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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AEARO TECHNOLOGIES LLC, AEARO HOLDING LLC, AEARO INTERMEDIATE LLC, AEARO LLC, and 3M COMPANY,	)	No. 381, 2024
Plaintiffs-Below/Appellants,	)	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
v.	)	
TWIN CITY FIRE INSURANCE COMPANY,	)	C.A. No. N23C-06-255 SKR (CCLD)
Defendant-Below/Appellee.	)	

OPENING BRIEF ON APPEAL OF
PLAINTIFFS-BELOW/APPELLANTS

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NATURE OF PROCEEDINGS

Defendant/Appellee Twin City Fire Insurance Company issued a general liability insurance policy for the 2000-2001 policy period (the "Policy") that requires Twin City to cover sums that Plaintiff/Appellant Aearo LLC becomes legally obligated to pay in lawsuits seeking damages because of bodily injury, including defense expenses. Although the Policy has a $250,000 self-insured retention ("SIR"), when read as a whole, the Policy confirms that this retention may be "exhausted" by amounts incurred by ***or on behalf of*** the insured by an affiliated entity. In any case, the Policy also confirms that any failure to pay this retention does not result in a forfeiture of coverage but, rather, an offset in the amount of the SIR.

The Superior Court, however, held that the SIR was not satisfied because it was paid not by the named insured, Aearo LLC, but by its owner and parent company and/or its wholly owned subsidiary. Worse still, the Superior Court went on to dismiss Aearo LLC's claim against Twin City rather than holding, as dictated by the plain language of the Policy, that failure to satisfy the SIR merely results in an offset of $250,000. These conclusions violated bedrock principles of insurance policy interpretation, including that language in an insurance policy must be interpreted in its context and in a manner that avoids commercially unreasonable results.

By way of background, in 2008, Plaintiff /Appellant 3M Company ("3M") acquired Aearo LLC and its affiliates, referred to collectively as "Aearo." The Aearo companies are all subsidiaries wholly owned by 3M. Aearo developed, manufactured, and sold an earplug product known as the Combat Arms Earplug. Post-acquisition, Aearo and 3M together continued to sell the earplug product until 2015. 3M prepares and files consolidated financial statements presenting the assets, liabilities, income, revenue, expenses, and cash flows of 3M and its wholly owned Aearo subsidiaries, as a single unified financial entity. Also, since the acquisition, the insurance functions (procuring insurance, processing insurance claims, etc.) for Aearo have been consolidated with the overall 3M corporate insurance functions.

Beginning in 2018, Aearo, along with 3M, was sued in approximately 280,000 product liability lawsuits alleging, in sum and substance, that earplugs manufactured and sold by Aearo and 3M were defective and caused hearing loss. Aearo and 3M incurred more than $370 million in "claim expenses" in their joint defense of these lawsuits (in which they were represented by the same counsel), which ultimately culminated in a $6.01 billion settlement in 2023. Because Aearo LLC is a holding company with no bank account, its "claim expenses" were paid on its behalf by 3M, as well as by Aearo LLC's wholly owned subsidiary, Aearo Technologies LLC.

After the settlement of these product liability lawsuits, Aearo and 3M filed this action against Twin City and other insurance companies seeking, *inter alia*, to recover "claim expenses" "incurred … on behalf of the insured" (Aearo LLC) in excess of the $250,000 retention. Twin City moved for summary judgment that Aearo forfeited coverage because it caused its SIR to be paid on its behalf by its subsidiary and/or parent, rather than engaging in the accounting formality of funneling those payments through a bank account set up in Aearo LLC's own name. To support this draconian result, Twin City pointed to the Policy's definition of the SIR, which is the "amount you or any insured must pay as damages and 'claim expenses'…." That definition further provides that the SIR "shall not be reduced by … [a]ny payment made on your behalf by another, including any payment from any other applicable insurance."

The Superior Court, purporting to enforce the plain meaning of this definition, adopted Twin City's radical forfeiture argument, holding that the term "you" in the SIR definition precluded affiliated entities from paying the SIR on Aearo LLC's behalf. The Superior Court also held that the term "another" in the SIR definition excluded payments made by a wholly owned subsidiary or 100% parent of the insured, as opposed to an unaffiliated third party. The Superior Court did not cite a single on-point case supporting this conclusion, because none exists

in the annals of insurance jurisprudence. And it reached this draconian result by departing from bedrock principles of insurance policy interpretation.

The Superior Court incorrectly viewed the SIR definition in isolation, instead of interpreting that provision in the context of the instrument as a whole and consistent with the parties' commercially reasonable expectations. The Superior Court ignored that the Policy expressly provides that the SIR may be "exhausted … by the payment of 'claim expenses,'" which are defined to include "[a]ll expenses incurred by ***or on behalf of*** the insured." Further, the Policy uses the word "you" throughout to describe functions that are frequently performed on behalf of the policyholder by its agents and parent, such as giving notice of a claim. And, notably, the only example in the SIR definition of an entity whose payments are prohibited from exhausting the retention is an insurer—a third party unaffiliated with the insured—which informs the meaning of the word "another" in the SIR definition.

Thus, when the SIR definition is interpreted in the context of the Policy as a whole, as required, a reasonable policyholder would harmonize these provisions and conclude that Aearo LLC can satisfy the SIR through payments made by its wholly owned subsidiary or 100% parent. At the very least, this is *a* reasonable interpretation of the Policy and, thus, controls.

But even if Twin City's unreasonable and atextual interpretation of the SIR language controlled and Aearo LLC was required to satisfy the SIR by payment from its own bank account, the Superior Court's finding that payment of the SIR by Aearo LLC's subsidiary and parent resulted in a total forfeiture of coverage is also contrary to the Policy and applicable law.

