility and likelihood of representations made in the Tillery Letter, then, at a minimum Zurich is entitled to discovery of Syngenta's privileged communications with its in-house counsel and Kirkland during 2016 regarding those representations under the "at issue" doctrine.

ZURICH'S ANSWER TO SYNGENTA'S CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN ZURICH'S FAVOR ON SYNGENTA'S BAD FAITH COUNTERCLAIM

A. Question Presented

Did the Superior Court correctly enter summary judgment on Syngenta's bad faith counterclaim, where Syngenta failed to meet its burden of showing that Zurich lacked a reasonable justification to deny coverage of the Paraquat Actions at the time of the denial, where there were facts and circumstances known to Zurich that created a *bona fide* coverage dispute, and where the trial court's resolution of the issues raised by Zurich's denial required two summary judgment opinions totaling 51 pages, a seven-day trial, and a 24-page post-trial opinion that further reflected a *bona fide* coverage dispute between the parties?

B. Scope of Review

This Court reviews *de novo* a decision granting summary judgment. Summary judgment is appropriate if, after viewing the facts in the light most favorable to the non-moving party, the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as matter of law. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

C. Merits of the Argument

The trial court properly granted Zurich's summary judgment motion on Syngenta's bad faith counterclaim because Syngenta's allegations of bad faith claims handling, including its alleged inferences of a bad faith claims investigation, did not raise genuine issues of material fact sufficient to present the bad faith counterclaim to a jury. At the time Zurich denied coverage for the Paraquat Actions in 2019, a *bona fide* coverage dispute existed between the parties as a matter of law, and therefore Zurich had a reasonable justification to deny coverage at that time, both on the basis that the Tillery Letter constituted a "claim for damages" that was "first made" prior to the inception of the Zurich Policies (i.e., the coverage defense at issue in this appeal) and on the basis that that Syngenta failed to disclose material information about the Tillery Letter in violation of 18 Del. C. § 2711 ("Section 2711"). The representations and allegations in the Tillery Letter, the circumstances surrounding Syngenta's receipt of the letter, and Syngenta's failure to disclose that letter to Zurich until 2019 created this *bona fide* coverage dispute. Significantly, the trial court's lengthy summary judgment and post-trial rulings provided a detailed evaluation of Zurich's reasons for denying coverage, fully confirming the *bona fide* nature of the coverage dispute. (Zur. Op. Br., Ex. 1, Ex. 2, Ex. 4)

Syngenta's appeal of the trial court's ruling strains to suggest why Zurich's coverage denial lacked any reasonable justification. The result of Syngenta's efforts is a hodgepodge of alleged claims handling errors and various conspiracy theories purporting to explain what Syngenta now perceives to be the "real" reason why Zurich denied coverage in 2019. However, having failed at presenting any summary judgment evidence that Zurich denied coverage without a reasonable justification, Syngenta's bad faith claim fails. There is no Delaware precedent supporting Syngenta's argument that it can prevail on a bad faith claim without showing that Zurich lacked a reasonable justification for denying coverage.

Syngenta's opening brief attempts to paint Zurich's claims handling in an unfavorable light and delves into various conspiracy theories purporting to explain Zurich's true motivations for denying coverage, which Zurich disputes as fanciful at best. However, the trial court properly found that these factual disputes did not preclude the entry of summary judgment in Zurich's favor on Syngenta's bad faith claim because none of these factual disputes are ***material*** to the ultimate question that must be decided by the Court—e.g., whether Syngenta can meet its burden of showing that Zurich had no reasonable justification for denying coverage in 2019. (Zur. Op. Br., Ex. 2 at 14-15) The only facts that matter to this determination are

the undisputed facts that formed the bases of Zurich's coverage declination and its declaratory judgment action in 2019, which were considered by the trial court at great length in connection with the parties' two rounds of summary judgment briefing and the parties' trial on Zurich's Section 2711 defense. (Zur. Op. Br., Ex. 1, Ex. 2, Ex. 4)

