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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIG SPECIALTY INSURANCE COMPANY f/k/a CHARTIS SPECIALTY INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, and LEXINGTON INSURANCE COMPANY, Defendants-Below, Appellants, v. CONDUENT STATE HEALTHCARE, LLC, f/k/a XEROX STATE HEALTHCARE, LLC, f/k/a ACS STATE HEALTHCARE, LLC, Plaintiffs-Below, Appellees.	No. 35, 2024 Court Below: Superior Court of the State of Delaware C.A. No. N18C-12-074 MMJ CCLD **PUBLIC VERSION** **EFILED: August 2, 2024**

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NATURE OF PROCEEDINGS[1]

Judgment for Insurers should be restored upon reversing any of a series of errors below. To argue for affirmance, Conduent must overcome not only the jury findings against it, but civil procedure, evidentiary stipulations, and express contractual terms.

After six trial days, eight witnesses, and nearly 100 exhibits, a unanimous jury found that Conduent acted in bad faith, failed to cooperate, failed to seek consent, and, by clear and convincing evidence, that Conduent committed insurance fraud. Each of these grounds independently precluded coverage. Trial proceedings were routine and nothing identified by Conduent or the Superior Court—not the stipulated admission of OAG Testimony, nor Insurers' references to a Press Release and basic facts evident from Conduent's privilege log, nor Insurers' statements that they did not believe they owed coverage—was improper, let alone justified undoing the verdict. Conduent's after-the-fact critiques defy the agreed conduct of trial and black-letter law, and cannot possibly call into question the jury's dispositive findings that Conduent committed fraud, acted in bad faith, and failed to cooperate and seek consent from Insurers, which would not have been futile.

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[1] This reply adopts the definitions in Insurers' opening brief ("OB").

Moreover, settlement of the State Action falls squarely within the plain terms of Exclusion 3(a) for "Loss in connection with" lawsuits "alleging, arising out of, based upon or attributable to a dishonest [or] fraudulent … act, error or omission, or … knowing violation of the law." Every iteration of the State Action was premised on allegations of fraud, dishonesty, and knowing violations. In nonetheless arguing that the State Action's gravamen sounded in contract rather than fraud, Conduent denies the obvious.

ARGUMENT

While invalidation of the jury verdict is unsustainable (*see infra* § III), two separate errors of law independently mandate reversal and judgment for Insurers.

I. Exclusion 3(a) Bars Coverage.

The parties agree that an exclusion bars coverage for a loss when "th[e] loss falls entirely within the policy exclusion." Conduent's Answering Brief ("AB") 26. Conduent's settlement falls "entirely" within Exclusion 3(a) because it was made "in connection with … a [**Suit**] … alleging" fraud. A2350.

An unambiguous exclusion is construed "first" and only according to its "plain meaning." *Raymond Corp. v. Nat'l Union Fire Ins.*, 833 N.E.2d 232, 234 (N.Y. 2005); *Harrison v. Nat'l Union Fire Ins.*, 675 N.E.2d 829, 832 (N.Y. 1996). The rules Conduent cites (AB.25-27) for construing ambiguous provisions cannot trump "plain meaning," which controls. *Utica First Ins. v. Mumpus Restorations, Inc.*, 115 A.D.3d 938, 938-39 (N.Y. App. Div. 2014) ("[T]he plain meaning of [the] policy's language may not be disregarded to find [nonexistent] ambiguity.").

Eliding the plain terms, Conduent asserts (AB.26-27) that Exclusion 3(a) applies only to losses "attributable to … allegations" of fraud, and that its allocation of the settlement payment to "breach-of-contract allegations and attorney's fees" disabled the exclusion. But the exclusion applies to a "**Suit**" "alleging" fraud. Conduent's labeling of the settlement did not change the thrust of Texas's underlying

"**Suit**." Conduent's contrary argument disregards Exclusion 3(a)'s language, which Conduent never even quotes.

Losses "in connection with" a "**Suit**" "alleging" fraud (Exclusion 3(a)'s language, A2350) are broader in scope than losses "attributable to" "fraud allegations" (Conduent's revisionist reading), as the former is not "tied to the concept of a causal connection." *Coregis Ins. v. Am. Health Found.*, 241 F.3d 123, 128-29 (2d Cir. 2001); *accord Exit Strategy v. Festival Retail Fund*, 2023 WL 4571932, *13 (Del. Ch. July 17, 2023) ("'[I]n connection with' … capture[s] the broadest possible universe.").

