In the Circuit Court of Marshall County, West Virginia

AXIALL CORPORATION,
Westlake Chemical Corporation,
Plaintiffs,

v.

Case No. CC-25-2019-C-59
Judge Christopher C. Wilkes

NAT'L. UNION FIRE INS CO OF PITTSBURGH,
ACE AMERICAN INSURANCE COMPANY,
Great Lakes Insurance SE,
Navigators Management Co, Inc,
Allianz Global Risks US Ins Co ET AL,
Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING BAD FAITH CLAIMS

This matter came before the Court this 8th day of May, 2024. The Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company, by counsel, have filed Defendants' Motion for Summary Judgment Concerning Bad Faith Claims. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, Paul C. Fuener, Esq., and Jeffrey V. Kessler, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General

Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter "Defendants" or "Insurers"), by counsel, James A. Varner, Sr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds an insurance coverage dispute involving Defendants' alleged failure to cover Plaintiff Westlake Chemical Corporation (hereinafter "Plaintiff" or "Westlake") for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Defs' Mot., p. 3-4; Pls' Resp., p. 5-6. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling. This motion is specific to Plaintiffs' claim for bad faith under Official Code of Georgia Annotated (hereinafter "O.C.G.A.") § 33-4-6. *See* Def's Mot., p. 1 (*citing* Pls' Compl., p. 12); *see also* Pls' Resp., p. 1.

2. The thirteen insurance policies at issue in this matter (the "Policies") are all part of a commercial property insurance program that Plaintiff Axiall Corporation (hereinafter "Plaintiff" or "Axiall") purchased from the Insurers. *See* Defs' Mot., p. 3-4; *see also* Pls' Resp., p. 5.

3. Following the August 2016 incident, there was a lengthy claims adjustment and investigation process. *See* Pls' Resp., p. 28. Defendants proffered

during this process, they retained technical consultants, ED&T, Failure Analysis & Prevention, Inc., Telcordia, and Werlinger & Associates to provide technical assistance during the loss investigation and assessment of potential damage. *See* Reply, p. 9-10.

4. On August 28, 2016, the day after the incident, Plaintiffs retained Exponent to evaluate the cause of the tank car failure and conduct a damage assessment of the Natrium Plant. *See* Defs' Mot., p. 6; *see also* Pls' Resp., p. 6. In the months following, Exponent conducted testing as part of their damage assessment that Defendants did not learn of until 2021. *Id*.

5. Plaintiffs gave Defendants notice of the August 27, 2016 tank car rupture on or about August 30, 2016. *See* Pls' Resp., p. 7.

6. On September 2, 2016, the Natrium Plant returned to full operation and has continuously operated since that time. *See* Defs' Mot., p. 4.

7. On September 14th, 20th and 21st, 2016, Engineering Design & Testing, retained by Defendants' adjuster to provide technical assistance, made site visits. *See* Defs' Mot., p. 5 *see also* Pls' Resp., p. 7.

8. Throughout the remainder of 2016, the adjuster and ED&T requested information from Plaintiffs regarding the claim. *See* Defs' Mot., p. 5, 7.

9. In September 2017, Plaintiffs provided, for the first time, an itemized list of expenses incurred after the incident totaling $1.1 million. *See* Defs' Mot., p. 7.

10. In December 2017, after metallurgical analyses of samples had been completed, ED&T reported to the Defendants its estimate of costs to repair or replace plant equipment. *See* Pls' Resp., p. 10. This estimate had a low range number of $202 million and high range number of $404 million. *Id*. at 11. The Court notes this was done without the benefit of the photographs depicting corrosion pre-leak and the Exponent assessment information.

11. On January 18, 2018, Defendants issued a reservation of rights letter to Plaintiffs. *See* Defs' Mot., p. 2, 10 *see also* Pls' Resp., p. 13. This letter identified provisions of the Policies that were determined to likely impact coverage. *Id*. at 10.

12. On January 26, 2018, the adjuster issued a Request for Information that included items of information needed from Plaintiffs. *See* Defs' Mot., p. 10.

13. On March 27, 2018, Plaintiffs responded to Defendants' first (January 2018) reservation of rights via letter. *See* Pls' Resp., p. 14.

14. Plaintiffs' first claim submission above the Policy property damage deductible was submitted on May 22, 2018. *See* Defs' Mot., p. 2, 12 *see also* Pls' Resp., p. 13.

15. In November 2018, pre-incident photographs were produced. *See* Defs' Mot., p. 2, 5.

16. On December 10, 2018, Plaintiffs advised Defendants that they were in the process of supplementing the May 22, 2018 partial proof of loss. *See* Defs' Mot., p. 14.

17. On December 19, 2018, Defendants' technical consultants presented Defendants with their findings and opinions based on the testing and analyses performed in 2018, and concluded that the alleged damage to equipment, lagging, and banding was contamination from chlorine and other contaminates, such as sulfates, and/or corrosion, most of which they concluded pre-existed the release. *See* Reply, p. 10.

18. On January 28, 2019, after technical consultants had completed their review of these photographs and their investigation, the adjuster, subject to Defendants' ongoing reservation of rights, conveyed Defendants' denial of Plaintiffs' May 22, 2018 claim via letter. *See* Defs' Mot., p. 2, 15 *see also* Pls' Resp., p. 13-14.