D. The Trial Court Properly Denied Syngenta's Request to Recognize a New Theory of Bad Faith Liability

Under Delaware law, "the claimant bears the burden of proof for a bad faith claim." *Arch Ins. Co. v. Murdock*, 2019 WL 1932536, at *6 (Super. Ct. May 1, 2019) (citing *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, ¶ 13 (Del. 2017)), *affirmed by RSUI Indem. Co. v. Murdock*, 248 A.3d 887 (Del. 2021). To prevail on a bad faith claim, "[t]he claimant must show that the insurer lacked 'reasonable justification' to deny coverage to the insured." *Id.* (quoting *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 511 (Del. 2016)). "The question is whether the insurer is aware of facts and circumstances, at the time of denial, that support a bona fide dispute as to whether the loss is covered." *Murdock*, 248 A.3d at 910. Further, "[w]here the issue to be tried is one of disputed fact, the question of bad faith refusal to pay should not be submitted to the jury unless it appears that the insurer did not

have reasonable grounds for relying upon its defense to liability." *Murdock*, 2019 WL 1932536, at *6 (internal quotations and citations omitted).

Syngenta's cross-appeal attempts to bypass this well-established Delaware law by asking the Court to recognize a new theory of bad faith liability that the trial court properly rejected. Under this unprecedented new theory proposed by Syngenta, it would be entitled to proceed to trial on its bad faith claim regardless of whether Zurich had a reasonable justification to deny coverage, based on Syngenta's argument that Zurich's reasonable justification was somehow pretextual. (Syn. Ans. at 51-53)

Syngenta claims that Zurich's true motivation for denying coverage was that "Zurich and its affiliate, ZIC, wanted to avoid their exposure to increasing liabilities as the Paraquat lawsuits multiplied." (Syn. Ans. Br. at 40) However, this "motive" could be conjured up with respect to ***every*** claim in which an insurer denies coverage, because every insurer that denies coverage necessarily limits the size of its exposure. As such, if this "motive" is deemed to be sufficient grounds for ignoring Zurich's facially valid and legitimate bases for denying coverage, then there will ***always*** be a triable issue of fact on every insured's bad faith claim, regardless of whether the insurer provided a reasonable justification for denying coverage. In other words,

under this novel "pretextual" theory of bad faith that Syngenta is asking this Court to adopt, every insured's bad faith claim will always create a triable issue of fact and go to trial, regardless of the merits. The Court should decline Syngenta's request to adopt this new theory of bad faith liability.

Accordingly, the sole question at issue on this cross-appeal is whether Syngenta can meet its burden as a matter of law of showing that Zurich lacked any reasonable justification to deny coverage at the time of its denial. For all of the reasons addressed below, the trial court correctly ruled that Syngenta failed to meet that burden.

E. The Trial Court Correctly Ruled That Syngenta Failed to Show That Zurich Lacked Any Reasonable Justification to Deny Coverage

1. Zurich's Denial of Coverage Under Section 2711

Syngenta cannot meet its burden as a matter of law of showing that Zurich lacked a reasonable justification to deny coverage pursuant to Section 2711. Zurich denied coverage under Section 2711 because Syngenta failed to disclose information about the Tillery Letter in its applications for the Zurich Policies. (Zur. Op. Br., Ex. 1 at 9, 24-25) If Zurich's denial on this basis lacked any reasonable justification, the trial court would have simply denied Zurich's motion for summary judgment on this defense as a matter of law. Instead, the trial court found questions of fact that

precluded summary judgment, including questions of fact regarding whether Syngenta's answers to certain questions on the applications for insurance were accurate and whether the omission of information about the Tillery Letter was "material" to the underwriters of the Zurich Policies. (Zur. Op. Br., Ex. 1 at 28) The trial court then held a seven-day trial on Zurich's Section 2711 defense, and the post-trial ruling reflects that the resolution of this issue involved complex factual determinations, including the resolution of the parties' factual disputes related to risk management, underwriting, the meaning of application questions included on a Bermuda Form Application, and the parties' course of dealing. (Zur. Op. Br., Ex. 4) Accordingly, Syngenta's failure to disclose the Tillery Letter to Zurich until 2019, and the trial court's complex determination regarding whether that failure constituted a material omission under Section 2711, confirms the *bona fide* coverage dispute on this issue existed at the time Zurich denied coverage. Therefore, Syngenta cannot meet its burden as a matter of law of showing that Zurich lacked any reasonable justification to deny coverage under Section 2711 at the time of its denial.

