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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RSUI INDEMNITY COMPANY, Plaintiff Below, Appellant, v. DAVID H. MURDOCK and DOLE FOOD COMPANY, INC., Defendants Below, Appellees and Cross-Appellants.	No. 154,2020 Court Below - Superior Court of the State of Delaware C. A. N16C-01-104 EMD CCLD

APPELLEES' REPLY BRIEF ON CROSS-APPEAL

Dated: October 12, 2020

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Elena C. Norman (No. 4780)
Mary F. Dugan (No. 4704)
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600
mdugan@ycst.com

Attorneys for Defendants Below, Appellees David H. Murdock and Dole Food Company, Inc.

OF COUNSEL:

PASICH LLP
Kirk Pasich (admitted *pro hac vice*)
Pamela Woods (admitted *pro hac vice*)
Christopher T. Pasich (admitted *pro hac vice*)
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024

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SUMMARY OF ARGUMENT

In its answering brief to the cross-appeal of Dole and Mr. Murdock (the "Insureds"), RSUI fails to establish that the Superior Court properly granted RSUI summary judgment on the Insureds' bad faith claim or that the court's collateral estoppel ruling was correct. Instead, RSUI either misrepresents the applicable law or omits elements that it was required to, but did not, establish in the Superior Court. RSUI also makes factual assertions that are simply not supported by the record.

On the bad faith issue, RSUI argues that bad faith cases have their own summary judgment standard that requires insureds to "establish" bad faith rather than show that there is a genuine issue of material fact. RSUI also ignores Delaware law that the reasonableness of an insurer's coverage position will be based on what the insurer knew and did at the time it made that decision. RSUI also advances a "have its cake and eat it, too" argument—that it can shield from disclosure its advice from its coverage counsel while using the fact of that advice as a sword against the Insureds' bad faith claim. Most importantly, RSUI asks this Court to ignore the testimony of its sole decision-maker, Robert Hennelly, despite offering no other evidence relating to its investigation or the reasonableness of its decision. The evidence presented by the Insureds below clearly raised a genuine issue of material fact regarding the reasonableness of RSUI's decision, and the Superior Court's granting of RSUI's motion was in error.

On the collateral estoppel issue, RSUI denies that the Superior Court's ruling was vague while being unable to articulate exactly what that ruling was. Additionally, in arguing that each of the elements of collateral estoppel is present, RSUI omits the requirement that a factual issue must be actually and necessarily determined by a court for it to have collateral estoppel effect and ignores that the *San Antonio* complaint raises numerous factual issues not addressed by the Memorandum Opinion. It also continues to claim that the Memorandum Opinion was a "final judgment," despite all authority to the contrary and the Memorandum Opinion's own language. All the necessary elements for collateral estoppel are not present here, and the Superior Court's ruling on that issue must be reversed as well.

ARGUMENT

I. The Superior Court Erroneously Granted RSUI Summary Judgment on the Insureds' Bad Faith Claim

Without a single citation to evidence from the record, RSUI argues that the Superior Court properly granted its motion for summary judgment on the Insureds' bad faith claim. RSUI submits that the court correctly concluded that RSUI's grounds for denying coverage were "objectively reasonable" because the underlying cases presented "unique and novel insurance issues." Accordingly, RSUI concludes the Superior Court properly acted in its role as "gatekeeper" for bad faith claims.

RSUI's argument misses the mark. ***First***, RSUI's claim that the Superior Court must act as "gatekeeper" for bad faith claims—an attempt to create a unique summary judgment standard that applies only to bad faith claims—is unsupported by Delaware law. ***Second***, RSUI ignores that a bad faith determination must be made based on what RSUI knew and considered ***at the time that it denied liability***. ***Third***, according to the testimony of its own claims handler and corporate designee, Robert Hennelly, RSUI's determination that there was no coverage for the *Stockholder* litigation was based on (i) the Profit/Fraud Exclusion, and (ii) the applicability of California law and California Insurance Code Section 533. Mr. Hennelly also testified that RSUI made its determination that there was no coverage for the *San Antonio* lawsuit based solely upon a review of the complaint therein. RSUI presented no evidence that it knew or considered any other bases for denying coverage when it

made its coverage determination. ***Fourth***, RSUI's bases for denying coverage for the *Stockholder* and *San Antonio* lawsuits were unreasonable when made. Mr. Hennelly's testimony—the only evidence of what RSUI actually did in determining coverage—establishes that RSUI did not perform a sufficient investigation to support a good faith denial based on either the Profit/Fraud exclusion or the applicability of California law and Section 533. ***Fifth***, RSUI's claim that its coverage positions were "reached with outside counsel" is both unsupported by the record and an impermissible attempt to use the attorney-client privilege as both a sword and a shield.