19. In response (or in lieu of response) to the January 28, 2019 letter, on March 20, 2019, Plaintiffs submitted another sworn proof of loss, for damages in the amount of $278,505,078.00 gross of the Policy's $3,750,000.00 deductible. *See* Defs' Mot., p. 2, 16; *see also* Pls' Resp., p. 14.

20. On April 9, 2019, Defendants wrote to Plaintiffs, reiterating their coverage positions and denial communicated in the January 28, 2019 letter, explaining their view on exclusions and explaining that the documentation submitted in the March 20, 2019 claim was insufficient. *See* Defs' Mot., p. 2-3, 16.

21. Also on April 9, 2019, Defendants filed a lawsuit against Westlake in Delaware state court. *See* Pls' Resp., p. 15, 19.

22. On April 10, 2019, Plaintiffs filed their Complaint in the instant civil action. *See* Defs' Mot., p. 17.

23. On or about November 23, 2021, Defendants filed the instant Defendants' Motion for Summary Judgment Concerning Bad Faith Claims, arguing Defendants are entitled to summary judgment in their favor regarding Plaintiffs' bad faith claim because Plaintiffs can not and have not met their burden to prove all necessary requirements for their bad faith claim under Georgia law. *See* Defs' Mot., 3, 35.

24. On a prior day, Plaintiffs filed their Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Bad Faith Claims, arguing the Court should deny the Defendants' motion because Defendants cannot meet their burden to establish no genuine issues of material fact remain as to Westlake's bad faith claim that would preclude a jury trial. *See* Pls' Resp., p. 20. Specifically, Plaintiffs rely on Georgia case law to argue that the motion should be denied because this is a bad faith claim where the insurer's conduct is the subject of disputed issues of material fact. *Id*. at 21.

25. On or about January 18, 2022, Defendants filed their Reply in Support of Defendants' Motion for Summary Judgment Concerning Bad Faith Claims, averring Georgia courts properly and frequently grant summary judgment on bad faith claims where there is no evidence of unfounded reason for nonpayment or if the issue is close. *See* Defs' Reply, p. 4. Further, Defendants aver they had reasonable ground to deny Plaintiff's claim and Georgia law dictates that there can be no finding of bad faith where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact on the question of liability under the policy. *Id*. at 6.

26. Meanwhile, on December 17, 2021, Defendants filed a Notice of Appeal of three November 19, 2021 coverage summary judgment decisions[1] in this civil action.

27. On or about January 26, 2024, a Notice of Dismissal and Order of the West Virginia Supreme Court of Appeals was issued, dismissing the Insurers' appeal of the aforementioned November 2021 Partial Summary Judgment Orders concerning coverage. The Court held a Status Conference on February 7, 2024. The Supreme Court issued its Mandate, certifying its opinion as final on or about March 5, 2024.

28. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for summary judgment. The Court cites the West Virginia standard for summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of

summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id*. at 60.

CONCLUSIONS OF LAW

Defendants argue they are entitled to summary judgment in their favor regarding Plaintiffs' bad faith claim because Plaintiffs cannot and have not met their burden to prove all necessary requirements for their bad faith claim under Georgia law. *See* Defs' Mot., 3, 18, 35. Specifically, Defendants argue Plaintiffs have failed to prove the amount of covered damages, if any, and Plaintiffs did not comply with the statutory

requirement of making a proper demand at least 60 days prior to filing suit. *See* Reply, p. 3.

Also, Defendants argue Plaintiffs have not met their burden of proving that Defendants' denial of their claim was motivated by bad faith. *See* Reply, p. 2. Further, Defendants aver there cannot be a finding of bad faith when the insurer has *any reasonable ground* to contest the claim. Under Georgia law, summary judgment on a bad faith claim is proper when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close. *Id*. Defendants aver that under Georgia law, this rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith. *Id*.

On the other hand, Plaintiffs argue that whether Defendants acted in bad faith is a jury issue based on the "extensive" disputed facts. Further, Plaintiffs argue the sixty-day notice requirement was waived. Finally, Plaintiffs argue they have adequately proved damages as coverage has been established in this civil action. *See* Pl's Resp., p. 2. The Court will analyze each of the three requirements.

As an initial matter, this Court notes that although West Virginia uses the above standard of summary judgment review, this Court must apply Georgia law for all claims by the agreement of the parties. It is undisputed by the parties in this matter that the relevant policy(ies)[2] contain a valid choice-of-law provision setting forth that Georgia law is to apply to all claims against Defendants. The choice-of-law provision reads as follows, in its entirety: "Any dispute concerning or related to this insurance will be determined in accordance with the law of the State of Georgia. Any dispute between the Assured and this company over the terms of this Policy shall be subject to the United States of America jurisdiction". *See* Ord. Gr. Defs' Mot. to Dismiss Counts II (Hayseeds Damages), IV and V of Pl's Compl., 2/12/21, p. 6.

Plaintiffs allege a claim for bad faith under O.C.G.A. § 33-4-6 which provides:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer.

O.C.G.A. § 33-4-6 (West).

