IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VIKING PUMP, INC. AND WARREN PUMPS LLC INSURANCE APPEALS	) No. 518, 2014) No. 523, 2014) No. 525, 2014) No. 528, 2014)	**PUBLIC VERSION**
	) CASES BELOW:)	
	) SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, Consolidated C.A. No. N10C-06-141 FSS [CCLD]) -and-) COURT OF CHANCERY OF THE STATE OF DELAWARE, Civil Action No. 1465-VCS	

APPELLANT WARREN PUMPS LLC'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

[redacted]

[1] All capitalized terms have the same meaning as that set forth in Appellant Warren Pumps LLC's Opening Brief ("Warren Br."). "EI Ans. Br." refers to the Excess Insurers' Answering Brief. "Trav. Ans. Br." refers to Travelers Casualty and Surety Company's Answering Brief.

[redacted]

When all else fails, the Excess Insurers regurgitate the discredited factual arguments already rejected in a jury verdict from which they have not appealed.

[redacted]

[redacted]

[redacted]

Neither can the Excess Insurers justify the Superior Court's erroneous legal rulings by asking this Court to deem the [redacted] to be a "finding of fact" pursuant to Superior Court Civil Rule 49(a) ("Rule 49(a)"). As an initial matter, no "finding" can be inferred under Rule 49(a) where, as here, the context makes clear that the trial court did not intend to make any factual finding with respect to [redacted]

[redacted]

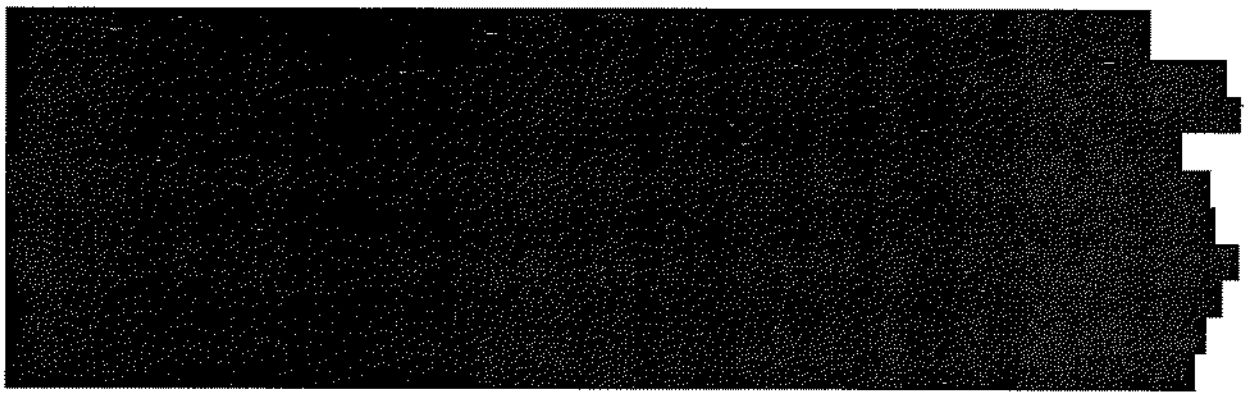
Finally, there is no merit to the Excess Insurers' arguments in "support" of the Superior Court's determination that sixteen Excess Policies pay defense costs within policy limits. For certain of those Policies, the Excess Insurers raise no argument other than their erroneous claim that the Policies contain no defense obligation whatsoever. For others, they suggest that the promise to pay both "indemnity" and "defense" in the Policies' insuring agreements means that both forms of coverage are subject to a single combined limit. That argument, which ignores the import of the crucial "ultimate net loss" definition, does not come close to meeting the standard necessary to clearly and unequivocally negate the promise to follow Liberty's obligation to pay defense costs in addition to limits. That is even truer for a final group of Policies, which contain no such insuring agreement language. Accordingly, the Superior Court's erroneous legal determination that those sixteen policies pay defense within limits should be reversed.

RESPONSE TO EXCESS INSURERS' STATEMENT OF FACTS

A. The Statement Of Facts Improperly Reargues Factual Findings Of The Jury From Which No Excess Insurer Has Appealed

[redacted] *That verdict has not been appealed by any Excess Insurer.* [redacted]

[redacted]



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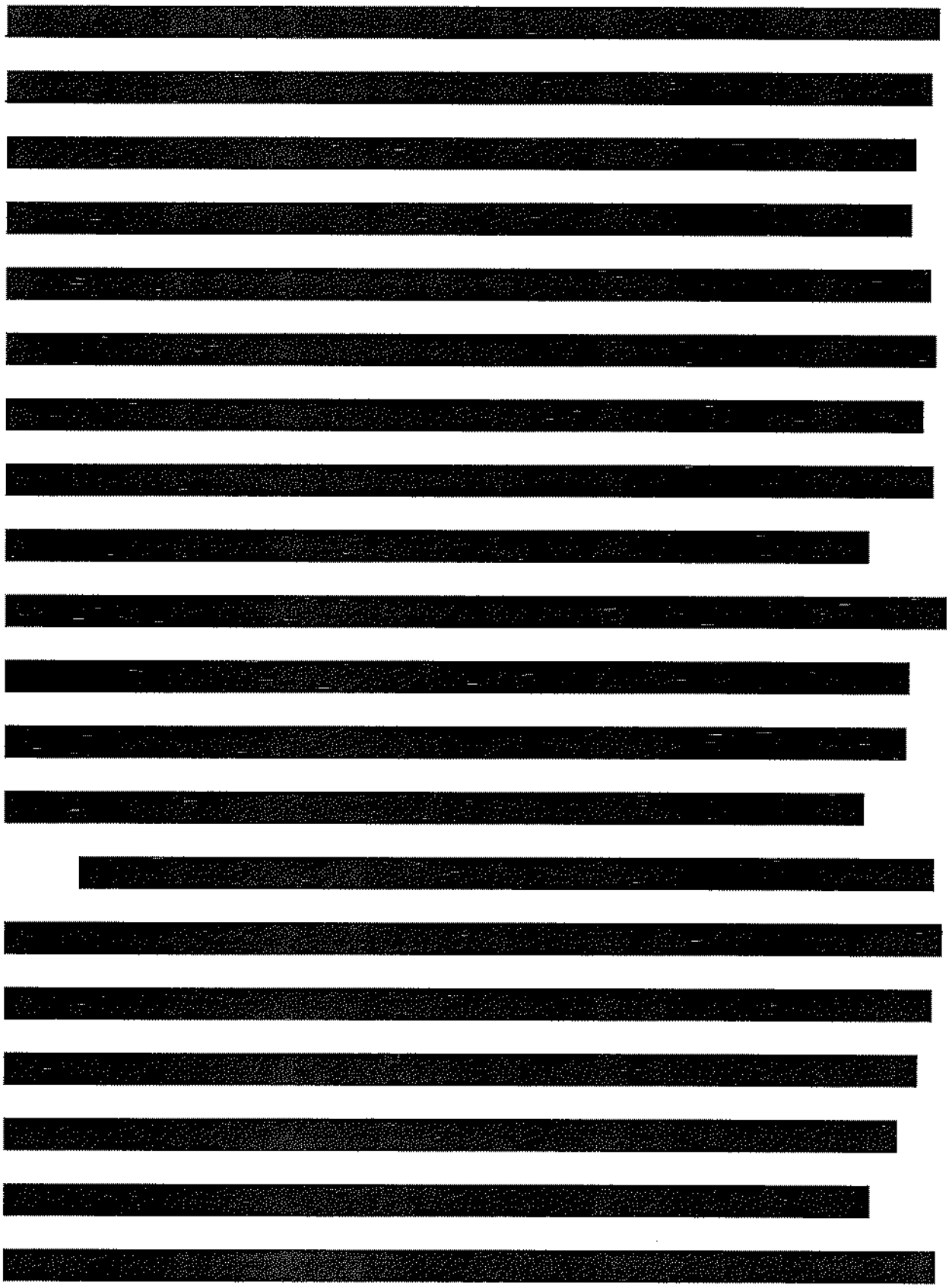