The Policy does not provide that payment of the SIR from the policyholder's bank account is a "condition precedent" to coverage. Instead, it obligates the policyholder to "maintain" the SIR and includes a broad "savings clause" pursuant to which Twin City is liable for amounts that exceed the SIR if the SIR is uncollectible "for any reason." This perfectly captures the scenario here. Aearo LLC "maintained" the SIR by virtue of its wholly owned subsidiary and parent company, who held sufficient funds to satisfy the SIR and stood ready and willing to do so. But because Aearo LLC is a holding company with no bank account that was acquired by and is wholly owned by 3M, the SIR was not collectible directly from Aearo LLC. Therefore, Aearo LLC is entitled to coverage from Twin City for its defense expenses, subject only to a setoff in the amount of the SIR. To hold otherwise would afford Twin City a massive windfall on account of the SIR definition, despite Twin City making clear in the Policy that its inability to collect the SIR "for any reason" would not result in forfeiture of the valuable coverage purchased.

For these reasons, Aearo and 3M respectfully request that the Court reverse the Superior Court's order granting Twin City's motion for summary judgment and remand to the Superior Court for further proceedings.

SUMMARY OF ARGUMENT

1. The Superior Court erred in concluding that the SIR definition in the Policy unambiguously required that the SIR only be exhausted by payment from the bank account of the named insured, Aearo LLC, and foreclosed Aearo LLC's parent company or wholly owned subsidiary from satisfying the SIR on Aearo LLC's behalf. Read as a whole, and consistent with common sense, the commercially reasonable expectations of the policyholder, and the purpose of SIRs, the SIR definition merely precludes payments by unaffiliated third parties from satisfying the SIR. Indeed, no court has *ever* interpreted this type of policy language to prevent a parent company that bears full financial responsibility for its subsidiary, or a wholly owned subsidiary of the policyholder, from paying the SIR on behalf of the policyholder.

2. In holding otherwise, the Superior Court interpreted the SIR definition in isolation, and without regard to other relevant provisions in the Policy or the commercially reasonable expectations of the policyholder. The Superior Court first relied on the definition of the SIR to comprise "the amount you or any insured must pay" as mandating payment solely by the named insured, Aearo LLC. Grasping onto the word "you," the Superior Court held that the SIR cannot be paid on behalf of the policyholder ***by anyone***. However, understood in context, this language simply conveys that the SIR is the insured's responsibility, not the

insurer's. Indeed, numerous courts have interpreted similar provisions (absent other qualifying language in the policy) to permit payment by another insurer, or a contractual indemnitor, to satisfy the SIR.

3. Moreover, the Superior Court's hyper-technical interpretation of "you"—to be satisfied only by amounts paid from an Aearo LLC bank account, as opposed to amounts paid on its behalf by a parent or subsidiary—would wreak havoc on the rest of the Policy given the usage of the word "you" in numerous other contexts. Multiple conditions in the Policy are framed in language stating that "you" must perform certain tasks, even though those tasks are frequently and uncontroversially performed by agents, parents, and subsidiaries of the policyholder. This includes, for example, the Policy's requirements that "you" provide notice to the insurer, maintain adequate claim records, and advise the insurer of defense counsel retained. The Superior Court's interpretation of "you" would foreclose a parent company, subsidiary, or an agent (such as a broker) from fulfilling these conditions, which is commercially unreasonable and contrary to the basic functioning of the insurance industry.

4. The Superior Court also incorrectly interpreted the portion of the SIR providing that the retention "shall not be reduced by … [a]ny payment made on your behalf by another, including any payment from any other applicable insurance." The Policy provides that the SIR may be "exhausted" by "claim

expenses," which are amounts incurred "on behalf of" the policyholder. Accordingly, the undefined word "another" in the SIR definition reasonably refers to a third party that is not affiliated with the policyholder and lacks an identity of interest with the policyholder regarding the loss for which coverage is sought. Indeed, the plain meaning of the word "another" is a person or entity "distinctly different from" the policyholder, which is not a description that naturally captures the policyholder's wholly owned subsidiary or ultimate parent, much less in unambiguous language as required under black-letter law.

5. Although the Superior Court sought to buttress its conclusion with the so-called "purpose" of SIR provisions, that purpose also strongly supports Aearo LLC's interpretation. Specifically, as the decision below recognized, the purpose of the SIR is to reduce "moral hazard" by making sure that the policyholder has "skin in the game." But permitting the SIR to be exhausted through payments by a parent company that bears the ultimate financial liability for its wholly owned subsidiaries, or by a subsidiary for whom the policyholder bears full financial responsibility, yields the exact same result from a moral hazard perspective. It is only when a payment is made by an unaffiliated third party—such as an insurance company—which lacks this identity of interest with the policyholder, that the SIR could arguably fail to satisfy that purpose. Thus, the moral hazard considerations underpinning the SIR support Aearo LLC's interpretation.

6. In the alternative, even if the SIR required payment directly from Aearo LLC's bank account, the Superior Court erred in holding that Aearo LLC's failure to pay the SIR in this manner deprived Aearo LLC of coverage entirely. Governing law disfavors strict interpretations of policy provisions that would lead to a forfeiture of coverage. Further, conditions precedent to coverage that can result in such forfeiture must be stated clearly and expressly. Twin City did not do so in the Policy.

7. In fact, rather than stating clearly and expressly that coverage may be forfeited for failing to pay the SIR, the Policy says the opposite. Indeed, Twin City included a broad "savings clause," which provided that Twin City still owes coverage if the SIR is uncollectible "for any reason," with the only caveat being that Aearo LLC is required to "maintain" the SIR, which it did through its parent and subsidiary. By providing that Twin City "shall be liable" even in circumstances when the SIR is not paid, the Policy confirms that payment by Aearo LLC is not required for Twin City's obligations to attach, and that all Twin City is entitled to is an offset in the amount of the SIR. Accordingly, the decision below should be reversed.

STATEMENT OF FACTS

I. The Combat Arms Earplug Litigation

In the late 1990s, Aearo developed a dual-ended earplug that eventually became known as the Combat Arms Earplugs version 2. A00443 ¶ 16; A00585–A00586 at 76:17-78:1, 81:15-20. Aearo began distributing the earplug product in or around August 1999. A00443 ¶ 16; A00586 at 81:15-20. For nearly a decade before its acquisition by 3M, Aearo designed, developed, marketed, and sold the earplug, both to military and non-military users. A00438–A00439 ¶ 3; A00443 ¶ 16; A00586 at 81:15-20.