Conduent's argument entails parsing the individual allegations in the "**Suit**" and then attributing its Loss to the non-fraud allegations. That entire exercise, however, defies the express contractual terms. Under Exclusion 3(a), the dispositive question is simply whether the loss was "in connection with … a [**Suit**] … alleging" fraud. The inexorable answer to that question is yes.

At all times, fraud defined the State Action, which contained *only* a fraud count for 1,744 of the 1,747 days it was pending (A1012), with contract and negligence added only at Conduent's request immediately before settlement, *see* A1039; A3753-55; *see also* A3706, 3727-28; A3673. As the Court found, "[t]he bulk of the original Petition is based on dishonest or fraudulent acts, or intentional or knowing

violations of the law." OB.Ex. B ("MSJ Op.") 10. Conduent admits that the allegations never "meaningfully chang[ed]" (AB.29), and the Third Amended Petition likewise made pellucid that it was about fraud—framing it as a "law enforcement action pursuant to the Texas Medicaid Fraud Prevention Act" (A3673), and "alleging unlawful acts and seeking civil remedies under the TMFPA" (A3677).

Conduent's only answer is to cherry-pick a handful of snippets—found in every iteration of the Petition—that merely referenced Conduent's contractual relationship with Texas. But these glancing references to a contract do not change the nature of Texas's lawsuit, which at all times was based on "dishonest or fraudulent acts." MSJ Op. 10. The same overarching fraud theme finds expression in the Third Amended Petition's headlines, which allege, for example, that Conduent:

- "***misrepresented*** its prior authorization review process";
- "***misrepresented*** the efficacy of its quality assurance processes";
- "***misrepresented material facts*** in its Management Response…";
- "reassured State officials through ***misrepresentations and omissions***…";
- "made ***misrepresentations and omissions*** of material facts…";
- "continued making ***misrepresentations***…."

A3681-93 (emphases added).

Anyone reviewing Texas's Petitions could see they were about fraud. Conduent ***itself*** admitted, when seeking contribution from the dental providers, that the

State Action "***sound[s] in fraud***." A3333 (emphasis added). It acknowledged the same in petitioning the Texas Supreme Court, analogizing "the complex fraud suit arising out of the collapse of Enron" (A3088) and describing the "[n]ature of the case" as a "civil Medicaid fraud case." A3050; *see* A3417 (Texas Supreme Court summarizing petition).[2] It acknowledged the same in its securities filings. A1019-1020.

Conduent cannot now transform the nature of the State Action by arguing (AB.28-29) that "a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract." Conduent made that argument before the Texas court (A2482-83; A1015-16), which rejected it, holding "false statements regarding contract performance could violate the TMFPA." A2881.

Nor can Conduent import (AB.28) "New York law" to transform what Texas pleaded under Texas law. While a policy's choice of law is properly used to interpret the *policy*, courts apply the state law invoked when analyzing the underlying claim. *See, e.g.*, *Chicago Ins. v. Borsody*, 165 F. Supp. 2d 592, 597 (S.D.N.Y. 2001) (applying New Jersey law to construe elements of New Jersey claim, even though policy was governed by New York law); *2002 Lawrence R. Buchalter Alaska Tr. v. Phila.*

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[2] Conduent cites (AB 29-30) an isolated sentence from a coverage letter (A2420) but omits the ensuing explanation for denying coverage: "The Petition expressly alleges that defendants knowingly or intentionally made false statements…." (A2449).

Fin. Life Assurance, 96 F. Supp. 3d 182, 200, 202 n.8 (S.D.N.Y. 2015) (contractual choice-of-law does not govern the analysis of underlying claim). Regardless, Conduent's argument fares no better under New York law. The cases Conduent cites (AB.28-29) address *common-law fraud* pleaded alongside breach of contract. By contrast, Section 145-b is New York's analog to the TMFPA. In suits under that statute, like the TMFPA, conduct related to a breach of contract may be pled as fraud. *State v. Britt*, 141 A.D.2d 911, 912-13 (N.Y. App. Div. 1988).

