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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE AEARO TECHNOLOGIES LLC INSURANCE APPEALS	No. 381, 2024 No. 423, 2024 SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N23C-06-255 SKR (CCLD)

SUPPLEMENTAL OPENING BRIEF ON INTERLOCUTORY APPEAL OF PLAINTIFFS-BELOW/APPELLANTS

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NATURE OF PROCEEDINGS

Plaintiffs-Below/Appellants 3M Company ("3M") and its wholly owned subsidiaries Aearo LLC, Aearo Technologies LLC, Aearo Holding LLC, and Aearo Intermediate LLC (collectively, "Aearo") file this supplemental opening brief to address issues specific to Appeal No. 423, 2024 and the insurance policies issued by Defendants-Below/Appellees Royal Surplus Insurance Company and ACE American Insurance Company.[1]

As previously explained, the Superior Court held that Twin City Fire Insurance Company was not obligated to pay for the defense of its insured, Aearo LLC, in massive product liability litigation. The Court found that Aearo forfeited its right to that coverage because it did not pay the Twin City Policy's $250,000 self-insured retention ("retention" or "SIR") *out of Aearo's LLC's own bank account*. The Court held that payments made by Aearo's parent company, 3M, to mount a joint defense on behalf of Aearo and 3M did not satisfy the SIR. For the reasons stated in the Opening Brief in Appeal No. 381, 2024, the Court's conclusion violated the plain language of the Twin City Policy, misconstrued that Policy's Savings Clause, contravened the reasonable expectations of any

[1] *See* Order Granting Motion to Consolidate Appeals, Nos. 381, 2024 and 423, 2024, Dec. 18, 2024 ("Order Granting Consolidation").

policyholder, gave Twin City an unreasonable windfall, and yielded a commercially absurd result.

The Superior Court's ruling was equally atextual and draconian as to the insurance policies sold to Aearo by Royal Surplus and ACE.[2] Those policies—like the Twin City Policy—provide uncapped coverage for defense costs, subject to a $250,000 SIR (which can be satisfied by defense costs). The Superior Court held that 3M's payment of hundreds of millions of dollars in defense costs on behalf of its wholly owned subsidiaries could not satisfy the SIR of the Royal and ACE Policies and that those Policies' Savings Clauses did not apply.[3] This ruling erred for the same reasons as did the Superior Court's holdings as to Twin City.

First, the Superior Court unreasonably interpreted the provisions in the ACE and Royal Surplus Policies stating that the SIR is the amount that "you" are

[2] Aearo and 3M have settled with the other primary insurers, Liberty Surplus Insurance Corporation and General Star Insurance Company. This brief therefore does not address the Superior Court's ruling as to those insurers; nor does it discuss portions of the ruling below that are not within the scope of the interlocutory appeal, despite Appellants' disagreement with certain of those rulings. Appellants reserve the right to appeal those portions of the Superior Court's ruling at the appropriate time.

[3] The Superior Court granted summary judgment in Twin City's favor because Twin City's insured, Aearo LLC, did not pay any defense costs. Ex. A to Opening Br. at 23. However, the Superior Court denied summary judgment as to Royal Surplus and ACE because Aearo Technologies LLC (which is insured under both policies) paid $411,696.70 toward defense costs; therefore, the Superior Court found genuine issues of material fact as to whether those payments satisfy the ACE and Royal Surplus retentions. Ex. A at 17; *see* Section II.A, *infra*.

obligated to pay to preclude payments made on Aearo's behalf by its parent company from satisfying the SIR. This is despite 3M's—*Aearo's 100% owner*—identity of interest in and with its subsidiary Aearo. The Superior Court's holding is inconsistent with the policies as a whole, which repeatedly use the word "you" to describe tasks that are commonly performed by the insured's parent company or agents, such as the provision of notice or insurance-related record keeping.

Likewise, the Superior Court misconstrued the provision of the ACE Policy stating that the SIR "shall not be satisfied by … payments made on behalf of the insured by any other insurer, person or entity." The ruling below read the provision to preclude not only payments by unaffiliated third parties from satisfying the SIR, but also payments made by Aearo's own parent company, which as Aearo's owner ultimately bears its financial losses. This interpretation of the word "other" was unreasonably broad given both its plain meaning and its use in the context of the ACE Policy, and is contrary to a policyholder's objectively reasonable expectations.

Second, even if the Royal Surplus and ACE Policies unambiguously required that Aearo pay the SIR from its own bank account (they do not), the Court erred in holding that any failure to comply with this requirement would result in a forfeiture of coverage, as opposed to merely an offset in the amount of the SIR. The policies include robust "Savings Clauses" establishing that, so long as the

$250,000 threshold is surpassed and the insurer will not be called on to pay any of the first $250,000 of loss itself, the agreement to provide coverage in excess of the retention remains intact and enforceable—even if the insured itself has not paid the $250,000 cushion.