Georgia courts have consistently stated that to prevail on a bad faith claim under O.C.G.A. § 33-4-6, "the insured must prove: 1) that the claim is covered under the policy; 2) that a demand for payment was made against the insurer within 60 days prior to filing suit; and 3) that the insurer's failure to pay was motivated by bad faith." *Lavoi Corp. v. Nat'l Fire Ins. Of Hartford*, 666 S.E.2d 387, 391 (Ga. Ct. App. 2008); *Am. Reliable Ins. Co. v. Lancaster*, 849 S.E.2d 697, 702 (Ga. Ct. App. 2020)[3]. Because the statute is penal in nature, "its requirements are strictly construed." *Id.* Further, "the right to such recovery must be clearly shown." J. Stephen Berry, Ga. Prop. & Liab. Ins. Law § 12:9 (Aug. 2021 Update).

Under Georgia law, "[t]he insured bears the burden of proving bad faith, which is defined as any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." *Johnston v. Companion Prop. & Cas. Ins. Co*., 318 F. App'x 868 (11th Cir. 2009)(quoting *Ga. Farm Bureau Mut. Ins. Co. v. Williams*, 597 S.E.2d 430, 432 (Ga. Ct. App. 2004)). A bad faith penalty is not permissible where the insurer has "any reasonable ground to contest the claim and where there is a disputed question of fact". *Id*. (quoting *S. Fire & Cas. Ins. Co. v. Nw. Ga. Bank*, 434 S.E.2d 729, 730 (Ga. Ct. App. 1993)).

Georgia courts have long recognized that statutes such as O.C.G.A. § 33-4-6

that act as a penalty are disfavored as a matter of law. *See Fortson v. Cotton States Mut. Ins. Co.*, 308 S.E.2d 382, 385 (Ga. Ct. App. 1983) (discussing 33-4-6 and stating: "As this provision is a penalty, which is not favored at law, the right to recovery must be clearly shown."). "[D]ue to the high standard to prove an insurer's conduct violated O.C.G.A. § 33-4-6", Georgia law, as compared to other jurisdictions, "makes it relatively difficult for insureds to state a claim for bad faith in first-party claims." J. Stephen Berry, Ga. Prop. & Liab. Ins. Law § 12:1 (Aug. 2021 Update).

Under Georgia law, while the issue of whether an insurer acted in bad faith can go to the jury under some circumstances, "when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties." *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App. 2021), *reconsideration denied* (July 13, 2021) (emphasis in original) (citation omitted) (affirming summary judgment in favor of insurer on insured's bad faith claim); *see also Safeco Ins. Co. of Indiana v. Alford*, No. 4:11-CV-0043-HLM, 2012 WL 13028900, at *12 (N.D. Ga. Feb. 17, 2012) (quoting language above and granting summary judgment in favor of insurer on insured's bad faith claim); *Cable Broadband & Telecomms., LLC v. Depositors Ins. Co.*, No. 1:16-CV-04006-ELR, 2018 WL 10647207, at *22 (N.D. Ga. Feb. 28, 2018) (granting defendant's motion for summary judgment as to bad faith claim where no evidence in record to support contention insurer acted in bad faith during its investigation); *Fuller-Dorce v. State Farm Fire & Cas. Co.*, No. 1:15-CV-2197-TCB, 2016 WL 7887998, at *4 (N.D. Ga. Sept. 20, 2016) ("Courts grant summary judgment to insurers on bad faith claims where the issue of liability was close.") (citation omitted); *see also Am. Safety Indem. Co. v. Sto Corp.*, 802 S.E.2d 448, 457 (Ga. Ct. App. 2017) (reversing trial court and finding that insurer was entitled to summary judgment as to plaintiff's bad faith claim, reasoning that "the

question of whether the previous reservations of rights were still effective had not been squarely answered in Georgia, and it may have appeared from a review of ASIC's records that reservation of rights letters had been subsequently sent out once ASIC agreed to cover the litigation"); *Gen. Star Indem. Co. v. Triumph Hous. Mgmt., LLC*, No. 1:18-CV-1770-TCB, 2019 WL 3521953, at *3 (N.D. Ga. Apr. 30, 2019) (stating that "where there is no reasonable basis for [a bad faith] claim, no bad faith exists as a matter of law").

"This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith." *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017).

Defendants argue Plaintiffs cannot meet their burden to prove all three elements of O.G.C.A. § 33-4-6. *See* Def's Mot., p. 6, 18. Under Georgia law, Defendants are entitled to summary judgment if even one requirement is not met. *See**Am. Reliable Ins. Co. v. Lancaster*, 356 Ga. App. 854, 861, 849 S.E.2d 697, 702 (2020)(finding no claim of bad faith when Plaintiff could not prove the first element); ***see also*** *Turner v. CMFG Life Ins. Co.,* No. 23-11387, 2023 WL 5527748, at *2 (11th Cir. Aug. 28, 2023)("An insurance company that fails to make a payment on a covered claim within sixty days of a demand faces a penalty only if its nonpayment was motivated by bad faith. *LavoiCorp. v. Nat'l FireIns. of Hartford*, 293 Ga. App. 142, 146 (2008); *see* O.C.G.A. § 33-4-6(a)."). The Court will take up the issues in turn.