A. RSUI's "Gatekeeper" Defense is an Unsupported Fiction

At the outset, RSUI argues that the Insureds "ignore[] the substantial role Delaware courts play as the gatekeeper of bad faith claims before they reach a jury," and that the Superior Court correctly determined in its "role as gatekeeper for the bad faith claims" that RSUI's coverage positions were objectively reasonable. RSUI Opp. Brief at 46-7.[1] In other words, RSUI argues that, with respect to bad faith claims, the standards for granting summary judgment under Delaware Superior Court Rule 56 do not apply. Instead, RSUI argues that to withstand a motion for summary judgment on its bad faith claim, an insured must meet a "heavy burden of proof" and

[1] Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal will be referred to herein as the "RSUI Opp. Brief."

is required to "establish" that RSUI's coverage position "clearly lacked reasonable justification." *Id*. at 46.

RSUI's position that the Superior Court must act as a "gatekeeper" for bad faith claims appears to have been manufactured out of whole cloth and is not supported by the authorities it cites. As this Court has held, in bad faith cases "[a] grant of summary judgment cannot be sustained unless there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Enrique v. State Farm Mut. Auto. Ins. Co*., 142 A.3d 506, 511 (Del. 2016). In addition, "[t]he 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." *Id*. For example, in *Bennett v. USAA Cas. Insurance Co*., 158 A.3d 877, ¶ 14 (Del. 2017), this Court affirmed the trial court's granting of a directed verdict in favor of the insurer because the insureds "failed to raise a material fact for consideration by the jury on their bad faith claim." Specifically, the Court noted that the insured failed to call an insurance company representative to explain why the insurer denied the claim and failed to call an insurance expert to opine as to the insurer's bad faith. *Id*. at ¶ 15.

The Insureds could find no Delaware case stating that the trial court acts as a "gatekeeper" for bad faith claims. RSUI appears to conflate a trial court's gatekeeping role ***with respect to expert testimony*** with its role with respect to bad

faith testimony, arguing that "lay jurors may have difficulty understanding the complexity of insurance disputes and fail to appreciate whether an insurer's stated position is objectively 'reasonable.'" RSUI Opp. Brief at 48. However, the need for additional insurance expertise is precisely why the Insureds proffered the affidavit of their bad faith expert, Jeffrey Posner, in support of the Insureds' opposition to RSUI's motion for summary judgment. (B1062-1077)

In short, the Insureds submitted substantial evidence (including both kinds of evidence identified as relevant by in *Bennett*) in opposition to RSUI's motion for summary judgment, and the Superior Court was required to accept the Insureds' version of any disputed facts. The Insureds satisfied their burden of coming forward with sufficient evidence to raise a genuine issue of material fact.

B. The Insureds Addressed the Proper Standards for Bad Faith

RSUI also contends that the Insureds address none of the standards for bad faith in their opening brief. Nonsense. The Insureds specifically cited to the same relevant authority from this Court cited by RSUI:

- The Insureds addressed the burden of production, explaining that "[w]here the non-moving party brings forth facts which . . . would support a finding of a breach of the implied covenant of good faith, summary judgment is

inappropriate." Insureds' Answering Brief at 63[2] (quoting *Thomas v. Hartford Mutual Ins. Co.*, 2003 WL 220511 at *3 (Del. Super. Jan. 31, 2003)).

- The Insureds relied on *Bennett*, 158 A.3d 877 at ¶ 13, quoting the proposition that the insured has a cause of action for bad faith when the insurer's coverage position "clearly lacks reasonable justification." Insureds' Answering Brief at 61.
- The Insureds cited *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 444 (Del. 2005), for the proposition that the parties to a contract must refrain from arbitrary or unreasonable conduct that prevents the other party from receiving the fruits of the bargain. Insureds' Answering Brief at 62.
- Finally, the Insureds quoted the same portion of *Casson v. Nationwide Insurance Co.*, 455 A.2d 361, 369 (Del. Super. 1982), as RSUI does. This language makes clear that the "ultimate question" in determining the reasonableness of the insurer's position is whether "***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 coverage. Insureds' Answering Brief at 61.

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[2] The Appellee's Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal will be referred to herein as the "Insureds' Answering Brief."

RSUI's suggestion that the Insureds have ignored the standards delineated by this Court and other Delaware courts is wrong.