2. Zurich's Denial of Coverage Because the Tillery Letter Presents a "Claim for Damages"

The trial court's summary judgment rulings in Syngenta's favor on the issue of whether the Tillery Letter presents a "claim for damages" does not establish that Zurich lacked any reasonable justification to deny coverage on this basis at the time of its denial. To the contrary, even when an insurer's determination about coverage is ultimately rejected by a court, the insurer's decision to deny coverage can nevertheless be "rational when made." *Murdock*, 2019 WL 1932536, at *6-7. Moreover, the trial court's summary judgment rulings on whether the Tillery Letter constituted a "claim for damages" does not remotely support the conclusion that Zurich's denial of coverage on this basis in 2019 was irrational. Rather, the trial court's analysis demonstrated that the determination of this issue is complex and that there is no case from Delaware or any other jurisdiction that mandated any particular outcome in favor of either party. (Zur. Op. Br., Ex. 1 at 1-23, Ex. 2 at 1-14) As such, if anything, the trial court's summary judgment opinions on this coverage defense supports the trial court's conclusion that there was *a bona fide* dispute between the parties on this coverage issue in 2019, and Syngenta's cross-appeal fails to present any contrary evidence indicating otherwise.

For instance, Syngenta argues that Zurich should have known that the Tillery Letter did not contain a "claim for damages" because "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." (Syn. Ans. Br. at 50) There is no need to address Syngenta's mischaracterization of Zurich's so-called "acknowledgement" of the meaning of "claim" under its policies. As addressed in Zurich's appeal on whether the Tillery Letter presents a "claim for damages," the Tillery Letter's affirmative representation that Mr. Tillery's clients "***have***"—in the present tense—"claims…for…damages" against Syngenta incorporates any meaning that may be ascribed to "claim for damages." (*See supra* pp. 9-12) As such, even if for purposes of argument, Zurich did acknowledge that the terms "claim for damages" means a demand for money, the Tillery Letter incorporated that meaning and reflected such a demand by its express use of the terms "claims…for…damages." (*Id.*)

As also addressed in Zurich's appeal, under Delaware law, the term "claim" is synonymous with "a challenging request," "a demand for benefits or payment," and "an assertion or statement." *See Lamberton*, 325 A.2d at 107. As such, even assuming for purposes of argument that the email cited by Syngenta actually reflects

Zurich's standard interpretation of the terms "claims for damages," *Lamberton* makes clear that the meaning of "claim for damages" can be more expansive under Delaware law.

F. The Trial Court Correctly Ruled That None of the Remaining Disputed Facts Relied on by Syngenta Showed that Zurich Lacked a Reasonable Justification for Denying Coverage

Syngenta's cross-appeal recites a litany of alleged "facts" to argue that Zurich's denial of coverage was in bad faith, including "facts" purporting to describe inadequacies with Zurich's coverage investigation, Zurich's alleged "pretextual coverage denial," and Zurich's allegedly "improper failure to 'split the file.'" (Syn. Ans. Br. at 51-57) However, Syngenta fails to explain how these alleged "facts" meet Syngenta's threshold burden of showing that Zurich lacked a reasonable justification to deny coverage, as it must to prevail on its bad faith claim. As such, the trial court properly rejected Syngenta's attempt to rely on these ancillary "facts" to defeat summary judgment because none of them are material to Zurich's motion.

For instance, Syngenta fails to explain how Zurich's decision to deny coverage without asking Syngenta or Tillery about the allegations in the Tillery Letter could possibly show that Zurich lacked any reasonable justification to deny coverage. (Syn. Ans. Br. at 55-59) This argument simply does not make any sense.