In April 2008, 3M Company acquired Aearo, and the Aearo entities became wholly owned subsidiaries of 3M. A00438–A00439 ¶ 3; A00444 ¶ 19. After the merger, 3M and Aearo continued to sell the earplugs until 2015. A00444 ¶ 19; A00492 ¶ 207.

Beginning in December 2018, Aearo and 3M were named in hundreds of thousands of lawsuits alleging personal injury due to use of the earplug product (the "Earplug Suits"). A00439 ¶¶ 4–6. The plaintiffs alleged that they suffered noise-induced hearing loss and/or tinnitus (ringing in the ears) due to the allegedly defective design of the earplugs and/or the alleged failure to warn or provide adequate instructions on their use. A00440–A00443 ¶¶ 8–13; A00457 ¶ 7; A00500–A00501 ¶¶ 265–267; A00504 ¶ 278; A00508–A00509 ¶¶ 302–304.

Aearo and 3M vigorously contested the allegations. *See* A00445–A00447 ¶¶ 23–29; A03822–A03823 ¶¶ 14–17.

The Earplug Suits, which numbered more than 280,000 at their peak, were mostly consolidated in federal multidistrict litigation in Florida, with a smaller number of cases (about 2,000) litigated in coordinated proceedings in Minnesota state court. A00439 ¶¶ 5–6; A00450–A00452; A00441 ¶ 10. Twenty-seven cases were set for bellwether trials. A00144; A00447 ¶¶ 28–29; A03824–A03826 ¶¶ 19–25. Of these, eight cases were dismissed prior to trial; six resulted in complete defense verdicts for 3M and Aearo; and thirteen resulted in verdicts for plaintiffs. A00144; A03825 ¶ 22.

Aearo and 3M were collectively defended in the Earplug Suits by the same counsel, who appeared on behalf of "Defendants 3M Company, Aearo Technologies LLC, Aearo Holding, LLC, Aearo Intermediate, LLC and Aearo, LLC." A03818–A03819 ¶¶ 6–8; A03832–A03834. Further, nearly all of Aearo and 3M's substantive filings in the MDL were filed and argued on behalf of both Aearo and 3M. A03819–A03820 ¶¶ 7–9; A03839–A03940; A03942–A03957. Discovery propounded on Aearo and 3M was jointly responded to by the same counsel, and Aearo and 3M's joint defense counsel likewise propounded their own discovery on the underlying plaintiffs. A03820–A03822 ¶¶ 10–12; A03959–A03981; A03983–A04009; A04011–04016.

On August 29, 2023, 3M and Aearo resolved the Earplug Suits in a global settlement for $6.01 billion. A00447 ¶ 30; A03824 ¶ 18. The costs to defend Aearo and 3M against the Earplug Suits totaled more than $370 million. A00856 ¶ 6.

II. The Twin City Insurance Policy

As part of its insurance program, Aearo purchased an insurance policy from Twin City (the "Policy"), which provides broad defense and indemnity coverage against the risk of incurring attorneys' fees and other expenses to defend suits such as the Earplug Suits and the legal liability to pay damages by way of judgments or settlements. The policy period for the Policy is September 30, 2000 to November 29, 2001. A00997; A01035. The Policy was issued to Aearo Corporation, which has since been renamed Aearo LLC. A00997; A00269 ¶ 7; A00273.

Relevant to this appeal, the Policy obligates Twin City to "pay 'claim expenses' which are incurred" after the Policy's "self-insured retention" of $250,000 is "exhausted," including by payment of "claim expenses" or damages. A01004 (§ I.1.a); A01010 (Supplementary Payments). "Claim expenses" include "[all] expenses incurred by or on behalf of the insured … in the investigation of 'claims' or defense of 'suits.'" A01017 (§ V.8). "Any amounts paid" by Twin City as "claim expenses" "will not reduce the limits of liability" of the Policy. A01010 (Supplementary Payments).

"Self-insured retention" is defined as "the amount you or any insured must pay as damages and 'claim expenses' for … any one 'occurrence.'" A01020 (§ V.26.c). It "shall not be reduced by … [a]ny payment made on your behalf by another, including any payment from any other applicable insurance." A01020 (§ V.26.b).

The Policy requires that the policyholder "maintain" the SIR. A01015 (§ IV.9). However, the Policy also provides that "[i]f the 'self-insured retention' becomes invalid, suspended, unenforceable or uncollectable for any reason," Twin City nonetheless "shall be liable" to Aearo "to the extent we would have been had such 'self-insured retention' remained in full effect" (the "Savings Clause"). *Id*.

III. Twin City's Failure to Comply With Its Coverage Obligations

Aearo and 3M timely notified Twin City of the Earplug Suits and requested that Twin City pay for the defense of Aearo in the litigation. A03783 ¶ 5; A03787–A03788. Aearo and 3M continued to keep Twin City apprised as to the mounting defense costs and the litigation. A03783–A03784 ¶¶ 4–8; A03787–A03788; A03795–A03798; A03804–A03806. Twin City, however, failed to provide any defense. A00935 ¶ 21.

IV. The Coverage Litigation and Summary Judgment Ruling

Following Twin City and other insurers' refusal to honor their coverage obligations, Aearo and 3M sued Twin City (among other insurers) in Delaware

Superior Court. A00126–A00163. In January 2024, Aearo and 3M moved for partial summary judgment seeking a declaration that Twin City and other insurers had a duty to pay some or all of the $370 million in defense costs. A00210–A00261.

Twin City filed a cross-motion, seeking a declaration that it owed no defense obligations to Aearo solely on the basis that the $250,000 SIR had not been paid with money coming directly from Aearo LLC's bank account. A01470–A01515.