[redacted]

On November 12, 2012, just before the charging conference, the Superior Court informed the parties that it was adopting the Excess Insurers' proposed instructions and interrogatories as its templates. WA586-87. [redacted]

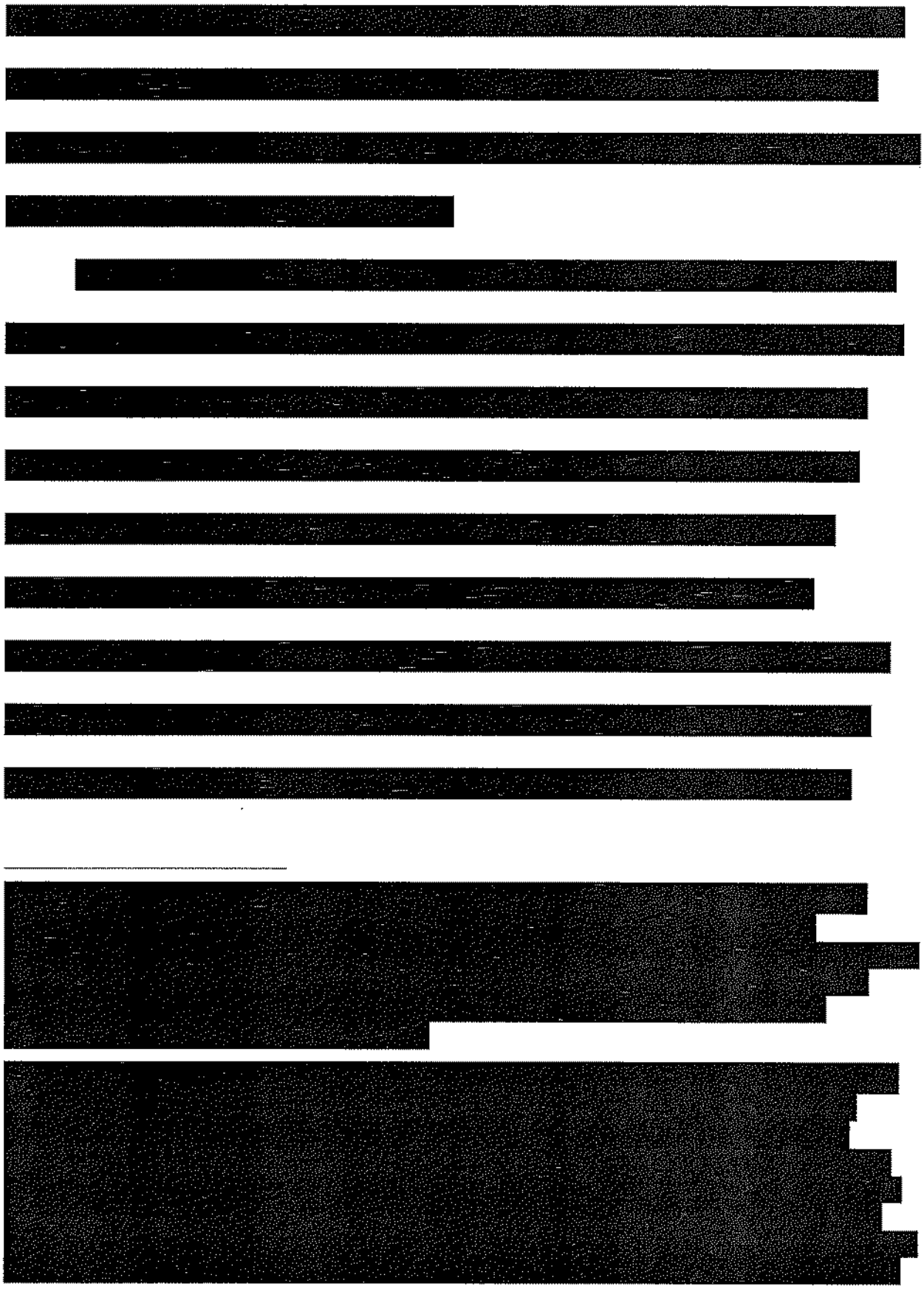
[redacted]

