**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| VENTECH SOLUTIONS, INC., | ) | |
| | ) | |
| Plaintiff/Counterclaim Defendant, | ) | |
| | ) | |
| v. | ) | |
| | ) | C.A. No. N20C-06-014 MMJ CCLD |
| CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NUMBER ESG02319546, | ) | **UNDER SEAL** |
| | ) | |
| Defendants/Counterclaim-Plaintiffs. | ) | |

Submitted: October 11, 2022
Decided: January 4, 2023

On Defendants' Motion for Summary Judgment
**GRANTED IN PART AND DENIED IN PART**

On Plaintiffs' Cross-Motion for Partial Summary Judgment
**GRANTED IN PART AND DENIED IN PART**

On Defendants' Motion to Strike
**DENIED AS MOOT**

**OPINION**

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, DE, Selena J. Linde, Esq. (*pro hac vice*), Michael T. Sharkey, Esq. (*pro hac vice*) (Argued), Catherine J. Del Prete, Esq. (*pro hac vice*), Perkins Coie LLP, Washington, D.C., *Attorneys for Plaintiff/Counterclaim Defendant Ventech Solutions, Inc.*

Robert J. Katzenstein, Esq., Smith Katzenstein & Jenkins LLP, Wilmington, DE, Stephen O'Donnell, Esq. (*pro hac vice*) (Argued), Elissa L. Isaacs, Esq. (*pro hac vice*), McCullough P.C., Chicago, IL, *Attorneys for Defendants/Counterclaim Plaintiffs Certain Underwriters at Lloyd's of London Subscribing to Policy Number ESG02319546*

**JOHNSTON, J.**

## FACTUAL AND PROCEDURAL CONTEXT

This is an insurance coverage dispute regarding a Technology Errors and Omissions policy. Plaintiff and Counterclaim Defendant Ventech Solutions, Inc. will be referred to as "Ventech." Defendant and Counterclaim Plaintiff Certain Underwriters at Lloyd's of London will be referred to as "Underwriters."

Ventech purchased a Technology Errors and Omissions insurance policy from Underwriters in 2015. The initial policy covered the time period from August 21, 2015 to August 21, 2016. Ventech renewed the policy in August 2016, and again in August 2017. Ventech's insurance policy from the 2017 to 2018 policy period will be referred to as the "Policy."

On July 21, 2017, Ventech filed suit against the Ohio Attorney General's Office ("AGO") alleging claims arising out of a 2012 contract to develop a new collections-enforcement system for the AGO. On the same day, the AGO filed suit against Ventech alleging breach of contract, negligent misrepresentation, and fraudulent inducement. The AGO alleged Ventech had failed to deliver an operational new collections-enforcement system. The AGO sought damages of no

less than $12 million. The suit the AGO filed against Ventech is known as the "Underlying Litigation."

Ventech provided Underwriters with notice and a copy of its complaint against the AGO no later than August 6, 2018. On November 26, 2018, Underwriters denied coverage, claiming Ventech should have provided notice during the 2016 to 2017 policy period when the AGO filed suit against Ventech. The letter also stated that the Continuous Cover clause in the policy was not applicable. Underwriters allege the denial was based on a phone call where Ventech said it considered whether the 2016 to 2017 policy applied. Underwriters contend Ventech made the conscious decision not to notify Underwriters during the 2016 to 2017 policy period. Underwriters also allege that Ventech misrepresented facts or circumstances in the renewal application.

After the AGO and Ventech tried the case, the Ohio Court of Claims issued an interim decision concluding that Ventech had breached its contract with the AGO by: (1) failing to deliver a working collections-enforcement system; and (2) not substantially performing its contractual obligations.[1] The judge requested

[1] *Ventech Solutions, Inc. v. Ohio Atty. Gen.*, 2019 WL 6902685, at *15–16 (Ohio Ct. Cl.).

further briefing prior to awarding damages.[2] After additional briefing, the Court issued its final decision awarding $4,973,403.88 in damages under the contract.[3]

Both Ventech and the AGO appealed the decision of the Ohio Court of Claims. Ventech argued that the Liquidated Damages clause in the contract limited the AGO's recovery to $4,973,403.88. On or about February 15, 2021, Ventech and the AGO settled the dispute. As part of the settlement, Ventech agreed to pay $4,979,300.84 to the AGO.

