EFiled: Aug 22 2023 10:25AM EDT
Filing ID 70687468
Case Number 135,2023

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 **PUBLIC VERSION**

APPELLANTS' SECOND CORRECTED OPENING BRIEF ON APPEAL

DATED: July 26, 2023

BALAGUER MILEWSKI & IMBROGNO

By: */s/ John D. Balaguer*

John D. Balaguer (DE #2537)
(JDBalaguer@bmilawpartners.com)
Lindsey E. Imbrogno (DE #5450)
(LEImbrogno@bmilawpartners.com)
2961 Centerville Rd., Suite 300
Wilmington, DE 19808
(302) 558-0761

Attorneys for Appellants/Plaintiffs Below, Zurich American Insurance Company and

American Guarantee and Liability Insurance Company

Of Counsel:
Michael M. Marick (admitted pro hac vice)
(mmarick@skarzynski.com)
Timothy H. Wright (admitted pro hac vice)
(twright@skarzynski.com)
SKARZYNSKI MARICK & BLACK LLP
353 North Clark Street
Chicago, IL 60654
(312) 946-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

NATURE OF THE PROCEEDINGS

Appellants, Plaintiffs below, Zurich American Insurance Company and American Guarantee and Liability Insurance Company (collectively, "Zurich"), appeal from: (1) the Superior Court's Memorandum Opinion dated August 3, 2020, which: (a) granted the Motion for Partial Summary Judgment filed by Appellee, Defendant below, Syngenta Crop Protection, LLC ("Syngenta") on Count I of Zurich's Complaint and Counterclaim Count II of Syngenta's Counterclaim, and (b) denied Zurich's Motion for Summary Judgment on Count I of Zurich's Complaint; (2) the Superior Court's bench ruling from the March 4, 2021 hearing, denying Zurich's Motion to Compel Discovery Related to Paraquat Under the "At Issue" Exception; (3) the Superior Court's Memorandum Opinion dated August 24, 2022, which: (a) granted Syngenta's Motion for Summary Judgement 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.

Syngenta and Zurich filed cross-motions for summary judgment on November 14, 2019 and January 22, 2020 regarding a twenty-page letter sent by plaintiffs trial attorney Stephen Tillery of the Korein Tillery LLP firm on January 18, 2016 (the "Tillery Letter"), which Syngenta admittedly received almost one year before Zurich's first insurance policies incepted. The cross-motions addressed whether that letter established that a "claim for damages" was first made prior to the policies'

inception, such that the Zurich "claims made" policies did not afford any coverage for numerous Paraquat lawsuits brought by Mr. Tillery against Syngenta beginning in 2017 (the "Paraquat Actions"). Before any discovery was undertaken, the Superior Court, in a Memorandum Opinion dated August 3, 2020 (the "2020 Summary Judgment Opinion"), granted Syngenta's motion for partial summary judgment on this issue and denied Zurich's cross-motion, holding that Zurich had a duty to defend Syngenta against the Paraquat Actions.

After the ruling, the parties continued to litigate the Counts asserted in Zurich's Amended Complaint, including Count II, which sought a declaratory judgment under Section 2711 of Title 18 of the Delaware Code ("Section 2711") that there was no coverage for the Paraquat Actions based on material omissions of fact in the applications for the Zurich policies.

On February 18, 2020, Zurich filed a Motion to Compel Discovery Related to Paraquat Under the "At Issue" Exception, seeking privileged documents exchanged between Syngenta and its attorneys regarding the Tillery Letter and Paraquat. In a ruling from the bench on March 4, 2021, the Superior Court denied the motion, but ordered Syngenta to produce all non-privileged communications between Syngenta

and its outside law firm, Kirkland and Ellis LLP ("Kirkland"), reflecting Mr. Tillery's communications with Kirkland.

On April 18, 2022, Zurich filed a Motion for Summary Judgment on Counts I, III, and IV of Its Amended Complaint, seeking a summary judgment that the discovery produced by Syngenta after the Superior Court's 2020 Summary Judgment Opinion demonstrated that the Tillery Letter constituted a "claim for damages" as a matter of law. On that same date, Syngenta filed a Motion for Summary Judgment seeking to dismiss Zurich's Amended Complaint in its entirety. Syngenta argued that the August 3, 2020 Opinion is not subject to reconsideration and is the law of the case. In an Opinion dated August 24, 2022 (the "2022 Summary Judgment Opinion"), the Superior Court rejected Syngenta's argument that the 2020 Summary Judgment Opinion was not subject to reconsideration, but denied Zurich's motion and granted Syngenta's motion, finding that the new discovery did not support Zurich's position that the Tillery Letter constituted a "claim for damages."

In October 2022, because the Superior Court did not grant summary judgment in Zurich's favor, a trial was held on Zurich's Section 2711 claim.

Zurich appeals the Superior Court's conclusions in its 2020 Summary Judgment Opinion and 2022 Summary Judgment Opinion that the Tillery Letter

itself, as further informed by the surrounding circumstances and context, do not constitute a "claim for damages" made in 2016, before the Zurich policies incepted. Zurich also appeals the Superior Court's 2021 ruling denying Zurich's Motion to Compel Discovery Related to Paraquat Under the "At Issue" Exception.

SUMMARY OF ARGUMENT

1. In denying Zurich's summary judgment motions, the trial court erred when it concluded that a twenty-page attorney letter (the "Tillery Letter"), which expressly stated 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," did not constitute a "claim for damages" under the Zurich policies. *See* 2020 Summary Judgment Opinion at 21-23, attached hereto as Exhibit 1; 2022 Summary Judgment Opinion at 13-14, attached hereto as Exhibit 2. The trial court's decisions wrongly concluded 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 credible indication that there is at least one specific individual that is prepared to assert a claim." Ex. 1 at 21-22; Ex. 2 at 8. Applying the test that it created, the trial court wrongly held that the Tillery Letter did not constitute a "claim for damages" because of its "lack of specificity regarding potential claimants or plaintiffs." Ex. 1 at 23; Ex. 2 at 8, 13.

2. These summary judgment rulings are wrong as a matter of law because they rest on a novel rule, without any basis in policy language, Delaware law, or the law of any other jurisdiction, that the existence or not of a "claim for damages" sufficient to trigger coverage under an insurance policy hinges upon whether an attorney's letter plainly threating personal injury litigation on behalf of numerous claimants specifically and credibly identifies one or more individual claimants or plaintiffs.