Ultimately, it is irrelevant whether, as Conduent claims, Texas had "ample good-faith bases" (AB.27) to tack on a breach of contract count predicated on the "materially identical factual allegations" (OB.Ex. A ("Trial Op.") at 29) of fraud and dishonesty that were present from the start—the gravamen of the case remained steeped in fraud.

Because losses "in connection with … a [**Suit**] alleging" fraud are not limited to losses "attributable to … allegations" of fraud, Conduent's discussion of the settlement payment's allocation—and whether that allocation was unreasonable or collusive (AB.27)—is immaterial. Upon looking to the "gravamen" of the lawsuit, as New York courts do, it is manifest that Conduent's settlement was "in connection with … a [**Suit**] … alleging" fraud. *Gibbs v. CNA Ins.*, 263 A.D.2d 836, 837-38 (N.Y. App. Div. 1999); *see Cent. Mut. Ins. v. Willig*, 29 F. Supp. 3d 112, 118-19

(N.D.N.Y. 2014); *accord Scottsdale Ins. v. RiverBank*, 815 F. Supp. 2d 1074, 1084-85 (D. Minn. 2011).

Conduent tries to distinguish *Gibbs* (AB.27) by noting that the insured there pleaded guilty to intentional acts. But *Gibbs* merely says "extrinsic facts *may* be considered," 263 A.D.2d at 837 (emphasis added), not that they must.[3] *Gibbs* confirms that, in assessing the "gravamen of th[e] action," the court "determine[s] the nature of the claim alleged in the complaint, based upon the facts alleged." *Id.* at 838.[4]

Nor can the jury's verdict here (which Conduent otherwise attacks, AB.20) rescue Conduent from the Exclusion. The jury's finding that the settlement was reasonable (AB.27) turned on issues different from the gravamen of the "**Suit**" and the undisputed fact that Texas was "alleging … fraud[]." It sufficed for the jury to credit the practical reality that the OAG routinely settles its cases on a non-fraud,

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[3] Conduent's suggestion that courts *must* look to "extrinsic facts" before enforcing an exclusion (AB.28) would require mini-trials over the conduct spawning the underlying lawsuit for which coverage is sought. In any event, extrinsic facts only further confirm that Texas was indeed alleging fraud. *See* A3441-88.

[4] Conduent fails to distinguish *Central Mutual* and *Scottsdale*. AB.28 n.6. While emphasizing the conclusion in *Central Mutual*, Conduent overlooks the court's *rationale*: "the [complaint] [was] replete with allegations of intentional conduct." 29 F. Supp. 3d at 119. In *Scottsdale*, the court considered the insured's criminal conviction but focused on "the gravamen of the underlying suit" as alleged in the complaint. 815 F. Supp. 2d at 1084.

non-penalty basis, as Conduent emphasized to the jury in closing (A1558), presumably in response to Insurers' positions and for the sake of expediting and maximizing recovery that benefits Texas's taxpayers. Especially because Insurers did not deny that Texas was an innocent third party that owed no duty to Conduent's Insurers (A1579), the jury had no reason to fault Texas's assessment of the ultimate settlement as reasonable (A3715). In declining to fault Texas, therefore, the jury was not grappling with the nature of the State Action or wading through its abundant fraud allegations. By no means can the verdict distract from straightforward judicial application of Exclusion 3(a) relative to the "**Suit**" and what it "alleges."

II. Conduent Should Not Be Excused From Breaching Its Duties To Cooperate And Seek Consent.

The Superior Court separately erred by (1) construing Insurers' "refusal to defend" as a "continued repudiation of coverage obligations," even after the jury found to the contrary (Trial Op. 32), and (2) overlooking Conduent's conceded failure to tender the Third Amended Petition before settling the State Action.

Conduent cannot have it both ways. It cannot defeat Exclusion 3(a) on the premise that its settlement was allocated only to a breach of contract count that first emerged in the Third Amended Petition (AB.2, 4-5, 10; A2206-07), while simultaneously shedding its cooperation and consent duties on the premise that the Third Amended Petition changed nothing about the lawsuit that had been pending all along in Texas (AB.35). At a minimum, Conduent needed to tender the Third Amended Petition, with its new causes of action, for a new coverage determination—which it concededly failed to do.