On June 1, 2020, Ventech filed the instant action against Underwriters, alleging breach of contract and bad faith. It also seeks a judicial declaration of the parties' rights and obligations as to coverage under the Policy for the Underlying Litigation. On November 6, 2020, Underwriters filed its answer and counterclaim, seeking a declaratory judgment and rescission of the Policy. On June 14, 2022, Underwriters filed its Motion for Summary Judgment. Ventech filed its Motion for Partial Summary Judgment on the same day. On October 12, 2022, the Court heard oral argument concerning the cross-motions.

## SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a

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[2] *Id.* at *16.

[3] *Ventech Solutions, Inc. v. Ohio Atty. Gen.*, No. 2017-00628JD, at 8–9 (Ohio Ct. Cl. Jan. 17, 2020).

matter of law.[4] All facts are viewed in a light most favorable to the non-moving party.[5] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[6] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[7] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[8]

Delaware Superior Court Civil Rule 56(h) states:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

However, where the moving parties continue to argue disputed facts, "the standard of review on cross-motions for summary judgment is equivalent to the situation where one party moves for summary judgment."[9]

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[4] Super. Ct. Civ. R. 56(c).
[5] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[6] Super. Ct. Civ. R. 56(c).
[7] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[8] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[9] *Spivey v. USAA Cas. Ins. Co.*, 2017 WL 3500402, at *4 (Del. Super.), *aff'd*, 184 A.3d 1289 (Del. 2018) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super.); *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)).

> [T]he existence of cross motions for summary judgment does not act per se as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[10]

## ANALYSIS

### *Insurance Policy Provisions*

Section 8 of the Definitions section of the Policy defines a "Claim" as:

> a) a demand for money, services, retraction or correction, including the service of suit or institution of arbitration or mediation proceedings; or b) a threat or initiation of a suit seeking injunctive relief (meaning a temporary restraining order or a preliminary or permanent injunction) or declaratory relief; or c) a disciplinary action, regulatory investigation or proceeding brought by any professional body, occupational health and safety body or regulator.

The Policy is a Claims Made and Reported policy. This means the policy provides insurance coverage for claims made, or filed, against the insured company during the policy period that are also reported to the insurance company during the policy period. However, Section 4 of the Conditions Section of the Policy also contains a Continuous Cover clause, which states:

[10] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

> If [Ventech has] neglected, through error or oversight only, to report a claim made against [it] during the period of a previous renewal of this Policy issued to [Ventech] by [Underwriters], then provided that [Ventech has] maintained uninterrupted insurance of the same type with [Underwriters] since the expiry of that earlier Policy, then, notwithstanding the circumstances known at inception EXCLUSION, [Underwriters] will permit the matter to be reported under this Policy and will indemnify [Ventech], provided that: a) the indemnity will be subject to the applicable aggregate limit of liability or limit of liability of the earlier Policy under which the matter should have been reported or the aggregate limit of liability or limit of liability of the current Policy, whichever is the lower; and b) [Underwriters] may reduce the indemnity entitlement by the monetary equivalent of any prejudice which has been suffered as a result of the delayed notification; and c) the indemnity will be subject to all of the terms, CONDITIONS, DEFINITIONS and EXCLUSIONS, other than the aggregate limit of liability or limit of liability contained in this current Policy.

Section 7 of the Conditions Section of the Policy contains an Innocent Non-Disclosure clause, which states:

> [Underwriters] will not seek to avoid the Policy or reject any claim on the grounds of non-disclosure or misrepresentation except where the non-disclosure or misrepresentation was reckless or fraudulent or [Ventech's] senior executive officers failed to conduct a full inquiry prior to providing the information that forms the basis of this insurance. In the event that [Underwriters] seek to avoid the Policy or reject any claim on this basis the burden of proving otherwise rests solely with [Ventech].

Section 30 of the Exclusions Section of the Policy, in conjunction with the introduction to the Exclusions Section, states: "[Underwriters] will not: a) make

any payment on [Ventech's] behalf for any claim; or b) incur any costs and expenses; or c) reimburse [Ventech] for any loss, damage, legal expenses, fees or costs sustained by [Ventech]; or d) pay any medical expenses[] [for] Liquidated damages . . . ."

