IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

FIRST SOLAR ELECTRIC, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO.: 5:21-CV-00408-MTT**
	)	
ZURICH AMERICAN INSURANCE COMPANY,	)	
	)	
	)	
Defendant.		

PLAINTIFF FIRST SOLAR'S OPPOSITION
TO DEFENDANT ZURICH'S MOTION TO DISMISS

Plaintiff First Solar Electric, LLC ("First Solar") respectfully asks this courts to deny Zurich American Insurance Company's ("Zurich") motion to dismiss. Zurich argues First Solar's complaint is too late and too early. It is neither. Zurich's motion to dismiss should be denied.

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INTRODUCTION

This is a multi-million dollar property insurance dispute over damages caused by torrential rains during construction of a solar project. The insurance policy covers the damage, but the parties disagree about which deductible applies. In its motion to dismiss, Zurich urges this Court to dismiss First Solar's complaint as untimely by adding words to the insurance policy and ignoring the statute of limitations. Yet Zurich also argues that First Solar filed its complaint was too early. Neither argument is supported by the insurance policy at issue, the applicable law, or the facts alleged in First Solar's complaint.

Zurich's argument that First Solar's claims are late is premised on the fiction that the "Suit Against the Company" provision in the policy is a time-limitation clause that shortens the statute of limitations period from six years to twelve months. That argument has no merit. First, the Suit Against the Company provision does no such thing. Not under the plain language of the provision. Not under Georgia law. Not according to a District Court in Nebraska that examined the identical clause thirteen years ago. Not when juxtaposed to other policy language with limiting language. The Suit Against the Company provision simply does not say what Zurich says it does.

Second, even if the Suit Against the Company provision contained a clear time limitation, Zurich's argument still fails for two separate reasons: the provision contains an exception that enlarges any limitation period back to Georgia's six-year statute of limitations; and Zurich waived this argument by misleading First Solar, paying an advance consistent with First Solar's deductible position, and repeatedly confirming that adjustment of the claim was ongoing, only to ultimately deny any further payment obligation months after the artificial deadline Zurich now urges this Court to adopt.

Zurich's argument that First Solar's bad faith claim is premature also fails. Zurich provides no legal analysis or factual application to suggest that First Solar failed to notify Zurich and wait

60 days before filing its bad faith claim. In a single, conclusory sentence, Zurich states that "First Solar did not make the required bad faith demand 60 days prior to filing suit." This sentence is insufficient to demonstrate that First Solar has failed to state a claim. Nor can Zurich do so given First Solar's allegations. Georgia's bad faith statute requires no particular language or formalities when an insured is making a demand; the insured simply must alert the insurer of its intent to seek recovery after the coverage denial. First Solar's complaint sufficiently alleges this.

FIRST SOLAR'S ALLEGATIONS

Zurich issued an all-risk Master Builder's Risk Policy (the "Policy") to cover risk of loss and damage during construction to a 2000+ acre project in Twiggs County, Georgia. (Doc. 1, p. 1, ¶ 1; p. 2, ¶ 2). First Solar expected, intended, and understood that loss and damage caused by heavy rains was covered as "water damage" as defined by the Policy. (Doc. 1, p. 2, ¶ 4; pp. 3–4, ¶¶ 9, 10; pp. 11–12, ¶¶ 42–50). This litigation relates to Zurich's position that the damage at issue is instead "flood" damage subject to a higher deductible that Zurich argues ultimately eliminates its obligation to pay any amount under the Policy. (Doc. 1, p. 2, ¶ 5).

I. Zurich starts to pay First Solar's "water damage" claim.

Serial heavy rain events in record amounts caused significant water damage to the Twiggs Project during construction beginning in December 2019 and lasting through April 2020. (Doc. 1, p. 2, ¶ 3). Following the damage and First Solar's resulting insurance claim, Zurich paid a $600,000 advance on July 11, 2020, treating the claim as "water damage" as defined by the Policy. (Doc. 1, p. 11, ¶ 42). Zurich then continued to lead First Solar to believe that Zurich was adjusting its obligation to pay additional amounts upon completion of its lengthy investigation. (Doc. 1, pp. 11–12, ¶¶ 42–50).