C. Bad Faith Is Determined by Examining RSUI's Grounds for Denying Coverage at the Time It Denied Liability

As stated above, Delaware law is clear: an insurer's bad faith is to be determined by the insurer's knowledge "at the time the insurer denied liability." *Casson*, 455 A.2d at 369; *Esposito v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 362689, at *2 (Del. Super. Jan. 27, 2016); *Albanese v. Allstate Ins. Co.*, 1998 WL 437370, at *2 (Del. Super. July 7, 1998). "What is essential to a decision on this issue is knowledge of the facts upon which [the insurer] relied and the analysis it conducted ***when it concluded***" that there was no coverage for the Insureds' claims. *Bennett v. USAA Cas. Ins. Co.*, 2013 WL 6667334, at *2 (Del. Super. Dec. 13, 2013) (emphasis added).

RSUI does not contest that an analysis of its good faith must be based on what it did and knew when it made its coverage determinations regarding the *Stockholder* litigation and the *San Antonio* lawsuit. However, RSUI objects to the Insureds' argument because it "focuses almost entirely on the subjective testimony of the RSUI claims handler, Robert Hennelly." RSUI Opp. Brief at 45. Of course it does. The Insureds relied on Mr. Hennelly's testimony because, as RSUI's corporate designee, he testified that he was the only RSUI representative who investigated and adjusted the Insureds' claims for coverage or reviewed the Policies in connection with the

claims. (B1159-60). He also testified that he was the only person who decided whether RSUI was obligated to indemnify the Insureds for the *Stockholder* and *San Antonio* settlements. (B1162). Finally, Mr. Hennelly testified that he made his decision about coverage for the *Stockholder* litigation shortly after the Memorandum Opinion was issued (B1140) and made his decision about *San Antonio* after reviewing only the complaint. (B1159).

To the Insureds' knowledge, Mr. Hennelly is the only person with knowledge as to what RSUI did and what it knew ***when it made its coverage determination***. If RSUI had presented any evidence to the contrary in support of its motion for summary judgment, it was free to bring it to this Court's attention. It did not do so. Although RSUI cites to the Superior Court's holding that other bases for denying coverage were reasonable, it does not offer any evidence that any of those was a basis for denying coverage ***at the time it denied liability***. Accordingly, the Superior Court should have only considered, and this Court should only consider, what Mr. Hennelly did and considered at the time he made his coverage determinations for the *Stockholder* litigation and the *San Antonio* lawsuit.

D. RSUI's Bases for Denying Coverage at the Time of Its Coverage Determination Were Unreasonable

Mr. Hennelly testified that he relied on two grounds for determining that there was no coverage for the *Stockholder* litigation: (1) the Profit/Fraud Exclusion, and (2) the applicability of California law and Section 533. (B1145; B1149-51). Therefore,

any analysis with respect to the reasonableness of RSUI's actions may consider only these grounds.

As discussed in the Insureds' opening brief, RSUI did not have a reasonable justification to support either of these two grounds. As to the Profit/Fraud Exclusion, Mr. Hennelly relied solely on the language of the exclusion to determine that the Policies did not provide coverage for the *Stockholder* settlement. (B1145). He did not testify, and RSUI has presented no evidence that he did any investigation as to what constituted a "final and non-appealable adjudication" under any state's law. As to California law and Section 533, the entirety of Mr. Hennelly's analysis at the time of his determination was (i) forming an opinion (based on no apparent investigation) that California law "is going to apply to companies and people who are in California" and (ii) an "analysis" of the applicability of Section 533 that consisted entirely of doing an internet search and reading a "blurb." (B1150-51).

RSUI claims that the Insureds' argument is that (i) the Insureds prevailed on all coverage issues, meaning (ii) RSUI's positions were ultimately wrong, and therefore (iii) RSUI's position were unreasonable when taken. RSUI Opp. Brief at 47. Not so. The question before the Court is whether the two bases for RSUI's denial of coverage at the time were reasonable at the time it denied coverage. The Insureds do not dispute that the Superior Court's rulings establish that RSUI's coverage positions were wrong. However, as the Insureds have made clear, the unreasonableness of

RSUI's positions is based on the actions taken and investigation done by Mr. Hennelly on behalf of RSUI ***before*** he made a coverage determination.

RSUI also argues that the Superior Court's subsequent determination that Delaware law applies to interpret the Policies does not render RSUI's position that they should be interpreted under California law unreasonable, and therefore RSUI cannot be found to have acted in bad faith with respect to the choice of law issue. However, the case relied upon by RSUI, *Neilson v. Mutual Life Insurance Co.*, 1997 WL 447910, at *4 (D. Del. June 20, 1997), does not support its position.