3. This appeal presents a clear legal issue that should have prevented this case from going to trial on Zurich's Section 2711 claim. The Tillery Letter, as a matter of law, constitutes a "claim for damages" based on the face of the letter itself because it: (a) contains an express and affirmative representation that Mr. Tillery's law firm has been "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); (b) summarizes the evidence and legal theories that Mr. Tillery's clients would eventually assert in the numerous Paraquat Actions that Mr. Tillery's firm began filing in 2017 (A140-A158); and (c) advises Syngenta if it does not accept Mr. Tillery's proposal to litigate a handful of "bellwether" Paraquat cases, the filing of Mr. Tillery's lawsuits would result in

"copycat" lawsuits, "creating exposure to liability far above [Syngenta's] insurance policy limits"—i.e., "defense costs of $500,000 per case" and "one billion annually before payment of compensatory or punitive losses" (A158-A159).

4. Although the Tillery Letter constitutes a "claim for damages" based on the face of the letter alone, the circumstances surrounding the letter in 2016 provide further support for this conclusion, including the fact that: (1) Mr. Tillery sent a follow-up letter on January 25, 2016, commanding Syngenta to impose a litigation hold given the "imminent initiation of litigation" (A160); (2) Syngenta immediately retained the law firm of Kirkland & Ellis LLP ("Kirkland") to investigate the allegations (A167-A170); (3) in 2016 alone, Kirkland billed Syngenta $1.4 million for a matter it described as "Paraquat Litigation" (A170; A654); (4) Mr. Tillery provided additional, specific information about his clients' claims to Kirkland in 2016 over a phone call and during an in-person meeting (A172-A182); and (5) in 2016, Syngenta's parent, SCPAG, disclosed the Tillery Letter to its business suitor, ChemChina, and SCPAG's auditor, as matters that presented potential exposure of at least $80 million and $5 million, respectively (A184-A202).

5. If the newly created test applied by the trial court to conclude that the Tillery Letter was not a "claim for damages" is upheld by this Court, then Zurich is

entitled to discovery of certain attorney-client communications under the "at issue" doctrine. When Syngenta argued that it did not believe Tillery's representation that he had clients, it injected a new issue into the litigation—i.e., Syngenta's purported belief that Mr. Tillery was lying about representing actual clients (A170). The trial court erred when it denied Zurich's motion to compel Syngenta's privileged communications with Kirkland under the "at issue" doctrine because it effectively prevented Zurich from challenging Syngenta's purported belief that Tillery had no actual clients at the time he sent his letter in 2016. *See* Transcript at 44:4-45:20; 51:18-52:20, attached hereto as Exhibit 3.

STATEMENT OF FACTS

A. The Parties

Plaintiffs Zurich American Insurance Company ("ZAIC") and American Guarantee and Liability Company ("AGLIC") (collectively "Zurich") brought this coverage action seeking declaratory relief against Defendant Syngenta Crop Protection, LLC ("Syngenta"). Both Zurich entities are New York corporations engaged in the insurance business and are authorized to transact business in Delaware. (Ex. 1 at 1.)

Syngenta is a Delaware LLC that is indirectly wholly-owned by Syngenta Crop Protection AG ("SCPAG"), which a wholly-owned subsidiary of Syngenta AG. (Ex. 1 at 1.) SCPAG is a global agrichemical company operating in approximately 90 countries, including the United States. (Ex. 1 at 1.)

B. The Atrazine Litigation

In 2004, Mr. Tillery, an accomplished personal injury attorney based in St. Louis, filed a class action against Syngenta in southern Illinois state court alleging that another Syngenta product, Atrazine, contaminated community water systems. (A165-A166; A206-A207 at 17:2-18:10; A210-A211 at 56:16-57:6; A212 at 58:1-58:14.) The lawsuit spawned a second lawsuit (collectively, the "Atrazine

Community Water Actions"), and Syngenta ended up settling both with Mr. Tillery for $105 million in 2012, after incurring approximately $80 million to defend those cases. (A166; A211 at 57:12-57:16)

In 2013, Mr. Tillery filed a third lawsuit against Syngenta on behalf of a Jane Doe client, alleging personal injury caused by in utero exposure to Atrazine (the "Doe Action"). (A167) [redacted] (A215 at 113:22-114:19)

C. The Tillery Letter

In a twenty-page letter dated January 18, 2016 from Mr. Tillery to Syngenta's then head of litigation, Alan Nadel (referred to in the letter by his first name), Tillery stated that his firm had been "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)) Tillery further explained that he had "retained outside scientific experts" to guide him on this matter, and then summarized scientific studies and other information allegedly linking exposure to Paraquat to Parkinson's. (A140-A158) Tillery also included the following assertions or statements in the letter: Syngenta's representations "about Paraquat droplets size and inhalation are patently false and misleading" (A144);

Syngenta "has been fully aware of [the alleged fact that Paraquat drift particles can be respirable and enter deep into the lungs] for many years" (A145); "Syngenta designed Paraquat such that it has certain chemical characteristics that make it hazardous to human health" (A157); Syngenta's Paraquat-containing products "were defective" (A157); and "Syngenta failed to warn farmers and applicators" of the adverse effects of Paraquat "on human health" (A158). The letter warns that once "all of this scientific information… is publicly disseminated there will likely be a huge number of 'copycat' lawsuits causing Syngenta to incur enormous defense costs all over the country and exposure to liability far above its insurance policy limits. As a simple example, if just 2,000 new Parkinson's cases are filed each year (we expect far more) and defense costs of $500,000 per case are incurred, the financial exposure to Syngenta will equal one billion annually before payment of compensatory or punitive losses." (A158) Tillery concluded by stating, "we believe the prudent approach is to pursue a few 'bellwether' cases... [to] allow Syngenta and my firm to avoid the enormous time and expense of pursuing cases all over the country while we determine legally whether the chemical is responsible for the onset of Parkinson's disease." (A158-A159) Tillery further advised that if the parties

adopted this "bellwether" approach, he believed tolling agreements should be executed for the remaining cases. (A159)

By letter dated January 25, 2016, Mr. Tillery commanded Syngenta to impose a litigation hold with respect to the subject matter of the Tillery Letter, given the "imminent initiation of litigation." (A160) Syngenta confirmed that it agreed to comply with the document preservation request. (A942)

D. Syngenta's Retention of Kirkland

In January 2016, immediately after first talking to Mr. Tillery about the allegations, Mr. Nadel engaged the law firm of Kirkland & Ellis to communicate with Tillery and investigate the allegations in his letter. (A167-A170; A208-A209 at 52:6-53:8; A212-A213 at 58:15-59:2) Kirkland organized a "Paraquat Litigation Team," which included several accomplished trial lawyers, and, over the next few weeks, they exchanged phone calls, emails, and held an in-person meeting with Tillery. (A172-A182) Based on these communications, the Kirkland Team communicated the following information to Syngenta:

- For three or four years, Tillery had been investigating and preparing Paraquat claims relating to Paraquat and Parkinson's Disease. (A172)