II. Zurich continues the claims process and, until March 2021, leads First Solar to believe more payments are coming.

After Zurich paid First Solar the $600,000 advance, Zurich repeatedly and consistently communicated that it was investigating the claim and led First Solar to believe it should await requests for additional information regarding its "water damage" claim. (Doc. 1, pp. 11–12, ¶¶ 43–49). The back-and-forth between First Solar and Zurich about the extent of the damage and when the remaining payment would be issued continued until March 2021. (Doc. 1, p. 11–12, ¶¶ 42–50). On August 4, 2020, Zurich sent a letter to First Solar indicating that it "continues to gather information for these claims and will continue to do so." (Doc. 1, p. 11, ¶ 43). Zurich sent a letter on October 26, 2021, over two months later, indicating its continued investigation of the claim and noted that "since the claim is still pending there may be additional requests in the future." (Doc. 1, p. 11, ¶ 44). On December 10, 2020, Zurich provided an "update as to the status regarding the claim and [its] ongoing review of the submitted damages/information" for the claim. (Doc. 1, p. 11, ¶ 45). Zurich noted that information was still being reviewed and would not be "finished till at least late next week at the earliest due to the complexity and amount of data." (Doc. 1, p. 11, ¶ 45). Zurich noted that it would "continue to work on it and keep [First Solar] updated of [its] progress." (Doc. 1, p. 11, ¶ 45). A week later, on December 18, 2020, Zurich provided its "preliminary review regarding the deductibles," which included preliminary "WORK IN PROGRESS" calculations from Zurich's consultants. (Doc. 1, p. 11, ¶ 46).

Zurich continued to adjust the claim with the help of its consultants and sent updated calculations as late as February 8, 2021 -- well over a year from the first in the series of rain events during construction. (Doc. 1, p. 11, ¶ 47). First Solar repeatedly sought Zurich's position throughout the process. (Doc. 1, p. 11, ¶ 48). On March 15, 2021, more than a year after the claim

was submitted and more than eight months after Zurich made its initial $600,000 advance payment on the claim, Zurich informed First Solar that it was "[s]till working on it." (Doc. 1, p. 11, ¶ 48).

Then suddenly, a week after informing First Solar that it was "[s]till working on it," Zurich's lawyer first took the position that Zurich did not owe anything else under the Policy because Zurich decided to treat the damage as "flood" damage, subject to a higher deductible than "water damage." (Doc. 1, p. 12 ¶ 50). This was fifteen months after the first in the series of rain events during construction and three months after Zurich now argues First Solar was supposed to file its complaint. First Solar promptly sent a demand for arbitration. (Doc. 1, p. 12 ¶ 52).

After First Solar demanded arbitration to satisfy the Policy's ADR provisions in April 2021, the parties agreed to mediate after months of further discussion regarding First Solar's contractual and extracontractual claims. (Doc. 1, p. 12, ¶ 52). First Solar and Zurich participated in an unsuccessful mediation on October 7, 2021. (Doc. 1, p. 12, ¶ 53). Until that mediation, Zurich never mentioned any position that First Solar was required to file suit by December 2020. Now Zurich asks this Court to dismiss First Solar's complaint as untimely, a result that would render ten months of claim adjustment and resolution activity meaningless.

III. The Policy

Zurich relies on the Suit Against the Company provision from the boilerplate "Construction Project General Conditions" form attached to the Policy. *See* Doc. 1-1, p. 59–63. That provision is not a time-limitation clause. Instead, it *allows* First Solar to file a claim within twelve months of discovering an occurrence (or a longer period if one is required by statute):

> **SUIT AGAINST THE COMPANY**
>
> No suit or action on this Policy for the recovery of any claim will be sustainable in any court of law or equity unless the Insured will have fully complied with all the requirements of this Policy. Any action or proceeding against the Company for recovery of any loss under this policy will not be barred if commenced within (12) twelve

> months after the OCCURRENCE* becomes known to the Named Insured unless a longer period of time is required by applicable statute.

(Doc. 1-1, p. 63).

LEGAL STANDARDS

The Federal Rules of Civil Procedure require that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Rule 8's pleading standard 'does not require detailed factual allegations[.]'" *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1296 (11th Cir. 2011) (quotation omitted).