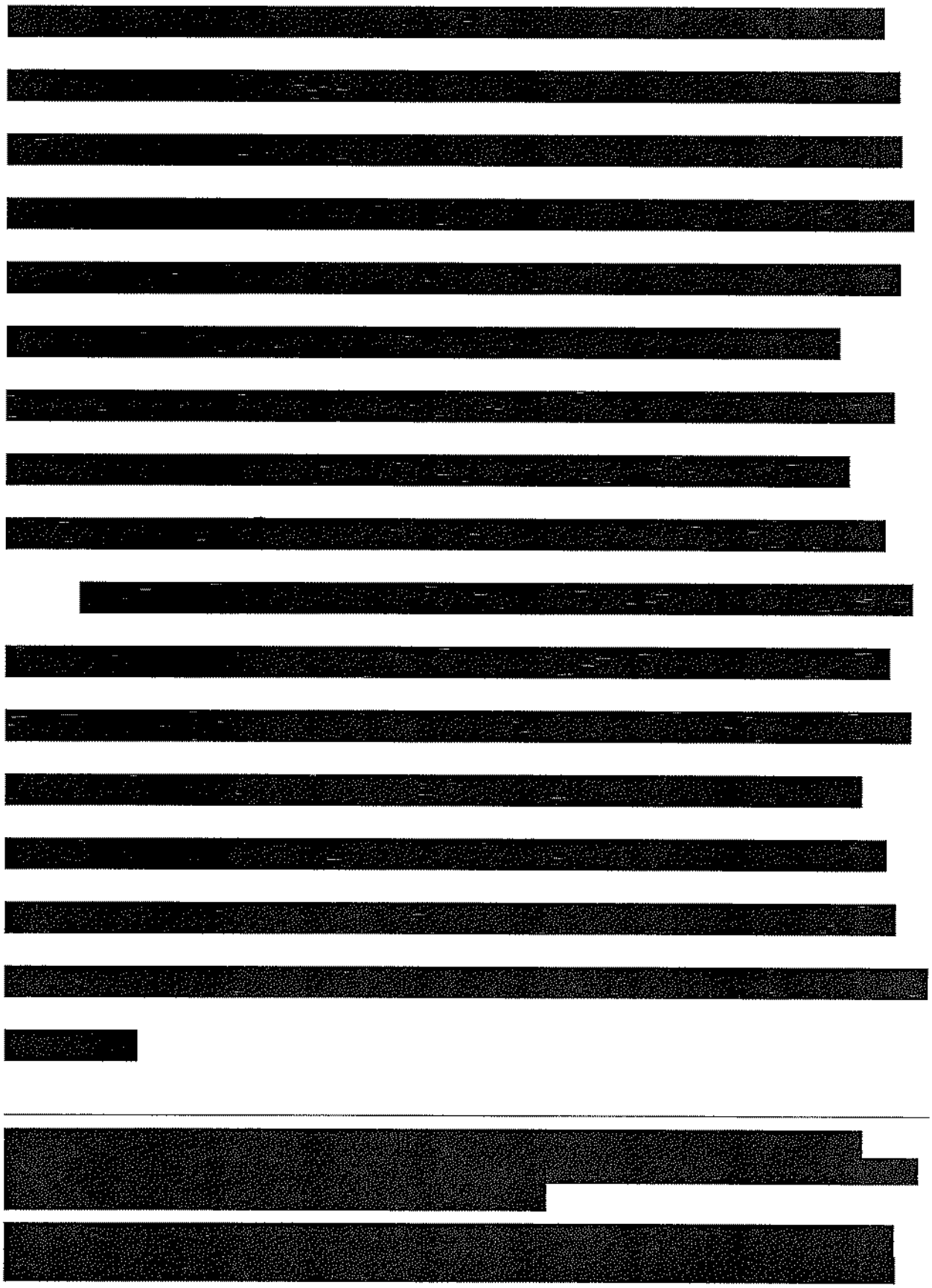
ARGUMENT

I. [redacted]

[redacted]

[redacted]





[redacted] That argument must be rejected, as no such "finding" can be inferred here, and, even if it could, it would constitute reversible error under any standard of review.

1. The Superior Court Expressly Refused To Make Any Factual Finding, And One Should Not Be Inferred

Rule 49(a) provides that, where the jury retires before a party demands submission of a factual issue to the jury, the court may make a finding on the omitted issue, "or, if it fails to do so, it shall be deemed to have made such a finding in accord with the judgment on the special verdict." The Excess Insurers cite no Delaware case applying this rule in circumstances such as those presented here. However, federal courts have refused to "deem" that a trial court made a factual finding where the record shows that it did not intend to do so.[8] *See Cullen*

[7] The Excess Insurers do not contend, nor could they, that the Superior Court made an express factual finding on this issue.

[8] That limitation is also consistent with the only Delaware state court case that the Excess Insurers cite on this issue, *Hubbard v. Dunkleberger*, 659 A.2d 227, 1995 WL 131789, at *6

v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987) (holding that it was "inappropriate to deem the [lower] court to have made a [Rule 49(a)] finding on the issue in question" where the lower court "believed plaintiffs were asking only for a ruling as a matter of law and expressly disavowed making a finding"), *overruled on other grounds*, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987); *Wood v. Old Sec. Life Ins. Co.*, 643 F.2d 1209, 1215 (5th Cir. Unit A May 1981) (declining to "deem the trial judge to have made a finding in accordance with the judgment where the record affirmatively show[ed] that [the judge] made no such finding because of a mistaken belief that, as a matter of law, the causation issue was irrelevant").

That is precisely the case here. [redacted]

(Del. Mar. 16, 1995) (TABLE), in which this Court held that the determination whether to make a factual finding pursuant to Rule 49(a) is "entirely discretionary with the trial judge." *See* EI Ans. Br. at 34.