***Continuous Cover***

The Continuous Cover clause allows Ventech to report a claim in a subsequent policy period if it "neglected through error or oversight only" to report the claim to Underwriters during the prior policy period. Ventech argues the Continuous Cover clause applies to its claim for insurance coverage of the Underlying Litigation. This is a narrow issue involving several nuanced legal questions: (1) whether delayed disclosure was excused by the Continuous Cover clause; (2) whether the delayed disclosure was "neglect" "through error or oversight;" (3) whether "error" includes a mistaken belief as to the significance of the claim; and (4) whether an intentional decision not to disclose the claim forecloses coverage under the Policy.

Timely notice to an insurer is necessary for many reasons. Among these reasons is to provide the insurer with an opportunity to control the defense in litigation involving a covered claim. The Continuous Cover clause takes this into account. The Continuous Cover clause reduces or sets off defense costs to the extent the insurer is prejudiced by its inability to control the defense. However, the

Court has not seen any evidence of set off damages by Underwriters at this stage in the case.

Ventech's Chief Financial Officer, Randy Fogle ("Fogle"), explained why Ventech reported the Underlying Litigation in a subsequent policy period during his deposition:

> BY MR. O'DONNELL:
>
> Q. Well, do you recall that the lawsuit seeking 12 million dollars had been filed by the AGO before Ventech applied for a renewal with Underwriters in August of 2017?
>
> MR. SHARKEY: Objection.
>
> THE WITNESS: Yeah. I'm aware of that.
>
> BY MR. O'DONNELL:
>
> Q. Why didn't you tell them about the 12-million-dollar lawsuit when you applied for renewal in August of 2017?
>
> MR. SHARKEY: Objection.
>
> THE WITNESS: At the time we felt as though -- I felt as though we had such a significant case against the AGO that the AGO had no legitimate claim and would not be successful on the litigation.
>
> BY MR. O'DONNELL:
>
> Q. So am I correct that a little over a year later your view on that had changed and you thought then in August 6th that it was time to report it?

> MR. SHARKEY: Objection.
>
> THE WITNESS: My view on that had not changed. I still felt that same way, that the AGO had no chance of recovery, that our position was extremely strong.
>
> BY MR. O'DONNELL:
>
> Q. Then why did you report the -- tell Mr. Reinmuth to report the claim on August 6th, 2018, per Deposition Exhibit 22?
>
> A. Because over that year nothing had occurred on the litigation. No discovery documents had taken place. Nothing had happened until about this time. They were starting to pass back requests for documents. So we were starting into the discovery phase of the litigation. I still felt our position was extremely strong.[11]

Underwriters point to certain evidence to demonstrate that Ventech made an intentional decision not to notify them. On November 26, 2018, Underwriters, through coverage counsel, issued a letter denying coverage for the Underlying Litigation. The letter stated that Underwriters were denying coverage because "Ventech deliberately chose not to notify Underwriters of the AGO Suit during the prior policy . . . ." Ventech and coverage counsel for Underwriters allegedly conducted a phone call on or about August 22, 2018.[12] During the call, Fogle allegedly mentioned Ventech decided not to report the Underlying Litigation because the claim was not significant.

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[11] Randy Fogle Dep. at 90:3–91:16.
[12] *Id.* at 110:9–13.

In a letter dated March 4, 2020, Ventech alleged that its failure to provide notice of the Underlying Litigation was a result of its error and oversight. The letter stated: (1) "Ventech mistakenly believed that there was no support for the AGO's position in the Action and believed that the matter would be resolved quickly;" and (2) "Ventech also mistakenly believed that it had no obligation to report the Action to Underwriters due to the Action's insignificance."

The Court finds there was no claim to report prior to the actual filing of the lawsuit by the AGO. The Continuous Cover clause does not refer to a potential claim. Therefore, the Continuous Cover clause did not apply until after July 21, 2017 (when the AGO filed suit). The claim for the Underlying Litigation was protected by the Continuous Cover clause as a matter of law until August 21, 2017 (the end of the policy period). Without the Continuous Cover clause, the claim should have been reported as of August 21, 2017 (or within sixty days thereafter pursuant to the extended reporting period allowed under the policies).