A. Insurers never repudiated coverage.

The mere fact Insurers initially denied coverage (in part) cannot be taken as a repudiation that vitiates Conduent's duties to cooperate and seek consent. To the contrary, a denial like the one here, where Insurers affirmed their intent "to shape [their] conduct in accordance with the provisions of the contract," is a disclaimer, not a repudiation. *New York Life Ins. v. Viglas*, 297 U.S. 672, 676-77 (1936).

Under New York law, "the doctrine of repudiation rests on notions of waiver and estoppel: the rationale ... is that an insurer may not rely on the terms of a policy whose binding effect it has disclaimed, and an insured should not be held to strict compliance with claim rules where the insurer has announced that it will not pay … regardless of the insured's compliance." *Jacobson v. Metro. Prop. & Cas. Ins.*, 672 F.3d 171, 177 (2d Cir. 2012). Short of repudiation, even an *improper* disclaimer cannot estop an insurer from raising policy defenses to the insured's invocation of the policy. *Id.* at 177-78.

Conduent wrongly equates (AB.32-33) an insurer's disclaimer of defense costs coverage with a wholesale repudiation of the contract—conjuring a bright-line rule no New York court has drawn. To the contrary, in *Bear Wagner Specialists v. National Union Fire Insurance*, even blanket denials of coverage and disclaimer of any duty to defend or indemnify related civil and criminal actions were found not to constitute a repudiation, including because "the denial letters never stated that all future claims would be denied, and even provided [the insured] with the opportunity to submit additional information for a re-evaluation of the claim by the insurers." 2009 WL 2045601, *3, *7 (N.Y. Sup. Ct. July 7, 2009). This is precisely what happened here: Insurers' coverage determinations were always expressly subject to change, and were actually reevaluated in light of "additional information" including

"amended or additional pleadings." A1466-68. Indeed, to a limited extent, Conduent did provide additional information to obtain new coverage determinations, *see, e.g.*, *id.*; none of the parties treated Insurers as having repudiated. Absent an "unequivocal" pledge by the insurer not to cover "all future claims," even those with "new circumstances … outside the scope of the original denial letter," the insured was not released from its obligations under a policy it might later invoke. *Bear Wagner*, 2009 WL 2045601, at *7.

Similarly, in *Federal Insurance v. SafeNet*, although the insurer declined to provide defense or indemnity coverage for a lawsuit, the court found the insured breached the policy by failing to seek consent before settling and that insurers' coverage denials stopped short of repudiating. 817 F. Supp. 2d 290, 295, 297-99, 305 (S.D.N.Y. 2011).

Conduent relies (AB.32-33) on *American Ref-Fuel v. Resource Recycling*, 722 N.Y.S.2d 570 (App. Div. 2001), and *Isadore Rosen & Sons v. Security Mutual Insurance*, 291 N.E.2d 380 (N.Y. 1972), for its position that "a breach of the duty to defend is a 'repudiation' as a matter of law." But neither case supports that.

In *American Ref-Fuel,* the insurer made an "unequivocal pronouncement" of non-coverage. Respondents' Brief, 1999 WL 33922527, at *11. Likewise, *Isadore Rosen* involved classic repudiation—where an insurer "did absolutely nothing to adjust or otherwise process the claim." 291 N.E.2d at 382-83. That is the sort of

recalcitrant disregard for the contract that qualifies as repudiation under New York law. *See J.P. Morgan v. Vigilant Ins.,* 151 A.D.3d 632, 633 (N.Y. App. Div. 2017) (unreasonable delay and unconditional denial of all liability constituted "repudiation").

Here, Insurers' coverage letter was neither an "unequivocal" nor an "absolute[] refus[al] to perform its obligations under the policy." *Nat'l R.R. Passenger v. Steadfast Ins.*, 2009 WL 562610, *13 (S.D.N.Y. Mar. 5, 2009).[5] Thus, the jury correctly found that cooperating and seeking consent would not have been futile. A1667-68. Ample evidence supports this finding. Besides providing defense coverage under this policy for other suits, in this suit, Insurers regularly communicated with Conduent, requested updates, updated their coverage positions with reference to specific policy provisions, and attempted to participate in the settlement process. *See* OB.13, 34. These actions markedly differed from an outright "repudiation" that could vitiate an insured's duties of cooperation and consent. *See Bear Wagner*, 2009 WL 2045601, at *7.