[redacted]

Moreover, Rule 49(a) applies only where a disputed issue of fact has been "omitted" from the matters to be decided by the jury. [redacted]

[redacted] As this Court held long ago in *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972), a trial court's factual findings are entitled to deference "[i]f they are sufficiently supported by the record *and are the product of an orderly and logical deductive process.*" (Emphasis added).[9] Even where the trial court's deliberative process is sufficient to invoke that deferential standard, its factual findings still are subject to reversal where they are "clearly wrong and the doing of justice requires their overturn." *Id.*[10]

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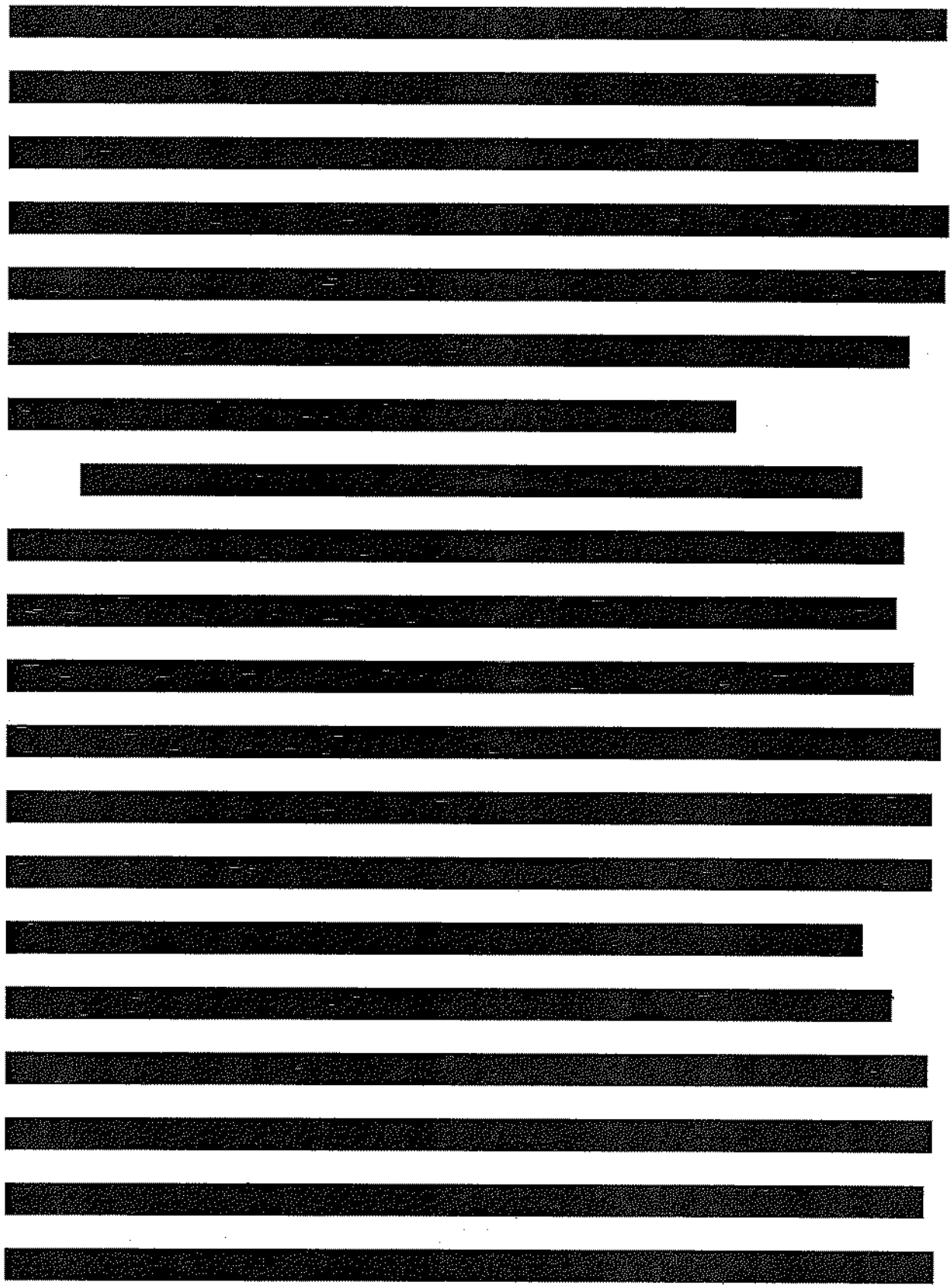
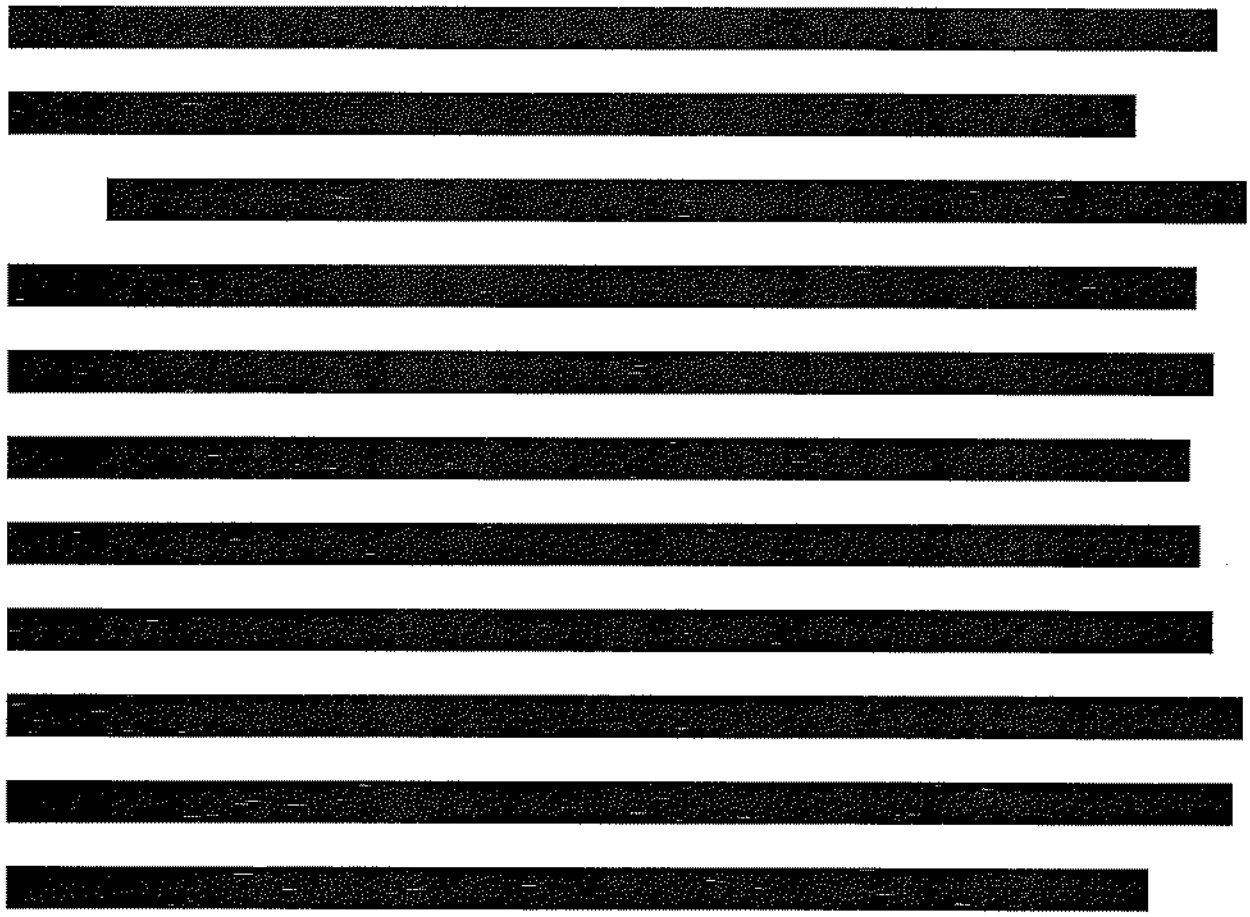
[9] *See also Gamles Corp. v. Gibson*, 939 A.2d 1269, 1274 (Del. 2007) (applying *Levitt* and reversing trial court factual determination that was not supported by the record).