The Court finds that there are genuine issues of material fact as to whether Ventech's non-disclosure of the Underlying Litigation was negligent. Questions that remain to be answered include: (1) whether Ventech intentionally, deliberately, or consciously decided not to disclose the claim for the Underlying Litigation before the 2016 to 2017 policy period ended; and (2) whether Ventech was negligent through error or oversight in not disclosing the claim. Therefore, the

Court cannot grant summary judgment on the application of the Continuous Cover clause for the 2017 to 2018 policy period.

***Innocent Non-Disclosure Clause***

Section 7 of the Conditions Section of the Policy contains an Innocent Non-Disclosure clause, which states in part: "[Underwriters] will not seek to avoid the Policy or reject any claim on the grounds of non-disclosure or misrepresentation except where the non-disclosure or misrepresentation was reckless or fraudulent . . . ." Underwriters allege that Ventech misrepresented circumstances surrounding the Underlying Litigation on its 2015, 2016, and 2017 applications for insurance. In 2015, Ventech represented on its application for coverage that it "was not aware of any fact, circumstance, situation, transaction, event, act, error or omission that it had reason to believe may or could reasonably be foreseen to give rise to a claim or loss that may fall within the scope of the insurance being sought."[13] In 2016 and 2017, Ventech again represented on its application for coverage that it "was not aware of any claim, loss, damage, or circumstances that may give rise to a claim against it."[14] Underwriters allege that Ventech should have disclosed on each of its insurance applications that its contract with the AGO was in jeopardy.

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[13] Underwriters' Answer, Affirmative Defenses, and Counterclaims, p. 17, ¶ 36.
[14] *Id.* at p. 19, ¶ 41; p. 20, ¶ 44.

"A fact is 'material' where it 'would either induce [the insurer] to decline an insurance altogether, or not to accept it unless at a higher premium.'"[15] "The perspective of the insurer, not the insured, determines the materiality of an answer (and the question to which it relates)[.]"[16] Whether a fact is material is a question for the factfinder.

If the factfinder determines that the non-disclosure at the renewal of the insurance policy in August 2017 was negligent, the Continuous Cover clause would control. A finding of negligence would end the inquiry because the same conduct cannot be deemed negligent for one disclosure, and reckless or fraudulent for another.

Therefore, the Court cannot grant summary judgment at this time on application of the Innocent Non-Disclosure clause.

***Liquidated Damages***

A liquidated damages clause should be construed strictly.[17] Exclusions in

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[15] *Chicago Ins. Co. v. Capwill*, 2011 WL 6440756, at *4 (N.D. Ohio), *aff'd*, 514 F. App'x 575 (6th Cir. 2013) (quoting *American Continental Ins. Co. v. Estate of Gerkens*, 591 N.E.2d 774 (Ohio Ct. App. 1990)).
[16] *Id.* (citing *Hutchins v. Cleveland Mut. Ins. Co*., 11 Ohio St. 477, 479 (1860)).
[17] *Sheffield-King Milling Co. v. Domestic Sci. Baking Co*., 115 N.E. 1014, 1016 (Ohio 1917) (explaining that courts will not construe contracts in a way authorizing recovery for liquidated damages unless the language is specific as to a certain sum, the damages would otherwise be difficult to prove, and the liquidated damages are not unreasonable); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co*., 369 F.3d 34, 71 (2d Cir. 2004) ("New York courts will construe a purported liquidated damages provision strictly . . . ." (citing *Elmira v. Larry Walter, Inc*., 564 N.E.2d 655, 656 (N.Y. 1990))).

insurance contracts are read narrowly in Ohio.[18]

The Ohio Court of Claims found in its final decision:

> The parties when they entered the Agreement knew the difficult nature of future damages and, with negotiations, made a knowing effort to estimate and/or limit their exposure with the liquidated damage cap. . . .
>
> [W]hen Section XVIII(C) is applied, the damages set forth in part 5 of the AGO's brief on damages is the proper amount of damages. Section XVlll(C) as modified by Amendment 10 states: ["]The Contractor's liability to the AGO is limited to the Holdback amount plus $200,000 plus two (2) times the greater of (1) the fees for Professional Services paid in the immediately preceding Fiscal Year or (2) the fees for Professional Services paid in the immediately preceding twelve (12) month period." . . .
>
> [T]he Court finds that the total fees paid in the immediately preceding 12-month period are greater than the fees paid during the immediately preceding fiscal year. This 12-month period spans July 1, 2016 to June 30, 2017.
>
> The original holdback amount of $624,798.00 is set forth in the Agreement (Ex. D, p. 4). When the contract amount increased, the holdback also increased. This additional amount, $52,532.00 is set forth in Exhibit 24. The Court therefore finds the total holdback amount is $677,330.00. The fees for professional services paid during the 12-month period immediately preceding June 30, 2017 are set forth in Exhibit 27 and total $2,048,036.94. These fees must be multiplied by two. Therefore, applying the formula set forth 1n Section XVlll(C) using the above