Establishment of Covered Loss

First, this Court analyzes the first requirement, whether the Plaintiffs have established covered loss. To prevail on a claim for bad faith under O.G.C.A. § 33-4-6, the insured must prove that the claim is covered under the policy. *See Lavoi*, 666 S.E.2d at 391; *Bay Rock Mortg. Corp. v. Chicago TitleIns. Co.*, 648 S.E.2d 433, 435

(Ga. Ct. App. 2007); *Morris v. Ins. Co. of North America*, 151 S.E.2d 813, 814 (Ga. Ct. App. 1966). Georgia law places the burden on the insured to establish their claimed loss or damage is actually covered. *See Reserve Life Ins. Co. v. Davis*, 164 S.E.2d 132, 133 (Ga. 1968). This includes the burden to "prove the amount of such loss." *Id*.

Defendants argue this Court's November 22, 2021 Order from the undersigned, and a discovery order entered by Discovery Commissioner Judge Clawges illustrate that Plaintiffs have yet to prove their claim for corrosion damages is covered (rather than being a claim outside the Policy period), and that Plaintiffs have not met their burden of showing the amount of claimed loss, respectively. *See* Def's Mot., p. 19.

On the other hand, Plaintiffs argue this element has already been resolved in favor of coverage, because in this Court's November 2021 orders on the parties' coverage motions for summary judgment, this Court ruled in favor of Plaintiffs on the Defendants' faulty workmanship, corrosion and pollution/contamination exclusions defenses, three exclusions the Defendants relied upon to deny coverage here. *See* Pl's Resp., p. 2.

Because Defendants are entitled to summary judgment if even one requirement is not met, the Court needs not address Defendants' arguments with regard to Plaintiffs' establishment of covered loss in this Order. *See Am. Reliable Ins. Co. v. Lancaster*, 356 Ga. App. 854, 861, 849 S.E.2d 697, 702 (2020)(finding no claim of bad faith when Plaintiff could not prove the first element); *see also Turner v. CMFG Life Ins. Co.,* No. 23-11387, 2023 WL 5527748, at *2 (11th Cir. Aug. 28, 2023)("An insurance company that fails to make a payment on a covered claim within sixty days of a demand faces a penalty only if its nonpayment was motivated by bad faith. *LavoiCorp. v. Nat'l FireIns. of Hartford*, 293 Ga. App. 142, 146 (2008); *see* O.C.G.A. § 33-4-6(a).").

Statutory Requirement of Demand 60 Days Prior to Suit

Next, this Court analyzes the second requirement, whether the complied with the statutory requirement of making a proper demand at least 60 days prior to filing suit.

To prevail on their bad faith claim, the relevant statute requires Plaintiffs to prove that a demand for payment was made against the insurer within 60 days prior to filing suit. *Lavoi*, 666 S.E.2d at 391; *Lancaster*, 849 S.E.2d at 702; *Johnston*, 318 F. App'x at 868. "[T]he purpose of the statute's demand requirement is to adequately notify an insurer that it is facing a bad faith claim so that it may make a decision about whether to pay, deny or further investigate the claim within the 60-day deadline." *Safeco Ins. Co. of Indiana v. Alford*, No. 4:11-CV-0043-HLM, 2012 W 13028900, at *11 (N.D. Ga. Feb. 17, 2012) (quoting *Primerica Life Ins. Co. v. Humfleet*, 458S.E.2d 908, 910 (Ga. Ct. App. 1998)). "[T]o serve as a bad faith demand, the demand must be made at a time when immediate payment is due." *Id.; see also Thompson v. Homesite Ins. Co. ofGA*, 812 S.E.2d 541, 545 (Ga. Ct. App. 2018). Thus, "demands made while an insurer has yet to complete its investigation or receive formal evidence of a loss do not qualify for purposes ofO.C.G.A. § 33-4-6." *Safeco Ins. Co.*, 2012 WL 13028900, at *11. Further, the demand is not sufficient "if the insurer has additional time left under the terms of the insurance policy in which to investigate or adjust the loss and therefore has no legal duty to pay at the time the demand is made." *In re Covington Lodging Inc.*, No. 19-54789-WLH, 2021 WL 150413, at *8 (Bankr. N.D.Ga. Jan. 15, 2021) ("When the prerequisites of the policy are not satisfied, no payment is due and no bad faith penalties can arise by virtue of O.C.G.A. § 33-4-6.").

While no particular language is required to constitute a demand under Georgia law, "the language must be sufficient to alert the insurer that bad faith is being asserted." *Safeco Ins. Co.*, 2012 WL 13028900, at *11; *see also Thompson*, 812 S.E.2d at 545. A proof of loss, standing alone, is not a sufficient demand for payment under the

plain provisions of the statute. *Safeco Ins. Co.*, 2012 WL 13028900, at *11 (that neither insured's claim under policy nor insured's counterclaim to insurer's complaint for declaratory judgment qualified as a demand for purposes of O.C.G.A.§ 33-4-6; because there was no evidence to indicate insureds made proper demand on insurer as required under O.C.G.A. § 33-4-6, insureds could not recover bad faith damages under the statute); *see also Guarantee Reserve Life Ins. Co. of Hammond v. Norris*, 134 S.E.2d 774, 775 (Ga. 1964); *Blue Cross & Blue Shield of Georgia/Atlanta, Inc. v. Merrell*, 170 Ga. App. 86 (Ga. Ct. App. 1984)(reversing award of bad faith penalties and holding that "the mere submission of the bills would not necessarily constitute an actual demand for payment within the meaning of the statute"). "[I]t is critical that the demand made of the insurer not only express displeasure with the insurer's handling of the claims process but that such demand actually alert the insurer that the insured plans to take legal action for bad faith if the claim is not paid." *Thompson*, 812 S.E.2d at 545 (finding that insured's statements to insurer that she was not happy with its handling of her claim and her complaint filed with the Georgia insurance commissioner, which required a response from her insurer, were insufficient to alert the insurer that she was considering filing a bad faith claim).