Construction of a contract is a question of law for the Court under Georgia law. O.C.G.A. § 13-2-1; *Savannah Yacht Corp. v. Thunderbolt Marine, Inc.*, 676 S.E.2d 728, 732 (Ga. Ct. App. 2009). When the language in an insurance policy is clear, the "policy is interpreted according to its plain language and express terms, just as any other contract." *Alewine v. Horace Mann Insurance Co.*, 398 S.E.2d 756, 757 (Ga. Ct. App. 1990). Georgia also follows the "well-known rule" if a policy is ambiguous: "ambiguities are strictly construed against the insurer as the drafter." *Auto-Owners Ins. Co. v. Neisler*, 779 S.E.2d 55, 59 (Ga. Ct. App. 2015). Similarly, "any exclusion from coverage sought to be invoked by the insurer is to be strictly construed." *Cunningham v. Middle Georgia Mutual Insurance Co.*, 601 S.E.2d 382, 385 (Ga. Ct. App. 2004). And a contract "is to be read in accordance with the reasonable expectations of the insured when possible." *Neisler*, 779 S.E.2d at 59. Georgia law is clear that courts must "address the merits of litigation" and "discourage the resolution of disputes on technicalities." *Guarantee Ins. Co. v. Merchants Emp. Benefits, Inc.*, 2008 WL 2559436, at *1 (M.D. Ga. June 23, 2008).

The insurer has the burden of using language that is clear and precise. *Travelers Indem. Co. v. Whalley Construction Co.*, 287 S.E.2d 226, 228 (Ga. Ct. App. 1981). And "an insurer seeking to invoke a policy exclusion carries the burden of proving its applicability in a given case." *First Specialty Insurance Corp. v. Flowers*, 644 S.E.2d 453, 455 (Ga. Ct. App. 2007).[1]

SUMMARY OF THE ARGUMENT

First Solar's complaint is not time barred as First Solar filed it within Georgia's six-year statute of limitations. The Suit Against the Company provision is not a time-limitation provision, it is a time-expansion provision, and thus it does not shorten the limitations period to twelve months as Zurich argues. It is clear that the provision is not a time-limitation clause under its plain language and when compared to other Policy language. Zurich's interpretation would also lead to unworkable results while ignoring other clauses in the Policy, contrary to the parties' intent. Putting Zurich's flawed interpretation aside, First Solar's complaint would be timely for two additional and separate reasons: the provision contains an exception that enlarges any limitation period back to Georgia's six-year statute of limitations; and Zurich waived this argument by misleading First Solar for a year into believing that it would provide full coverage.

Zurich's argument that First Solar's bad faith claim is premature also fails. Zurich provides no legal analysis or factual application to suggest that First Solar failed to notify Zurich and wait 60 days before filing its bad faith claim. In a single, conclusory sentence, Zurich states that "First Solar did not make the required bad faith demand 60 days prior to filing suit," which is insufficient to demonstrate that First Solar has failed to state a claim. Nor can Zurich do so; under Georgia's

[1] Although First Solar reserves the right to argue that Georgia law does not necessarily apply to every issue presented in this case, Zurich's motion to dismiss should be denied under either Georgia or Arizona law. First Solar has therefore cited Georgia law in this response. But the Court need not decide any choice of law questions because the Suit Against the Company provision does not actually establish a limitations period.

bad faith statute, the insured simply must alert the insurer of its intent to seek recovery after the coverage denial, and First Solar's complaint sufficiently alleges this.

ARGUMENT

I. First Solar's complaint is not time-barred.

A. First Solar filed its claim within Georgia's six-year statute of limitations period for contract claims.

First Solar filed its claim within Georgia's six-year statute of limitations period for contract claims. *See* O.C.G.A. § 9-3-24. The heavy rains that caused the damage at issue occurred during construction between December 2019 and April 2020. (Doc. 1, p. 2, ¶ 3; p. 10, ¶ 35). First Solar submitted a claim to Zurich shortly thereafter. (Doc. 1, p. 10, ¶ 40). Zurich did not finally deny further payment obligation until its lawyer sent a letter in March of 2021. (Doc. 1, p. 12, ¶ 50). First Solar filed this lawsuit on November 12, 2021, within two years of the first in the series of rain events, within eight months of Zurich saying it would not pay more on the claim, and within one month after completion of the dispute resolution process outlined in the Policy. First Solar's complaint is timely with years to spare.

B. The Suit Against the Company provision is not a time-limitation clause.

The Suit Against the Company provision is not a time-limitation clause. This is apparent from the plain language of the Policy, from a review of bona fide time-limitation clauses, and from the unworkable consequences of Zurich's interpretation.