- Tillery claimed to have discovered internal documents in the Atrazine Community Water Actions confirming Syngenta's longstanding awareness of the Paraquat-Parkinson's connection. (A180)
- Tillery's clients were all farmers and applicators who were diagnosed with Parkinson's in their 50s and 60s, many of whom were unable to walk or were in nursing homes. (A172; A180-A181)
- Tillery intended to seek damages for his clients not just because they suffered from Parkinson's, but also because their diagnosis had been delayed due to Syngenta's failure to warn of the chemical's dangers. (A181)
- Tillery wanted to file a few nondescript complaints and use the bellwether/tolling process to maintain control of the litigation and prevent other plaintiffs lawyers from bringing copycat cases. (A172-A173)
- Tillery "claims to have 6 plaintiffs he'd suggest as 'bellwethers.'" (A181)
- Tillery intended to file suit in St. Clair or Madison County, in Southern Illinois, close to where he was based, because his clients were exposed or lived there. (A180) Kirkland advised Syngenta that Tillery had "substantial influence with the judiciary" in those counties. (A175) In 2017, Tillery would in fact file the first Paraquat Action in St. Clair County. (A222)

- Tillery's goal with the bellwether process was to obtain a few large verdicts of $5 to $10 million and to leverage those wins into a massive settlement with Syngenta. (A173) If he lost one or more of the bellwether cases, he said he would be open to settling cases for less. (A173)
- If Syngenta would not agree to a bellwether process, he was prepared to associate with other counsel and file hundreds of paraquat lawsuits across the country, which he expected would spawn copycat lawsuits that would cost Syngenta $2 to $3 billion to defend. (A182)
- Tillery advised he was not in a big hurry to file suit, and he was willing to spend some time trying to work out the bellwether process. He acknowledged that gearing up to file hundreds of suits—his "Plan B"—would take considerable time. (A182)

E. Syngenta's Disclosure of the Threatened Paraquat Litigation to KPMG and ChemChina

In January 2016, Syngenta's parent, SCPAG, reported Tillery's threatened Paraquat litigation to its auditor at KPMG as threatened litigation entailing potential liability exceeding $5 million. (A184, A187)

In February 2016, in financial disclosures for the impending takeover of SCPAG by the China National Chemical Corporation ("ChemChina"), SCPAG

disclosed that Tillery's threatened Paraquat litigation "could reasonably result" in payment or loss exceeding $80 million. (A199-A200)

F. Kirkland's Litigation Risk Assessment

Syngenta tasked its Paraquat Litigation Team at Kirkland to undertake a wide-ranging "litigation risk assessment," to evaluate the potential legal liabilities it faced because of Paraquat (A170), which included the very same liabilities Tillery had just told them in no uncertain terms that he intended to pursue. In 2016, Kirkland billed Syngenta approximately $1.4 million for its work investigating the Tillery Letter and this so-called "litigation risk assessment." (A170) All of these bills were submitted under the matter described by Kirkland as "Paraquat Litigation." (A564) In 2018, before Zurich initiated coverage litigation, Syngenta's claims agent advised Zurich that these fees were included in Syngenta's "total ***legal defense expenditure*** incurred from the first receipt of a notice of potential litigation from the Korein Tillery law firm in January 2016…." (A625 (emphasis added))

G. The Zurich Policies

ZAIC issued three primary commercial general liability policies to SCPAG as the first named insured, written on a claims-made basis: (1) policy number GLO 0144423-00, effective January 1, 2017 to January 1, 2018; (2) policy number GLO

0144423-01 (effective January 1, 2018 to January 1, 2019); and (3) policy number GLO 0144423-02, effective January 1, 2019 to January 1, 2020. (A627-A768)[1] Syngenta was an additional named insured under these primary policies. (A634)

Each of the primary policies provides an aggregate limit of $5 million in excess of a self-insured retention of $1 million. (A631; A677) The insuring agreement of the ZAIC primary policies provides that "[t]his insurance applies to 'bodily injury' . . . only if . . . [a] claim for damages because of the 'bodily injury' . . . is ***first made*** against any insured . . . ***during the policy period*** …." (A730 (emphasis added))

AGLIC also issued three umbrella liability insurance policies effective January 1, 2017 to January 1, 2018, January 1, 2018 to January 1, 2019, and January 1, 2019 to January 1, 2020. (A769-A855)[2] These umbrella policies are each subject to aggregate limits of $19 million and apply in excess of and follow form to the ZAIC primary policies. (A772; A779) The Zurich primary and umbrella policies are collectively referred to herein as the "Zurich Policies."

[1] The relevant language in each of these policies is identical. Only the first-issued primary policy is included in the appendix.
[2] The relevant language in each of these umbrella policies is identical. Only the first-issued umbrella policy is included in the appendix.

H. The Paraquat Actions

From 2017 to 2019, Syngenta was named as a defendant in thirteen different actions in Illinois and California by numerous plaintiffs represented by the Tillery firm (collectively, the "Paraquat Actions"). (Ex. 1 at 4-5; A222-A563)[3] The complaints in the Paraquat Actions were filed by farmers, farm hands, landowners and/or professional sprayers and alleged that the underlying plaintiffs suffered from Parkinson's disease caused by plaintiffs' exposure to Paraquat manufactured, distributed or sold by Syngenta. (Ex. 1 at 5) The Paraquat Actions asserted claims for negligence, public nuisance, strict product liability claims for design defect and failure to warn, and breach of implied warranty of merchantability. (Ex. 1 at 5) Syngenta retained Kirkland to defend them in these actions. (A171)

I. Syngenta's Tender of the Paraquat Actions and Zurich's Response

Syngenta first provided notice to Zurich of the first-filed Paraquat Action on or about November 13, 2017. (Ex. 1 at 8) Syngenta's notice made no mention to Zurich of the Tillery Letter or any of its communications with Tillery. (Ex. 1 at 8.)

[3] Only the Complaint and Amended Complaint for the first-filed Paraquat Action (the Hoffmann Action) is included in the appendix.

In response to the notice, by email dated December 22, 2017, Zurich generally reserved all of its rights.

By email dated June 27, 2018, Syngenta's claims agent advised Zurich that "the total legal defense expenditure incurred from first receipt of a notice of potential litigation from the Korein Tillery law firm in January 2016 is approx. $3.43 Million." (A625)

By email dated January 10, 2019, Syngenta provided notice of two additional Paraquat Actions filed by the Korein Tillery firm against Syngenta. In response, by email dated January 10, 2019, Zurich generally reserved all of its rights.

