

Superior Court
of the
State of Delaware

Jan R. Jurden
President Judge

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June 29, 2017

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**RE: TIAA-CREF v. Illinois National Insurance Company, *et al.*,
C.A. No. N14C-05-178 JRJ [CCLD]**

Dear Counsel:

Before the Court are the following post-trial motions for judgment as a matter of law (“JMOL”): (1) Plaintiffs’ (collectively “TIAA-CREF”) Renewed Motion for JMOL, and Notwithstanding the Verdict, Regarding Zurich’s Notice and Consent Defenses;¹ (2) Defendant Illinois National Insurance Company’s Renewed Motion for JMOL, and Notwithstanding the Verdict, on the Grounds that Plaintiffs did not Present Evidence, so as to Satisfy Their Burden to Establish, that Defense Costs Incurred for the *Bauer-Ramazani* Action were Reasonable and Necessary;² and (3) Defendant Arch Insurance Company’s Renewed Motion for JMOL, or in the Alternative, Motion for a New Trial.³ For the reasons explained below, the motions are **DENIED**.

I. BACKGROUND

The Court held a five-day jury trial in December 2016.⁴ At trial, TIAA-CREF presented the testimony of 12 witnesses, including its expert witness on the reasonableness of defense costs, Leif Clark. The jury was very attentive and engaged throughout the trial.

At the close of TIAA-CREF’s case, the parties submitted three Rule 50(a) JMOL

¹ Plaintiffs’ Renewed Motion for Judgment as a Matter of Law, and Notwithstanding the Verdict, Regarding Zurich’s Notice and Consent Defenses (“TIAA-CREF Renewed JMOL Mot.”) (Trans. ID. 59990689).

² Defendant Illinois National Insurance Company’s Renewed Motion for Judgment as a Matter of Law, and Notwithstanding the Verdict, on the Grounds that Plaintiffs did not Present Evidence, so as to Satisfy Their Burden to Establish, that Defense Costs Incurred for the *Bauer-Ramazani* Action were Reasonable and Necessary (“Ill. Nat. Renewed JMOL Mot.”) (Trans. ID. 59987618.)

³ Defendant Arch Insurance Company’s Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial (“Arch. Renewed JMOL Mot.”) (Trans. ID. 60226659).

⁴ Civil Trial Activity Sheet in Case Number N14C-05-178 JRJ CCLD (Trans. ID. 59944248).

motions.⁵ The Court reserved decision on the motions, and the jury returned its verdict which is discussed in relevant part below. In general, the jury found against TIAA-CREF in relation to Zurich, in favor of TIAA-CREF in relation to Arch, and in favor of TIAA-CREF in relation to the reasonableness and necessity of its defense costs.⁶

Following trial, the parties submitted the instant renewed JMOL motions under Rule 50(b). TIAA-CREF also filed a Motion for Allowance of Costs,⁷ which was resolved by stipulation of the parties.⁸ The parties' other post-trial motions, TIAA-CREF's Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b)⁹ and Zurich's Motion for Costs Pursuant to Superior Court Civil Rule 54(d)¹⁰ will be addressed in a forthcoming decision.

II. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 50(a):

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law

If such motion is denied or is not granted, the motion may be renewed following trial.¹¹ Viewing all the evidence in the light most favorable to the non-moving party, the Court must determine whether the evidence and all reasonable inferences that can be drawn therefrom could justify a jury verdict in favor of the plaintiff(s).¹² Thus, "the factual findings of a jury will not be disturbed if there is *any* competent evidence upon which the verdict could reasonably be based."¹³

III. DISCUSSION

A. TIAA-CREF's Renewed Motion for JMOL Regarding Zurich's Notice and Consent Defenses

The *Bauer-Ramazani* Action was filed in August 2009, the *Bauer-Ramazani* court certified a class in May 2013, and TIAA-CREF entered into a settlement agreement in January

⁵ Defendant Zurich American Insurance Company's Motion for Judgment as a Matter of Law (Trans. ID. 59929856); Defendant Arch Insurance Company's Motion for Judgment as a Matter of Law on its Consent to Settlement Defense (Trans. ID. 59930001); Plaintiffs' Memorandum in Further Support of Their Motion for Directed Verdict and in Opposition to Zurich's Cross-Motion Regarding Zurich's Notice and Consent Defenses (Trans. ID. 59931297). Illinois National joined Zurich's Motion for JMOL as to Section C (arguing that TIAA-CREF failed to prove its defense costs were reasonable and necessary). Notice of Joinder (Trans. ID. 59928488).

