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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE and LIABILITY INSURANCE COMPANY, Plaintiffs-Below/Appellants and Cross-Appellees, v. SYNGENTA CROP PROTECTION, LLC, Defendant-Below/Appellee and Cross-Appellant.	No. 135, 2023 **PUBLIC VERSION** **Filed September 22, 2023** Court Below: Superior Court of the State of Delaware C.A. No. N19C-05-108 MMJ CCLD

SYNGENTA CROP PROTECTION, LLC'S REPLY BRIEF ON CROSS-APPEAL

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INTRODUCTION

Zurich misconstrues the arguments made by Syngenta in support of its appeal. Syngenta is not asking this Court to create a new standard or arguing that it "can prevail on a bad faith claim without showing that Zurich lacked a reasonable justification for denying coverage." (Zurich Ans. Br. at 38). Nor is Syngenta suggesting that a bad faith claim should survive summary judgment solely on the basis of an ***allegation*** of pretext on the part of the insurer. Rather, Syngenta's position is that there is overwhelming support in the evidentiary record for a factfinder to conclude that Zurich did not have a reasonable justification for denying Syngenta's claim. More specifically, Syngenta's position is that its bad faith claim should be determined at trial given that Zurich's grounds for denying coverage lacked merit and in light of the ***evidence*** in the record showing that (1) the "set of facts" that Zurich argues created a *bona fide* dispute was artificially limited by its intentional curtailment of its investigation, (2) Zurich knew the grounds for its denial were baseless, and (3) Zurich's stated basis for its denial was pretextual.

According to Zurich's logic, once a hint of a "reasonable justification" to deny coverage for a claim appears, an insurer may terminate its investigation, deny coverage, and insulate itself from a bad faith claim even if the insurer's basis for denying coverage is ultimately adjudged to be without merit. That cannot be the standard under Delaware law. Yet that is what Zurich would be permitted to do if

Syngenta's appeal is denied. After receiving the Tillery Letter, Zurich abruptly halted its investigation and raced to the courthouse without making a single attempt to obtain any further information and context that Syngenta could have offered. By immediately filing suit without even giving Syngenta an opportunity to provide such information and context, Zurich violated its own claims-handling guidelines and Delaware law, which requires an insurer to base its coverage determination on a solid foundation of facts.

Zurich's opposition does not address the applicable law or the relevant facts. What happened at trial in 2022 is irrelevant for purposes of determining the bona fides of Zurich's conduct at the time of denial in 2019; the fact that Zurich could cobble together a (losing) trial argument through the use of discovery has no bearing on whether Zurich actually had a good-faith coverage dispute three years earlier. The Superior Court's 2020 ruling that there were issues of fact precluding summary judgment on its Section 2711 claim is equally irrelevant, because (1) that ruling was a pre-discovery ruling on a motion brought by Zurich and (2) an issue of fact does not necessarily constitute a *bona fide* dispute for purposes of a bad faith claim.

Insurers like Zurich may not insulate themselves from bad faith claims by artificially limiting their investigations to reach a pre-determined outcome. Whether Zurich actually had a good-faith justification to deny coverage in May 2019 is a material issue of triable fact. Syngenta's bad faith claim should be reinstated.

ARGUMENT

I. THE RESOLUTION OF SYNGENTA'S BAD FAITH CLAIM REQUIRES AN INQUIRY INTO ZURICH'S "MENTAL STATE"

Zurich attempts to wave away the mountain of documentary evidence and the damning chronological sequence of events presented by Syngenta as a "hodgepodge of alleged claims handling errors" and "conspiracy theories," and argues that "[t]he only facts that matter" to the determination of Syngenta's bad faith claim "are the undisputed facts that formed the bases of Zurich's coverage declination and its declaratory judgment action in 2019." (Zurich Ans. Br. at 38-39).

Zurich's argument that the Court should ignore all of the evidence pointed to by Syngenta and focus only on the Tillery Letter, which Zurich asserts provided a "facially valid" reason to deny coverage, is inconsistent with Delaware law. (*Id.* at 40). Rather, a bad faith claim "requires an inquiry into the insurer's motives." *Powell v. AmGuard Ins. Co*., 2019 WL 4509165, at *4 (Del. Super. Ct. Sept. 19, 2019). This inquiry requires consideration of all evidence relevant to the issue of whether a party acted in bad faith, and inferences from observable facts are sufficient to create a triable issue of fact; no "smoking gun" is required. *See, e.g.*, *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2023 WL 4307699, at *49 (Del. Ch. June 30, 2023) ("When making a factual finding about mental state, a fact finder only has access to observable indicia. . . . Without the ability to read minds, a trial

judge only can infer a party's subjective intent from external indications." (cleaned up)); *Powell*, 2019 WL 4509165, at *3.