In *Neilson*, the insurer moved to dismiss an insured's bad faith claim. The insured argued that the insurer's denial of coverage was in bad faith because it was based, in part, on a New Jersey Supreme Court case, when Delaware law applied to interpret the policy and there was a District of Delaware case to the contrary. The insured also argued that the insurer had failed to properly investigate its claim. The court granted the motion to dismiss "to the extent that [the] claim is based on a difference of opinion regarding the applicable case law." *Id*. at *4. It noted that the insurer had based its denial on its judgment that the District of Delaware case, which was on appeal, would either be reversed on appeal or would not be followed because it was not mandatory authority. *Id*. However, the court denied the insurer's motion to dismiss with respect to the insured's claim that the insurer had not properly investigated the claim. *Id*. at *4-5.

Neilson is not helpful to RSUI, and in fact supports the Insureds' arguments. As in *Neilson,* the Insureds' bad faith claim is based in part on its position, supported by expert testimony, that RSUI failed to properly investigate the Insureds' claims, including the potential applicability of Delaware law as detailed above. (B1062-1077). Just as the *Neilson* court declined to grant the insurer's motion to dismiss to the extent the insureds' bad faith claim was based on allegations that the insurer "failed to properly investigate his claim," RSUI's motion for summary judgment should have been denied here. As in *Neilson*, the Insureds' bad faith claim is based on RSUI's failure to conduct any investigation into the factors that determine which state's law applies, its lack of any investigation other than an internet search and reading of a "blurb" to determine that Section 533 applied, and its failure to investigate the applicability of the Profit/Fraud exclusion. (B1149-51).

Further, unlike the policy in *Neilson,* the AXIS Policy contained a choice-of-law provision that specifically applied to the uninsurability of loss as a matter of public policy. Mr. Hennelly did not consider that provision in making his choice-of-law "analysis," and did not testify that he even read the choice-of-law provision. Nor did Mr. Hennelly consider Delaware's interests or look to additional authority with respect to the choice of law, such as the *Restatement*. Unlike the insurer in *Neilson,* Mr. Hennelly did not do the appropriate research and make a reasoned, if incorrect, decision that a specific case would not apply. Instead, he simply decided that

California law applied based on the residence of some insureds. RSUI's failure to perform any investigation (or even read its own policy) with respect to the choice-of-law issue is what renders RSUI's position unreasonable, not the Superior Court's later decision.

RSUI argues that the Superior Court found that RSUI had "at least four" reasonable bases to refuse payment. RSUI Opp. Brief at 47. However, there is no evidence that either of the two other bases, the Consent and Cooperation conditions, were considered by Mr. Hennelly at the time he determined there was no coverage for the *Stockholder* litigation. RSUI cannot now contend, without the support of any evidence to the contrary, that it had any other justification for its position at the time it made its coverage determination.

Nor can it do so with respect to the *San Antonio* lawsuit. Mr. Hennelly testified that he made his (and therefore RSUI's) coverage determination after reviewing the complaint. There is no evidence that RSUI conducted any further investigation into the Insureds' claim for coverage for the *San Antonio* lawsuit other than that review. Accordingly, any determination as to RSUI's bad faith may be based solely on RSUI's review of the *San Antonio* complaint. For the reasons discussed in the Insureds' Answering Brief, that review is insufficient. Insureds' Answering Brief at 63-66.

E. RSUI May Not Use the Attorney-Client Privilege as a Sword and a Shield

In attempting to establish that there were bases for its denial of coverage other than Mr. Hennelly's "investigation," RSUI argues that its coverage positions "were analyzed and reached in consultation with outside counsel," and that its reliance on that advice was proper and shields it from bad faith. RSUI Opp. Brief at 49. This argument is improper for several reasons. First, it is unsupported by any evidence. RSUI points to no testimony by Mr. Hennelly or other evidence that in arriving at its coverage position, it relied on consultation with outside counsel. Indeed, Mr. Hennelly's testimony is to the contrary—he testified that he alone made the coverage determination. (B1159-60, B1162). Second, to the extent that any purported consultation with counsel took place after Mr. Hennelly made his coverage determination, it is irrelevant to RSUI's bad faith, which is judged by RSUI's state of mind when it made its coverage decision, not on whether its attorneys came up with additional rationales for denying coverage after the fact. Third, and most importantly, during Mr. Hennelly's deposition as RSUI's corporate designee, RSUI's counsel instructed Mr. Hennelly not to respond to questions relating to the advice that RSUI received from counsel relating to the claim, and Mr. Hennelly followed those instructions. (B1150-51). RSUI may not now be permitted to use any such advice against the Insureds.