The Superior Court issued a ruling on the summary judgment motions on July 16, 2024, denying Aearo and 3M's motion, and granting Twin City's motion. *See* Exhibit A, Memorandum Opinion and Order. The Superior Court held that Aearo LLC was required to pay the $250,000 self-insured retention itself, using its own separate funds, and that the hundreds of millions of dollars that 3M paid for Aearo's defense "do not count towards the Self-Insured Retention." *Id.* at 13. The court also held that $411,697 in defense costs paid by Aearo LLC's wholly owned subsidiary, Aearo Technologies LLC, also could not count toward the $250,000 SIR. *Id.* at 16–17; 23. Accordingly, the Superior Court held that Twin City was relieved of all coverage obligations. *Id*. at 23.

Following the Superior Court's ruling, Plaintiffs/Appellants and Twin City stipulated to a final judgment and dismissal of certain counterclaims of Twin City

in the Delaware litigation, which the Court granted. *See* Exhibit B.[1] Aearo and 3M filed a timely Notice of Appeal on September 12, 2024. A04873–A04877.

[1] Plaintiffs/Appellants Aearo and 3M also petitioned this Court to accept an interlocutory appeal as to the self-insured retention ruling against the primary insurers other than Twin City. *See* Case No. 423, 2024. This Court accepted the interlocutory appeal on December 2, 2024.

ARGUMENT

I. The Superior Court Erred in Holding That Payments Made by Aearo LLC's Parent and Wholly Owned Subsidiary Cannot Satisfy the SIR

A. Question Presented

Whether the Superior Court erred in finding that the Policy's SIR definition unambiguously foreclosed payments from the insured's parent company or wholly owned subsidiary from satisfying the $250,000 SIR. A03745–A03748.

B. Scope of Review

A decision on "cross-motions for summary judgment" is reviewed *de novo* "both as to the facts and the law to determine whether or not the undisputed material facts entitled [either] movant to judgment as a matter of law." *Wilmington Tr., N.A. v. Sun Life Assurance Co. of Can.*, 294 A.3d 1062, 1071 (Del. 2023). "If material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate." *Id.*

C. Merits of the Argument

The Superior Court erred in holding that payments made on behalf of Aearo LLC by its ultimate parent and wholly owned subsidiary did not satisfy the Policy's SIR. This interpretation is contrary to the plain terms of the Policy ***as a whole***, the reasonable expectations of the policyholder, common sense, and the purposes of SIRs. When the terms of the Policy are considered in their entirety, as

required, it is clear that the SIR definition only precludes the policyholder from satisfying the retention through payments by an unaffiliated third-party, such as from another insurer. At the very least, this is *a* reasonable interpretation of the Policy and, thus, controls.

1. Read as a Whole, the Policy Does Not Preclude a Parent and/or Subsidiary From Satisfying the Retention

It is axiomatic that an insurance policy must be read as a whole and that the language of the policy be interpreted in its context. *O'Brien v. Progressive N. Ins. Co*., 785 A.2d 281, 291 (Del. 2001) ("the terms of an insurance contract are to be read as a whole"); *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1043 n.5 (Del. 2023) ("we interpret the plain language of a contract and enforce its ordinary meaning, *as informed by context*") (emphasis added); *Buckeye State Mut. Ins. Co. v. Carfield*, 914 N.E.2d 315, 318 (Ind. Ct. App. 2009) ("We construe the insurance policy as a whole and consider all of the provisions of the contract and not just the individual words, phrases or paragraphs.").[2]

Further, where terms in an insurance policy could reasonably be construed to afford coverage, that interpretation controls. *Monzo v. Nationwide Prop. & Cas. Ins. Co*., 249 A.3d 106, 118 (Del. 2021) (where "there is more than one reasonable

[2] In the Superior Court, the parties briefed Twin City's motion under the law of Delaware (the state of incorporation for Aearo LLC) and Indiana (where Aearo is headquartered). A00236–A00238; A01495–A01498.

interpretation of an insurance policy, Delaware courts apply the interpretation that favors coverage"); *Pac. Ins. Co. v. Liberty Mut. Ins. Co*., 956 A.2d 1246, 1255 (Del. 2008); *Eli Lilly & Co. v. Home Ins. Co*., 482 N.E.2d 467, 470 (Ind. 1985) ("The terms of an insurance policy should be interpreted most favorable to the insured if there is an ambiguity in the policy.").

The Superior Court violated these bedrock principles by interpreting the Policy's SIR definition without regard to its context or other, related terms and conditions in the Policy, both of which inform the meaning of the terms used in the SIR definition and an objectively reasonable insured's expectations and understanding of how the SIR will operate. The court then compounded that error by ignoring reasonable interpretations of the SIR definition that result in coverage.

First, the decision below relied on the fact that the SIR definition provides that the retention must be paid by "you" and that it cannot be reduced through payment by "another." That definition, however, must be read in the context of the Policy's insuring agreement, which provides that the SIR may be "exhausted" through "claim expenses," which are defined in the Policy to include amounts incurred "on behalf of" the policyholder. A01004 (§ I.1.a.); A01017 (§ V.8.a). Considering that definition, a reasonable policyholder would conclude that payments made on behalf of the policyholder can exhaust the retention if those amounts are paid by or caused to be paid by an entity that shares an identity of

interest with the policyholder under the Policy, such as a wholly owned subsidiary or parent company. In those circumstances, the amounts being paid are effectively paid by "you," the policyholder, and not by "another," *i.e.*, an unaffiliated third party. The Superior Court made no effort to harmonize these provisions, which a reasonable policyholder would read together.

Second, the Superior Court's interpretation is inconsistent with the Policy as a whole. While the Policy defines "you" to be the Named Insured, it also uses the term "you" throughout the Policy to describe obligations that are frequently performed on behalf of the policyholder by agents, subsidiaries, or parents:

- The Policy provides that "***you***" "must … [n]otify us in writing as soon as practicable if the 'claim' is likely to exceed the amount of the 'self-insured retention.'" A01014 (§ IV.5.b.(2)) (emphasis added).