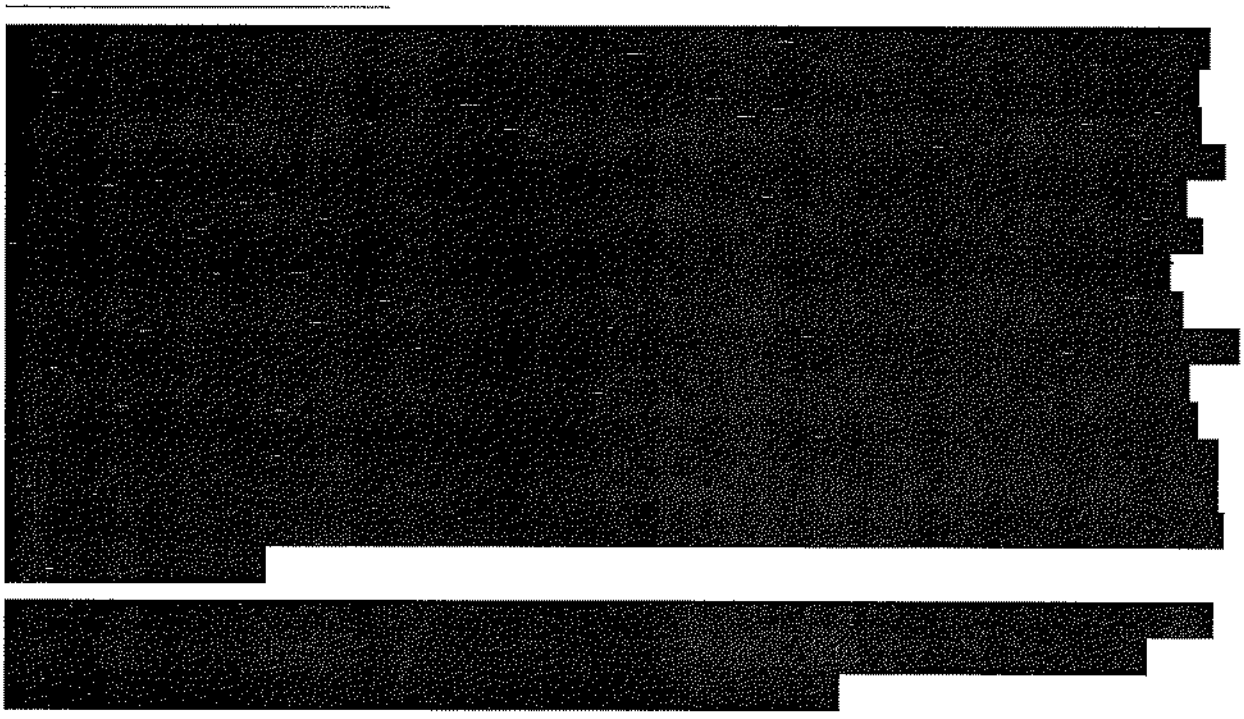
[10] *See also Titan Investment Fund II, LP v. Freedom Mort. Corp.*, 58 A.3d 984, 2012 WL 6049157, at *3-4 (Del. Dec. 5, 2012) (TABLE) (applying *Levitt* and reversing trial court factual determination which was made without citation to the record and which was at odds with the only record evidence existing on the issue).

[redacted]

[11] That is particularly true given the Superior Court's decision to close the courthouse door to the parties at a time when it should still have remained available, at the very least, to enforce the Final Judgment – particularly after denying the Excess Insurers' motion for a stay – [redacted] As the Excess Insurers note (EI Ans. Br. at 38), Warren does not appeal from that determination, though it does assert that it provides grounds, in the interest of justice, for this Court to consider the post-judgment facts in its consideration of this appeal. Warren Br. at 30-31. However, Warren notes that the facts leading to the Superior Court's decision to bar further filings here bear absolutely no relation to the history of abusive and frivolous filings which led to the directions not to accept further filings in the cases upon which the Excess Insurers rely. *See* EI Ans. Br. at 39 and cases cited therein.