In *Grunstein v. Silva*, 2012 WL 5868896, at *1 (Del. Ch. Nov. 20, 2012), the plaintiff moved *in limine* to preclude evidence relating to the defendants' claims. In deposition, the defendants or their counsel had "asserted the attorney-client privilege when asked about the basis for Defendants' claims." *Id.* The court granted the plaintiff's motion *in limine*, holding that "[b]ecause Defendants' knowledge and understanding of these issues are based on the advice of counsel, the Court will not allow Defendants to use this evidence when Plaintiffs have been shielded from it." *Id.* The court reasoned that the "sword and shield" concept applied when, like here, the advice of counsel was at issue:

> Under Delaware law, "a party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position." Similarly, "Delaware decisions involving the 'sword and shield' concept have precluded a party from shielding evidence from an opposing party and then relying on the evidence at trial to meet its burden of proof on an issue central to the resolution of the parties' dispute." "The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."

Id. (citations omitted).

RSUI admits that when Mr. Hennelly was deposed, RSUI's attorneys objected to the Insureds' questions and instructed Mr. Hennelly not to "testify to advice he received from counsel, as is his and RSUI's right." RSUI Opp. Brief at 49. Although RSUI may have had the right to assert the attorney-client privilege regarding this

testimony, it cannot now turn around and use that same evidence as a sword to argue that its positions were reasonable. *In re Quest Software Inc. S'holders Litig.*, 2013 WL 3356034, at *2 (Del. Ch. July 3, 2013) ("a party cannot use the attorney-client privilege as both a 'shield' from discovery and a 'sword' in litigation."). Had RSUI wanted to rely on the advice of its counsel as a defense to bad faith, it could have done so by allowing Mr. Hennelly to testify as to what that advice entailed. Having made the decision not to do so, it should not now be permitted to rely on unknown, undisclosed, unchallengeable justifications to defeat the Insureds' claim.

F. RSUI Breached the Implied Covenant of Good Faith and Fair Dealing

Finally, RSUI does not respond to the Insureds' arguments that whether an insurer breached the implied covenant of good faith and fair dealing is a separate issue from whether it acted in bad faith and that RSUI had breached the implied covenant by (i) failing to preserve the spirit of its bargain with the Insureds and (ii) acting unreasonably and taking advantage of its position in an attempt to manufacture additional coverage defenses and prevent the Insureds from receiving the "fruits of their bargain." RSUI should therefore be considered to have conceded that argument.

II. The Memorandum Opinion Has No Collateral Estoppel Effect in This Litigation

RSUI's arguments that the Superior Court correctly ruled that the Memorandum Opinion has collateral estoppel effect fail for several reasons. First, RSUI does not address the substance of the Insureds' arguments that the court's ruling was impermissibly vague, nor does it articulate exactly what it believes the scope of that ruling to be. Second, RSUI completely ignores the requirement that for collateral estoppel to apply, an issue must be actually and necessarily decided, and fails to satisfy its burden of establishing which issues were actually and necessarily decided in the Memorandum Opinion. Third, RSUI argues for a very loose definition of "identical" that is contrary to Delaware law and ignores the lack of identity between the factual issues purportedly decided in the Memorandum Opinion and those alleged in the *San Antonio* action. Fourth, and finally, RSUI argues that the Memorandum Opinion was a final adjudication despite language on its face evidencing its lack of finality.

A. The Superior Court's Collateral Estoppel Ruling Was Impermissibly Vague

RSUI's only response to the Insureds' argument that the Superior Court's ruling was impermissibly vague is contained in a footnote, and substance of this response is, essentially, "no it wasn't." RSUI Opp. Brief at 54 n. 6. RSUI does not and cannot dispute that the Superior Court's ruling does not answer the basic

questions of (i) what factual issues it held were necessarily determined in the Memorandum Opinion; (ii) which factual issues so "determined" it found to be the same as the issues in this coverage lawsuit; and (iii) which insured it found to be collaterally estopped with respect to each determination.