By letter dated January 15, 2019, Zurich agreed to defend Syngenta in the first-filed Hoffmann Action, subject to a general and specific reservation of rights. By email dated January 28, 2019, Zurich expressly requested "[a] copy of the January 2016 attorney letter received by Syngenta" (i.e., the Tillery Letter); "any subsequent correspondence with the plaintiff law firms representing the claimants"; and copies of various documents generated by Kirkland (including defense theme memoranda, science memoranda, and general/new cases paraquat litigation summaries). (A866)

By email dated April 18, 2019, Syngenta provided notice of ten additional Paraquat Actions filed by the Korein Tillery firm against Syngenta. In response, by email dated May 2, 2019, Zurich generally reserved all of its rights.

Only after Zurich engaged outside counsel, and that outside counsel yet again requested a copy of the Tillery Letter, did Syngenta finally provide the Tillery Letter to Zurich on April 30, 2019. (A868-A869)

In light of the newly produced Tillery Letter, Zurich withdrew its prior agreement to defend and denied coverage to Syngenta for the Paraquat Claims under the Zurich Policies, advising, among other things, that the first such claim was made against Syngenta no later than January 2016, prior to the inception of Zurich's claims-made coverage eleven months later, on January 1, 2017.

J. Relevant Procedural History

On May 13, 2019, Zurich filed a declaratory judgment action against Syngenta, seeking a declaration that: (1) it owes no duty to defend or indemnify Syngenta under the Zurich Policies for the Paraquat Actions (Count I); and (2) pursuant to Delaware Code Title 18, Section 2711 ("Section 2711"), Syngenta's misrepresentations or omissions in its applications for the Zurich policies prevent recovery under the policies for the Paraquat Actions (Count II). (Ex. 1 at 9)

In the initial cross-motions for summary judgment, Syngenta argued that Zurich had a duty to defend it based on the terms of the Zurich Policies and the allegations in the underlying Paraquat Actions. (Ex. 1 at 16) Zurich asserted that it had no duty to defend or indemnify Syngenta for the Paraquat Actions because the Tillery Letter was a "claim for damages" that was first made prior to the policies' inception, such that the Zurich claims-made policies did not afford any coverage for Paraquat Actions. (Ex. 1 at 16-17)[4] Zurich also asserted that it had no duty to defend or indemnify Syngenta for the Paraquat Actions under Section 2711 based on material omissions of fact in the applications for the Zurich Policies. (Ex. 1 at 24)

In a memorandum opinion dated August 3, 2020 (the "2020 Summary Judgment Opinion"), the Superior Court granted Syngenta's motion for partial summary judgment and denied Zurich's cross-motion, holding that Zurich owed a duty to defend Syngenta against the Paraquat Actions. (Ex. 1 at 23) On the "claim for damages" issue, the trial court stated, "[w]hile it may not be necessary to reveal potential claimants' specific information, such as name, address or treating

[4] Under the Zurich Policies' Claims Series Endorsement, all occurrences which result in a series of claims or suits for damages because of bodily injury due to a "common cause or condition" of Syngenta's products shall be deemed to be just one occurrence, which is deemed first made at the time of the earliest occurrence. (A767)

physician, 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." (Ex. 1 at 21 (emphasis in original)) The Superior Court further stated, "[t]he insured must have credible indication that there is at least one specific individual that is prepared to assert a claim," and that "an unclear or amorphous threat of future litigation is not sufficient to constitute a claim for damages." (Ex. 1 at 22) Applying this criteria, the Superior Court concluded that the Tillery Letter did not constitute a "claim for damages" because of its "lack of specificity regarding potential claimants or plaintiffs." (Ex. 1 at 23)[5] On the Section 2711 issue, the Superior Court concluded that material questions of fact precluded the entry of summary judgment in Zurich's favor. (Ex. 1 at 28)

To comply with the Superior Court's ruling, Zurich exhausted the $24 million limits of the 2017 Zurich Policies through the payment of defense costs incurred by Syngenta in the Paraquat Actions, subject to a reservation of its right to recoup those costs if it is determined that Zurich had no coverage obligations.

[5] Having ruled that the Tillery Letter was not a "claim for damages," the trial court did not address whether the subsequently-filed Paraquat Actions were deemed made in 2016 based on the Zurich Policies' Claims Series Endorsement. As such, Zurich's appeal does not address this issue.

After the Superior Court's ruling, the parties engaged in discovery regarding the Counts asserted in Zurich's Amended Complaint, including Zurich's Section 2711 claim. On February 18, 2020, Zurich filed a Motion to Compel Discovery Related to Paraquat Under the "At Issue" Exception, seeking privileged documents exchanged between Syngenta and its attorneys regarding the Tillery Letter and Paraquat. (A870-A883) In a ruling from the bench on March 4, 2021, the Superior Court denied the motion, but ordered Syngenta to produce all non-privileged communications between Syngenta and Kirkland, which reflected Kirkland's communications with Mr. Tillery about the allegations in his letter. (Ex. 3 at 44:4-45:20; 51:18-52:20)

On April 18, 2022, Zurich filed a Motion for Summary Judgment on Counts I, III, and IV of Its Amended Complaint, maintaining that the discovery produced by Syngenta after the Superior Court's 2020 Summary Judgment Opinion demonstrated that the Tillery Letter constituted a "claim for damages" as a matter of law. (Ex. 2 at 6, 9-11) Zurich further sought recoupment for the money that it paid to Syngenta to comply with the Superior Court's 2020 Summary Judgment Opinion, finding that Zurich had a duty to defend Syngenta. On that same date, Syngenta filed a Motion for Summary Judgment arguing that the August 3, 2020 Opinion is

not subject to reconsideration and is the law of the case. (Ex. 2 at 6.) In an Opinion dated August 24, 2022 (the "2022 Summary Judgment Opinion"), the Superior Court rejected Syngenta's argument that the 2020 Summary Judgment Opinion was not subject to reconsideration, but denied Zurich's motion and granted Syngenta's motion on the issue of whether the new discovery established that the Tillery Letter constituted a "claim for damages." (Ex. 2 at 11, 13-14)[6]

Because the Superior Court denied Zurich's motions for summary judgment, there was a bench trial on Zurich's Section 2711 claim in October 2022. After the parties' submitted post-trial briefing in lieu of closing arguments, the Superior Court ruled in Syngenta's favor on the Section 2711 claim in a Post-Trial Opinion dated March 28, 2023. (Exhibit 4) Although the Superior Court concluded that the application for the Zurich Policies did not require the disclosure of the Tillery Letter, and that Zurich failed to demonstrate that the Tillery Letter was material to its underwriting, the trial court did recognize that "[b]ased on Syngenta's prior knowledge of and experience with litigation initiated by Tillery, it would have been

[6] Because the Superior Court held that Zurich had a duty to defend Syngenta, it denied as moot Zurich's motion for recoupment of the costs it paid to Syngenta to comply with the Superior Court's 2020 Summary Judgment Opinion. (Ex. 1 at 21.) As such, Zurich's appeal does not address this issue.