[5] Insurers reserve their right to appeal the trial court's interlocutory orders that are not the subject of this limited appeal, including its finding that Insurers breached the duty to defend.

B. Conduent failed to tender the Third Amended Petition.

Insurers did not repudiate coverage because Conduent *never tendered* the Third Amended Petition for a coverage determination. *See* OB.33. Conduent discounts (AB.34-35) this theory as "novel," and contends that "the nature" of the Third Amended Petition was no different from its predecessors. But that argument is untenable and irreconcilable with its argument concerning Exclusion 3(a).

To begin, Conduent errs in arguing (AB.34-35) that denying the duty to defend automatically encompasses all possible future iterations of the complaint. For example, in *Mt. Hawley Insurance v. First Street Ocean Grille*, a New York federal court held that an amended complaint that "changed the theory of liability" could reinstate an insurer's duty to defend. 2024 WL 1364704, *4 (S.D.N.Y. Apr. 1, 2024). The court held that the amended complaint should be covered, even though, had the court been "considering whether there was a duty to defend the Original Complaint, it would hold that there is no duty to defend because the lawsuit falls squarely within the Exclusion." *Id.*

The same reasoning applies here. Conduent argued below that "the Third Amended Petition expressly included causes for breach of contract and negligence that would not fall within [Exclusion 3(a)]." A2053. Yet Insurers were never permitted to assess whether, as Conduent contends (AB.26; A2053), those new counts

properly changed "the application of the Exclusion," *Mt. Hawley*, 2024 WL 1364704, at *4.

Conduent argues (AB.35) that it "informed Insurers that Texas would amend its petition to include a contract claim," and Insurers responded "that Conduent had 'not provided [them] with any additional information that would change [their] view.'" But the jury considered this precise argument, based on this precise correspondence (which included a request by Insurers that Conduent provide a copy of any amended petition), and *rejected* it in finding that compliance by Conduent would *not* have been futile. A1478-79; A1667-68. The jury's finding on this point remains undisturbed and fatal to Conduent.

III. The Jury's Findings Of Fraud And Bad Faith Should Stand.

The Superior Court ordered a new trial for "four principal reasons." Trial Op. 34. Although Conduent notes the need for "appellate deference" to the lower court's exercise of discretion (AB.36), it discounts the deference owed to the jury verdict and the extraordinary basis the Superior Court needs to overcome it. *See Reinco, Inc. v. Thompson*, 906 A.2d 103, 110-12 (Del. 2006) (reversing grant of new trial). If any of the Superior Court's claimed pillars falls, its extraordinary decision cannot stand.

A. The OAG Testimony cannot justify a new trial.

According to Conduent (AB.37), the court was "well within its discretion in ordering a new trial because the [OAG testimony] was inadmissible and unfairly prejudicial." Conduent errs on all scores.

As Conduent recognizes (AB.37), "[w]here … a court grants a new trial to correct an evidentiary ruling," the appellate court should first "review[] the underlying ruling"; if not erroneous, it is an "abuse[] [of] discretion" to "grant[] [a] motion for a new trial." *O'Riley v. Rogers*, 69 A.3d 1007, 1012 (Del. 2013); *see Reinco*, 906 A.2d at 111-12. Because the admission of OAG Testimony was neither erroneous nor an abuse of discretion, the Court need not address the absence of "prejudice" before reversing. *O'Riley*, 69 A.3d at 1012.

The OAG Testimony was, as stipulated, "*admissible* by any party for any purpose at trial." A0652 (emphasis added). That stipulation was reached "as a consequence of negotiations" to resolve Conduent's motion to preclude Insurers from calling a live OAG witness at trial, with the parties agreeing that "none of the parties will call a State witness to testify." *Id.* Although Conduent speculates (AB.39-40) that the OAG would never have testified live, its own motion to prevent such testimony belies that (A0546). Regardless, this is irrelevant. If nothing else, the OAG Testimony—by deposition taken under Superior Court Rule 31—would have been admissible as unavailable witness testimony under Superior Court Rule 32 and Rule of Evidence 804(b)(1).