⁶ Special Verdict Form (Trans. ID. 59944248).

⁷ Trans. ID. 60199216.

⁸ Stipulation and Order Regarding Plaintiffs' Costs (Trans. ID. 60361088).

⁹ Trans. ID. 60199238.

¹⁰ Trans. ID. 60197572.

¹¹ Super. Ct. Civ. R. 50(b).

¹² *Atwell v. RHIS, Inc.*, 2007 WL 914648, at *1 (Del. Super. Feb. 26, 2007) (citing *Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Jan. 31, 2003)).

¹³ *Mumford*, 2003 WL 231611, at *2 (quoting *Delaware Elec. Co-op., Inc. v. Pitts*, 633 A.2d 369, 1993 WL 445474, at *1 (Del. Oct. 22, 1993) (TABLE)).

2014.¹⁴ Yet TIAA-CREF did not request Zurich to cover the *Bauer-Ramazani* Action until the instant lawsuit was filed in May 2014.¹⁵ As to Zurich, the jury was instructed to consider: (1) whether TIAA-CREF provided Zurich notice of the *Baurer-Ramazani* Action as soon as practicable after TIAA-CREF reasonably believed that the *Bauer-Ramazani* Action was likely to result in loss or damages that would exceed 25% of the sum of the “Underlying Limits” and any retention specified in the “Primary Policy;” (2) whether Zurich waived its notice defense with respect to the *Bauer-Ramazani* Action; and (3) whether Zurich waived the consent condition in the insurance policies with respect to the *Bauer-Ramazani* settlement.¹⁶

In its Renewed Motion for JMOL Regarding Zurich’s Notice and Consent Defenses, TIAA-CREF argues that no reasonable jury could have found that Zurich did not waive its notice and consent defenses.¹⁷ In support of this argument, TIAA-CREF rehashes its argument from its Reply Memorandum in Further Support of its Motion *in Limine* to Exclude Defendant Zurich’s Notice and Consent Defenses that Zurich’s failure to specifically assert notice and consent defenses when it first disclaimed coverage for *Bauer-Ramazani* constitutes waiver as a matter of law.¹⁸

In this case, Zurich’s first opportunity to disclaim coverage was in its response to TIAA-CREF’s Complaint. In its Answer, Zurich: (1) denied TIAA-CREF’s allegation that it timely and properly provided the Zurich with notice of the *Bauer-Ramazani* Action; and (2) asserted that TIAA-CREF’s claims against Zurich are barred, in whole or in part, by the terms, exclusions, conditions and limitations of the policies “all of which are reserved and none of which are waived.”¹⁹ As such, the Court is not persuaded that New York case law involving insurers’ pre-litigation disclaimer letters is controlling.²⁰ There was no such disclaimer in this case because Zurich first received notice of TIAA-CREF’s request that Zurich cover the *Bauer-Ramazani* Action almost four months after TIAA-CREF entered into a settlement agreement.

The Court finds that the evidence at trial and all reasonable inferences that can be drawn therefrom could justify a jury verdict in favor of Zurich on its notice and consent defenses. Therefore, TIAA-CREF’s Renewed Motion for JMOL Regarding Zurich’s Notice and Consent

¹⁴ Pretrial Stipulation and Order, Ex. A Facts Admitted Without Formal Proof ¶¶ 10–17 (Trans. ID. 59832651).

¹⁵ *Id.* ¶ 17; Jury Instructions at 7.

¹⁶ Special Verdict Form at 2–3.

¹⁷ TIAA-CREF Renewed JMOL Mot. at 2–3.