Georgia courts have held that "a failure to wait at least 60 days between making demand and filing suit constitutes an ***absolute bar*** to recovery of a bad-faith penalty and attorney fees under this statute." *Merrell*, 316 S.E.2d at 548–49; *Norris*, 134 S.E.2d at 775 (emphasis added) (reversing award of bad faith penalties and attorney's fees where insured's demand for payment was made less than 60 days before suit filed).

Plaintiffs concede that the Defendants commenced litigation on April 9, 2019 by filing a declaratory judgment action in Delaware and on April 10, 2019, Plaintiffs filed its Complaint in the instant civil action. *See* Pls' Resp., p. 19, 25. Defendants' argument

here is simple. Defendants contend Plaintiffs did not make a sufficient demand under O.C.G.A.§ 33-4-6 at least 60 days prior to filing suit, and therefore, they cannot prevail on their bad faith claim. *See* Def's Mot., p. 21.

Further, Defendants contend that Plaintiffs implicitly concede they did not meet this requirement by arguing Defendants waived it. *Id*. Defendants aver that, specifically, Plaintiffs claim that by filing a declaratory judgment action against Westlake in Delaware (the day before Plaintiffs filed this action) regarding their coverage obligations under the Policy, Defendants waived the 60-day pre-suit notice requirement applicable to bad faith claims brought under O.G.C.A. § 33-4-6. *Id*. (citing Compl. at ¶ 71).

Defendants allege that even assuming *arguendo* Defendants did waive the statute's 60-day notice requirement period by filing a complaint for declaratory judgment, this does not waive the requirement that a demand must actually be made by Plaintiffs. *Id*. (citing *Safeco*, 2012 WL 13028900, at *11) ("Although . . . some courts have found that an insurer waives the sixty-day notice requirement of O.C.G.A. § 33-4-6 when the insurer files a complaint for declaratory judgment seeking to relieve itself from liability under an insurance policy, those cases do not stand for the proposition that a lender waives the actual demand requirement when it files such a complaint."). In *Safeco*, the court found that because there was no evidence indicating that insureds ever made a proper demand on the insurer as required under O.C.G.A. § 33-4-6, the insured could not recover bad faith damages under that statute. *Id.* The court held that neither the insured's claim under the policy nor its counterclaim in response to insurer's complaint for declaratory judgment constituted a proper demand. *Id.*; *see also Howell v. S. Heritage Ins. Co.*, 448 S.E.2d 275, 276 (Ga. Ct. App. 1994) (holding that because insured's counterclaim seeking penalties for bad faith refusal to pay his claim was filed several months prior to his demand letter under the statute, demand was not proper

under O.C.G.A. § 33-4-6, even though insured later amended his complaint to assert a bad faith claim).

On the other hand, Plaintiffs argue the demand requirement was either satisfied or waived. *See* Pls' Resp., p. 23. Plaintiffs argue the demand was waived by Defendants when they chose to commence litigation rather than continue the investigation and adjustment in the ordinary course. *Id*. at 25. Plaintiffs urge this Court not to follow *Safeco*, which it describes as an outlier case, and instead argues that Georgia case law holds that where an insurer initiates litigation by preemptively filing a declaratory judgment action seeking a ruling that there is no coverage for the policyholder's claim, the insurer waives, the presuit notice requirement. *Id.* at 24 (citing *Leader National Insurance Company v. Kemp & Son, Inc*., 375 S.E.2d 231 (Ga. Ct. App 1988)).

In *Leader National Insurance Company v. Kemp & Son, Inc*., 375 S.E.2d 231 (Ga. Ct. App 1988), the insurer had filed a declaratory judgment action seeking a finding of no coverage of liability, before the policyholder had filed its own claims including a bad faith claim against the insurer. The Georgia Court of Appeals found the demand requirement of O.C.G.A. § 33-4-6 was waived when the insurer filed its declaratory judgment action:

> The purpose of the 60-day waiting period, which is to protect the insurer by giving it a reasonable time to investigate the claim, examine the facts, and determine its liability, is no longer served when the insurer files suit seeking to relieve itself of liability under the policy…Consequently, since [the insurer] filed a declaratory judgment action to determine its duty to defend its insured under the policy before initiation of the case sub judice, it waived the 60-day notice requirement under O.C.G.A. § 33-4-6.

Id. at 234.

Plaintiffs argue *Kemp & Son*, as a Court of Appeals decision, represents

controlling Georgia law. *See* Pls' Resp., p. 25. Plaintiffs also cite *Owners Insurance Co. v. White*, 2014 WL 12461048 (N.D. Ga. Apr. 9, 2014) and *Allied Prop. & Cas. Co. v. Bed Bath & Beyond, Inc*., No. 1:12-CV-1265-RWS, 2013 WL 425085 (N.D. Ga. Feb. 4, 2013), for its proposition that the insurer waives the demand requirement under Georgia law by filing a preemptive declaratory judgment action. *See* Pls' Resp., p. 24-25.