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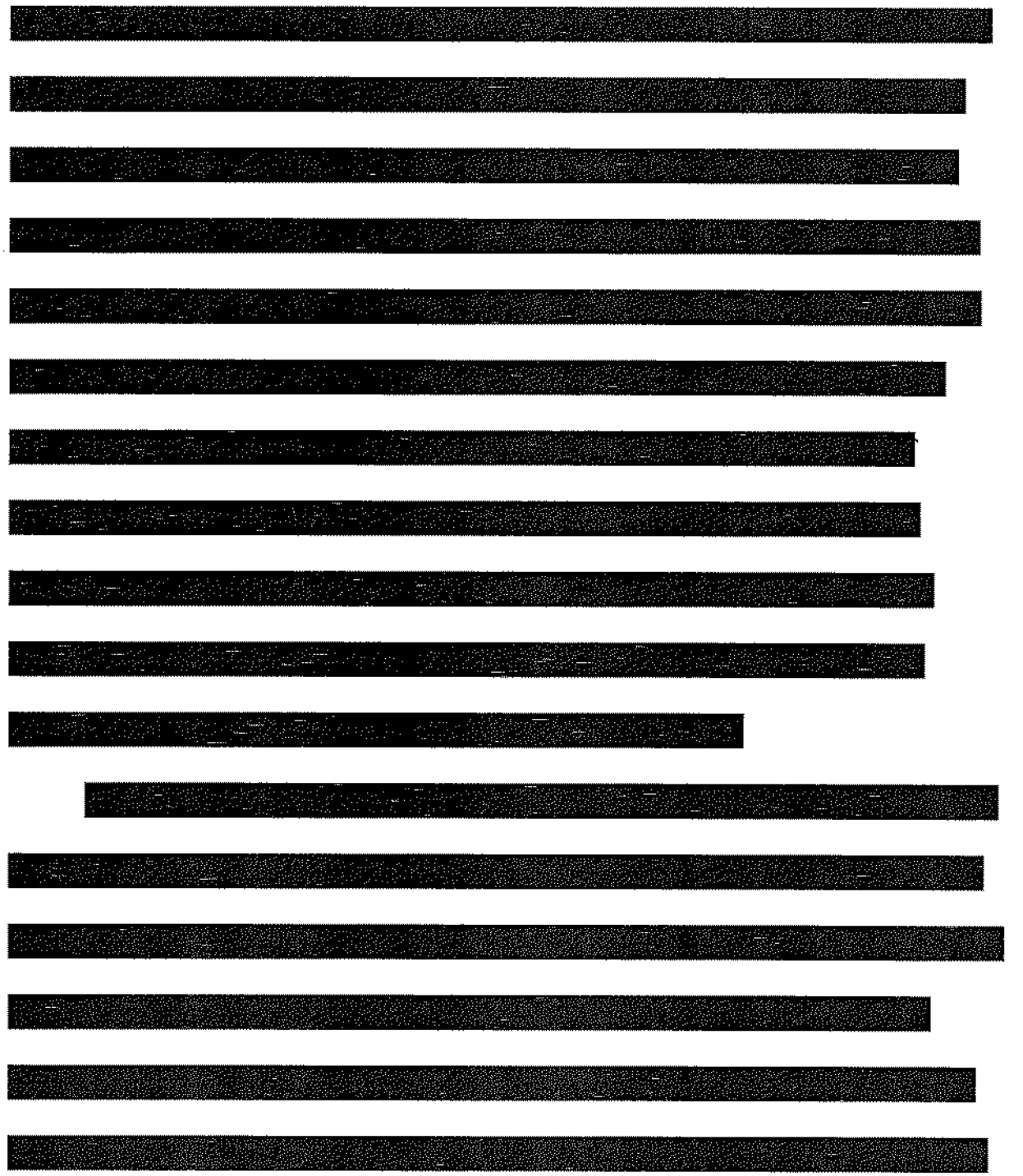