[18] *AKC, Inc. v. United Spec. Ins. Co.*, 187 N.E.3d 501, 504 (Ohio 2021); *Hybud Equip. Corp. v. Sphere Drake Ins. Co*., 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102 (1992) ("[A]n exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded.").

> figures results in the following equation: \$677,330 + \$200,000 + 2(\$2,048,036.94) = \$4,973,403.88.[19]

Ventech referred to "Liquidated Damages" in its appellate briefing. In the Response Brief of Ventech Solutions, Inc., Ventech acknowledged that the damages it owed to the AGO were liquidated damages. Ventech's briefing stated:

> Ohio enforces liquidated damages provisions. In accordance with that well-recognized principle of Ohio law, the trial court held that the AGO's damages for breach of contract must be limited by the liquidated damages provision in the parties' Agreement.[20]

In the same briefing, Ventech dedicated approximately eight pages to arguing: "If Ventech Breached The Contract, The Liquidated Damages Provision Limits The AGO's Recovery."[21] In its briefing, Ventech mentioned liquidated damages approximately two dozen times.[22]

Ventech argues that the policy exclusion for liquidated damages does not apply because it settled its case with the AGO before the Ohio Court of Appeals heard the case. Underwriters counter that the liquidated damages exclusion bars recovery because the settlement qualifies as liquidated damages.

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[19] *Ventech Solutions, Inc. v. Ohio Atty. Gen.*, No. 2017-00628JD, at 7–8 (Ohio Ct. Cl. Jan. 17, 2020).

[20] Response Br. of Ventech Solutions, Inc. to Ohio Court of Appeals at p. xii.

[21] *Id.* at 43–51 (bolded in original).

[22] *Id.* While Ventech's previous assertions could be viewed as an admission that the Settlement Amount is indeed liquidated damages, Underwriters did not argue waiver, estoppel, or *res judicata* in support of its motion on this issue.

The Settlement Agreement and Release ("Settlement") between the AGO and Ventech, dated February 15, 2021, refers to the amount paid as the "Settlement Amount," not liquidated damages. The total settlement amount listed in the Settlement was $4,979,300.84. The Ohio Court of Claims judgment was for $4,973,403.88. The difference between the Settlement Amount and the Ohio Court of Claims judgment is $5,896.96.[23] This difference is *de minimis*. The Settlement never characterizes the Settlement Amount in reference to liquidated damages.

The Court finds the Liquidated Damages clause does not exclude coverage. While the judgment and settlement amounts are nearly identical, the characterization of the Settlement controls.[24] The Settlement is the agreement Ventech is bound to abide by—not the Ohio Court of Claims judgment. The issue of liquidated damages was pending on appeal. The Settlement did not characterize the amount to be paid as liquidated damages. Therefore, strict construction, and a

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[23] This Court is unclear on what resulted in difference between the Settlement and judgment amounts. The Settlement refers to the judgment from the Ohio Court of Claims as being $4,979,300.84, while the judgment from the Ohio Court of Claims lists the judgment as $4,973,403.88.

[24] Underwriters cite to two cases for the proposition that a settlement should not change the nature of the claims against the insured: (1) *Level 3 Communs., Inc. v. Fed. Ins. Co*., 272 F.3d 908, 911–12 (7th Cir. 2001) (explaining that a settlement should not change the nature of the claims against the insured for purposes of coverage in the context of a fraud suit); and (2) *Philadelphia Indem. Ins. Co. v. Sabal Ins. Gp., Inc*. 786 Fed.App'x. 167, 175 (11th Cir. 2019) ("[I]t 'can't be right' that if a case is settled before an entry of judgment, "the insured is covered regardless of the nature of the claim against it[]' because "doing so would create an artificial distinction between parties who have settled criminal cases and parties who have not . . ."). However, neither of these cases involved a liquidated damages provision. Each involved the nature of the claim, rather than the nature of damages.

narrow reading of the Policy exclusion, require a finding that the Settlement does not qualify as a claim for liquidated damages under the Policy. The Court grants Partial Summary Judgment against Underwriters on this issue.