Zurich maintains that the Tillery Letter on its face, in and of itself, presents a "claim for damages." The additional "facts" that Zurich could have learned through further investigation regarding Syngenta's subjective belief about Tillery's credibility have no impact on that legal determination. Moreover, as reflected by Zurich's arguments on appeal and in the trial court on its Section 2711 defense, the additional information disclosed by Syngenta and Tillery about the allegations in the Tillery Letter since May 2019 has only served to confirm Zurich's original position that the Tillery Letter constitutes a "claim for damages" and that Syngenta's failure to disclose the Tillery Letter on the application for the Zurich Policies was a material omission. (*See supra* pp. 27-30; Zur. Op. Br., Exs. 2 & 4)

Syngenta likewise fails to explain how Zurich's so-called "failure" to conduct separate investigations into potential coverage defenses and the underlying actions could show that Zurich lacked any reasonable justification to deny coverage in May 2019. (Syn. Ans. Br. at 53-55) Moreover, there is simply no evidence supporting Syngenta's contention that Zurich's claims handler did anything improper by meeting with Kirkland about the Paraquat Actions after agreeing to defend Syngenta under a reservation of rights to deny coverage. (B103) None of the information contained in Zurich's disclaimer letter or declaratory judgment complaint contained

any work product that was divulged by Kirkland during its March 2019 meeting with Zurich's claims handler. The basis for Zurich's denial of coverage was instead the various documents, including the Tillery Letter, that Zurich received from Syngenta's coverage counsel. (B97-B103; B318) In any event, these factual allegations about Zurich's meeting with Kirkland are simply not material to whether Zurich had a reasonable justification for denying coverage.

CONCLUSION

For the reasons set forth above in Zurich's Reply in Support of Appeal and in Appellants' Opening Brief on Appeal, plaintiffs below/appellants Zurich, respectfully request that the Court: (1) reverse the Superior Court's Memorandum Opinion dated August 3, 2020, to the extent that it: (a) granted Syngenta's Motion for Partial Summary Judgment on Count I of Zurich's Complaint Count II of Syngenta's Counterclaim, and (b) denied Zurich's Motion for Summary Judgment on Count I of Zurich's Complaint; (2) reverse the Superior Court's Memorandum Opinion dated August 24, 2022, to the extent that it (a) granted Syngenta's Motion for Summary Judgment on Count I of Zurich's Amended Complaint, and (b) denied Zurich's Motion for Summary Judgment on Count I of Zurich's Amended Complaint; (3) reverse the Superior Court's bench ruling from the March 4, 2021 hearing, to the extent that it denied Zurich's Motion to Compel Discovery Related to Paraquat Under the "At Issue" Exception; and (4) remand this case to the Superior Court for proceedings consistent with this Court's ruling.

For the reasons set forth above in Zurich's Answer to Syngenta's Cross-Appeal, plaintiffs below/appellants Zurich, respectfully request that the Court affirm

the Superior Court's summary judgment ruling in Zurich's favor dismissing Syngenta's Amended Counterclaim IV alleging bad faith denial of coverage.

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Case Number 135,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF SERVICE

I John D. Balaguer, Esquire do hereby certify that on this 31st day of August 2023, that **APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL AND APPENDIX** was served upon all counsel of record via File & Serve*Xpress*.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

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DATED: August 31, 2023

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE

1. Plaintiffs Below, Appellants/Cross-Appellees, Zurich American Insurance Company and American Guarantee and Liability Insurance Company's *Appellants' Reply Brief on Appeal and Answering Brief on Cross-Appeal* in this action complies with the typeface requirement of Rule 13(a)(1) because it was prepared in Times New Roman 14-pont typeface using Microsoft Word 2016.

2. The Motion for Admission *Pro Hac Vice* complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,706 words, which were counted by Microsoft Word 2016.

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Attorneys for Appellants/Cross-Appellees, Plaintiffs Below, Zurich American Insurance Company and American Guarantee and Liability Insurance Company

Dated: August 31, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE and LIABILITY INSURANCE COMPANY Plaintiffs Below, Appellants, v. SYNGENTA CROP PROTECTION LLC, Defendant Below, Appellee.	)	No. 135, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N19C-05-108 MMJ CCLD

APPENDIX IN SUPPORT OF APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

DATED: August 31, 2023

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ZURICH AMERICAN INSURANCE COMPANY and AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,	)	
Plaintiffs,	)	C.A. No. N19C-05-108 MMJ CCLD
v.	)	
SYNGENTA CROP PROTECTION, LLC,	)	
Defendant.	)	

AFFIDAVIT OF SIMON ORAM

Simon Oram declares the following under penalty of perjury:

1. I am employed as Senior Underwriter Liability by Zurich Insurance Company Ltd. ("Zurich Insurance") in Switzerland and have personal knowledge of the matters described herein and am competent to testify thereto.