For the reasons set forth in its opening cross-appeal brief and further discussed below, Syngenta submits that a factfinder could easily "conclude based upon the totality of the evidence that [Zurich] handled this claim with an 'I don't care' attitude" as to Syngenta's plight. *Moyer v. Am. Zurich Ins. Co.*, 2021 WL 1663578, at *4, *6 (Del. Super. Ct. Apr. 28, 2021).

II. THE EVIDENTIARY RECORD SUPPORTS THE CONCLUSION THAT ZURICH'S DENIAL WAS NOT REASONABLY JUSTIFIED

Zurich incorrectly argues that Syngenta is asking this Court to adopt an "unprecedented new theory," which would allow Syngenta "to proceed to trial on its bad faith claim regardless of whether Zurich had a reasonable justification to deny coverage, based on Syngenta's argument that Zurich's reasonable justification was somehow pretextual." (Zurich Ans. Br. at 40). Syngenta is not asking this Court to adopt any new theory. Rather, Syngenta is arguing that the evidentiary record gives rise to a strong inference that Zurich did not have a reasonable justification to deny coverage. This evidentiary record includes documentary evidence showing that Zurich chose, in contravention of Delaware law and its own claims-handling guidelines, not to conduct a good-faith investigation; that Zurich knew or should have known that its grounds for denial were baseless; and that the actual reason for Zurich's denial was its concern about its liability exposure and that of its Swiss affiliate, ZIC.[1] In light of this evidence, whether Zurich acted reasonably in denying Syngenta's claim is an issue of fact that should be determined at trial.

[1] Zurich asserts that the trial court "rejected" Syngenta's attempt to rely on what Zurich calls "ancillary facts." (Zurich Ans. Br. at 45). The trial court did not affirmatively reject Syngenta's arguments; instead, it ignored them and the evidence cited by Syngenta. Syngenta submits that this was improper for the reasons stated herein and in its opening brief.

Notwithstanding Zurich's argument that Syngenta "fails to explain how these alleged 'facts' meet Syngenta's threshold burden of showing that Zurich lacked a reasonable justification to deny coverage" (Zurich Ans. Br. at 45), Syngenta's opening brief clearly explained, step-by-step, how the facts in the record give rise to a strong inference that Zurich purposely curtailed its investigation to manufacture a pretextual justification for a denial that it knew was not legitimate, in order for ZIC to get the upper hand in the global fight with Syngenta over $75 million in excess coverage. (Syngenta Br. at 48-59). A few of those facts—and Zurich's unavailing attempts to dismiss them—are highlighted below.

A. Zurich Unreasonably Limited Its Investigation

In its answering brief, Zurich fails to mention—much less meaningfully engage with—the Delaware case law requiring an insurer to conduct a reasonable investigation before arriving at a coverage position. Delaware courts have repeatedly permitted bad faith claims to proceed to trial where there "is an issue of fact as to whether the investigation of policy defenses . . . was sufficient to provide a reasonable basis for denying coverage." *Playtex, Inc. v. Columbia Cas. Co.*, 1993 WL 83343, at *2 (Del. Super. Ct. Mar. 10, 1993). *See, e.g.*, *MPM Holdings Inc. v. Federal Ins. Co.*, 2022 WL 811170, at *6 (Del. Super. Ct. Mar. 17, 2022) (denying summary judgment where insured argued that insurer "denied coverage . . . without reasonable justification, and failed to timely and adequately investigate the claim");

Powell, 2019 WL 4509165, at *5 (denying summary judgment where evidence supported inference that insurer intentionally delayed investigating "red flags" in insured's file in order to avoid paying claim); *Brandywine Smyrna, Inc. v. Millenium Builders, LLC*, 2010 WL 1380252, at *3 (Del. Super. Ct. Apr. 8, 2010) (denying summary judgment motion as unripe where insured claimed that insurer "acted in bad faith . . . by failing to conduct a reasonable investigation before denying coverage"); *Arrowood Indem. Co. v. Hartford Fire Ins. Co.*, 774 F. Supp. 2d 636, 656 (D. Del. 2011) (denying summary judgment in light of "disputed factual issues with regard to whether Hartford properly responded to [insured's] notice of loss, and whether Hartford's failure to pursue the matter any further was appropriate"); *cf. Ponzo v. Nationwide Mut. Ins. Co.*, 2013 WL 3965396, at *2–3 (Del. Com. Pl. July 30, 2013) (finding that insurer's "failure to investigate the validity of [insured's] claim was clearly without justification" where insurer should have known that report on which it based its denial was potentially unreliable).