Because this testimony was admissible, the Court had no "duty" (AB.39) to exclude it. Moreover, Conduent's own case, *Dupree v. State*, 2023 WL 2783164 (Del. Apr. 4, 2023) (cited at AB.38), held that the trial court did *not* abdicate its responsibility by admitting hearsay evidence, where, as here, counsel made a "strategic decision" not to object. *Id.* at *4.[6]

[6] *S. Atl. S.S. v. Munkacsy*, 187 A. 600 (Del. 1936) (cited AB.38-39), merely recognizes that courts *may* exclude hearsay testimony "in the absence of objection" while instructing that "[t]his authority should be exercised with caution." *Id.* at 606. Here, the parties "all agreed to put [the OAG Testimony] in" and the court "underst[ood] why." (A0847.)

Conduent also seeks (AB.38) to stand on its purported "line-item objections" to the OAG Testimony. But those superseded *pro forma* deposition designation objections related only to reading testimony from the witness stand, which the OAG Testimony never was. A0845. As to the exhibit *itself*, the parties and court agreed that the OAG's written answer would be marked as an exhibit, unredacted, and submitted to the jury. *Id.* Lest there be any doubt, Conduent included the full OAG Testimony on *its own trial exhibit list*, lodged no objection to the exhibit on Insurers' list, and included it, again without objection, on the joint exhibit list it prepared. *Id.* The court correctly recognized that, "you have all agreed to put it in" and "if I start piecemeal excluding things [within it,] it becomes very problematic." A0847.

Finally, Conduent's contention (AB.38) that the OAG Testimony was inadmissible because it "included 'double and triple hearsay'" is misconceived. Because Winter testified in his capacity "as representative of the [OAG]" (A3737), he could properly draw upon knowledge extending throughout the office. *See Terra Soil Farming v. Blue Iron Equip.*, 2010 WL 3823973, *1 (Del. Ch. Sept. 28, 2010).

Conduent is likewise incorrect (AB.40) that "Winter's credibility became central at trial" (*id.*) and thus posed "unfair[] prejudice[]" to Conduent. That credibility testimony is exactly what Conduent envisioned, as reflected in Conduent's successful opposition to Insurers' motion *in limine* that would have prevented Conduent

from making Winter's credibility a central trial issue. A0558-64; A0572-79; A0660; A0712-13.

Conduent then used the OAG Testimony first, affirmatively in its opening (A0905) and throughout trial (*e.g.*, A1553). Overruling Insurers' objections, the court allowed Conduent to solicit testimony exploring his prosecutorial approach (A1533) to label him as a "rogue attorney" (A1054). Conduent cannot be said to have suffered "unfair[] prejudic[e]" from the OAG Testimony and the resulting focus on Winter's credibility (AB.40) when Conduent itself successfully made this "central at trial."

Finally, Superior Court Civil Rule 59(c) was in all events violated. Conduent could not overturn the jury verdict by faulting the admission of stipulated testimony and, therefore, neither could the court. *See* OB.40. Additionally, because Conduent did not even argue the OAG Testimony was improperly or prejudicially admitted (OB.39), Insurers were denied "notice and an opportunity to be heard." Super. Ct. Civ. R. 59(c). Conduent contends (AB.40) that its post-trial briefing identified "problems" with the OAG Testimony "to which Insurers responded." But Conduent questioned only the *probative* value of the OAG Testimony—claiming it was "unreliable" and "insufficient to establish fraud." A1755, 1768. Insurers never had requisite opportunity to contest the assertion that the entire submission was improper and prejudicial.

B. Insurers' references to Conduent's privilege log cannot justify a new trial.

Nor could the court properly fault Insurers' approved use of Conduent's privilege log. The court's order permitting use of the privilege log was clear:

> The privilege logs themselves are not … privilege[d]…. The fact that meetings took place, the dates of those meetings, the general subject matter, and who attended those meetings may be relevant…. [T]he information contained in the privilege log may be put in a demonstrative exhibit and shown to the jury. Defendants may refer to the information. However, Defendants may not use the privilege log as the basis for arguing that Conduent's attorneys must have advised Conduent in a certain way.

A0809.

Insurers complied, never inviting the jury to infer how Conduent's attorneys must have advised Conduent. Insurers simply argued that the approved demonstrative, by listing the general and non-privileged subject matter of "insurance coverage," "show[ed] … the pattern of what Conduent was talking about … during that fateful critical period right before it settled the case." A0925. That was hardly inviting an improper inference: it is exactly what the approved demonstrative conveyed on its face. A4177-79. The pattern evident from the demonstrative simply combined the communications' general subject matter with their timing, without delving into specifics of any attorney advice.