2. The Declaration of Anette Terp ("Terp Declaration") submitted by Syngenta Crop Protection, LLC ("Syngenta"), attaches as Exhibit C a copy of Syngenta's response dated December 3, 2013 to certain requests for information from Zurich Insurance relating to Paraquat. The Terp Declaration, however, fails to disclose to the Court that Zurich Insurance made annual requests for information concerning certain chemicals, including Paraquat. Attached as Exhibit 1 is an email that I sent to Syngenta's broker, Martin Eddison of JTL Specialty Limited, dated

September 19, 2016, seeking up to date information on three substances, including Paraquat, in connection with the January 1, 2017 renewal coverage.

3. Syngenta responded by providing the Regulatory Update attached as Exhibit 2 and the email dated December 16, 2016 from Ian Pettman of JTL Specialty Limited attached as Exhibit 3. However, Syngenta's response did not disclose the Korein Letter of January 2016 or Syngenta's subsequent retention of Kirkland & Ellis LLP in 2016 "to undertake a general study of the science and assessment of potential liabilities arising out of the manufacture and sale of Paraquat," as described in paragraph 18 of the Declaration of Alan B. Nadel, Esq. submitted by Syngenta.

4. By email dated October 31, 2018, attached as Exhibit 4, I conveyed the renewal quote for the January 1, 2019 excess policy. I specifically advised that Zurich Insurance would be adding an exclusion for glyphosate at renewal. In November 2018, the new exclusion for glyphosate was also negotiated for the January 1, 2019 Captive Fronting Program, which included the US local policies.

5. Subsequently, on December 10, 2018, Syngenta Crop Insurance Ltd. provided a tentative "Notice of Circumstance" to Zurich Insurance regarding glyphosate, which is attached to the Terp Declaration as Exhibit E.

6. I, along with Olivier Godet of Zurich Insurance, responded to this tentative "Notice of Circumstance" by letter dated January 25, 2019, explaining that litigation against Bayer/Monsanto is not a claim or circumstance which could trigger

the policies issued to Syngenta Crop Protection AG. See Exhibit F to the Terp Declaration.

7. The Terp Declaration fails to include a copy of Syngenta's March 1, 2019 response to our letter of January 25, 2019, which is attached here as Exhibit 5.

8. By letter dated April 18, 2019, Olivier Godet and Pascal Baumann of Zurich Insurance, replied to Syngenta's March 1, 2019 response, reiterating the bases for Zurich Insurance's rejection of Syngenta's tentative "Notice of Circumstance." See Exhibit G to the Terp Declaration.

9. Attached as Exhibit 6 is a copy of the excess policy issued by Zurich Insurance Company Ltd. to Syngenta Crop Protection AG, effective January 1, 2018 to January 1, 2019, which contains a provision regarding the meaning of "circumstances," stating:

> A claim shall be deemed to have been made at the time when the risk management department of the policyholder first became aware of circumstances which made it appear likely that a claim will be brought against an insured. . . .

10. After Zurich Insurance received notice of the Hoffman Lawsuit in 2017, Zurich Insurance did not amend the already quoted terms and conditions for the Zurich renewal coverage incepting on January 1, 2018 due, in part, to the fact that Syngenta's potential exposure to the lawsuit was not clear. At that time, of course, Zurich Insurance had not received notice of the Paraquat claims asserted by the 2016 Korein Letter, or the nearly $2.15 million Syngenta had incurred after it received the

letter and retained Kirkland & Ellis LLP "to undertake a general study of the science and assessment of potential liabilities arising out of the manufacture and sale of Paraquat," as described in paragraph 18 of the Declaration of Alan B. Nadel, Esq. submitted by Syngenta.

11. Zurich Insurance assessed it was not necessary to add a Paraquat exclusion to Zurich coverage incepting on January 1, 2018 and January 1, 2019 because if the policies afforded any coverage for Paraquat-related claims, we expected that, pursuant to the policies' "Claim Series" clause, all Paraquat-related claims filed after the Hoffman Lawsuit would be deemed to occur on the date the Hoffman Lawsuit was initiated, during the Zurich coverage incepting on January 1, 2017.