- "If a 'claim' is made or a 'suit' is brought against any insured, ***you*** must … [i]mmediately record the specifics of the 'claim' or 'suit' and the date received." A01014 (§ IV.5.b.(1)) (emphasis added).

- "***You*** and any other involved insured must … [a]dvise us of the name and address of defense counsel retained to represent the insured's interest with respect to the 'self-insured retention." A01014 (§ IV.5.c.(5)) (emphasis added).

- "***You*** and any other involved insured must … [m]aintain adequate 'claim' records and supporting data which document reserves for payment of 'claims,' dates and amounts of any settlements, including specific identification of 'claim expenses' incurred and paid." A01014 (§ IV.5.c.(7)) (emphasis added).

These functions are routinely handled by insurance brokers or lawyers on the insured's behalf, as opposed to insureds themselves. Thus, the word "you" as used

elsewhere in the Policy contemplates that certain tasks and obligations may be performed on behalf of the insured. Yet, under Twin City and the Superior Court's interpretation of the word "you," Aearo LLC would forfeit coverage if it provided notice of a "claim" through 3M or an insurance broker's e-mail address, as opposed to an Aearo LLC address, or if 3M maintained Aearo LLC's claim records in a centralized database. In fact, under this interpretation, coverage would be forfeited if Aearo Technologies LLC provided the notice. Thus, Twin City's interpretation peppers the Policy with unintended and pointless requirements that the named insured itself perform virtually every policy obligation on threat of forfeiture, even though such functions are routinely performed by a policyholder's agents and parent entities. This type of "gotcha" approach to insurance policy interpretation is contrary to bedrock principles of insurance policy interpretation.

Twin City's approach is also particularly problematic here, given that *none* of the Aearo entities had separate insurance or litigation personnel after their acquisition by 3M (as is common in corporate acquisitions), such that these tasks would obviously be handled by 3M. A03817–A03818 ¶ 3; A00929–A00930 ¶¶ 2, 4; A00933 ¶ 14. This further highlights the draconian and commercially unreasonable consequence of Twin City's interpretation of the Policy. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1211 (Del. 2021) ("Delaware courts read contracts as a whole, and interpretations that are

commercially unreasonable or that produce absurd results must be rejected."); *A House Mechs., Inc. v. Massey*, 124 N.E.3d 1257, 1263–64 (Ind. Ct. App. 2019) ("[W]e will not interpret a contract in a fashion that achieves an absurd result.").

Third, the Superior Court construed the term "another" in the SIR without reference to the full clause, which precludes payments made by "another, ***including any payment from any other applicable insurance***." A01020 (§ V.26.b) (emphasis added). That this definition identifies another insurer—an unaffiliated third party—as the only example of a payor whose payment would not exhaust the retention indicates to the reader that the SIR definition is referring to payments by unaffiliated third parties.

Twin City's use of this single example ("other applicable insurance") in its Policy is meaningful because the term "another" must be construed in light of the qualifying phrase "including other applicable insurance." Indeed, in *Moses v. State Farm Fire & Casualty Insurance Co.*, 1991 WL 269886 (Del. Super. Ct. Nov. 20, 1991), the court recognized that the word "including" suggests "everything that follows is merely a part of the class." *Id.* at *3. And in *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 4130631 (Del. Super. Ct. Sept. 10, 2021), the court held that the policy's reference to "injunctive relief" following the words "including, but not limited to" in the phrase "any written demand for monetary or non-monetary relief (including, but not limited to,

injunctive relief)" revealed "the parties' intent to define the term 'non-monetary relief' as non-monetary legal or equitable redress, *i.e.*, a remedy available in court, rather than a less technical form of reparation.'" *Id.* at *2, *16. Here, a reasonable policyholder would read the sole example provided in the definition of the SIR in the Twin City Policy as confirming that only unrelated third parties, such as other insurance companies, were intended to be included in the undefined term "another."

Fourth, reading "another" as referring only to unaffiliated third parties is reasonable in light of the plain and ordinary meaning of that word, which is something or someone "distinctly different from the first." *State v. Moore*, 2021 WL 4059689, at *3 (Minn. Ct. App. Sept. 7, 2021) (citing *American Heritage Dictionary of the English Language* 74 (5th ed. 2018)). A parent company responsible for its wholly owned subsidiary's financial and insurance functions is simply not "distinctly different" than that wholly owned subsidiary. *Reid v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 2513672, at *3 (Del. Super. Ct. June 18, 2019) (recognizing where insurer "chose not to further define" a term, "the term should be read broadly in the insured's favor"); *Med. Protective Co. of Fort Wayne Ind. v. Am. Int'l Specialty Lines Ins. Co*., 2020 WL 241368, at *2 (N.D. Ind. Jan. 16, 2020) (similar). Here, the Policy is at least ambiguous as to whether 3M (or Aearo

Technologies LLC) is sufficiently and "distinctly different" from Aearo LLC to constitute "another" under the SIR definition.

Fifth, Aearo LLC's construction of "another" is consistent with the Policy's use of "another" elsewhere to describe unaffiliated third parties. For example, the Policy excludes coverage for "personal and advertising injury" arising out of a breach of contract, except an "implied contract to use ***another's*** 'advertising idea' in your 'advertisement[.]'" A01009 (§ I.2.o.(7), (9)) (emphasis added). The term "another" as used in this context (as in the SIR) refers to a third party unaffiliated with the insured, because a wholly owned subsidiary or parent would never be making a claim against Aearo LLC for personal or advertising injury.

Finally, at the very least, Aearo LLC has proffered a reasonable interpretation of the Policy. Indeed, it is the *only* interpretation that is consistent with the Policy as a whole and avoids absurd and commercially unreasonable results. Therefore, this interpretation controls. *Monzo*, 249 A.3d at 118; *see also Pac. Ins.*, 956 A.2d at 1255; *Eli Lilly*, 482 N.E.2d at 470 ("The terms of an insurance policy should be interpreted most favorable to the insured if there is an ambiguity in the policy.").