reasonable to anticipate [in 2016] that indemnity and defense costs could exceed $2 million for future Paraquat actions," and that "Syngenta could not reasonably pass off any possibility of future litigation involving Tillery as a purely frivolous threat." (Ex. 4 at 14, 17, 23)

ARGUMENT

I. THE TILLERY LETTER AND OTHER FACTS KNOWN TO SYNGENTA PROVE A "CLAIM FOR DAMAGES" WAS FIRST MADE BEFORE THE ZURICH POLICIES INCEPTED

A. Question Presented

Did the Superior Court err by concluding as a matter of law that an attorney letter does not constitute a "claim for damages" under the Zurich Policies, where the twenty-page letter expressly stated the attorney'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," Syngenta had previously settled two other lawsuits brought by this same noted trial attorney for $105 million, and Syngenta immediately retained Kirkland to investigate the allegations in the letter and paid it $1.4 million for a matter billed as "Paraquat Litigation," which included work related to Kirkland's investigation into the allegations in the attorney letter and to "evaluate potential legal liabilities Syngenta might face in the future because of Paraquat"? (A960-A964)

B. Scope of Review

This Court reviews, *de novo*, "rulings that involve the interpretation of contract language, including policies of insurance." *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 626–27 (Del. 2003). This Court also reviews

de novo a decision granting summary judgment. *Id.* Because all parties agreed that no material issue of fact precluded the entry of summary judgment, "this Court's sole task is to determine and apply the principles of law that govern the interpretation of the parties' contract." *Id.*

C. Merits of Argument

1. The Tillery Letter On Its Face Constitutes a "Claim for Damages"

The insuring agreement of the Zurich Policies does not apply unless a "claim for damages" is "first made" against Syngenta "during the policy period . . . ." (A730) As such, the most fundamental issue to be resolved in this appeal is whether the January 18, 2016 Tillery Letter, which predates the inception of the Zurich Policies, constitutes a "claim for damages." *See United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *9 (Del. Super. Ct. June 13, 2011). Syngenta bears the burden of establishing that the Paraquat Actions fall within the insuring agreement of the Zurich Policies. *See E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (affirming trial court's determination that insured had "the burden of proving that it was entitled to coverage"). As such, Syngenta bears the burden of establishing that the Tillery Letter does not constitute a "claim for damages" within the meaning of the insuring agreement.

The Zurich Policies do not define "claim." Under Delaware law, the term "claim" is synonymous with a "request" or a "demand" or "an assertion or statement." *See Lamberton v. Travelers Indem. Co.*, 325 A.2d 104 (Del. Super. Ct. 1974), *aff'd*, 346 A.2d 167 (Del. 1975) ("A 'claim' is a challenging request, a demand of a right, a calling upon another for something due, a demand for benefits or payment, a privilege to something, a title to something in the possession of another, an assertion or statement. . . .").

The Tillery Letter asserts a "claim for damages" on the very face of the letter. Mr. Tillery expressly stated in the letter, verbatim, 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***." (A140 (emphasis added)) In the twenty-page letter, Mr. Tillery further advised that he "retained outside scientific experts" to guide him on this matter, and then proceeded to summarize scientific studies and other information linking exposure to Paraquat to Parkinson's. (A140-A158) Mr. Tillery also included the following assertions or statements in the letter: Syngenta's representations "about Paraquat droplets size and inhalation are patently false and misleading" (A144); Syngenta "has been fully aware of [the alleged fact that Paraquat drift particles can be respirable and enter

deep into the lungs] for many years" (A145); "Syngenta designed Paraquat such that it has certain chemical characteristics that make it hazardous to human health" (A157); Syngenta's Paraquat-containing products "were defective" (A157); and "Syngenta failed to warn farmers and applicators" of the adverse effects of Paraquat "on human health" (A158) The letter warned that once "all of this scientific information … is publicly disseminated there will likely be a huge number of 'copycat' lawsuits causing Syngenta to incur enormous defense costs all over the country and exposure to liability far above its insurance policy limits." (A158) The letter suggested that the cases would cost "one billion annually to defend ***before payment of compensatory or punitive losses***." (A158 (emphasis added)) In conclusion, Mr. Tillery stated, "we believe the prudent approach is to pursue a few 'bellwether' cases... [to] allow Syngenta and my firm to avoid the enormous time and expense of pursuing cases all over the country while we determine legally whether the chemical is responsible for the onset of Parkinson's disease." (A158-A159) Mr. Tillery further advised that if the parties adopted this "bellwether" approach, then tolling agreements should be executed for the remaining cases. (A159)

Nothing could more clearly articulate a "claim for damages." Mr. Tillery expressly stated that his clients have "claims . . . against Syngenta for . . . damages" (his words) (A140), and then provided the outline of the allegations that would later appear in the complaints his clients filed against Syngenta, which he claimed would result in "compensatory (and) punitive losses" to Syngenta (A140-A158). Nevertheless, the Superior Court's two summary judgment rulings on this issue concluded that for the letter to constitute a "claim for damages": (1) "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 (2) "[t]he insured must have credible indication that there is at least one specific individual that is prepared to assert a claim." (Ex. 1 at 21-22) Applying its newly minted criteria, the trial court concluded that the Tillery Letter did not constitute a "claim for damages" because of its "lack of specificity regarding potential claimants or plaintiffs." (Ex. 1 at 23)

The Superior Court does not reference any policy language, case law, or other justification supporting these purported requirements, which—as far as Zurich can tell—have never been applied by any court, in any jurisdiction, to determine whether an attorney letter constitutes a "claim for damages." Moreover, although the

Superior Court stated at the summary judgment hearing that, "I am not ready to assume that any member of the bar would lie in a letter like this and say they had [been retained by] numerous, quote, victims" (A940 at 38:5-38:7), the Superior Court's rulings do in fact presume that Mr. Tillery was lying, in direct violation of his ethical obligations as an attorney. Otherwise, even using the test formulated by the Superior Court's rulings, Mr. Tillery's affirmative representation that his firm was retained by clients should have been sufficient to put Syngenta on notice that there is an "actual person or persons who are intending to file a claim for damages."

Apparently, on summary judgment, the Superior Court was persuaded by Syngenta's argument that it subjectively believed the Tillery Letter "amounted to nothing but a vague threat by counsel" and that "Mr. Tillery did not possess actual claimants. . . ." (A923) As addressed below in Section 3, Syngenta's purported beliefs about the letter are inconsistent with the undisputed facts, and even the Superior Court's findings after trial, where it conceded that "Syngenta could not reasonably pass off any possibility of future litigation involving Tillery as a purely frivolous threat." (A897) Nevertheless, any legal determination about whether the Tillery Letter constitutes a "claim for damages" should be based on an objective evaluation of the letter itself—not on Syngenta's purported subjective belief about

the credibility of the letter and its representations. In any objective assessment of the letter, a lawyer's representation that his firm has been retained by clients is plainly sufficient to put a company on notice that there is an "actual person or persons who are intending to file a claim for damages."