1. The Suit Against the Company provision is a time-expansion clause, not a time-limitation clause.

The Suit Against the Company provision is a time-<u>expansion</u> provision, not a time-<u>limitation</u> provision. The provision *promises* that a suit in compliance with the Policy will "not be barred" if it is brought within twelve months after the event's occurrence becomes known. The Suit Against the Company provision thus creates a "grace period," not a "limitations period."

Indeed, the language upon which Zurich relies is permissive -- not restrictive. As the *Northwest Steel Erection Co.* court explained to Zurich, thirteen years ago:

> I do not believe that the "Suit Against the Company" provision can reasonably be construed as a contractual limitations provision. As written, the provision instead acts as a sort of "discovery rule" for the insured's benefit by permitting an action to be brought within 12 months after the occurrence becomes known (or such longer period of time as may be permitted by State law).

Northwest Steel Erection Co. v. Zurich Am. Ins. Co., 2008 WL 187687, at *4 (D. Neb. Jan. 18, 2008). The policy reasons behind a time-expansion provision are straightforward and make sense. It would be unfair to penalize an insured who discovered a potential loss late and was wrongfully denied coverage after a statute of limitations ran -- especially if the cause of the loss is unknown.

2. The plain language of the Suit Against the Company provision cannot reasonably be construed as a time-limitation clause.

Simply put, the Suit Against the Company provision does not say what Zurich contends. The plain language of the Suit Against the Company provision speaks for itself. The provision unambiguously states that an action *will not be barred* if it is brought within twelve months after the occurrence becomes known. Nothing in that provision says that First Solar's claims must be brought within twelve months after learning of an occurrence, so nothing is "requiring First Solar to commence any action" within that time. *See* Doc. 12, p. 7. Likewise, nothing in that provision says that First Solar's claims may not brought after twelve months of discovering an occurrence, so there is nothing that "precludes any action by First Solar against Zurich if commenced after" that period. *See* Doc. 12, p. 1. In fact, neither "require," "preclude," nor any of their derivations appear in that provision.

Yet, Zurich contends that this language supersedes the applicable statute of limitations, by providing that an action *will be barred* if it is *not* brought within twelve months of a known occurrence. That an action "will not be barred if commenced within twelve months" is not the

same as a statement that a claim will be barred if commenced after twelve months. Zurich's argument is logically flawed.

Of course, Zurich already knows that its argument is wrong and unreasonable. The court in *Northwest Steel Erection Co.* rejected Zurich's identical argument as "fallacious" and "faulty" -- *over thirteen years ago* -- when Zurich raised it on a nearly verbatim provision. 2008 WL 187687, at *1, n.5 ("Zurich's argument is a logical fallacy known as denying the antecedent.").

It is also clear from other provisions in the Policy that the Suit Against the Company provision is not a time-limitation clause. The Policy contains an example of a clause that contains unambiguous, limiting language:

> It is a condition precedent to recovery under this extension . . . that the Insured shall give written notice to the Company of intent to claim for cost of debris removal or cost to cleanup not later than twelve (12) months after the date of such physical loss or damage.

(Doc. 1-1, p. 47) (the "Debris Removal" provision). If Zurich intended to create a time-limitation provision, it could have used similar language. Indeed, it should have, given *Northwest Steel Erection Co.*'s strong rejection of Zurich's argument, which put Zurich on notice -- over thirteen years ago -- that the Suit Against the Company provision was not a time-limitation clause.

3. The Suit Against the Company provision does not meet the requirements of a time-limitation clause under Georgia law.

The Suit Against the Company provision does not meet the requirements of a time-limitation clause under Georgia law. Only time-limitation clauses that state unambiguously that they are shortening the relevant limitations period, with language that is "clearly labeled and simply worded," are recognized in Georgia. *NAFRA Worldwide, LLC v. Home Depot U.S.A, Inc.*, 2013 WL 12098772, at *7 (N.D. Ga. Aug. 29, 2013). Zurich's argument violates this requirement.[2]

[2] Georgia courts allow parties to contractually shorten a statute of limitations period but only so long as "the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage in some way." *Rabey Elec.*

A Georgia court has never held that the language at issue in the Suit Against the Company provision constitutes a time-limitation clause. Instead, the following are examples of provisions that have been recognized as valid time-limitation clauses in Georgia -- provisions that are categorically different than the Suit Against the Company provision:

- "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." *E. Tennessee Mortg. Co. v. U.S. Fid. & Guar. Co.*, 491 S.E.2d 333, 335 (Ga. 1997).