Indeed, even if Twin City had offered a more reasonable reading of its Policy (and it has not), that would be insufficient under Delaware law, which required Twin City to demonstrate that its "interpretation is the *only* reasonable

construction." *BitGo Holdings, Inc. v. Galaxy Digital Holdings, Ltd.*, 319 A.3d 310, 323 (Del. 2024) (emphasis in original); *see also Phillips Home Builders, Inc. v. Travelers Ins. Co*., 700 A.2d 127, 130 (Del. 1997) (construing policy language in insured's favor after finding "[b]oth sides offer reasonable, though problematic, interpretations of provisions").

Notably, "a provision may be ambiguous when applied to one set of facts but not another." *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1034 (Del. 2013). The language in the Twin City Policy may be sufficient to alert a reasonable insured that payments made by unrelated third parties (such as other insurers or unrelated contractual indemnitors) do not satisfy the SIR. But the Policy does not provide—much less unambiguously provide—that the SIR cannot be satisfied by the insured's parent company or wholly owned subsidiary sharing a unified financial interest with the named insured. Because Aearo LLC's interpretation of the Policy language is, at a minimum, reasonable under this "set of facts," the Superior Court's decision must be reversed. *Activision Blizzard, Inc.*, 106 A.3d at 1034.

2. Aearo LLC's Interpretation of the Policy Is Consistent with Persuasive Authority

a) Case Law Supports Aearo LLC's Interpretation

Notably absent from the Superior Court's decision is a citation to a single case from any jurisdiction interpreting the policy language at issue here and

reaching the same conclusion. Twin City's briefs below are similarly bereft of on-point authority supporting its position, despite the relevant policy language appearing in Twin City's policies for *decades*. That is because no such case exists holding that a parent company's payment of "claim expenses" cannot satisfy the SIR of a policy issued to a wholly owned subsidiary.

To the contrary, courts have held that if an insurer intends to limit coverage to circumstances in which the SIR is paid from the policyholder's own bank account, it must do so expressly. And no court has ever reached this conclusion based on a vague requirement in a policy's definitions section that the payment must be made by "you" and not by "another." For example, in *Intervest Construction of Jax, Inc. v. General Fidelity Insurance Co*., 133 So.3d 494 (Fla. 2014), the court distinguished between policies that expressly require *both* that the SIR be paid for from the policyholder's "own account" *and* may not be paid by "others, including but not limited to additional insureds or insurers," and policies that require that payment be made "by you." *Id.* at 502–03.

In the latter scenario, where the policy does not "specify where those funds must originate," the SIR may be satisfied by amounts that do not come exclusively from the policyholder's own account. *Id.*; *see also Nationwide Mut. Ins. Co. v. Certain Underwriters at Lloyd's London*, 2016 WL 3648610, at *4 (N.D. Cal. July 7, 2016) ("While the insured obviously must make sure the SIR gets paid, nothing

in the term 'responsible for' unambiguously precludes an insured from satisfying that obligation by purchasing other insurance to make the payment.").

Indeed, ***certain insurers***, but not Twin City, expressly require that the SIR be exhausted through payment from the policyholder's own account. *See Travelers Indem. Co. v. Arena Grp. 2000, L.P.*, 2007 WL 935611, at *5 (S.D. Cal. Mar. 8, 2007) (interpreting policy language that "unambiguously requires the Insured to pay the Retained Amount from its 'own account'"); *Ruffin v. Burton*, 34 So. 3d 301, 303 (La. App. 4 Cir. 2009) (quoting policy language that states that the "policy applies [in] access [*sic*] of a retained amount … and it is to be paid from the insured's own account").

Because Twin City did not include this readily available and clear limitation in the Policy, this Court should not read that limitation into the Policy under the guise of interpretation. *See Reid*, 2019 WL 2513672, at *3 (recognizing where insurer "chose not to further define" a term, "the term should be read broadly in the insured's favor"); *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020) ("Implying terms that the parties did not expressly include risks upsetting the economic balance of rights and obligations that the contracting parties bargained for in their agreement."); *Pardee Constr. Co. v. Ins. Co. of the W.*, 92 Cal. Rptr. 2d 443, 457 (Cal. Ct. App. 2000) ("[T]he insurers' failure to use available language … implies a manifested intent not to do so."); *Gerdau Ameristeel US Inc.*

v. Zurich Am. Ins. Co., 2021 WL 7691816, at *1 (S.D. Fla. July 26. 2021) ("if different language was available that would have accomplished the insurer's present objective, the failure to use that language is proof of the insurer's intent not to restrict coverage").

b) Twin City Relied Upon Distinguishable Cases

This conclusion is underscored by the two cases Twin City relied on below, which present clear foils to this case. In *Walsh Construction Co. v. Zurich American Insurance Co.*, 72 N.E.3d 957 (Ind. Ct. App. 2017), the decision relied upon the fact that the policy included a dedicated "self-insured retention" endorsement that expressly provided that (1) the SIR was a "condition precedent" to coverage, and (2) the SIR controlled to the extent inconsistent with any other terms of the policy. *Id.* at 964. The Twin City Policy has neither of these features. To the contrary (and as discussed below), the Policy does *not* identify the SIR as a "condition precedent" to coverage. *See* Section II, *infra*.

Further, the question in *Walsh* was ***not*** whether payment by a parent company or wholly owned subsidiary of the named insured could satisfy the SIR, but whether a general contractor seeking coverage as an "additional insured" under the policy of a subcontractor with which it had no corporate relationship could satisfy the SIR under the language of the subcontractor's policy. *Id.* at 958–59.