Under the novel test formulated by the Superior Court's ruling, any dispute about whether something constitutes a "claim for damages" is vulnerable to disputes over the insured's (or the insurer's) purported subjective belief that it did not believe the representations made in an attorney's written statement, request or demand. As such, this test is not a practical means for determining what is ultimately a legal question.

Additionally, the application of the Superior Court's test for determining what constitutes a "claim for damages" will inevitably frustrate parties' and trial courts' ability to determine whether an insurer has a duty to defend at the beginning of a case. *See Smith v. Liberty Mut. Ins. Co.*, 201 A.3d 555, 560 (Del. Super. Ct. 2019) (quoting *Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, No. N10C-04-078 MMJ, 2011 WL 1598575, at *3 (Del. Super. Ct. Apr. 21, 2011)) (recognizing that the issue of whether a party has a duty to defend "should be made at the outset of the case"). For instance, if an attorney's affirmative statement that his firm represents clients is

insufficient to satisfy the Superior Court's requirement that "[t]he insured must have credible indication that there is at least one specific individual that is prepared to assert a claim," then the resolution of this issue likely would require extensive discovery related to the credibility of the attorney's assertions in the letter and the recipient's belief in those assertions.

2. The Tillery Letter Did Not Need to Expressly Demand a Type or Quantity of Damages

In the 2020 Summary Judgment Opinion, the trial court rejected Syngenta's argument that the Tillery Letter "is not a claim for damages because it does not demand any type or quantity of damages." (Ex. 1 at 18-19) Nevertheless, the Superior Court concluded that "while the Tillery Letter goes into great detail supporting the reasons Syngenta may be found liable, the letter stops short of making any actual claim for damages. Rather, the letter suggests a bellwether process for resolving claims." (Ex. 1 at 22) In the subsequent 2022 Summary Judgment Opinion, however, the Superior Court never addressed Syngenta's argument that the Tillery Letter could not constitute a "claim for damages" in the absence of an express demand for money. Instead, the trial court concluded only that the Tillery Letter was not a "claim for damages" for a different reason—it did not include sufficient information about any "individual potential claimant." (Ex. 2 at 13-14) Presumably,

if the 2022 Summary Judgment Opinion was also supported, separately and independently, by the conclusion that the Tillery Letter "stops short of making any actual claim for damages," the Superior Court would have noted it.

In any event, even if the Superior Court did base both of its summary judgment rulings on the conclusion that the Tillery Letter did not expressly demand damages, that conclusion fails to take into consideration the express language of the letter, which states 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)) This representation in and of itself establishes that Tillery's clients "have" claims for damages—in the present tense. As such, this statement is sufficient to establish that Tillery's clients were—at the time of the letter—demanding damages from Syngenta.

Consistent with these facts, the Superior Court acknowledged that "[t]aken as a whole, the Tillery Letter is reasonably interpreted at most as *requesting* damages…." (Ex. 1 at 22-23 (emphasis in original)) Under Delaware law, the term "claim" is synonymous with a "request," in addition to a "demand." *See Lamberton*, 325 A.2d 104 ("A 'claim' is a challenging request, a demand of a right . . . ."). As

such, the Superior Court's own ruling acknowledges that the Tillery Letter constitutes a "claim for damages" as those terms are construed under Delaware law. Moreover, even if the Tillery Letter is not considered a "request" for damages, it plainly constitutes an "assertion or statement" for "damages," because the word "claim" is also synonymous with "an assertion or statement" under Delaware law. *Id.* ("A 'claim' is. . . an assertion or statement. . . .")

To determine whether an attorney letter constitutes a "claim," courts outside of Delaware consider it significant that the letter threatens litigation, since that threat reflects a demand or the assertion of a legal right. *See, e.g.*, *Carosella & Ferry, P.C. v. TIG Ins. Co.*, 189 F. Supp. 2d 249, 253-54 (E.D. Pa. 2001); *Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co.*, 78 Cal. Rptr. 3d 264, 268-69 (Cal. Ct. App. 2008).

Additionally, numerous courts outside of Delaware have found that a "claim" need not demand a sum certain. *See, e.g.*, *Precis, Inc. v. Fed. Ins. Co.*, 184 F. App'x 439, 441 (5th Cir. 2006); *Pine Mgmt., Inc. v. Colony Ins. Co.*, 2023 WL 2575082, at *3 (S.D.N.Y. Mar. 20, 2023); *Carosella & Ferry, P.C.*, 189 F. Supp. 2d at 254; *Westrec*, 78 Cal. Rptr. 3d at 268-69; *Paradigm Ins. Co. v. P & C Ins. Sys., Inc.*, 747

So. 2d 1040, 1041 (Fla. Dist. Ct. App. 2000); *Herron v. Schutz Foss Architects*, 935 P.2d 1104, 1109 (Mont. 1997).

As recognized by the Superior Court at the summary judgment hearing, it is not even permissible to request a sum certain in a complaint for personal injury that is filed in Delaware state court. (A941 at 45:16-45:20.) Additionally, the United States Court of Appeals for the Eighth Circuit expressly rejected the position that an attorney letter cannot be a "claim" absent a "specific demand for payment." *Berry v. St. Paul Fire & Marine Ins. Co.*, 70 F. 3d 981, 982 (8th Cir. 1995). The attorney letter in *Berry* stated that as a result of the use of the insured's product, Mr. Berry had sustained severe and permanent disability to his lungs. However, the letter did not identify any dollar amount of damages, nor did it make a settlement demand for a sum certain. The court reasoned that this letter qualified as a "claim" even in the absence of a specific demand for payment because it was "sufficiently demanding in tone and substance."