- "No suit or action may be brought against us unless there has been full compliance with all policy terms. Any suit or action must be brought within one year after the inception of the loss or damages." *McCoury v. Allstate Ins. Co.*, 561 S.E.2d 169, 172 (Ga. Ct. App. 2002).

- "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." *Suntrust Mortg.*, 416 S.E.2d at 322.

- "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." *Jones v. Valley Forge Ins. Co.*, 382 S.E.2d 404, 405 (Ga. Ct. App. 1989).

- "No suit or action on this policy for the recovery of any claim shall be sustainable . . . unless commenced within twelve months next after inception of the loss." *Gravely v. S. Tr. Ins. Co.*, 258 S.E.2d 753, 753 (Ga. Ct. App. 1979)

- "Notwithstanding any provision to the contrary, Supplier agrees to bring any claim or dispute against The Home Depot (including payment disputes)

Co. v. Hous. Auth. of Savannah, 378 S.E.2d 169, 170 (Ga. Ct. App. 1989) (citation and quotation omitted). Zurich's interpretation of the Suit Against the Company provision would grant an undue advantage to Zurich because it is no more than a "gotcha" argument. Zurich's interpretation would thus thwart the fundamental rule limiting Georgia time-limitation clauses.

> within one year after the occurrence of the event giving rise to such dispute." *NAFRA Worldwide*, 2013 WL 12098772, at *3.

In contrast to these Georgia time-limitation clauses, the Suit Against the Company provision says nothing about any condition or requirement that a suit must be filed within a year, let alone imposes a condition precedent unambiguously and expressly. [3]

4. Zurich's interpretation of the Suit Against the Company provision is unworkable and cannot be what the parties intended.

Zurich's interpretation of the Suit Against the Company provision is unworkable and cannot be what the parties intended. In Georgia, "the cardinal rule of contract construction is to ascertain the intention of the parties." *Alimenta (USA), Inc. v. Oil Seed South*, 622 S.E.2d 363, 365 (Ga. Ct. App. 2005). Additionally, "Georgia law requires us to give meaning to every term of a contract rather than construe any term as meaningless, and to construe a contract so as to uphold the contract in whole and in every part." *Albany v. Dougherty Cty.*, 835 S.E.2d 681, 685 (Ga. Ct. App. 2019); *see also* O.C.G.A. § 13-2-2(4). Zurich's interpretation violates these principles and would lead to absurd results if accepted by the Court.

This first event in the series of rain events during construction and triggering coverage occurred in December 2019. (Doc. 1, p. 2, ¶ 3). Zurich's position, therefore, is that First Solar should have filed suit at least by December 2020. (*See* Doc. 12, p. 7). This is roughly the same time that Zurich wrote to provide an "update" about its "ongoing review of the submitted

[3] The Court should deny Zurich's motion under the unambiguous language of the Suit Against the Company provision. First Solar respectfully believes that it is not a close call. Zurich agrees that the provision is unambiguous, though it ignores the plain language and *Northwest Steel Erection Co.* to reach a different interpretation. To the extent the Court finds that Zurich's position has any merit, it must find the provision ambiguous and construe it in First Solar's favor. At a minimum, *Northwest Steel Erection Co.* creates an ambiguity because it made clear – thirteen years before the Policy was issued – that others read the Suit Against the Company provision differently than how Zurich read it. Even if the court does not deny the motion based on the plain language of the Policy, therefore, it may nonetheless deny the motion because of that perceived ambiguity. To rule otherwise would require this Court to find that the interpretation of the *Northwest Steel Erection Co.* is unreasonable.

damages/information" and about the time Zurich sent a "preliminary review regarding the deductibles." (Doc. 1, p. 11, ¶¶ 45, 47). And, it is about three months *before* Zurich's lawyer's letter stating for the first time Zurich's position that additional amounts were not owed by Zurich -- the very position giving rise to this dispute. (Doc. 1, p. 12, ¶ 50). It cannot have been the parties' intent to require First Solar to file suit *months before* Zurich stated its position and refused to pay any more on First Solar's claim. And had First Solar filed suit for declaratory judgment in December 2020, Zurich likely would have questioned whether there was a justiciable controversy.[4]

Zurich's interpretation of the Suit Against the Company provision is also unworkable because it cannot give full effect to the Debris Removal provision cited above. It would not make sense for the Debris Removal provision to provide an insured up to twelve months to provide notice if the Suit Against the Company provision shortens the time to file a suit to twelve months.