***Bad Faith Claims Handling***

"Even if the denial of coverage [is] erroneous, the mere wrongful denial of a claim is not actionable under Ohio law."[25] "An insured must prove that the insurer's refusal to pay a claim was totally arbitrary and capricious and without reasonable justification. An insured must also provide proof of actual malice, fraud, or insult on the part of the insurer in order to warrant punitive damages."[26] "'[T]o grant a motion for summary judgment brought by an insurer on the issue of whether it lacked good faith in the satisfaction of an insured's claim, a court must find after viewing the evidence in a light most favorable to the insured, that the claim was fairly debatable and the refusal was premised on either the status of the law at the time of the denial or the facts that gave rise to the claim.'"[27]

The Court finds that coverage for Ventech's claim was "fairly debatable." Therefore, the Court dismisses Ventech's bad faith claim. Partial Summary Judgment is granted against Ventech on this issue.

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[25] *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 17 F.4th 645, 653 (6th Cir. 2021).
[26] *Spremulli's Am. Serv. v. Cincinnati Ins. Co.*, 632 N.E.2d 599, 602 (Ohio Ct. App. 1992).
[27] *Carpenter v. Liberty Ins. Corp.*, 850 F. App'x 351, 356–57 (6th Cir. 2021) (quoting *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 605 N.E.2d 936, 943 (Ohio 1992)).

### ***Sham Affidavit***

The Delaware Supreme Court has outlined the sham affidavit doctrine as follows:

> The "sham affidavit" doctrine . . . refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant's prior sworn deposition testimony. The core of the doctrine is that where a witness at a deposition has previously responded to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact, that witness cannot thereafter create a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without an adequate explanation. An affidavit of that kind, in those circumstances, is deemed to create sham issues, and will not be considered by the trial court as evidence on a motion for summary judgment.[28]

The Court will strike a sham affidavit "if it finds the following factors are met: the affidavit (i) contradicts prior sworn testimony, (ii) given in response to unambiguous questions, (iii) yielding clear answers, (iv) without adequate explanation, (v) in order to defeat a summary judgment motion."[29]

Underwriters argue that the Fogle Affidavit should be stricken pursuant to Superior Court Rule 30(b)(6) and the sham affidavit doctrine. However, the Court finds that it is not necessary to consider the Fogle Affidavit to reach the foregoing

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[28] *Cain v. Green Tweed & Co*., 832 A.2d 737, 740 (Del. 2003).

[29] *Ocimum Biosolutions (India) Ltd. v. AstraZeneca UK Ltd*., 2019 WL 6726836, at *14 (Del. Super.), *aff'd*, 247 A.3d 674 (Del. 2021).

conclusions. The Court has found numerous genuine issues of material fact. The sham affidavit doctrine applies when there otherwise is no factual dispute and one is proffered through an affidavit filed at the Summary Judgment stage. The Court finds that genuine issues of material fact exist without consideration of the Fogle Affidavit. Therefore, the Court denies the Motion to Strike the Fogle Affidavit as moot. The statements in the Fogle Affidavit more properly may be offered during trial, and, of course, will be subject to cross examination, if deemed admissible pursuant to the Rules of Evidence.

## CONCLUSION

The Court finds there is a genuine issue of material fact as to whether Ventech's non-disclosure of the Underlying Litigation was negligent. If the factfinder determines that the non-disclosure at the renewal of the insurance policy in August 2017 was negligent, then the Continuous Cover clause will control. A finding of negligence would end the inquiry because the same conduct cannot be deemed negligent for one disclosure, and reckless or fraudulent for another. The Court finds the Liquidated Damages clause does not exclude coverage. The Court finds coverage for Ventech's claim was "fairly debatable." The Court finds that genuine issues of material fact exist without considering the Fogle Affidavit.

Ventech's claim for bad faith claims handling is hereby **DISMISSED**.

Ventech's Motion for Partial Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**.

Underwriters' Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**.

Underwriters' Motion to Strike the Fogle Affidavit is hereby **DENIED** as moot.

**IT IS SO ORDERED**.

*/s/ Mary M. Johnston*
The Honorable Mary M. Johnston