¹⁸ *Id.* at 2–4. See Plaintiffs’ Reply Memorandum in Further Support of Their Motion *in Limine* to Exclude Defendant Zurich’s Notice and Consent Defenses and to Exclude Any Argument in Connection with Defendants Arch and Zurich’s Consent Defense that the Underlying Class Action Settlements were Unreasonable (Trans. ID. 59840118). The case law cited in TIAA-CREF’s Reply Memorandum in Further Support of Their Motion *in Limine* was not cited in its original Motion *In Limine*. See Plaintiffs’ Motion *In Limine* to Exclude Defendant Zurich’s Notice and Consent Defenses to Exclude Any Argument in Connection with Defendants Arch, St. Paul and Zurich’s Consent Defense that the Underlying Class Action Settlements were Unreasonable (Trans. ID. 59752314).

¹⁹ Complaint ¶¶ 69, 80 (Trans. ID. 55477629); Defendant Zurich American Insurance Company’s Answer and Affirmative Defenses to Plaintiffs’ Complaint ¶¶ 69, 80 (Trans. ID. 55748750).

²⁰ TIAA-CREF argues that under New York law, “even when an insurance company denies coverage via a court pleading, it is required to raise defenses or they are deemed waived” by citing to *In re Balfour MacLaine International Ltd.*, 873 F. Supp. 862 (S.D.N.Y. 1995). TIAA-CREF Renewed JMOL Mot. at 4 (quoting *Balfour*, 873 F. Supp. at 871). However, TIAA-CREF overstates *Balfour*’s significance. *Balfour* involved an insurer’s waiver of a defense for failure to include it in the insurer’s declaratory judgment complaint against the policyholder, filed in response to the policyholder’s calim. *Id.* at 865. Zurich first received notice of *Bauer-Ramazani* as a defendant in the instant litigation.

Defenses is **DENIED**.

B. Illinois National's Renewed Motion for JMOL that Defense Costs Incurred for the *Bauer-Ramazani* Action were Reasonable and Necessary

Bauer-Ramazani was a class action suit filed in federal court in Vermont, TIAA-CREF retained the firm O'Melveny & Myers ("O'Melveny") to defend it, and TIAA-CREF paid \$7,519,822.91 in legal fees and costs in connection with its defense in the *Bauer-Ramazani* Action. In the Special Verdict Form submitted to the jury, the jury was asked to determine what amount of TIAA-CREF's "Defense Costs" were reasonable and necessary, and therefore recoverable by TIAA-CREF.²¹

To prove the reasonableness and necessity of the \$7,519,822.91 amount, TIAA-CREF, among other things, introduced the testimony of Theresa Gee, a former O'Melveny lawyer who worked on the *Bauer-Ramazani* Action for three years, and the expert testimony of Leif Clark, a former federal bankruptcy judge. Among other exhibits related to the *Bauer-Ramazani* litigation and settlement, three binders of defense cost invoices and payment confirmations were admitted into evidence as Plaintiffs' Exhibit 191.

The jury instructions included a list of the *Cox*²² factors for the jury to consider in determining what amount of TIAA-CREF's legal fees and costs in *Bauer-Ramazani* were reasonable and necessary, and the jury instructions expressly stated that the *Cox* facts are non-exclusive.²³ In its verdict, the jury determined that TIAA-CREF proved by a preponderance of the evidence that all \$7,519,822.91 in Defense Costs sought in connection with the *Bauer-Ramazani* Action were reasonable and necessary.

In its Renewed Motion for JMOL, Illinois National argues that this verdict must be overturned as a matter of law because TIAA-CREF failed to produce evidence sufficient to satisfy its burden to prove that all the Defense Costs incurred in connection with the *Bauer-Ramazani* Action were reasonable and necessary.²⁴ Specifically, Illinois National argues: (1) TIAA-CREF failed to present evidence that anyone reviewed all the bills associated with the *Bauer-Ramazani* Action for reasonableness or necessity; (2) TIAA-CREF presented no fact witness regarding pre-December 2012 O'Melveny & Myers' bills; and (3) TIAA-CREF presented no evidence as to the reasonableness and necessity of rates billed in excess of those charged in the locality.