C. The Suit Against the Company provision contains an exception that enlarges any limitation period to Georgia's six-year statute of limitations for contract claims.

Even if Zurich's threshold position had merit, the Suit Against the Company provision contains an exception that enlarges any limitation period back to Georgia's six-year statute of limitations for contract claims. The final clause of the Suit Against the Company provision provides that the twelve-month grace period applies "unless a longer period of time is required by applicable statute." (Doc. 1-1, p. 63). Under Georgia law, the six-year statute of limitations for contract claims qualifies as an "applicable statute" if "certain amendatory language is contained in a limitations clause itself." *Relf v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 2552770, at *1 (M.D.

[4] In fact, Zurich's inconsistent "too late/too early" positions would have required First Solar to send a formulistic, bad faith demand 60 days prior, meaning First Solar would have had to threaten a claim for bad faith at least by October 2020, six months after the last rain event and *five months before* Zurich's lawyer took the position that gave rise to this dispute.

Ga. June 20, 2019). In *Queen Tufting Co.*, the Supreme Court of Georgia ruled that the exception in the following provision superseded to the Georgia's six-year statute of limitations:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity unless . . . commenced within twelve (12) months next after the happening of the loss, *unless a longer period of time is provided by applicable statute*.

239 S.E.2d 27, 28 (Ga. 1977) (emphasis added). Georgia courts look to whether the clause at issue contains this same "special language," and if it does, Georgia's six-year statute of limitations controls. *Dr. Roger Abbott, Inc. v. State Farm Fire & Cas. Co.*, 2016 WL 4592172, at *2–4 (N.D. Ga. Jan. 5, 2016).

The exception in the Suit Against the Company provision contains the "special language" that is necessary to subject any limitations clause to Georgia's six-year statute of limitations. The amendatory language in the Suit Against the Company provision refers directly to the applicable statutes. Indeed, the language here is nearly identical to the special language in *Queen Tufting*. That controls the analysis even if the Policy said what Zurich incorrectly suggests.

D. Zurich waived any time limitation imposed by the Suit Against the Company provision because Zurich led First Solar to believe that Zurich would cover its claim.

Finally, even if the Policy contained an enforceable suit time limitation provision that did not contain the *Queen Tufting* language, Zurich's request for dismissal would still fail under well-established waiver and estoppel law. In Georgia, an insurer cannot mislead an insured as Zurich did here. Zurich waived any time limitation imposed by the Suit Against the Company provision under the facts alleged.

Under Georgia law, a time-limitation provision can be waived by conduct inconsistent with the enforcement of that limitation. *Brown v. Nationwide Ins. Co.*, 306 S.E.2d 62, 63 (Ga. Ct. App. 1983). Inconsistent conduct exists when an insurer's "investigations, negotiations, or assurances

up to and past the period of limitation led the insured to believe the limitation would not apply." *Gilbert v. S. Tr. Ins. Co.*, 555 S.E.2d 69, 72 (Ga. Ct. App. 2001). If an insurer "continually discusse[s] the loss with its insured with a view toward negotiation and settlement without the intervention of a suit," then there is a fact question on whether this conduct "lulled the insured into a belief" that the insurer waived the policy's limitation period. *Auto-Owners Ins. Co. v. Ogden*, 569 S.E.2d 833, 835 (Ga. 2002); *see also Giles v. Nationwide Mut. Fire Ins. Co.*, 405 S.E.2d 112, 114 (Ga. Ct. App. 1991) ("If the insurer makes direct promises to pay or if settlement negotiations have lead [sic] the insured to believe that the claim will be paid without litigation, the time requirement is waived.").

It "is not necessary that there be an actual promise to pay in order for the acts of the insurer to effect a waiver of the time limitation." *Nee v. State Farm Fire & Cas. Co.*, 236 S.E.2d 880, 882 (1977). An insurer's "express or implied" actions can lead an insured to believe that the time-limitation clause has been waived. *Ogden*, 569 S.E.2d at 835. "If the facts show that negotiations for a settlement have led the insured to believe that the claim would be paid by the insurer without a suit, this will constitute a waiver of the time requirement, and the insurer cannot take advantage thereof in a suit to recover the loss." *Nee*, 236 S.E.2d at 882; *see also Balboa Life & Cas., LLC v. Home Builders Fin., Inc.*, 697 S.E.2d 240, 244 (Ga. Ct. App. 2010) ("If the insurer never denied liability, but continually discussed the loss with its insured with a view toward negotiation and settlement without the intervention of a suit, whether or not this lulled the insured into a belief that the twelve–month clause in the contract was waived by the insurer can become a disputed question of fact for the jury."). Importantly, "[i]f applying a limitation to an insurance contract would result in the forfeiture of a policy benefit, 'the court will strictly construe the provision against the insurance company[,] and small circumstances will be sufficient to show a waiver by the