12. I declare under penalty of perjury the foregoing statements are true and correct

DATED: March 14, 2020

Simon Oram

4824-0396-1527,

EXHIBIT 4

From:	Simon Oram <simon.oram@zurich.com>
Sent:	Wednesday, October 31, 2018 10:00 AM
To:	Campbell-Gray, Lyn
Cc:	Marcel Steinmann
Subject:	Syngenta Excess, Liability Renewal Quote 01.01.2019
Attachments:	DRAFT_Excess Master 01.01.2019_Syngenta_LA_20181031_V1.pdf; Renewal Quote Excess 01.01.2019_Syngenta_LA_20181031_V1.pdf

Dear Lyn,

Please find attached our renewal quote for the above mentioned Excess Liability Program. Reference is made to our meeting last week in Zürich, where we have already addressed the need for additional premium and/or new exclusions.

After analyzing carefully, we regret to advice that we need to introduce an exclusion for glyphosate. The exclusion for glyphosate will be a total exclusion (claims for losses in connection with glyphosate) in order to avoid any discussions in case of any possible claims against Syngenta with respect to glyphosate.

Our decision to add an exclusion for glyphosate is based on the following thoughts:

- Although the EU has renewed the permission for glyphosate for 5 years (instead of 10 years), we believe that glyphosate will be banned sooner or later.
- The International Agency for Research on Cancer judged glyphosate to be a "probable human carcinogen" in 2015.
- Even though many studies came to the conclusion that the toxicity of glyphosate to animals and humans is low and does not cause cancer, the probability of being sued in connection with glyphosate has increased over time.
- Increase of lawsuits in the US and potential class actions in the near future.
- The global media attention (also in Europe) on glyphosate increased rapidly over the past few years and an increase in lawsuits in this region might be expected as well.
- The outcome, especially for lawsuits in the US, is very unpredictable.

Besides the fact that we assessed glyphosate as not any longer insurable, we need a premium increase of 10%, which results to a total premium of USD 6'171'000. The loss history of recent years shows a negative trend of the exposure for this industry with its critical products. Some of the losses have a potential to trigger the excess policy.

Furthermore, all other terms and conditions remains the same, especially our Zurich capacity of USD 75'000'000 (33.3333% of 225m xs 75m) for the excess tower is unaltered.

If you are available, Marcel und myself will call you this afternoon. Is 2:30pm (UK time) suitable for you?

Many thanks and best regards,
Simon

Simon Oram
Senior Underwriter Liability

Zurich Insurance Company Ltd
Commercial Insurance Switzerland

P.O. Box, CH-8085 Zürich
Hagenholzstrasse 60, CH-8050 Zürich

+41 (0)44 628 85 64 (direct)
simon.oram@zurich.com
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EXHIBIT 5

Anette Terp
Head Corporate Insurance

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syngenta

Zurich Insurance Company Ltd.
Commercial Insurance Switzerland
Mr. Olivier Godet
Hagenholzstrasse 60
P.O. Box
8022 Zurich

Basel, 1. March 2019

ADVANCE NOTICE BY E-MAIL

Y/Ref.: Master Policy 15.784.532 & Excess Policy 15.784.739

Notice of Circumstance 10.12.2018 – Your letter of January 25th 2019

This will respond to your letter of January 25, 2019, in which you requested additional information as to the basis for our notice of circumstance regarding glyphosate containing products sold by Syngenta. That circumstance was a $289 million verdict (since reduced) in a bodily injury lawsuit filed against another manufacturer, but which involved the herbicide glyphosate. It is therefore reasonably likely that Syngenta may find itself a defendant in similar litigation.

According to our insurance policies, Syngenta is required to notify our insurers when we become aware of circumstances which make it appear likely that a claim will be brought against us. We believe this circumstance reaches that threshold and therefore felt it appropriate to notify you. The verdict in the aforementioned lawsuit was reached in August of 2018. It was widely reported in agricultural and other media at that time.

Please contact us if you have any questions or wish to further discuss this matter.

Yours sincerely,

Anette Terp

Head Corporate Insurance
Syngenta Crop Protection AG

Stephen Landsman

Group General Counsel
Syngenta Crop Protection AG