Before joining O'Melveny, Ms. Gee worked for the U.S. Department of Labor litigating and later overseeing the Department's ERISA litigation.²⁵ O'Melveny hired Ms. Gee for her expertise in ERISA issues, and Ms. Gee began working on the *Bauer-Ramazani* Action beginning in 2012, at which time she familiarized herself with the case by reviewing the docket

²¹ Special Verdict Form at 6 (Trans. ID. 59944248).

²² *Gen. Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

²³ Jury Instructions at 13–14 (Trans. ID. 59944248).

²⁴ Ill. Nat. Renewed JMOL Mot. at 1. Arch joined in Illinois National's Renewed Motion for JMOL. Arch. Renewed JMOL Mot. at 1 n.2.

²⁵ Plaintiffs' Opposition to Defendant Illinois National's Renewed Motion for Judgment as a Matter of Law, and Notwithstanding the Verdict, as to Defense Costs Incurred for the *Bauer-Ramazani* Action ("TIAA-CREF Resp. Ill. Nat. Renewed JMOL Mot."), Ex. D, December 1, 2017 Deposition Transcript of Theresa Gee at 19:4–24:6.

and speaking to the attorneys already working on the case.²⁶ At the time Ms. Gee began working on *Bauer-Ramazani*, the focus of the case was the issue of class certification.²⁷ Some limited discovery had taken place, but not full discovery.²⁸ Prior to Ms. Gee being brought on, two other ERISA lawyers in the O'Melveny firm, Mr. Catalano and Mr. Eccles, worked on the case.²⁹

Mr. Clark testified that he reviewed thousands of fee applications, including attorney's fee applications, for reasonableness in connection with his work as a bankruptcy judge.³⁰ He testified that the *Bauer-Ramazani* Action required more expertise than the earlier *Rink* Action because *Bauer-Ramazani* involved class action ERISA claims.³¹ Mr. Clark explained that ERISA is a complicated federal law that could complicate the outcome of the case and have potentially serious ramifications for the company.³² For this reason, Mr. Clark believed that TIAA-CREF had legitimate reasons to hire the best counsel available, i.e. a defense firm with the experience, expertise, and resources to defend a class action involving a national class of plaintiffs and ERISA claims.³³ O'Melveny fits this description, and given the nature of the case and the nature of the litigation, Mr. Clark found O'Melveny's rates reasonable.³⁴ To reach this conclusion, Mr. Clark reviewed the docket in *Bauer-Ramazani* to compare the services rendered with the activity of the case, the qualifications of defense counsel, the result of the litigation, and the qualifications of the class action plaintiffs' counsel.³⁵

Under Rule 50, the Court must uphold the jury's verdict in favor of TIAA-CREF as long as the evidence and all reasonable inferences that can be drawn therefrom could justify a jury verdict in its favor. Illinois National's arguments—that it is entitled to JMOL because TIAA-CREF did not present testimony that *every* bill in the *Bauer-Ramazani* Action was evaluated for reasonableness and necessity, because TIAA-CREF did not present the testimony of an O'Melveny lawyer who worked *Bauer-Ramazani* prior to 2012, because Mr. Clark did not discuss the Vermont rates for “complex litigation work”—attempt to impose an evidentiary burden on TIAA-CREF that it did not have.

Mr. Clark reviewed the binders of defense cost invoices in light of the nature and course of the *Bauer-Ramazani* litigation, testified regarding the nature of the *Bauer-Ramazani* proceedings, discussed the various factors he took into consideration, and concluded that O'Melveny's rates were reasonable and discussed the reasons why he reached this conclusion. Mr. Clark's testimony emphasized the national scope of the potential liability in the case, the nature of the case quickly exceeding the abilities of TIAA-CREF's Vermont counsel, and the reasons TIAA-CREF was correct to seek out “the best counsel they could get” to litigate ERISA claims like those in the *Bauer-Ramazani* Action.³⁶ This analysis was consistent with Ms. Gee's discussion of her role in the case, the course of litigation, and the actions taken by the firm, e.g.

²⁶ *Id.* at 23:21–24:18, 26:6–23.

²⁷ *Id.* at 450:21–52:4.