Here, consistent with *Berry*, the Tillery Letter on its face is sufficiently demanding in tone and substance to constitute a "claim for damages," regardless of whether it asserts an express demand for payment of a sum certain. In addition to expressly advising Syngenta that Tillery's clients "have" claims for damages against

Syngenta, the Tillery Letter does not merely threaten future litigation against Syngenta; instead, it presumes that such litigation is a foregone conclusion and immediately asks Syngenta if it would agree to pursue a few "bellwether" cases "to avoid the enormous time and expense of pursuing cases all over the country…." (A159) In Mr. Tillery's contemporaneous communications with Syngenta, he made clear that absent some agreement on his "bellwether proposal," he would be "forced to turn to 'Plan B,' which is to affiliate with 'very strong counsel in agricultural areas around the country and sign up all the strong paraquat/PD cases before anyone else can, then file [] 'thousands' of cases around the country." (A182) Moreover, Tillery advised that if Syngenta rejected his proposal to file a small number of "bellwether" lawsuits under seal, the filing of these claims across the country would expose Syngenta to, among other things, "copycat" lawsuits and defense costs totaling "one billion annually before payment of compensatory or punitive losses." (A158)

Given the alleged magnitude and nature of the claims identified by the Tillery Letter (Parkinson's is a progressive nervous system disorder), it is hardly surprising that instead of including a demand for payment of a sum certain, the letter proposed bellwether trials to establish liability, which naturally would be followed by an individual assessment of damages. The claimants' progressive disease would

worsen over time, such that it is entirely reasonable not to demand a sum certain pre-suit, before the extent of an individual's disease and case value is more clear. As such, requiring Mr. Tillery to include an express demand for damages in his letter to constitute a "claim for damages" (which Delaware state courts do not even require for personal injury claims) ignores this obvious reality and could lead to the absurd result where an attorney letter demanding a small sum of money for a garden-variety negligence claim constitutes a "demand for damages," but a letter stating an intent to file prolific litigation that would be orders of magnitude more financially consequential to Syngenta would not constitute a "demand for damages."

3. The Circumstances Surrounding Syngenta's Receipt of the Tillery Letter Confirm That It Is a "Claim for Damages"

To determine whether the Tillery Letter constitutes a "claim for damages," the Court need look no further than the letter itself. However, the following undisputed facts surrounding Syngenta's receipt of and response to the Tillery Letter further confirms it constitutes a "claim for damages":

- Before receiving the Tillery Letter, Syngenta had paid $105 million in 2012 to settle two lawsuits brought in Illinois by Tillery regarding the chemical Atrazine, after paying approximately $80 million to defend those cases. (A166; A211 at 57:12-57:16) In 2013, Mr. Tillery filed a third lawsuit against

Syngenta in Illinois on behalf of a Doe client, alleging personal injury caused by in utero exposure to Atrazine, and [redacted] (A167; A215 at 113:22-114:19)

- During Tillery's February 2016 meeting with Kirkland, he disclosed that he had "six bellwether plaintiffs" that would file the proposed "bellwether" cases referenced by the Tillery Letter. (A181)
- Tillery expressly told Syngenta in 2016 that his clients "are primarily men" that were "diagnosed in their 50s and 60s." (A172)
- Tillery advised Syngenta in 2016 that his clients: (1) "were exposed and/or live in Madison or St. Clair counties and will file suit there"; (2) "were either mixing/applying the product or were in the vicinity while it was applied"; and (3) "were all 'relatively sophisticated about the application process and use of paraquat....'" (A180) At the hearing on the parties' initial cross-motions for summary judgment, Syngenta acknowledged that one of the "hallmarks" of a claim is "where they [the claimants] were exposed." (A939 at 13:4-13:11) Further, in 2016, Kirkland advised Syngenta that Tillery had "substantial influence with the judiciary" in St. Clair county, where Tillery would in fact ultimately file the first Paraquat Action. (A175)

- Tillery advised Syngenta in 2016 that his clients "are severely disabled by PD; many can no longer walk and are in nursing homes."
- Tillery advised Syngenta in 2016 that he "expects to leverage a massive settlement based on winning $5 million to $10 million verdicts for the first plaintiffs…." (A181)
- By letter dated January 25, 2016, Tillery commanded Syngenta to impose a litigation hold with respect to the subject matter of the Tillery Letter, given the "imminent initiation of litigation." (A160) Syngenta confirmed that it agreed to comply with the document preservation request. (A942)
- By no later than January 29, 2016, Kirkland had formed a "Paraquat Litigation Team." (A175) This team included Leslie Smith and Jim Hurst, who are accomplished trial lawyers. (A180; A216-A220)
- Syngenta incurred approximately $1.4 million in Kirkland fees in 2016 and an additional approximately $750,000 in 2017 before Tillery filed the first Paraquat Action. (A170) In 2018, before this coverage litigation began, Syngenta's claims agent characterized these fees as Syngenta's "total legal defense expenditure incurred from first receipt of a notice of potential litigation from the Korein Tillery law firm in January 2016." (A625) After

Zurich filed this coverage litigation, Syngenta refuted its agent's characterization of these fees as "defense costs" and claims instead that these fees were incurred to investigate the allegations in the Tillery Letter and to "evaluate potential legal liabilities Syngenta might face in the future because of Paraquat." (A170) Nevertheless, although Syngenta heavily redacted Kirkland's invoices from 2016, all those that have been produced refer to the billed matter as "Paraquat Litigation." (A564-A622)

- In February 2016, Syngenta's parent, SCPAG, disclosed the litigation contemplated by the Tillery Letter to ChemChina in connection with its proposed acquisition of Syngenta, describing it as an action that was "pending or threatened against Syngenta AG or any of its Subsidiaries which could reasonably result in a payment or loss exceeding USD 80'000'000 each (or in the case of Actions arising from a common set of allegations, that could result in payments or losses together exceeding USD 80 million)…." (A199-A200)
- SCPAG also disclosed the litigation contemplated by the Tillery Letter to its auditor, KPMG, in early 2016, as one of the matters that "could result in potential maximum contingencies of" Syngenta "exceeding or equal to U.S.$5,000,000." (A184, A187)

- In Tillery's deposition in this coverage action, he confirmed that when he sent the Tillery Letter, [redacted] (A944-A945 at 49:20-50:3; 50:12-54:13; A947 at 82:21-84:16.) As to the remaining "victims" referenced in his letter, Tillery testified that he had "something over 200 contacts" for other potential clients, but that he had not "signed contracts" with these clients due to statute of limitations concerns. (A944 at 49:20-50:3; A944-A945 at 50:12-53:15.) Syngenta was well aware of these statute of limitations issues, as noted by Kirkland's email about its meeting with Tillery. (A182)
- Additionally, Tillery testified that he did not respond to Syngenta's request for the medical records for his six proposed "bellwether" plaintiffs because it would have put him at an "extreme disadvantage because they [Syngenta] would initiate investigation long before the…formal discovery process would occur in the litigation." (A951-A952 at 111:10-113:8.)
- Finally, although Syngenta now contends in the coverage litigation that it came to the conclusion at some point in 2016 that Tillery's allegations "amounted to nothing but a vague threat by counsel" and that Tillery's

statements during his meeting with Kirkland in February 2016 "conveyed the impression that Mr. Tillery did not possess actual claimants and had not done the necessary legwork to bring an action against Syngenta" (A923), Syngenta did not produce a single document in the coverage action reflecting that it reached those conclusions in 2016. Relatedly, Syngenta failed to point to any evidence showing that Tillery was lying about having formally retained six bellwether clients in 2016.