Likewise, Twin City cited *Forecast Homes, Inc. v. Steadfast Insurance Co.*, 105 Cal. Rptr. 3d 200, 204 (Cal. Ct. App. 2010), which it contended involved "policy language nearly identical to the language at issue" here. A03175–A03176. But the policy in *Forecast Homes* broadly provided that "[p]ayments by others, including but not limited to ***additional insureds*** or insurers, do not serve to satisfy the self-insured retention." 105 Cal. Rptr. 3d at 203–05 (emphasis added). Accordingly, the court held that a home developer seeking coverage as an "additional insured" under policy of an unrelated subcontractor could not satisfy the SIR. *Id.*

The inclusion of "additional insureds" after the word "including" broadened the class of parties whose payments would not satisfy the SIR to include parties that are often affiliated with the policyholder and plainly applied to the "additional insured" at issue in that case. The Policy here lacks similar language. Additionally, both cases Twin City relied on below involved very different factual scenarios. Neither case addresses the set of facts at issue here, where a corporate parent pays for defense counsel it shares with the named insured, its wholly owned subsidiary. At best, these cases merely confirm the type of policy language Twin City ***could*** have used to yield the post-hoc result in now advances. Twin City, however, failed to do so.

3. Aearo LLC's Interpretation of the Policy Is Most Consistent With the Purposes of SIR Provisions

The decision below should be reversed for the additional reason that the Superior Court failed to interpret the language in the SIR consistent with the purposes of SIR provisions, contrary to Delaware and Indiana law. *Dukart v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 1993 WL 331175, at *1 (Del. Super. Ct. July 13, 1993) (interpreting policy exclusion in a manner "consistent with the purpose of the exclusion"); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 152, 157 (Del. 1996) (considering "the purpose of liability policies in general" when interpreting "owned property exception" to insurance policy); *United Techs. Auto. Sys., Inc. v. Affiliated FM Ins. Co*., 725 N.E.2d 871, 873 (Ind. Ct. App. 2000) ("terms in an insurance contract may not be construed in a manner which is repugnant to the purposes of the policy as a whole").

Here, as the Superior Court recognized, one purpose of the SIR is to reduce moral hazard because an insured that is responsible for some portion of a loss before coverage is triggered will be less likely to engage in risky commercial behavior. Ex. A at 15 n.65 (citing George William Van Cleve, *Bankruptcy and the Future of Insurance Risk-Sharing*, 21 Am. Bankr. Inst. L. Rev. 99, 101 & n.8 (Summer 2013) (one purpose of a self-insured retention is to "reduce[] moral

hazard"—i.e., the "risk that insureds will have less incentive to avoid risks covered by insurance because of the availability of insurance")).

The Superior Court relied on this purpose to support its interpretation of the Policy. But this purpose of SIRs is equally served in circumstances where an insured's wholly owned subsidiary pays the SIR, because that loss flows up to the policyholder. The same is true where the SIR is paid by the policyholder's parent company, which bears the full brunt of any losses suffered by the policyholder and is thus fully incentivized to avoid commercially risky behavior on the part of its subsidiary that could lead to losses. Thus, the purpose of SIRs is consistent with and furthered by Aearo LLC's interpretation of the Policy.

Indeed, Twin City conceded that the retention would be satisfied if 3M deposited the money in Aearo's account, and those funds originating from 3M were then used to pay the retention:

> THE COURT: Let's assume that 3M did – let's assume that Aearo did have a bank account and 3M deposited the money in Aearo's account, and Aearo cut the check for the defense costs with the heading on the check "Aearo Entity." Would you have an issue?
>
> MR. WEINBERG: If Aearo –
>
> THE COURT: And they're admitting we're getting it from 3M.
>
> MR. WEINBERG: Sure. If that money had been given to Aearo and it was Aearo's property, and Aearo used that money to pay the self-insured retention, that would satisfy the retention.

A04740–A04741 at 62:11–63:4. The Superior Court, too, recognized that its interpretation of the SIR would have allowed 3M to transfer $250,000 to Aearo, with Aearo then "in the next moment" using those funds to satisfy its obligation to "pay" the retention amount on its behalf (rather than 3M paying it on Aearo's behalf). Ex. A at 14–15. In that scenario, however, the ultimate financial risk is borne by 3M regardless of whether 3M deposits the money in any account created specifically for Aearo LLC or pays to defend its wholly owned subsidiary directly; the moral hazard is exactly the same either way.

Given that the moral hazard is the same—no more, no less—whether payment is made directly by 3M for Aearo LLC's benefit, or if 3M's money is funneled through an Aearo LLC account, the Superior Court's reliance on the "purpose" of the SIR to support its interpretation is unfounded. To the contrary, moral hazard considerations and this purpose of SIR provisions strongly supports Aearo LLC's interpretation.

II. Alternatively, the Superior Court Erred in Holding That the Savings Clause Did Not Apply

A. Question Presented

Whether the Superior Court erred in holding that the Savings Clause did not apply and, therefore, that Aearo LLC forfeited coverage under the Twin City Policy when 3M and/or Aearo Technologies LLC paid the $250,000 retention on its behalf, rather than first transferring that money to Aearo LLC to make the same payment with the same funds. A03745–A03748.

B. Scope of Review

A decision on "cross-motions for summary judgment" is reviewed *de novo* "both as to the facts and the law to determine whether or not the undisputed material facts entitled [either] movant to judgment as a matter of law." *Wilmington Tr.*, 294 A.3d at 1071. "If material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate." *Id.*

C. Merits of the Argument

Even if the Twin City Policy unambiguously required 3M or Aearo Technologies LLC to momentarily transfer $250,000 to Aearo LLC before using those same funds to pay their joint underlying defense counsel (it does not), the Superior Court erred in holding that this purported failure released Twin City from its obligation to pay for Aearo LLC's claim expenses entirely. Because conditions

precedent can result in forfeiture, they are disfavored under both Delaware and Indiana law and must be "expressly" or "explicitly" identified in a contract. *Thomas v. Headlands Tech Principal Holdings, L.P.*, 2020 WL 5946962, at *5 (Del. Super. Ct. Sept. 22, 2020); 15 Williston on Contracts § 44:15 (4th ed. 2022) (If "a provision was intended as a condition precedent to the duty of one of the parties, it would be natural for them to say so, and when this is not done, courts will not generally construe the provision as a condition precedent, especially if doing so would result in injustice."). Twin City did not do so here. On the contrary, it added a Savings Clause to the Policy that confirms that the SIR is not a condition that results in forfeiture. Instead, it results in an offset in the amount of the SIR.