²⁸ *Id.* at 50:1–20.

²⁹ *Id.* at 82:23–83:14.

³⁰ TIAA-CREF Resp. Ill. Nat. Renewed JMOL Mot., Ex. C, December 7, 2017 Trial Transcript at 50:22–54:7..

³¹ *Id.* at 79:14–80:16.

³² *Id.* at 80:17–82:4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 82:18–92:9.

³⁶ *Id.* at 79:14–82:4.

unsuccessfully challenging class certification and successfully seeking summary judgment on two of the three counts.

Viewing the evidence in the light most favorable to TIAA-CREF, the Court finds that the evidence and all reasonable inferences that can be drawn therefrom could justify a jury verdict in favor of TIAA-CREF on this issue, and therefore, Illinois National's Renewed Motion for JMOL is **DENIED**.

C. Arch's Renewed Motion for JMOL, or in the Alternative, Motion for New Trial

At trial, the jury was asked to consider whether TIAA-CREF: (1) proved by clear and convincing evidence that Arch waived the consent condition with respect to the *Rink* settlement; (2) proved by a preponderance of the evidence that, at the time of the *Rink* settlement, it reasonably appeared to be futile for TIAA-CREF to request Arch to consent to the *Rink* settlement; (3) proved by clear and convincing evidence that Arch waived the consent condition with respect to the *Bauer-Ramazani* settlement; and (4) proved by a preponderance of the evidence that, at the time of the *Bauer-Ramazani* settlement, it reasonably appeared to be futile for TIAA-CREF to request Arch to consent to the *Bauer-Ramazani* settlement.³⁷ On the subject of waiver, the jury instructions stated that waiver could be express or it could be implied from conduct or other evidence.³⁸ The jury returned a verdict in TIAA-CREF's favor as to all four questions.

In its Renewed Motion, Arch argues that the Court should grant it JMOL because no reasonable jury could have found that TIAA-CREF was excused from seeking Arch's consent to settle the *Rink* and *Bauer-Ramazani* Actions, or that Arch waived its right to consent to the settlements. In support of this argument, Arch characterizes TIAA-CREF's case against it as "predicated chiefly on two pieces of evidence—Arch's closure of its files for *Rink* [January 29, 2008 *Rink* closure letter] and Arch's June 7, 2013 letter addressing *Bauer*."³⁹ According to Arch, because the January 29, 2008 *Rink* closure letter concerns the higher layer "BFI Policy," a layer not at issue in this action, and because the letter contains reservation of rights language, "no reasonable juror could have found that Arch waived its consent rights."⁴⁰ Similarly, with regard to the June 7, 2013 letter, in which Arch adopted Illinois National's "no coverage" position for *Bauer-Ramazani*, Arch argues its reservation of rights language precludes any finding in TIAA-CREF's favor on Arch's consent defense.⁴¹

As to the *Rink* Action, among other evidence, the jury heard evidence that: Arch closed both its *Rink* files;⁴² TIAA-CREF updated Arch regarding the *Rink* Action over the course of the litigation;⁴³ after receiving notice of the *Rink* settlement, Arch did not object;⁴⁴ and the total cost of the *Rink* Action settlement and defense fell below Arch's attachment point.⁴⁵

³⁷ Special Verdict Form at 4.

³⁸ Jury Instructions at 10.

³⁹ Arch Renewed JMOL Mot. at 3 (footnotes omitted).

⁴⁰ *Id.* at 4–5.

⁴¹ *Id.* at 5–6.

⁴² TIAA-CREF Resp. Arch Renewed JMOL Mot, Ex. A, December 8, 2016 Trial Transcript at 43:7–13.

⁴³ TIAA-CREF Resp. Arch Renewed JMOL Mot., Exs. D (PX 315), E (PX 217), F (PX 218), G (PX 220), H (PX 221), I (PX 229), J (PX 222), and L (PX 232).

⁴⁴ TIAA-CREF Resp. Arch Renewed JMOL Mot., Ex. A, December 8, 2016 Trial Transcript at 118:20–119:12.

⁴⁵ TIAA-CREF Resp. Arch Renewed JMOL Mot., Ex. M (PX 366).