Insurers also complied with Rule of Evidence 512(a), which prohibits counsel from commenting on or inviting inferences from a party's "claim of privilege." Insurers never mentioned the word "privilege" or indicated that the demonstrative described documents Conduent had withheld.

Conduent argues (AB.42) that it had "no way of rebutting" the pattern disclosed by its privilege log. But that just proves that facts are indeed stubborn things. Assuming Conduent's allocation of the settlement payment to breach of contract was truly driven by concern about its business reputation (AB.2), Conduent was free to present evidence demonstrating its communications regarding business reputation. Bereft of any corroborating documentation, however, Conduent could marshal only the self-serving testimony of its general counsel. A0957; A0962; A1039. If that was feeble proof, Insurers should not be faulted for it.

Finally, Conduent waived any objections to Insurers' closing statements by concededly failing to object contemporaneously. *See, e.g.*, *Gen. Motors v. Grenier*, 981 A.2d 531, 541 n.27 (Del. 2009); *Klosiewicz v. Stevenson*, 2020 WL 707639, *6 n.46 (Del. Super. Ct. Feb. 12, 2020).[7] *Grenier* is particularly instructive because the Superior Court had advised counsel during trial that "in this jurisdiction objections

[7] *See also Del. Elec. Coop. v. Duphily,* 703 A.2d 1202, 1210 (Del. 1997); *Med. Ctr. v. Lougheed,* 661 A.2d 1055, 1060 (Del. 1995); *Koutoufaris v. Dick,* 604 A.2d 390, 400 (Del. 1992) (all holding that failure to contemporaneously object deprives opportunity to take corrective action, and therefore waives objection).

during closing arguments are strongly disfavored." 981 A.2d at 541 n.27. On appeal, this Court noted that it "has consistently required that any objections be made contemporaneously" and admonished the Superior Court for advising otherwise. *Id.*

Conduent argues (AB.43) that the court could have "consider[ed] the issue *sua sponte*" in any event. But such discretion extends only to "reason[s] for which it might have granted a new trial on motion of a party." Super. Ct. Civ. R. 59(c). Again, the failure to raise any issue contemporaneously—while a curative instruction could supply a remedy—should preclude *post hoc* reliance upon this as basis for the extraordinary remedy of a new trial.

C. Insurers' references to the Press Release cannot justify a new trial.

The court further erred by setting aside the verdict because Insurers "referred to [a] Press Release in the presence of the jury." Trial Op. 21. Conduent's contrary arguments (AB.45-47) are meritless.

To begin, Conduent overlooks that the questions Insurers asked in front of the jury about the Press Release followed the court's instructions. The Superior Court ruled pretrial that "on cross examination a Conduent witness might be asked:

> 'Isn't it true that the OAG referred to the settlement as one for Medicaid fraud after the Third Amended Petition was filed?'"

A0808. The question Insurers began to ask (before being interrupted by an objection) aligned: "[D]o you recall that the … day after the settlement agreement was

signed, the Texas Attorney General's Office issued a press release announcing --" A1069.

Nor can Conduent show any resulting prejudice. Conduent argues (AB.46) that, although this question was never finished and revealed nothing about the content of the Press Release, the question "prejudiced Conduent" because "counsel's trajectory was clear, especially to the court, observing the episode in real time." During the lengthy sidebar that ensued, however, Conduent never asserted that the jury could already deduce the "trajectory" of Insurers' question or that a curative instruction was warranted. A1072-76. Nor did the court during the sidebar find any damage resulting from the unfinished question. *Id.*

What is more, Conduent fails (AB.46-47) to rebut that Insurers had a non-hearsay purpose for referencing the Press Release. Conduent's witnesses testified that, to protect its government contracts business, Conduent did not want to "be seen as having settled a … pure fraud claim." A1069; A1041; *accord* AB.2. That highlights the question why Conduent was *unbothered* by the Press Release, which told the world that the OAG had recovered $235.9 million from Conduent in a "*Medicaid Fraud Settlement*" (A3730 (emphasis added)). *See Atkins v. State*, 523 A.2d 539, 548 (Del. 1987) (admitting recording "to prove the effect of those words upon [the listener] irrespective of their truthfulness"). Conduent's conceded silence in response to the Press Release undermines Conduent's claim that it insisted on the last-

minute inclusion of contract and negligence counts solely to avoid assertions that it had engaged in fraud, rather than to manufacture insurance coverage. A1073-74, 1305, 1408 (argument and testimony outside presence of jury).