Courts that have construed SIRs to result in a forfeiture of coverage have done so where the SIR is expressly identified as a "condition precedent" to coverage. *See, e.g.*, *Walsh Constr. Co.*, 72 N.E.3d at 959 (noting that the policy's SIR was expressly identified as a "condition precedent" to coverage); *Forecast Homes*, 105 Cal. Rptr. 3d at 205 (quoting policy as providing that "it is a condition precedent to our liability that you make actual payment of all damages and defense costs for each occurrence or offense" until SIR is satisfied); *Osborne Constr. Co. v. Zurich Am. Ins. Co.*, 356 F. Supp. 3d 1085, 1089 (W.D. Wash. 2018) (quoting policy as stating SIR is "a condition precedent to [insurer's] liability"); *Pak-Mor*

Mfg. Co. v. Royal Surplus Lines Ins. Co., 2005 WL 3487723, at *2 (W.D. Tex. 2005) (quoting policy as stating "it is a condition precedent to the [insurer's] liability that the insured, and no other person, insurer or organization for or on behalf of the insured, makes actual payment of the 'Retained Limit'").

Here, Twin City did not identify the SIR as a "condition precedent" to coverage. Instead, Twin City did the opposite. It included a Savings Clause in the Policy, which makes clear that "[i]f the 'self-insured retention' becomes invalid, suspended, unenforceable or uncollectable ***for any reason***," Twin City "shall be liable only to the extent [it] would have been had such 'self-insured retention' remained in full effect." A01015 (§ IV.9) (emphasis added). This language confirms that if Twin City is unable to enforce or collect on the SIR "***for any reason***," Twin City still must nevertheless cover loss in excess of the $250,000 SIR, subject only to a setoff. Put differently, the Savings Clause confirms that the SIR ***is not*** a condition precedent to coverage for amounts that exceed the SIR but, rather, entitles Twin City to deduct the SIR amount from any recoverable loss under the Policy.

Liberty Mutual Insurance Co. v. Wheelwright Trucking Co., 851 So.2d 466 (Ala. 2002), is instructive. There, the Supreme Court of Alabama considered a similar savings clause provision and concluded that—in light of the fact that the policy expressly contemplated performance by the insurer in some situations where

the retention is not paid—"payment of the SIR cannot be viewed as a condition precedent to" the insurer's "obligation under the policy." *Id.* at 487. Therefore, the court found that the policyholder failure to pay the retention did not result in a forfeiture of coverage. Rather, the insurer received "a setoff in the amount of the SIR." *Id.* The result should be no different here.

The Superior Court's discussion of the Savings Clause focused solely on whether the fact that Aearo LLC lacked a bank account—and thus could not make payment—was enough to render the retention "invalid, suspended, unenforceable or uncollectable" within the meaning of the clause. Ex. A at 16. But the Superior Court missed the forest for the trees; it failed to recognize that the Savings Clause's very existence confirms that any payment of the SIR is not a condition precedent and that the failure to do so does not deprive the insured of coverage, so long as Twin City receives the benefit of its $250,000 SIR cushion in the form of a setoff. And, notably, the breadth of the language that Twin City chose to use in the Savings Clause —"for any reason"—captures a scenario where the "reason" the SIR is not paid is because those amounts were paid by Aearo LLC's parent company or wholly owned subsidiary.

Indeed, the Superior Court's interpretation would make Aearo LLC worse off than if 3M and Aearo were unable to pay the SIR amount at all, such as due to insolvency. In that scenario, it is undisputed that Twin City would simply receive

a $250,000 setoff in the amount of the SIR. But, here, where the SIR amount has been fully paid—with the only problem, in Twin City's view, being that 3M did not artificially funnel those funds through Aearo LLC—the Superior Court found a forfeiture of coverage. That holding is unsupported by the Policy and contrary to Delaware law disfavoring a "strict interpretation" of the Policy that "would lead to forfeiture of coverage." *See Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249, 1259 (Del. Super. Ct. 2019), *rev'd on other grounds sub nom. In re Solera Ins. Coverage Appeals*, 240 A.3d 1121 (Del. 2020); *cf. State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974) (requiring prejudice for late notice of claims to avoid "loss or forfeiture with respect to a risk which was undeniably within the policy's coverage").

Similarly off-base is the Superior Court's observation that nothing prevented Aearo LLC from setting up its own bank account, and that it was required to do so under the Policy's requirement that:

> You shall do whatever is required, including provision of sufficient funds, to maintain the "self-insured retention" in full effect during the currency of this policy.

A01015 (§ IV.9). As stated, this entirely misses the import of the Savings Clause. But it also ignores the practical reality that following 3M's acquisition of Aearo in 2008, Aearo LLC was a holding company that was owned by 3M. Thus, although Aearo LLC lacked its own bank account, it fully "maintained" the SIR through 3M

and its own wholly owned subsidiary, Aearo Technologies LLC, both of which were willing and able to satisfy that SIR. Thus, Aearo LLC did "maintain" the SIR within the meaning of the Policy.

However, following the acquisition, and by virtue of the dictates of Aearo LLC's parent entity, 3M, the SIR was not collectible directly from Aearo LLC, triggering the Savings Clause. The notion that, notwithstanding these circumstances, Aearo LLC would forfeit coverage entirely is inconsistent with the Savings Clause and would result in a massive and improper windfall to Twin City.

Therefore, even assuming that there was a breach of a requirement that the named insured alone pay the $250,000 self-insured retention, the Superior Court erred in holding that the result of such a breach was to deprive Aearo LLC of coverage entirely. At most, Twin City is entitled to a $250,000 setoff in the amount of the SIR.

CONCLUSION

Aearo and 3M respectfully request that this Court reverse the Superior Court's order granting Twin City's motion for partial summary judgment, and remand to the Superior Court for further proceedings.

[Signature on next page.]

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