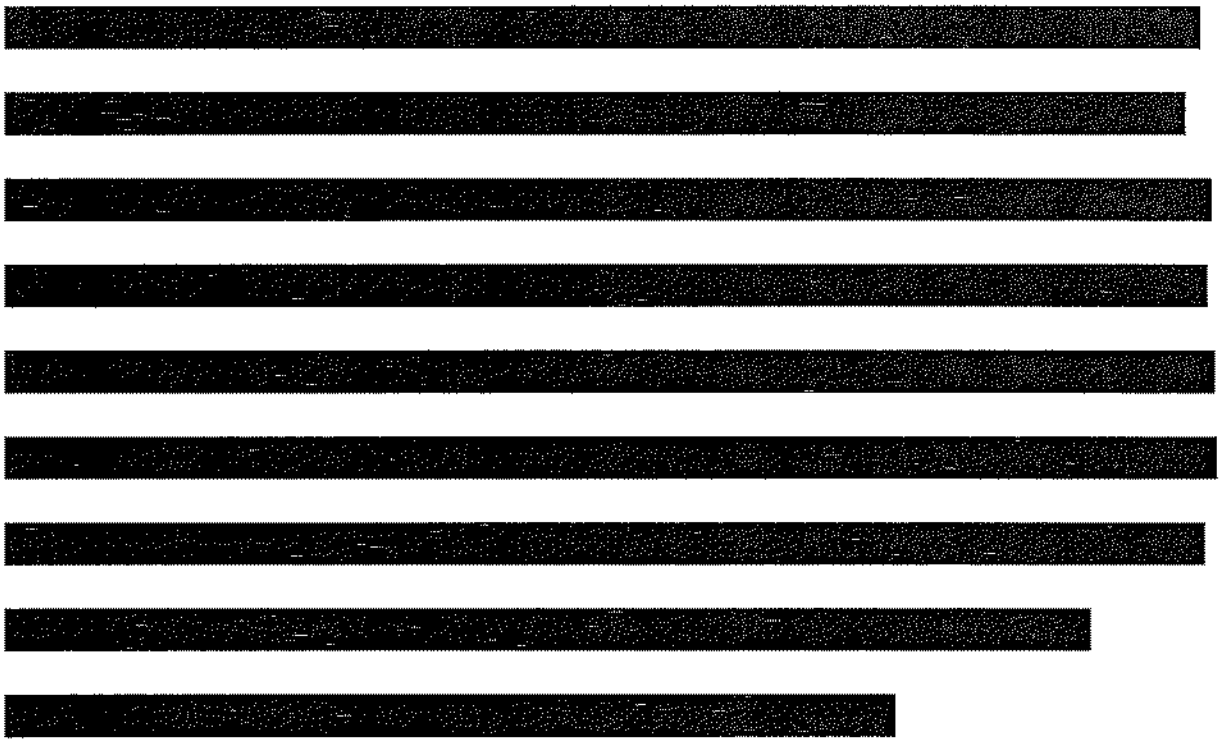

II. THE EXCESS INSURERS' ARGUMENTS CANNOT SUPPORT THE ERRONEOUS "DEFENSE WITHIN LIMITS" RULING

[redacted] the Excess Insurers' response to Warren's appeal from the "defense within limits" ruling is far more notable for what it does not say than for what it does. In particular, the Excess Insurers do not dispute that in order to avoid their agreement to follow form to the Liberty defense payment obligation, including the obligation to pay defense outside of limits, their policies must clearly negate that promise. *See* Warren Br. at 44-45 and cases cited therein. Yet while they do not challenge that standard, the Excess Insurers fail utterly to meet it, either raising *no* justification for the Superior Court's determination that certain policies follow form to Liberty's defense payment obligation, but not to the obligation to pay such costs outside of limits, or asserting arguments that misstate the applicable case law and ignore the actual policy language. Accordingly, their arguments cannot support the Superior Court's erroneous interpretation of the policies, which must be reversed.

A. The Excess Insurers Offer No Grounds To Support The Superior Court's Erroneous Interpretation Of The Group Three Policies

The Excess Insurers' only response to Warren's arguments with respect to the four Excess Policies in "group three" (Warren Br. at 13 n.5) is a single sentence arguing that those policies contain no defense obligation whatsoever. *See* EI Ans.

Br. at 49.[15] In particular, the Excess Insurers do not contest Warren's showing that: (1) none of the group three Policies bars incorporation of the "amounts and limits" of the underlying Liberty umbrella policies (Warren Br. at 13-14); (2) none of those policies contains "any provision placing defense costs within the policy limits" (*id.*); and (3) the Superior Court's failure to explain the basis for its finding that the group three Policies "carry defense obligations within the policy's applicable limits" constitutes an independent ground for reversal. *Id.* at 45 n.22.

As set forth in Warren's Answering Brief ("Warren Ans. Br."), the Superior Court's conclusion that 33 of 34 Excess Policies, including all of the group three Policies, follow form to Liberty's defense obligation was correct, and should be affirmed. Warren Ans. Br. at 41-49. Because that is true, and because the Excess Insurers offer no other justification for the Superior Court's erroneous conclusion that the group three Policies pay defense costs within limits, that portion of the Final Judgment must be reversed.

B. The Group One Excess Polices Do Not Unambiguously Negate The Obligation To Pay Defense In Addition To Limits

The Excess Insurers cannot, of course, deny that the eight Excess Policies in group one (Warren Br. at 12 n.3) are obligated to pay the costs of Plaintiffs'

[15] In "support" of that argument, the Excess Insurers cite to the entirety of their appellate argument on that issue, making no specific reference whatsoever to the language or terms of the group three Excess Policies. *See* EI Ans. Br. at 49.

defense, because each of those policies contains an insuring agreement which expressly obligates the Excess Insurer to pay defense costs. Instead, they suggest that because those insuring agreements state that the obligations are "subject to the limitations, terms and conditions hereinafter mentioned," a single aggregate limit applies to the combined costs of settlement and defense. EI Ans. Br. at 42-43.

However, as demonstrated by the very cases the Excess Insurers cite, that analysis improperly fails to consider the full policy language, including, in particular, the policy limitation provision. For example, the Excess Insurers cite *Aetna Casualty & Surety Co. v. Home Insurance Co.*, 882 F. Supp. 1328 (S.D.N.Y. 1995), for the proposition that the inclusion of the defense obligation in the insuring agreement necessarily means that defense and indemnity are subject to the same policy limits. EI Ans. Br. at 43. That is not what the *Aetna* court held; to the contrary, it held that a policy that promises to indemnify the policyholder for its defense costs *must pay defense costs in addition to limits unless those costs are expressly included within the definition of ultimate net loss:*

> The *starting point*, therefore, is to determine whether claims expenses are within the scope of coverage at all. If that question is answered in the affirmative, the court must examine whether those expenses are enumerated within the policy's definition of ultimate net loss. . . . If expenses are covered by the policies, and *if the duty to pay such expenses is not encompassed within the definition of ultimate net loss, it follows that the insurer's liability for expenses is in excess of whatever sums it must pay for ultimate net loss*. If the limit of liability does not serve as a cap on all

> payments under the policy, then the [insurer's] liability for those expenses is simply unlimited.

828 F. Supp. at 1335 (emphasis added).

Thus, as set forth in *Aetna*, on which the Excess Insurers themselves rely, the determination that the insuring agreement obligates the group one Excess Insurers to cover the costs of defense "subject to the limitations . . . hereinafter mentioned" only begs the question: do the "limitations hereinafter mentioned" bring the defense costs payments within the policy limit? Contrary to the Excess Insurers' strained depiction of the policy language, they do not.

The Excess Insurers do not dispute that the group one Policies, like those at issue in *Aetna*, obligate the Excess Insurers to continue payments until their "ultimate net loss" reaches the aggregate policy limit.[16] They also do not dispute that "ultimate net loss" is not defined in those Policies – indeed, they attempt to distinguish several of the cases cited by Warren on the ground that those cases involved "ultimate net loss" definitions that expressly provided for the payment of

[16] The Excess Insurers' assertion that the group one Policies provide that the insurer is liable to "pay only the excess . . . up to" a stated aggregate limit (EI Ans. Br. at 43-44) is irrelevant to the determination of whether defense costs are inside or outside of that limit. The Liberty umbrella policies, too, have "specific dollar" aggregate limits – as do all policies that pay defense costs outside of limits. The question is not whether the insurer is obligated to pay further amounts once the aggregate is reached; it is, rather, whether defense payments count against that aggregate. As set forth herein, and in Warren's opening brief, defense costs payable under the groups one, two and three Excess Policies do not.

defense in addition to limits. EI Ans. Br. at 44.[17] But they ignore that, even absent an express definition, the full context of the group one Excess Policies gives scope and meaning to "ultimate net loss," because *those Policies use the phrase to refer to the Liberty umbrella limits, which do not include defense costs.* As set forth in Warren's opening brief – and as the Excess Insurers do not dispute – the phrase "ultimate net loss" cannot mean two completely different things when used just a few lines apart in a single insurance policy. *See* Warren Br. at 47-48 and cases cited therein.