The Court has reviewed the relevant case law. *Safeco*, which is a federal court decision from the Northern District of Georgia – Rome applying Georgia law, discussed this issue and recognized and cited *Kemp and Son*. The Court, in *Safeco*, stated:

> Although Defendants correctly pointed out that some courts have found that an insurer waives the sixty-day notice requirement of O.C.G.A. § 33-4-6 when the insurer files a complaint for declaratory judgment seeking to relieve itself from liability under an insurance policy, those cases do not stand for the proposition that a lender waives the actual demand requirement when it files such a complaint. *Lender Nat'l Ins. Co. v. Kemp & Son, Inc.,* 189 Ga. App. 115, 118, 375 S.E.2d 231, 234 (1988); *Sawyer v. Citizens & S. Nat'l Bank*, 164 Ga. App. 177, 184, 296 S.E.2d 134, 140 (1982).

Safeco Ins. Co. of Indiana v. Alford, No. 4:11-CV-0043-HLM, 2012 WL 13028900, at *11 (N.D. Ga. Feb. 17, 2012).

Based on the foregoing, the Court notes and concludes that because of the differing case law in Georgia concerning waiver, including the delineation of a "notice" or "demand" within the statute, and because Defendants are entitled to summary judgment if even one requirement is not met, the Court needs not make a conclusion regarding waiver here. *See Am. Reliable Ins. Co. v. Lancaster*, 356 Ga. App. 854, 861, 849 S.E.2d 697, 702 (2020).

Bad Faith Motivation of Denial of Claim

Finally, the Court addresses the last requirement, whether Defendants' denial of Plaintiffs' claim was motivated by bad faith. Under Georgia law, bad faith "is defined as

any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." *Georgia Farm Bureau Mut. Ins. Co. v. Williams*, 597 S.E.2d 430, 432 (Ga. Ct. App. 2004); *Johnston v.Companion Prop. & Cas. Ins. Co.*, 318 F. App'x 861, 868 (11th Cir. 2009). A finding of bad faith is "not authorized where the insurance company has ***any reasonable ground*** to contest the claim and where there is a disputed question of fact [on the question of liability under the policy]." *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App.2021), *reconsideration denied* (July 13, 2021) (brackets in original) (emphasis added) (internal citation omitted); *see also Johnston*, 318 F. App'x at 868 (finding that insured failed to prove the third element of his bad faith claim where insurer had "a legitimate, although ultimately unsuccessful, challenge to Johnston's claim"; insurer's "reason for denying coverage was not so unbelievable as to sink below the minimal threshold of *any* reasonable ground to contest the claim"). Even if an insurer's interpretation of a policy provision is erroneous, that does not mean it is necessarily unreasonable. *King v. Public Savings Life Ins. Co.*, 290 S.E.2d 134 (1980).

As the Court stated above, under Georgia law, while the issue of whether an insurer acted in bad faith can go to the jury under some circumstances, "when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties." *Montgomery*, 859 S.E.2d at 135 (emphasis in original) (citation omitted) (affirming summary judgment in favor of insurer on insured's bad faith claim); *see also Safeco*, 2012 WL 13028900, at *12 (internal citations and quotations omitted) (quoting language above and granting summary judgment in favor of insurer on insured's bad faith claim); *Cable Broadband & Telecommunications, LLC v.Depositors Ins. Co.*, No. 1:16-CV-04006-ELR, 2018 WL 10647207, at *22 (N.D. Ga. Feb. 28, 2018) (granting defendant's motion for summary

judgment as to bad faith claim where no evidence in record to support contention insurer acted in bad faith during its investigation); *Fuller-Dorce v.State Farm Fire & Cas. Co.*, No. 1:15-CV-2197-TCB, 2016 WL 7887998, at *4 (N.D. Ga. Sept. 20, 2016) ("Courts grant summary judgment to insurers on bad faith claims where the issue of liability was close.") (citation omitted). Importantly, "[t]his rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith." *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017).

Defendants argue they had reasonable grounds to deny Plaintiffs' claim. *See* Def's Mot., p. 23. Plaintiffs, on the other hand, argue whether Defendants' refusal to pay said claim was in bad faith is "heavily disputed" and is, thus, a question of fact for the jury. *See* Pls' Resp., p. 1, 4, 27-31. Plaintiffs contend Defendants have not met their burden on summary judgment to show there are no genuine issues of material fact remaining with regard to the instant bad faith claim. *Id*. at 21.

The Court has reviewed the relevant case law, including the cases cited by Plaintiffs in their Response to support their contention that the issue of whether or not Defendants' conduct constitutes bad faith should be for the jury. The Court notes Plaintiffs' aforementioned proffered cases were unpublished federal cases, while the case law establishing that penalties against an insurer for bad faith denial of a claim under OCGA § 33-4-6 are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact are Court of Appeals of Georgia decisions, which Plaintiffs themselves argue represent controlling Georgia law. *See* Pls' Resp., p. 25.

The Court's review of this case law also illustrated that the general rule is that the issue of bad faith is for the jury. The Georgia Court of Appeals, in *Bituminous Cas.*

Corp. v. Mowery, a case cited by Plaintiffs, set forth:

> The question of good or bad faith of the insurer is for the jury. Government Employees Ins. Co. v. Hardin, 108 Ga.App. 230, 235, 132 S.E.2d 513. Accord: Pearl Assurance Co. v. Nichols, 73 Ga.App. 452, 455, 37 S.E.2d 227; Key Life Ins. Co. v. Mitchell, 129 Ga.App. 192, 195, 198 S.E.2d 919.

Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45, 53, 244 S.E.2d 573, 579 (1978).

In *Mowery*, the jury was charged with determining whether "the defendant insurance company had any reasonable ground for contesting the claim of (the plaintiff)". *Id*.

However, given this general rule, it is also black letter law[4] in Georgia that penalties against an insurer for bad faith denial of a claim under OCGA § 33-4-6 are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact [on the question of liability under the policy]. Ordinarily, the question of bad faith is one for the jury. However, when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties. This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based on bad faith. *Lee v. Mercury Ins. Co. of Ga.*, 343 Ga. App. 729, 748 (4), 808 S.E.2d 116 (2017) (citation and punctuation omitted; emphasis in original)(cited by *Montgomery v. Travelers Home & Marine Ins. Co.*, 360 Ga. App. 587, 591–92, 859 S.E.2d 130, 134–35 (2021)).

Here, the event underlying this claim involved a large-scale incident and there was a lengthy claims adjustment and investigation process. *See* Pls' Resp., p. 28, 32. Plaintiffs argue that the Defendants didn't raise any exclusions or any other defenses to coverage at any time within the first sixteen months of this process and that upon

receiving a $220 million to $404 million loss estimate, the Defendants immediately and drastically changed course – retaining outside counsel, retaining enhanced technical experts, and by issuing a reservation of rights letter asserting exclusions Plaintiffs' claim could be barred under. *Id*. at 28-29 *see also* Pls' Resp., p. 8-10. However, Defendants allege what Plaintiffs omit is that during this time Plaintiffs intentionally withheld documents and information pertinent to the evaluation of damages. *See* Defs' Mot., p. 24. Defendants state this information includes photographs illustrating pre-release corrosion and the results of multiple Exponent metallurgists' assessments (completed shortly after the incident) concluding there was no corrosion initiating or propagating as a result of the chlorine release. *Id*. at 25. With regard to Exponent's assessments, the Court notes again that Exponent was engaged the day after the incident to assess damage, and in the months following in 2016, Exponent conducted testing as part of their damage assessment that Defendants did not learn of until 2021. *Id*. at 6. Further, the Court notes again that in November 2018, the pre-incident photos were produced. *Id.* at 2, 5. The Court concludes that the investigation was ongoing, and the Court finds evidence of reasonableness of this continued investigation, especially in light of uncovering evidence of pre-event damage to the Plant.

Plaintiffs also cite to their experts, to support the argument that the Defendants' handling of Plaintiffs' claim was not consistent with good-faith claims-handling standards, and that Defendants did not adhere to accepted insurance industry customs. Pls' Resp., p. 30-31.

The Court considers, however, the evidence shows the condition of the Plant prior to the leak, and therefore would aid in Defendants' handling of the investigation of the claim to determine what amount of damages Axiall actually suffered versus what was pre-existing. Therefore, in the course of this investigation, that creates a

reasonable question as to Defendants' liability in regard to coverage. "This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith." *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017). Further, the Court considers that on March 20, 2019, Plaintiffs submitted another sworn proof of loss, for damages in the amount of $278,505,078.00 gross of the Policy's $3,750,000.00 deductible. *See* Defs' Mot., p. 2, 16; *see also* Pls' Resp., p. 14. Given the fact that in September 2017, Plaintiffs provided an itemized list of expenses incurred after the incident totaling $1.1 million, a claim for damages in the amount of $278,505,078.00 gross of the Policy's $3,750,000.00 deductible would warrant further investigation. This Court cannot conclude that it was unreasonable to continue investigating. This Court finds this extreme variation in the amount claimed made it reasonable for Defendants to continue their investigation. Given all of the foregoing, the Court finds Defendants had legitimate, reasonable grounds to deny the claim in the application of various exclusions after a good faith investigation. *See* Defs' Mot., p. 23-24. As detailed above, the investigation was lengthy, but a thorough investigation is evidence of a good faith investigation. Applying Georgia law, this Court must preclude the claim for bad faith given this Court's finding of Defendants having a (any) reasonable ground to deny the claim.

Moreover, the Court will examine some of the other considerations proffered in the briefing. Around December 2017 is when Plaintiffs allege that Defendants received a large estimate from ED&T and abruptly changed course. Much of this expense surrounded lagging and banding. Defendants, however, proffer that as of December 2016, Exponent concluded that monitoring of the plant was all that was required and that replacement of all lagging and electrical equipment that had been exposed to the

plume would not be required, and that Plaintiffs did not tell Defendants, the adjuster, or any of the technical consultants about the existence of this comprehensive testing and conclusions for nearly five years (after a motion to compel was litigated in 2021). *See* Def's Mot., p. 25. Likewise, Defendants proffer that it wasn't until November 8, 2018, that it was provided photographs depicting the corroded nature of the plant equipment, banding, and lagging. *Id.* Defendants aver they were previously told such photographs from before the incident did not exist. *Id*. ED&T's preliminary rough order of magnitude which included the range of figures described above was made without the benefit of the pre-release photographs and Exponent report.