- [redacted]

The allegations and representations made on the face of the Tillery Letter prove, as a matter of law, a "claim for damages" was made in 2016, before the Zurich Policies incepted. The undisputed facts surrounding Syngenta's receipt of the

Tillery Letter, taken as a whole, further confirm that the allegations asserted in the letter were "sufficiently demanding in tone and substance" to constitute a "claim for damages." *See Berry*, 70 F. 3d at 982. Indeed, even the Superior Court's post-trial ruling on Zurich's Section 2711 claim (not at issue in this appeal), found that "[b]ased on Syngenta's prior knowledge of and experience with litigation initiated by Tillery, it would have been reasonable to anticipate that indemnity and defense costs could exceed $2 million for future Paraquat actions" in 2016 and that "Syngenta could not reasonably pass off any possibility of future litigation involving Tillery as a purely frivolous threat." (A897) This finding underscores why the Superior Court's novel test for determining what constitutes a "claim for damages" is too formalistic: it ignores that an attorney's claim letter can give rise to significant potential exposure against an insured, regardless of whether or not the insured subjectively believes that the attorney represents actual clients.

Additionally, even under the novel test formulated by the Superior Court to determine whether the Tillery Letter constitutes a "claim for damages"—which Zurich maintains was applied in error—the facts surrounding Syngenta's receipt of the letter provide more than enough specific information to credibly indicate that Mr. Tillery represented "at least one" actual person who was intending to file a claim

for damages against Syngenta. How could Syngenta have reasonably anticipated in 2016 that the Tillery Letter could lead to indemnity and defense costs exceeding $2 million dollars—as found by the Superior Court—if there was not enough information to credibly indicate that Mr. Tillery represented at least one actual client?

II. SYNGENTA PUT ITS RELIANCE ON COUNSEL'S EVALUATION OF THE TILLERY LETTER AT ISSUE SUCH THAT IT WAIVED THE ATTORNEY-CLIENT PRIVILEGE

A. Question Presented

Did the Superior Court err in denying Zurich's motion to compel discovery under the "at issue" doctrine, where Syngenta injected into the litigation its purported beliefs about the credibility of factual representations made in the Tillery Letter, Syngenta retained Kirkland to investigate the credibility of the assertions made in the Tillery Letter, and Zurich had no ability to test the veracity of Syngenta's claims in the absence of the production of certain otherwise privileged documents under the "at issue" doctrine? (A873-A881)

B. Scope of Review

This Court reviews discovery rulings under an abuse of discretion standard. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010). Under this standard, "[s]o long as the [court] has committed no legal error, its factual findings will not be set aside on appeal unless they are clearly wrong and the doing of justice requires their overturn." *Id.*

C. Merits of Argument

Litigants can waive the attorney-client communication privilege by "inject[ing] an issue into the litigation, the truthful resolution of which requires an

examination of the confidential communications." *In Re Oxbow Carbon LLC, Unitholder Litigation*, 2017 WL 2210156, at *1 (Del.Ch. May 18, 2017). The at-issue exception rests upon "a rationale of fairness," *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995), and "reflects the principle that parties should not be able to use the attorney-client privilege to cherry-pick only the best morsels of evidence from a mixed batch concerning the same subject matter." *TCV VI, L.P. v. TradingScreen, Inc.*, 2015 WL 5674874, at *2 (Del. Ch. Sept. 25, 2015). *See also Nama Holdings, LLC v. Related WMC LLC*, 2014 WL 210263, at *2 (Del. Ch. Jan. 16, 2014); *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 2008 WL 241616, at *3 (Del. Ch. Jan. 17, 2008).

Courts have applied the "at issue" exception in insurance coverage disputes to require the disclosure of an insured's communications with its attorneys where the resolution of issues raised by the insured in the coverage litigation required such disclosure as a matter of fairness. *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 otherwise-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").

Here, Zurich moved to compel Syngenta's 2016 communications with counsel regarding the Tillery Letter under the "at-issue" doctrine because Syngenta allegedly relied on its in-house attorney's assessment of the Tillery Letter after retaining Kirkland to investigate it. (A879-A880) Specifically, Syngenta's opposition to Zurich's cross-motion for summary judgment relied on a Declaration submitted by Alan Nadel, then Syngenta's Global Head of Litigation, who testified that, after retaining Kirkland to "evaluate the likelihood of the various assertions made in the Tillery Letter," he concluded that 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)

The Superior Court denied Zurich's motion to compel Syngenta's privileged communications with Kirkland about the Tillery Letter, concluding that because Mr. Nadel did not purport to rely on any specific communications with Kirkland to form

his conclusions about Tillery's allegations—and instead purportedly relied on his analysis of Syngenta's past conduct with Mr. Tillery—the "at-issue" exception to the attorney-client privilege did not apply. (Ex. 3 at 44:4-45:20; 51:18-52:20)

As addressed above in Section I, the issue of whether the Tillery Letter constitutes a "claim for damages" can be resolved on the face of the letter itself, and Syngenta's purported beliefs about the truth of Mr. Tillery's factual representations in the letter should be disregarded. However, if this Court concludes that the trial court properly considered whether "[t]he insured must have a credible indication that there is at least one specific individual that is prepared to assert a claim" to determine the "claim for damages" issue, then, as a matter of fairness, the trial court erred by refusing to compel the production Syngenta's 2016 privileged communications about the Tillery Letter and Kirkland's Paraquat investigation under the "at-issue" doctrine.

Although Syngenta claims that it reached its conclusion about the credibility of the Tillery Letter based on its past experience with Mr. Tillery, and without relying on any specific communications with Kirkland, Zurich had no way to test the veracity of that assertion in the absence of Syngenta's privileged communications regarding the Tillery Letter and Kirkland's Paraquat investigation.

Without those communications, Zurich was forced simply to accept Mr. Nadel's assertions as true, something that Syngenta now claims it was unwilling to do when Mr. Tillery affirmatively represented in his letter that he had been retained by clients with claims for damages against Syngenta.

This discovery dispute further underscores the practical difficulties created by the Superior Court's determination that Syngenta must have had "a credible indication that there is at least one specific individual that is prepared to assert a claim" for the Tillery Letter to constitute a "claim for damages." This novel test would allow insureds and insurers to question the veracity of an attorney's factual representations in a claim letter and thus create the potential for prolonged disputes about whether the insured or the insurer subjectively believed in the credibility of those representations, before any such letter can qualify as a "claim for damages." Nevertheless, to the extent that the Court concludes that the Superior Court properly applied this novel test to these facts, then, as a matter of fairness under the "at-issue" doctrine, Zurich is also entitled to test the veracity of Syngenta's purported belief that Mr. Tillery's letter was a "vague threat" and that he did not represent any "actual claimants." As such, the Court should reverse the Superior Court's ruling on Zurich's Motion to Compel.

CONCLUSION

For the reasons set forth above, 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 and Counterclaim 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.