As to the *Bauer-Ramazani* Action, among other evidence, the jury heard evidence that: TIAA-CREF sent updates to Arch regarding the *Bauer-Ramazani* Action;⁴⁶ prior to mediation in the *Bauer-Ramazani* Action, TIAA-CREF told Arch that “we will need to decide on settlement authority for the purpose of negotiating,”⁴⁷ whereupon Arch adopted Illinois National’s April 23, 2013 coverage denial letter;⁴⁸ and after receiving notice of the *Bauer-Ramazani* settlement, Arch did not object.⁴⁹

Arch’s boilerplate general reservation of rights in the January 29, 2008 and June 7, 2013 letters does not preclude the jury from considering Arch’s other actions or inactions in determining whether it would have been futile for TIAA-CREF to seek Arch’s consent or whether Arch waived its rights, notwithstanding its purported reservation.

Viewing the evidence in the light most favorable to TIAA-CREF, the Court finds that the evidence and all reasonable inferences that can be drawn therefrom could justify a jury verdict in favor of TIAA-CREF on these issues, and therefore, Arch’s Renewed Motion for JMOL is **DENIED**.

In the alternative, Arch seeks a new trial under Rule 59 due to “various errors during trial, which led to jury confusion and improperly prejudiced Arch.”⁵⁰ Specifically, Arch argues: (1) it was prejudiced by the admission of the January 29, 2008 “BFI Policy” file closure letter into evidence;⁵¹ (2) the Court erred when it permitted TIAA-CREF to use evidence of Arch’s closure of the *Rink* file to prove waiver when TIAA-CREF was not aware of the file closure;⁵² (3) Arch was prejudiced by TIAA-CREF’s use of deposition testimony from other insurers regarding whether consent the insurer’s consent was needed to settle in this case;⁵³ (4) the Court erred in giving a jury instruction and special verdict form on futility;⁵⁴ (5) Arch was prejudiced by TIAA-CREF’s introduction of deposition testimony from Illinois National employees in which they make arguably disparaging remarks about Ira Cohen, who was responsible for TIAA-CREF’s corporate risk insurance;⁵⁵ and (6) a new trial should be granted because the jury’s verdict was against the “great weight of the evidence.”⁵⁶

“In contrast to Rule 50, when considering a Rule 59 motion for a new trial, the Court

⁴⁶ TIAA-CREF Resp. Arch Renewed JMOL Mot., Exs. P (PX 283), Q (PX 284), O (PX 325).

⁴⁷ TIAA-CREF Resp. Arch Renewed JMOL Mot., Exs. O (PX 325).

⁴⁸ TIAA-CREF Resp. Arch Renewed JMOL Mot., Exs. N (PX 347), O (PX 325); see *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 39 N.Y.S.3d 864, 867 (N.Y. Sup. 2016), *aff’d*, No. 3898, 2017 WL 2744405 (N.Y. App. Div. June 27, 2017) (“[T]he repudiation of liability by an insurer on the ground that the loss is not covered by the policy will excuse an insured from complying with the term of the policy obligating it to obtain the insurers’ consent before settlement of any matter, provided that the settlement is reasonable.” (citations omitted)),

⁴⁹ TIAA-CREF Resp. Arch Renewed JMOL Mot., Ex. A, December 8, 2016 Trial Transcript at 134:22–135:2, 136:23.

⁵⁰ Arch JMOL Mot. at 1.

⁵¹ *Id.* at 10–12.

⁵² *Id.* at 12–14.

⁵³ *Id.* at 14–15.

⁵⁴ *Id.* at 16–18.

⁵⁵ *Id.* at 18–19.

⁵⁶ *Id.* at 9 n.19 (citing *James v. Glazer*, 570 A.2d 1150, 1156 (Del. 1990)); see *Glazer*, 570 A.2d at 1156 (“A trial judge has the discretionary power to grant a motion for a new trial on the ground that the jury verdict is against the weight of the evidence.” (citing *Storey v. Camper*, 401 A.2d 458 (Del. 1979))).