company." *Thompson v. State Farm Fire & Cas. Co.*, 264 F. Supp. 3d 1302, 1320–21 (M.D. Ga. Aug. 31, 2017) (J. Treadwell) (quoting *Gilbert v. Southern Trust Ins. Co.*, 555 S.E.2d 69, 72 (Ga Ct. App. 2001)).

First Solar sufficiently alleges that Zurich's affirmative conduct led First Solar to believe that Zurich did not contend that any time limits applied. Zurich paid an advance of $600,000 and led First Solar to believe that it was investigating the damage for more than one year and into the first months of 2021. (Doc. 1, p. 2, ¶ 4; pp. 11–12, ¶¶ 42–50). In none of Zurich's subsequent communications with First Solar -- some of which were well past the twelve-month period in which Zurich now contend suit should have been filed -- did Zurich mention or otherwise indicate that it would be revaluating this or evaluating coverage generally. This includes an update by Zurich on December 10, 2020 -- *just three days* before the one-year mark of the initial occurrence -- that it was still reviewing the "submitted damages/information." (Doc. 1, p. 11, ¶ 45) (emphasis added). The update stated that it would need until "at least late next week at the earliest due to the complexity and amount of data." (Doc. 1, p. 11, ¶ 45). First Solar also alleged that Zurich had processed such claims in the past under the Water Damage provision. (Doc. 1, p. 4, ¶ 10). First Solar thus had no reason to believe that Zurich would not satisfy its claim following the investigation. Taken together, these allegations show that First Solar was under the impression that Zurich was investigating only the amount of damage and that its claim would be covered under the Policy.

Zurich's reliance on *Premier Eye Care Assocs., P.C. v. Mag Mut. Ins. Co.* is misplaced. 844 S.E.2d 282 (Ga. Ct. App. 2020), *cert. denied* (May 17, 2021). The Court of Appeals made clear there that the insured was "well aware" that the insurer "did not intend to fully pay the amounts it claimed to be due." *Premier Eye Care.*, 844 S.E.2d at 288. The case does not stand

for the proposition that an advance *cannot* constitute a waiver. The case also undermines Zurich's motion and highlights its inconsistency because the court relied on the insured's "formal" notice to the insurer to conclude that the insured knew that his claims would not be covered; but here, Zurich's entire second argument is premised on the notion that First Solar failed to give adequate notice. Aside from Zurich arguing itself into a corner, First Solar alleges far more than "mere negotiations" and "simply engaging in discussions." *Ga. Farm Bureau Mut. Ins. Co. v. Pawlowski*, 643 S.E.2d 239, 241 (Ga. Ct. App. 2007); *Scottsdale Ins. Co. v. BPS Intl., Inc.*, 2017 WL 6618247, at *12 (N.D. Ga. Oct. 12, 2017). First Solar's allegations here "show that negotiations for a settlement [] led [it] to believe that the claim would be paid by the insurer without a suit." *Nee*, 236 S.E.2d at 882. Under these circumstances, and accepting First Solar's allegations as true, Zurich waived its enforcement of any time-limitation clause that may exist.[5]

* * *

The Court should not resolve the waiver issue in Zurich's favor at the motion to dismiss stage. The factual, individualized nature of the waiver inquiry often makes it "a question of fact not well suited for resolution at the motion to dismiss stage." *Huck v. Philadelphia Indem. Ins. Co.*, 2020 WL 6119519, at *3 (N.D. Ga. Oct. 16, 2020); *see also Scottsdale Ins. Co.*, 2017 WL 6618247, at *10 ("The case law addressing what constitutes a waiver does not yield a simple, broadly applicable rule. Instead, the results are highly dependent on the specific facts of the case.").

II. Zurich's challenges to First Solar's bad faith claim lack merit.

Zurich's challenges to First Solar's bad faith claim lack merit.