Conduent contends (AB.46-47) that, regardless of Insurers' non-hearsay purpose, the Press Release still should have been excluded pursuant to Rule of Evidence 403. But Conduent does not argue that the references to the Press Release that were *actually made in front of the jury* were so prejudicial that they should have been excluded under Rule 403. In any event, for purposes of a new trial, it suffices to note that the benign references at issue do not come close to establishing the requisite "significant prejudice [that] denied [Conduent] a fair trial." *O'Riley*, 69 A.3d at 1010; *see Reinco*, 906 A.2d at 111-12.

Finally, the court violated Superior Court Civil Rule 59(c) by failing to give Insurers notice and an opportunity to be heard on the issue. Having not sought a new trial based on the Press Release, Conduent argues (AB.47) only that Insurers supposedly were heard when they "addressed the issue in their re-argument motion" *after* the court already ordered a new trial. But the court summarily denied reargument (A2243), and thereby bypassed "opportunity to be heard," Super. Ct. Civ. R. 59(c).

D. Insurers' references to coverage obligations cannot justify a new trial.

Conduent does not contest (AB.43-45) that the Superior Court failed to identify any specific testimony or argument regarding coverage obligations that it deemed objectionable (Trial Op. 17). That alone warrants reversing on this issue. *See Storey v. Camper*, 401 A.2d 458, 466 (Del. 1979) (reversing new trial where Superior Court failed to identify basis).

Nor can Insurers be faulted for referencing coverage obligations as they did. The jury instructions for collusion required Insurers to prove that "Conduent intended to manufacture insurance coverage that would not otherwise be available." A1656. The jury's task was *not* to determine whether coverage was required *legally*. Instead, the jury had to determine Conduent's *intent—i.e.*, to manufacture coverage that Insurers might otherwise deny. *Id.* To prove intent, Insurers needed to elicit testimony about the reasons why Insurers denied coverage, which in turn went to Conduent's motivations for allocating its settlement payment entirely to breach of contract. The *correctness* of Insurers' coverage positions was beside the point, and the court expressly permitted the very approach Insurers then took at trial. A0911-12.

Furthermore, Conduent's core trial theme was that "[a]ll [Insurers] did was deny, deny, deny, deny." A0905-06. Insurers were entitled to respond with testimony from their claims handler that she "believe[d] [Insurers' coverage positions] were correct," "believe[d] [Insurers] had reasons for making them," and "spen[t] … time analyzing the policy and … pleadings, and … reading the case law." A1469.

Conduent suggests (AB.45) that Insurers "could have limited their arguments to the duty to indemnify." But Conduent does not explain how Insurers could have done so without distinguishing between indemnification and defense costs, which the court's pretrial ruling precluded them from doing. A0713. At best, Conduent is resorting to after-the-fact nitpicking of the sort that should never warrant a new trial—lest new trials become commonplace.

Conduent similarly complains (AB.16) that it "could not tell the jury [its cooperation and consent] obligations were discharged when Insurers breached *their* duty to defend." Conduent is thus attempting to relitigate the court's motion *in limine* order precluding argument or testimony on its earlier ruling regarding defense costs. A0713. Because Conduent never argued that ruling warranted a new trial, the argument "is deemed waived and cannot be considered on appeal." *King Constr. v. Plaza Four Realty*, 976 A.2d 145, 155 (Del. 2009).

E. The jury's verdict was not inconsistent.

Conduent asserts (AB.20, 47-48) that the jury's verdict was "inconsistent," while stopping short of characterizing this as a "standalone ground for setting aside the verdict." As explained above (§ I), because it is not "inconceivable" that the jury rendered a consistent verdict—faulting Conduent but crediting the OAG's testimony (A3756) and Insurers' express efforts to avoid painting Texas with the same brush as Conduent (A1579)—the verdict poses no concerns whatsoever. *Grand Ventures v. Whaley*, 632 A.2d 63, 72 (Del. 1993).

CONCLUSION

This Court should reverse the grant of a new trial and judgment as a matter of law for Conduent and direct judgment for Insurers.

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