ED&T's preliminary rough order of magnitude assumed replacement of all lagging, banding, instrumentation, and electrical distribution equipment within the reported plume zone. *Id.* at 26. Given these circumstances, the court cannot conclude that Defendants changed course solely based upon ED&T's estimate. Instead, given the circumstances, the court must conclude that Defendants had reasonable ground to take the position they did. Defendants had reasonable grounds to take the position that certain exclusions applied. The fact that this Court granted Defendants' motion for summary judgment concerning asbestos exclusions supports at least a reasonable basis to deny coverage for any sum relating to asbestos. And while this Court denied Defendants' remaining motions for summary judgment regarding exclusions, that does not prevent the Court finding there was a reasonable basis to deny Plaintiffs' claim. *See Schoen v. Atlanta Cas. Co.*, 200 Ga. App. 109, 407 S.E.2d 91 (1991). Additionally, this Court's Order concerning the corrosion exclusion did not decide, as a matter of law, whether corrosion damage pre-existed the chlorine release. *See* Reply, p. 2, 9.

Further, the Court considers Defendants' thorough investigation, including the use of retained technical consultants. "The advice of an independent consultant may

provide an insurer with a reasonable ground to contest an insured's claim under the policy, entitling the insurer to summary judgment on a claim for bad faith penalties". *Montgomery v. Travelers Home & Marine Ins. Co.*, 360 Ga. App. 587, 592, 859 S.E.2d 130, 135 (2021). Georgia courts have held: As a matter of law, it is reasonable for an insurer to deny a claim based on such advice unless the advice is patently wrong and the error was timely brought to the insurer's attention, *Haezebrouck v. State Farm Mut. Automobile Ins. Co.*, 216 Ga. App. 809, 811 (3), 455 S.E.2d 842 (1995), or unless the advice is "in the nature of mere pretext for an insurer's unwarranted prior decision to [deny the claim]." *Wallace v. State Farm Fire & Cas. Co.*, 247 Ga. App. 95, 97 n.6, 539 S.E.2d 509 (2000) (cited by *Montgomery v. Travelers Home & Marine Ins. Co.*, 360 Ga. App. 587, 592, 859 S.E.2d 130, 135 (2021)).

Defendants proffered they retained ED&T, Failure Analysis & Prevention, Inc., Telcordia, and Werlinger & Associates to provide technical assistance during the loss investigation and assessment of potential damage. *See* Reply, p. 9-10. On December 19, 2018, these consultants presented Defendants with their findings and opinions based on the testing and analyses performed in 2018, and concluded that the alleged damage to equipment, lagging, and banding was contamination from chlorine and other contaminates, such as sulfates, and/or corrosion, most of which they concluded pre-existed the release. *Id*. at 10.

Finally, the Court considers that no Georgia court has interpreted the specific policy provisions at issue. *See* Reply, p. 13. *See State Farm Mut. Auto. Ins. Co. v. Harper*, 188 S.E.2d 813,817 (Ga. Ct. App. 1972) ("Where questions of law as to the proper construction of an insurance policy provision have not been decided by the courts of Georgia and are not of easy solution, then a finding of damages for bad faith and attorney's fees are not authorized."); *McKeel v. State FarmMut. Auto. Ins. Co.*, 619

F. App'x 849, 851 (11th Cir. 2015) ("Without any Georgia law to the contrary, we are hard-pressed to conclude that State Farm could have acted in bad faith or negligently by equally representing its insureds."); *Schoen v. Atlanta Cas. Co.*, 407 S.E.2d 91, 92(Ga. Ct. App. 1991) (affirming trial court's grant of summary judgment as to insured's bad faith claim, reasoning: "[O]ur courts have consistently held that no bad faith exists where there is a doubtful question of law involved. . . . [T]his case is one of first impression in Georgia in itsinterpretation of the specific language, and presented a close question as to the construction to be given this language") (internal citations and quotations omitted).

The Court has not been presented with any Georgia court opinion construing the specific policy provisions at issue, and the Court's own research of Georgia law also did not reveal such an opinion. *See* Reply, p. 13.

For all of these reasons, the Court finds that Defendants had reasonable grounds to take the position that certain exclusions applied. Accordingly, Defendants' Motion for Summary Judgment Concerning Bad Faith Claims must be GRANTED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Bad Faith Claims is hereby GRANTED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

Enter: May 8, 2024

[1]On November 19, 2021, the Court denied the Insurers' Coverage Summary Judgment Motions and granted Westlake's cross motions on the "corrosion," "faulty workmanship," and "contamination/pollution" exclusions.

[2] The Court notes there are thirteen (13) policies at issue in the instant litigation, collectively referred to

as “Policy” or “Policies” by the parties.

[3] Plaintiffs agree the policyholder must prove these three elements. *See* Pls’ Resp., p. 1, 21.

[4] Indeed, the Court notes that a headnote on Westlaw states that: Statutory penalties against an insurer for bad faith denial of an insurance claim are not authorized where the insurer has any reasonable ground to contest the claim and where there is a disputed question of fact on the question of liability under the policy. Ga. Code Ann. § 33-4-6. *Montgomery v. Travelers Home & Marine Ins. Co.*, 360 Ga. App. 587, 859 S.E.2d 130 (2021).

/s/ Christopher C. Wilkes
Circuit Court Judge
2nd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.