‘weighs the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached.’”⁵⁷ Under Rule 59, the Court will set aside a verdict if it is clear that the “verdict was the result of passion, prejudice, partiality, corruption, or if it is clear that the jury disregarded the evidence or law.”⁵⁸

As to the January 9, 2008 “BFI Policy” file closure letter, the Court was keenly aware of Arch’s concern regarding the risk of jury confusion, and the Court was vigilant throughout the trial to ensure that TIAA-CREF did not inadvertently mislead the jury on this issue. Additionally, on the subject of Arch’s closure of its *Rink* files, during Jeremy Salzman’s cross-examination, TIAA-CREF elicited clear testimony from Mr. Salzman that Arch closed both its *Rink* files but only sent out the file closure letter with the reservation of rights language with respect to the BFI Policy, not the “ICP Policy.”⁵⁹ The Court does not find that the admission of the January 9, 2008 letter prejudiced Arch.

As to TIAA-CREF’s use of evidence of Arch’s closure of the *Rink* ICP Policy file as evidence to support a finding of waiver or futility, the Court does not find that this evidence was erroneously admitted. The file closure is relevant in itself, and the closure sheds light on Arch’s subsequent inactions, including Arch’s decision to not reassign the file after its handler left the company, Arch’s silence in response to updates regarding the case, and Arch’s silence in response to notice of the *Rink* settlement.

As to deposition testimony regarding consent under Zurich’s policy, the Court is not persuaded that the jury was confused or misled. The Court finds it highly unlikely that the jury confused Zurich and Arch because at every stage of the trial the jury was reminded of the distinction, including in jury instruction No. 5 pertaining to multiple defendants, in the Special Verdict Form, by defense counsel, all of whom strived to differentiate their respective clients, and by TIAA-CREF’s counsel, who carefully distinguished between evidence relevant only to Zurich and evidence relevant only to Arch throughout their examination and arguments. As to the deposition testimony regarding consent under ACE’s policy (that ACE’s consent would not be needed if the settlement did not reach ACE’s attachment point), the Court finds that, even if admission of this limited testimony was error, it was harmless in light of Mr. Salzman’s extensive testimony, which addressed Arch’s view of the requirements of its policies and Arch’s actions and inactions in relation to TIAA-CREF’s *Rink* and *Bauer-Ramazani* claims. Similarly, the Court finds any prejudice stemming from the comments of Illinois National employees harmless.

As to the jury instruction on futility, the Court rejects Arch’s argument that futility is not a legally recognized counter to Arch’s consent defense.⁶⁰ Nevertheless, assuming *arguendo* that TIAA-CREF should have met the clear and convincing evidence standard rather than the preponderance of the evidence standard, the Court will not grant a new trial because the jury

⁵⁷ *Doe v. Infectious Disease Assocs., P.A.*, 2016 WL 498901, at *1 (Del. Super. Feb. 1, 2016) (quoting *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997)), *appeal dismissed*, 135 A.3d 310 (Del. 2016), and *aff’d*, 149 A.3d 518 (Del. 2016), *reargument denied* (Oct. 31, 2016).

⁵⁸ *Id.* (quoting *Cooke v. Murphy*, 99 A.3d 226 (Del. 2014)).

⁵⁹ TIAA-CREF Resp. Arch Renewed JMOL Mot, Ex. A, December 8, 2016 Trial Transcript at 8786:8–87:19.

⁶⁰ *See J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 15 A.D.3d 444, 446 (N.Y. App. Div. 2005) (“[O]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent” (quoting *Allbrand Disc. Liquors, Inc. v. Times Square Stores Corp.*, 60 A.D.2d 568, 568 (N.Y. App. Div. 1977))).

found in TIAA-CREF's favor on the independent basis of clear and convincing evidence of waiver.

Finally, as to Arch's argument that the jury's verdict was against the great weight of the evidence, the Court rejects this argument for the reasons discussed in relation to Arch's request for JMOL.

For the foregoing reasons, Arch's alternative request for a new trial is **DENIED**.

IT IS SO ORDERED.

Very truly yours,



Jan R. Jurden
President Judge

JRJ:mls

cc: Prothonotary