Indeed, RSUI never specifically states what it believes the Superior Court's ruling to be. At one point it seems to argue that the court ruled that the Memorandum Opinion's purported overall finding that Murdock and Carter committed fraud has collateral estoppel effect. *Id*. at 52. However, if this is the case, the court did not address the issue of whether the purported fraud "found" in the Memorandum Opinion is the same fraud alleged in the *San Antonio* lawsuit. At another point, RSUI seems to argue that the Superior Court found that every sentence from the Memorandum Opinion quoted in the *San Antonio* complaint has collateral estoppel effect with respect to the *San Antonio* lawsuit and insurance coverage for its settlement. *Id*. at 55. If this is the case, then the Superior Court did not address whether each of these purported factual findings was necessary to the Court of Chancery's ruling in the Memorandum Opinion or whether the factual issues in the *Stockholder* litigation are identical to the issues in the *San Antonio* lawsuit.[3]

[3] Nor do the Superior Court's orders on the parties' motions for summary judgment provide guidance on any of these questions because the Superior Court never used any of the "facts" the insureds were purportedly collaterally estopped from disputing in its rulings.

Without knowing the scope of and basis for the court's ruling, both the Insureds and RSUI are making hypothetical arguments and this Court cannot determine whether that ruling was correct. Therefore, to the extent this Court rules in favor of RSUI on any of its grounds for appeal, it should also remand the collateral estoppel issue with instructions to the Superior Court to provide further guidance as to which factual issues were both necessarily determined in the Memorandum Opinion and relevant to issues of coverage for the *Stockholder* and *San Antonio* settlements.

B. RSUI Misstates the Standard for the Application of Collateral Estoppel

In its Opposition Brief, RSUI purports to list four elements required for the application of collateral estoppel, and then goes on to discuss each of these elements. However, RSUI omits from its discussion key requirements for collateral estoppel to apply. As this Court stated in a case cited by RSUI:

> A fundamental precept that is common to the doctrines of both res judicata and collateral estoppel is that a "right, question or fact ***distinctly put in issue and directly determined by a court of competent jurisdiction*** ... cannot be disputed in a subsequent suit between the same parties or their privies...." . . . The doctrine of collateral estoppel provides that once an issue is ***actually and necessarily determined*** by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Hercules Inc. v. AIU Ins. Co., 783 A.2d 1275, 1278 (Del. 2000) (emphasis added). *See also Rogers v. Morgan*, 208 A.3d 342, 346-47 (Del. 2019) ("A claim will be collaterally estopped only if the same [factual] issue was presented in both cases, the issue was litigated and decided in the first suit, and the determination was essential to the prior judgment.") (alteration in the original). Further, this Court has held that "[t]he party asserting collateral estoppel has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Proctor v. State*, 931 A.2d 437 (Del. 2007).

RSUI does not address the Insureds' arguments that the Memorandum Opinion did not ***actually or necessarily*** decide the factual issues that RSUI claims are identical to those raised in this coverage litigation. For example, RSUI does not establish where fraud by Mr. Murdock was "distinctly put at issue" in the *Stockholder* litigation and "directly determined" by the Memorandum Opinion. RSUI does not respond to the Insureds' argument that, to the extent there were any determinations of fraud by Mr. Murdock, those determinations were not necessary to the Court of Chancery's ruling that Mr. Murdock was liable for breach of fiduciary duty, nor does it address the authorities cited in support of that argument. Therefore, RSUI has failed to meet its burden of proof under *Proctor*. For that reason alone, the collateral estoppel ruling should be reversed.

C. The Issues Decided in the Memorandum Opinion Are Not Identical to the Issues Raised Regarding Coverage for the *Stockholder* and *San Antonio* Settlements

RSUI argues that the issues presented in the *Stockholder* litigation, the *San Antonio* litigation, and this case are identical, that the Memorandum Opinion found that Mr. Murdock and Mr. Carter committed fraud, and that therefore the Insureds are collaterally estopped from arguing that Mr. Murdock, Mr. Carter, and Dole's actions did not constitute fraud in the context of insurance coverage for the *Stockholder* and *San Antonio* settlements. Putting aside the fact that the Memorandum Opinion did not find that Mr. Murdock committed fraud, RSUI reads the "identity" requirement too broadly. Without citing any authority, RSUI argues that the Insureds' "strict interpretation of the 'identical' requirement would essentially mean that collateral estoppel almost never applies, because it is almost always a different party with different circumstances that is attempting to assert issue preclusion[.]" RSUI Opp. Brief at 52. It further argues that it is sufficient for the application of collateral estoppel that the *Stockholder* litigation and the *San Antonio* lawsuit allege the "same basic facts that Dole and Murdock artificially depressed Dole's stock price with respect to the going-private transaction." *Id*. at 55. In short, RSUI argues that because the Memorandum Opinion stated that Mr. Carter generally committed fraud in connection with the going-private transaction, he and the other Insureds are collaterally estopped from asserting that (i) any specific allegation of a fraudulent

statement in connection with that transaction is not true; or (ii) that they or other Dole employees did not commit fraud with respect to any statement made in connection with the transaction.