Here, as in these cases, it was for the trier of fact to determine, in light of the evidence adduced and the inferences to be drawn therefrom, whether Zurich's investigation was performed in good faith. Given the evidence suggesting that Zurich (i) decided to deny coverage without even having seen the Tillery Letter and (ii) rushed to court following Zurich's receipt of the Tillery Letter without asking Syngenta—or anyone else, including Mr. Tillery—a single question or giving

Syngenta an opportunity to provide additional information (in violation of Zurich's own guidelines), a factfinder could reasonably conclude that Zurich's failure to perform a good-faith investigation, coupled with the lack of merit to its grounds for denial, constituted bad faith.

Zurich does not deny that its investigation ended upon its receipt of the Tillery Letter, but it asserts that any information that it could have learned through further investigation would have had no impact on its coverage determination. (Zurich Ans. Br. at 45). Whether this is credible and, if so, whether refusing to consider the additional information would have been reasonable are questions for the factfinder. Syngenta submits that there are ample grounds for the factfinder to conclude that Zurich's failure to investigate was unreasonable and done in bad faith.

At the March 12, 2019 meeting, Ms. Nwaomah learned that Mr. Tillery's letter had mentioned 200 claimants, that Kirkland lawyers had asked for information about Mr. Tillery's alleged clients, and that Mr. Tillery had not provided any of the requested information. (B839). Ms. Nwaomah's notes make clear that she became very concerned about Zurich's exposure upon learning about these purported 200 claimants. (B838).[2] In that circumstance, and given Ms. Nwaomah's testimony that

[2] Ms. Nwaomah's notes also stated that she wished to "continue to follow up on the knowledge issue." (B838). This belies Zurich's argument that Syngenta lacks evidence that information received at that meeting formed the basis for Zurich's coverage decision. (Zurich Ans. Br. at 46-47). It was precisely after this meeting

[redacted] (BR3), why did Zurich not follow up with Syngenta for more information about Mr. Tillery's purported clients, unless it was more concerned with rushing to court than learning information that might be relevant to its coverage position? Ms. Nwaomah's conversation with Kirkland put Zurich on notice that there were questions regarding the assertions made in the Tillery Letter. Zurich's decision not to investigate those assertions was "clearly without justification." *Ponzo*, 2013 WL 3965396, at *2-3.

The notion put forth by Zurich that it had no reason to investigate after receiving the Tillery Letter because it could not have expected to learn anything that might have affected its coverage position is self-serving and without basis. If Mr. Tillery had withdrawn his assertions later in 2016 before any claims, would that not have caused Zurich to change its coverage position? While that did not happen, it is a fact—one that Zurich could have learned in 2019 through a reasonable investigation—that Mr. Tillery did not have 200 clients in 2016 as Zurich assumed from the face of the letter, but rather had, at most, six. While Zurich may argue that

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that things began to move in "a different direction" for Zurich. (B303). [redacted] (B610). As explained in Syngenta's opening brief, Zurich's decision to obtain and use information supporting a potential coverage defense that it learned under the guise of meeting with Syngenta for an update on claims for which it had agreed to provide a defense is further evidence of Zurich's bad faith. (Syngenta Br. at 53-55).

this fact would not have changed its coverage position, such a contention is a question for the factfinder.

Zurich's internal claims-handling guidelines further underscore the unreasonableness of its failure to investigate the facts relevant to the Tillery Letter, given that it was the basis for the coverage denial. As noted in Syngenta's opening brief, Zurich's guidelines state that letters denying coverage "shall also advise the insured that we will re-evaluate our coverage position upon presentation of additional, material information relative to pertinent coverage issue(s)." (B9). This language was notably absent from Zurich's May 13, 2019 denial letter to Syngenta, sent the same day that Zurich filed its declaratory judgment action. (B321-46). It is hard to imagine a clearer signal that Zurich was uninterested in learning more.