[5] Arizona's distaste for a forfeiture is equally as strong. While contractual limitations clauses are valid under Arizona statutory law, an insurer "may be estopped from raising a defense based upon such an adhesive clause where the enforcement of the clause would work an unjust forfeiture." *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 448 (Ariz. 1982). The "key factor" in the determination of this issue is whether the insurer can show that it was prejudiced by reason of the delay in filing suit. *Id.* Absent such a showing, the limitations clause can be breached with impunity.

Georgia law authorizes a supplemental award when an insurer refuses to make payment under a relevant policy in "bad faith," sixty days after the insured demanded payment. O.C.G.A. § 33-4-6(a). The insured must show that a demand for payment was properly and timely lodged against the insurer prior to the insured filing suit. "[N]o particular language" is required, however; the insured merely must use language "sufficient to alert the insurer that a bad faith claim will be asserted if the specific loss noted is not paid." *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1356 (N.D. Ga. 2001); *see also Cotton States Mut. Ins. Co. v. Clark*, 151 S.E.2d 780, 786 (Ga. Ct. App. 1966) (finding sufficient insured's statement: "Well, if you won't pay me I'll have to take you in court.").

Zurich's argument that First Solar's bad faith claim is premature is legally and factually incorrect. Zurich provides zero support or explanation for its conclusory statement that "[h]ere, First Solar did not make the required bad faith demand 60 days prior to filing suit." (Doc. 13, p. 13). That single, conclusory sentence is the extent of Zurich's argument. Zurich does not discuss any dates or challenge the dates of the extensive back-and-forth between the parties or otherwise explain how and why First Solar failed to meet this requirement.

Given the allegations of extensive discussions between Zurich and First Solar, and given First Solar's expressed expectation throughout that its claims would be covered, First Solar has met its burden at the pleading stage. *Byce v. Pruco Life Ins. Co.*, 2011 WL 233390, at *5 (N.D. Ga. Jan. 21, 2011) ("These letters taken together clearly indicate that, at minimum, a 'mere specter' of a bad faith lawsuit existed. Plaintiff's counsel stated that Defendant's assertions were 'not made in good faith' and were a 'delay tactic.'"). While Zurich led First Solar to believe that Zurich would cover its claims consistent with the $600,000 advance and Zurich's assurances that it was "working on it," Zurich simultaneously understood from those negotiations and letters that First

Solar would be filing suit if Zurich did not provide coverage. This was more than "simple notice." *Milam v. Metro. Life Ins. Co.*, 2011 WL 13272452, at *7 (M.D. Ga. Mar. 18, 2011). And this is unlike the situation in which a plaintiff "clearly [] has not shown diligence and has not shown good cause for permitting the out-of-time amendment" because "the plaintiff recognized that it had not complied with the statute and withdrew the bad faith claim in the first amended complaint." *Montezuma Welding & Radiator Works, Inc. v. Auto-Owners Ins. Co.*, 2020 WL 4810688, at *1–2 (M.D. Ga. Feb. 6, 2020) (J. Treadwell).

Zurich's conclusory argument is devoid of factual support, misconstrues Georgia law, and falls short of Zurich's burden on a motion to dismiss.[6]

CONCLUSION

The Court does not need to read anything more than the Suit Against the Company provision upon which Zurich relies to deny the motion to dismiss because, simply put, that provision does not say what Zurich contends. Contrary to Zurich's central argument, the Suit Against the Provision is not a time-limitation clause and thus has no effect on Georgia's six-year statute of limitations that is incorporated into the very provision on which Zurich relies. First Solar's claims comply with the Policy and that statute. Moreover, Zurich waived any time limitation defense by leading First Solar -- over the course of a year -- into believing that Zurich would honor the Policy and cover its claims. Zurich's ancillary argument -- that First Solar's bad faith claim is premature -- is not only inconsistent with its primary statute of limitations argument, but it also lacks factual and legal support. Zurich's motion to dismiss should be denied.

[6] Because a choice of law determination could be required later in the case, First Solar alleged bad faith generally, reserving the right to seek application of Arizona common law or Georgia statutory law. Zurich's argument that First Solar failed to demand payment would fail under Arizona law as well because Arizona does not contain a pre-suit demand requirement and First Solar sufficiently alleged the two elements of bad faith under Arizona law. *See Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 723 (Ariz. 1990) ("In a first-party situation the insurer breaches the implied duty of good faith and fair dealing if it (1) acts unreasonably towards its insured, and (2) acts knowingly or with reckless disregard as to the reasonableness of its actions.").

Respectfully submitted, this 23rd day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will notify all counsel of record.

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