Unfortunately for RSUI, Delaware law is to the contrary. Even if the Memorandum Opinion found that Mr. Carter made misrepresentations of fact, there is no collateral estoppel with respect to the *San Antonio* lawsuit and its settlement if the Memorandum Opinion's findings were based on statement A and the allegations against the Insureds in the *San Antonio* complaint were based on statements B, C, and D—even if all the statements relate to the same general business transaction. *See Taylor v. State*, 402 A.2d 373, 375-76 (Del. 1979) (criminal defendant who broke into victim's New Castle County home and kidnapped her and then took her to Kent County and raped her was found not guilty by reason of insanity in Kent County rape trial; defendant could not invoke collateral estoppel regarding insanity in the subsequent New Castle County burglary trial because the Kent County indictment pertained only to the offenses committed in Kent County); *Acierno v. New Castle Cty.*, 679 A.2d 455, 459-60 (Del. 1996) (collateral estoppel did not apply even through two lawsuits related to a party's efforts to develop a parcel because the issues presented to the two courts were not the same).

That is precisely the situation presented here. Although RSUI claims that the "same false disclosures" alleged in the *San Antonio* complaint were found to be

fraudulent in the Memorandum Opinion, that is simply not true. The *San Antonio* claims against Mr. Murdock, Mr. Carter, and Dole for violations of sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 are based upon purported misrepresentations made in the following public statements:

- Dole's January 2, 2013, press release (A1178-79);
- Dole's January 24, 2013, press release (A1180-81);
- Dole's January 25, 2013, Form 8-K signed by Joseph S. Tesoriero (A1182);
- Dole's February 22, 2013, press release (A1182-83);
- Dole's February 25, 2013, Form 8-K signed by Mr. Carter (A1183);
- Dole's March 12, 2013, earnings conference call with investors (A1183-84);
- Dole's March 12, 2013, Form 10-K signed by Mr. Carter (A1183-84);
- Dole's May 2, 2013, Form 8-K signed by Keith Mitchell and accompanying press release (A1185-86);
- Dole's May 2, 2013, conference call with financial analysts (A1186);
- Dole's May 28, 2013, Form 8-K signed by Mr. Carter (A1186-87);
- Mr. Murdock's June 10, 2013, offer letter (A1187-88);
- Dole's July 25, 2013, Form 8-K signed by Keith Mitchell and accompanying press release and earnings call (A1188-92); and

- Dole's August 21, 2013, Preliminary Proxy Statement (A1193-1201).

Only the January and February 2013 press releases and the June 10, 2013, letter are referred to in the Memorandum Opinion—the other purported misrepresentations were not even mentioned. Because RSUI has not demonstrated that the Memorandum Opinion made any finding with respect to these statements (or that they were even at issue in the *Stockholder* litigation), the Memorandum Opinion can have no collateral estoppel effect with respect to the *San Antonio* lawsuit or insurance coverage for its settlement.

Further, the *San Antonio* complaint alleges that several of the purported misrepresentations were made by Dole employees not party to the *Stockholder* litigation, including Mr. Tesoriero and Mr. Mitchell. The Memorandum Opinion refers to Mr. Mitchell only once, in a citation to his deposition testimony (A0394), and does not suggest that Mr. Tesoriero made any fraudulent statements. There can be no collateral estoppel as to these alleged bases for liability in the *San Antonio* lawsuit.

Finally, RSUI also argues that the Insureds improperly focus on the difference between the elements of a claim for breach of fiduciary duty and the elements of a claim for securities fraud. It argues that "[t]he facts are the same, even if the causes of action are not." RSUI Opp. Brief at 55. However, RSUI ignores the obvious truth that which facts are at issue in a litigation is based upon the elements of the causes of

action in that litigation. Unless a fact is necessary to prove a required element of a cause of action, it cannot be "necessarily" decided and can have no collateral estoppel effect. And, unless the same fact is required to prove an element in the lawsuit in which collateral estoppel is sought, there is nothing to apply collateral estoppel to. As demonstrated above, there is no identity of issues between those discussed in the Memorandum Opinion and those raised in the *San Antonio* lawsuit. The Memorandum Opinion has no collateral estoppel effect with respect to the *San Antonio* lawsuit or insurance coverage for its settlement.