B. The Stated Grounds for Zurich's Denial Were Pretextual and Not Legitimate

Zurich's argument that Syngenta's bad faith claim was properly dismissed because its grounds for coverage were "facially valid" is further undermined by the record evidence on which a factfinder could reasonably conclude that Zurich knew or should have known that there was no merit to those grounds,[3] and that the actual

[3] While Zurich generally does not challenge any of Syngenta's factual assertions, it does attempt to blunt the impact of the email in which it acknowledged that under its policies a "claim" requires a "demand for money damages by claimant/plaintiff" by incorrectly arguing that the Tillery Letter "incorporated that meaning." (Zurich Ans. Br. at 44). The Tillery Letter plainly did no such thing.

reason behind Zurich's denial and simultaneous filing of litigation was to increase ZIC's chances of avoiding up to $75 million in exposure. (Syngenta Br. at 50-53).

To be clear, Syngenta is not arguing, as Zurich suggests, that a bad faith claim should survive summary judgment wherever the insured has merely ***alleged*** that the insurer was motivated by a desire to limit the size of its exposure. (Zurich Ans. Br. at 40). Zurich is propping up a straw man; Syngenta's argument is based on record evidence, not allegations. Thus, despite Zurich's assertion, it is not the case that "every insured's bad faith claim will always create a triable issue of fact and go to trial" if this Court reinstates Syngenta's bad faith claim based on the unique circumstances present here. (*Id.* at 41).

III. A *BONA FIDE* DISPUTE CANNOT BE EQUATED WITH AN ISSUE OF FACT

Zurich relies on the trial court's denial of summary judgment on its Section 2711 claim to argue that there was automatically at least a "*bona fide* dispute" as to coverage because there were issues of fact which prevented summary judgment on that claim. (Zurich Ans. Br. at 41-42). This argument, however, conflates the two standards, which are entirely separate. The fact that Zurich's Section 2711 claim proceeded to trial—where the trial court found in favor of Syngenta—does not inexorably mean the bad faith claim should not have, for several reasons.

First, Syngenta's bad faith claim hinges on whether "at the time of the denial," Zurich had a "reasonable justification" for denying Syngenta's claim—not whether with hindsight Zurich can cobble together an argument in litigation that there exists a "bona fide dispute" regarding Syngenta's application. *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 WL 2502101, at *1 (Del. Super. Ct. Jan. 12, 2009); *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 910 (Del. 2021) (what is relevant is knowledge "at the time the insurer denied liability"). Apart from the Tillery Letter, there is no evidence that any of the "facts" that Zurich relied on at trial as supposedly being supportive of its Section 2711 claim were considered by Zurich when it denied the claim.

Ultimately, the trial court found that Syngenta had not made a material misrepresentation or omission, rejecting the ZIC underwriter's speculative and

uncorroborated testimony that Zurich would not have issued the Policies without a Paraquat exclusion had Zurich and ZIC known about the Tillery Letter. (Zurich Opening Br., Ex. 4). This further demonstrates the gulf between an "issue of fact" and a "*bona fide* dispute": although the underwriter's sworn testimony would have been sufficient to withstand summary judgment (because it would have created an issue of fact), the trier of fact would have been entirely free to disregard his testimony and conclude that there was no *bona fide* coverage dispute at the time of denial. An issue of fact on summary judgment does not inexorably lead to a ruling, as a matter of law, that there was a *bona fide* dispute.

Second, the only reason Zurich could point to a facial "*bona fide* dispute" regarding its Section 2711 claim was because it refused to perform an investigation that would have uncovered facts that would have called into question its decision to deny coverage.

Third, even if there was a "*bona fide* dispute" regarding Syngenta's application—and the trial court's post-trial decision shows that there was not—Zurich still had no "reasonable justification" in 2019 for reneging on its promise to pay Syngenta's defense costs in connection with the duty to defend imposed on Zurich by the Policies unless and until Zurich could prove its entitlement to relief under Section 2711. Zurich could have defended Syngenta subject to a reservation of rights, including the right to investigate and/or litigate a potential Section 2711

claim. Whether Zurich's decision to instead deny coverage without performing an investigation into the stated reason for denial constitutes bad faith is an issue that should be determined at trial.

CONCLUSION

Defendant-Below, Appellee/Cross-Appellant Syngenta respectfully requests that this Court reverse the trial court's August 24, 2022 order granting Zurich summary judgment with respect to Syngenta's bad faith counterclaim.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2023, a copy of the foregoing document was caused to be served by File & Serve*Xpress* upon the following counsel of record.

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