For that reason, the sole case cited by the Excess Insurers for the proposition

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[17] In reality, the Excess Insurers misstate the holdings and facts of several of those cases. For example, they suggest that in *Owens-Corning Fiberglas Corp. v. American Centennial Insurance Co.*, 660 N.E.2d 770 (Ohio Ct. Com. Pl. 1995), "the umbrella carrier had the obligation to pay defense costs in addition to 'ultimate net loss' based on specific policy language that required the umbrella insurer to pay [defense] 'in addition to the amount of ultimate net loss.'" EI Ans. Br. at 44. In fact, the *excess* policy at issue did not contain that additional language – and also did not contain a definition of ultimate net loss. The court held that it was therefore obligated to follow form to the underlying policy's obligation to pay defense outside of limits.

Similarly, the Excess Insurers seek to distinguish *In re Silicone Implant Insurance Coverage Litigation*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *reversed in part on other grounds*, 667 N.W.2d 405 (Minn. 2003) on the ground that the primary policy in that case "provided for paying defense costs in excess of 'ultimate net loss.'" EI Br. at 44. However, the excess insurer specifically relied on the fact that its policies *did not* contain that language. *Id.* at 66 (noting excess insurer's argument that "because its policies do not explicitly provide that defense costs will be reimbursed in addition to policy limits," it had no obligation to pay costs on that basis). The court rejected that argument, and held that the undefined phrase "ultimate net loss" could not negate the excess insurers' obligation to follow form and pay defense in addition to limits.

In short, the *excess* insurers in both cases were in *precisely* the same situation as are the group one Excess Insurers here – they followed form to a policy that expressly paid defense in addition to limits, and their own policy language, including the phrase "ultimate net loss," did not expressly state whether defense costs were included in "ultimate net loss" or instead were payable outside of limits.

that the term "ultimate net loss," when undefined, necessarily includes defense costs, is inapposite. In *Missouri Public Entity Risk Management Fund v. Investors Insurance Co. of America*, 2007 WL 1147318, at *3 (W.D. Mo. Apr. 17 2007), an unreported trial-level decision which has never been cited for this or any other proposition by any eourt, the court found as a matter of fact that "[n]othing in the language of the policy itself supports [the] interpretation of 'ultimate net loss'" as not including defense costs. Nothing in that faet-speeifie holding supports the Exeess Insurers' contention that "ultimate net loss" "generally" includes defense eosts (EI Ans. Br. at 47) – or that any such "general" rule applies to polieies that specifically equate that phrase with underlying umbrella policy limits that do not include the costs of defense.

Accordingly, whether hased on the follow-form obligation or solely on the language of the Excess Policies themselves, the group one Excess Polieies do not unambiguously include defense costs within the policy limits, and the Superior Court's ruling to the eontrary must be reversed.

C. The Group Two Polieies Contain No Language Supporting The Payment Of Defense Costs Within Limits

Finally, the Excess Insurers argue that the four Excess Policies in "group two" (Warren Br. at 13 n.4) do not pay defense in addition to limits beeause (1) they supposedly do not pay defense costs at all; and (2) they expressly exclude any obligation to follow form to the Liberty policy "limits." EI Ans. Br. at 48-49.

As set forth in Warren's Answering Brief, the "assume charge" provisions in the group two Excess Policies do not negate the insurers' obligation to follow form to the Liberty umbrella defense payment obligations. Warren Ans. Br. at 44-45. Accordingly, the Superior Court's determination that the group two Excess Policies are obligated to pay defense costs was correct and must be affirmed, negating the first of the Excess Insurers' rationales for why those policies do not pay defense in addition to limits.

Moreover, the Excess Insurers' reliance on the fact that the group two (and group one) Excess Policies state that they do not follow form to the "limits" of the Liberty umbrella policies is inapt. As set forth in Warren's opening brief, that language merely ensures that each layer of coverage, and each Excess Policy, is subject to a separate dollar limit of coverage. Warren Br. at 46-47. In any event, as set forth above, even on their own terms, none of the group one and group two Excess Policies, which do not define the "ultimate net loss" upon which the policy limits are based, unambiguously provides that defense costs fall within that phrase, and thus within the limits of the policy. *See id.* at 47-48.

Indeed, many of the arguments on which the Excess Insurers rely in their attempts to justify the Superior Court's "within limits" ruling with respect to the group one Policies are not even arguably applicable to the group two Policies. Because the group two Policies contain no express reference to the obligation to

pay defense costs in their insuring agreements (*see, e.g.,* JA2433-34), the Excess Insurers' argument that such a reference brings "costs" and "damages" within the ambit of a single limit does not apply. Moreover, while the group one Excess Policies contain their own Prior Insurance Provisions, the group two Policies do not. *See, e.g.*, JA2405-77. As set forth in Warren's Opening Brief, the Excess Insurers' consistent contention that those policies nonetheless follow form to the Liberty Non-Cumulation Provisions – which are part of the Liberty "Limits of Liability" section and act to reduce "per occurrence" limits in certain circumstances – belies any assertion that language stating that the Excess Policies do not follow form to the Liberty "limits" somehow excludes the obligation to follow form to all limits-related provisions. Warren Br. at 47. Coupled with the promise to follow form to the Liberty defense obligations, and the failure to negate that promise by express language, these distinctions make clear that the group two Excess Insurers may not evade their obligation to pay defense in addition to limits, and that the Superior Court ruling to the contrary should be reversed.

CONCLUSION

For the reasons set forth above, Warren respectfully requests that this Court reverse the Superior Court's rulings [redacted] and issue an Order directing that the Final Judgment Order be amended to provide that [redacted] and (2) the Excess Policies identified by the Superior Court as providing for the payment of defense costs within limits instead are required to pay those costs in addition to the limits of their policies.

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