D. The Memorandum Opinion Was Not Sufficiently Final to Have Collateral Estoppel Effect

RSUI argues, and the Superior Court found, that the Memorandum Opinion was "sufficiently definite" to be considered a final adjudication on the merits.[4] For this argument, it relies on Section 13 of the *Restatement (Second) of Judgments*, which states that, for purposes of issue preclusion, "'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13 (1982). However, the *Restatement* also states that "[u]sually there is no occasion to interpret finality less strictly when the question is one of issue preclusion, that is,

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[4] RSUI also reasserts its argument that the Memorandum Opinion is a final decision. For the reasons stated in the Insureds' Answering Brief, RSUI is simply wrong. Insured's Answering Brief at 77-78.

when the question is whether decision of a given issue in an action may be carried over to a second action in which it is again being litigated." *Id*. comment g. The *Restatement* also states that, in applying the "sufficiently firm" test, "preclusion should be refused if the decision was avowedly tentative." *Id*. The test of finality "is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision." *Id*.

Because the Memorandum Opinion was not procedurally definite and, on its face, was not intended to be the Court of Chancery's "last word", it does not have collateral estoppel effect. The Memorandum Opinion concludes by stating that there are unresolved issues remaining in the litigation (particularly with respect to Dole and the Appraisal claim) and directs the parties to "meet and confer about whether further rulings are necessary" and "advise the court as to any issues that remain to be addressed." (A0420). It was not a final adjudication or "sufficiently definite" to be considered one. *See Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *7 (Del. Ch. Aug. 10, 2006) (order has no collateral estoppel effect when its interlocutory nature is clear on its face); *Sussex Cty. v. Berzins Enters., Inc*., 2017 WL 4083131, at *3 (Del. Ch. Sept. 15, 2017) (collateral estoppel does not apply to decision that is explicitly preliminary and required further action by the parties), *aff'd*, 197 A. 3d 1050 (Del. 2018).

RSUI relies on *Aiello v. City of Wilmington*, 470 F. Supp. 414 (D. Del. 1979), for its argument that the Memorandum Opinion was sufficiently firm to be considered a "final judgment." In that Civil Rights Act case against a city and individuals, the district court, following a jury verdict, had entered judgment on behalf of the individual defendants. *Id*. at 417. A final judgment in the case as a whole was not entered because equitable issues remained with respect to the city. However, the court found the judgment against the individual defendants was sufficiently final to have collateral estoppel effect because it was "final in the sense of inalterable from the date it was issued" as to those defendants and the claims determined by the jury. *Id*. at 419.

Aiello is distinguishable from this case. Unlike in *Aiello*, no judgment was entered following the *Stockholder* litigation trial on any claims. Also unlike *Aiello*, the Court of Chancery specifically stated that further steps had to be taken (and requested that the parties weigh in on those steps) before any judgment would be entered. The Memorandum Opinion, unlike the *Aiello* judgment, is not sufficiently firm to be given collateral estoppel effect.

CONCLUSION

This Court should reverse the Superior Court's ruling on RSUI's motion for summary judgment as to bad faith because the Insureds presented substantial evidence that when RSUI made its determination that there was no coverage for the

Stockholder litigation and *San Antonio* lawsuit, RSUI had no reasonable basis for doing so. In addition, to the extent this Court reverses the Superior Court's rulings on any of the grounds asserted by RSUI, it should also reverse and/or remand the Superior Court's ruling on collateral estoppel, because that ruling is impermissibly vague and because all the elements required to impose collateral estoppel are not present here.

Dated: October 12, 2020

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Mary F. Dugan
Elena C. Norman (No. 4780)
Mary F. Dugan (No. 4704)
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600
mdugan@ycst.com

Attorneys for Defendants Below, Appellees/Cross-Appellants David H. Murdock and Dole Food Company, Inc.

OF COUNSEL:

PASICH LLP
Kirk A. Pasich (*pro hac vice*)
Pamela Woods (*pro hac vice*)
Christopher T. Pasich (*pro hac vice*)
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024

CERTIFICATE OF SERVICE

I, Mary F. Dugan, Esquire, hereby certify that on October 12, 2020, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below:

BY FILE & SERVEXPRESS

Robert J. Katzenstein
Kathleen M. Miller
Smith, Katzenstein & Jenkins LLP
1000 West Street, Suite 1501
P.O. Box 410
Wilmington, DE 19899

/s/ Mary F. Dugan

Mary F. Dugan (No. 4704)