In holding otherwise, the Superior Court misinterpreted the plain language of the policies, holding that notwithstanding the Savings Clauses, the failure of a policyholder to pay the SIR from its own bank account results in a forfeiture of coverage. But this interpretation renders material portions of the Savings Clauses superfluous, including specifically (1) the Royal Surplus provision stating that if the policyholder fails or refuses to pay the SIR for any reason, the "amounts payable hereunder shall be determined … as if the self-insured retention were available and collectible," and (2) the ACE policy language confirming that if the policyholder fails to pay the SIR, ACE will only be liable to the same extent as if the SIR had been paid. It is also inconsistent with black-letter law holding that a policy term must be expressly and clearly identified as a "condition precedent" to coverage to result in forfeiture. Here, not only did ACE and Royal Surplus fail to do so, but they sold policies with robust Savings Clauses stating the opposite.

At bottom, the Superior Court's rulings violate established principles of insurance policy construction, including that policy language must be interpreted in a manner consistent with its plain and ordinary meaning, in the context of the

policy as a whole, in a manner that avoids commercially absurd results, and in a manner that does not render terms and conditions superfluous.

At a minimum, Aearo and 3M's reading of the policy language is reasonable, and therefore controls. Accordingly, this Court should hold that 3M's payment of defense expenses can satisfy the Royal and ACE Policies' SIR. Alternatively, this Court should hold that any failure to pay the SIR simply results in an offset.

SUMMARY OF ARGUMENT

1. The Royal Surplus and ACE Policies do not require that the SIR be satisfied by payments made from an Aearo bank account. In holding otherwise, the Superior Court wrongly construed the references to "you" in the SIR provisions to preclude the named insured's parent from satisfying the SIR. Properly understood in context, these references simply convey that the SIR is the insured's responsibility, not the insurer's, such that Aearo could cause the SIR to be satisfied through payment by its parent. That is confirmed by multiple other conditions in the Royal Surplus and ACE Policies using the word "you" to describe tasks, such as providing notice to the insurer, that are regularly performed by parent corporations or agents, without affecting insurance coverage.

2. The Superior Court also misinterpreted the ACE Policy provision that the SIR "shall not be satisfied by payment" by "any other insurer, person or entity." Considering the ACE Policy as a whole, the term "other" refers to a third party unaffiliated with the policyholder and lacking an identity of financial interest regarding the insured loss, such as another insurer or a third-party indemnitor. It does not describe (much less unambiguously describe) the policyholder's parent company, which *owns* the insured and *bears* the insured's financial losses on its own books. Moreover, because the Royal Surplus Policy lacks any such language,

that policy certainly cannot be construed to foreclose payment of the SIR by the insured's parent company.

3. This conclusion is confirmed by the two main purposes of an SIR provision. The SIR's first purpose—relieving the insurer from defending smaller claims—is satisfied because Aearo's interpretation does not require that Royal Surplus or ACE pay for (or defend) any claims that do not reach the $250,000 threshold. And its second purpose—reducing so-called "moral hazard"—applies with equal force when the policyholder's own parent entity pays the SIR.

4. Alternatively, the Superior Court erred in holding that failure to pay the SIR from the policyholder's own bank account results in a forfeiture of coverage. It reached this result by misinterpreting the Royal Surplus and ACE Savings Clauses, which expressly preserve coverage excess of the SIR if Aearo fails to comply with the SIR for "any reason" (Royal Surplus) or even refuses to pay the SIR (ACE). These Savings Clauses—like that in the Twin City Policy—make clear that if the SIR is not satisfied in whatever manner might be prescribed by the policies, the insurers are entitled only to a $250,000 offset, not a $370 million windfall.

5. Indeed, to result in the drastic remedy of forfeiture, the law requires that insurers clearly and expressly identify a policy term as a "condition precedent." Here, not only did Royal Surplus and ACE fail to do so in their

policies, but they added Savings Clauses which any reasonable policyholder would interpret as *non-forfeiture* clauses for losses that exceed the SIR amount.

SUPPLEMENTAL STATEMENT OF FACTS

I. The Royal Surplus and ACE Policies

Aearo seeks insurance coverage for the Earplug Suits described in the Opening Brief submitted in Case No. 381, 2024. Opening Br. at 11–13. In addition to the Twin City Policy discussed in the Opening Brief (at pages 13–14), Aearo purchased primary insurance policies from four other insurance companies during the relevant time period, including Royal Surplus and ACE.

A. The Royal Surplus Policy

The "Royal Surplus Policy" (Policy No. KHA011654) was in effect September 30, 1997 to September 30, 2000. A00945. The named insureds are Aearo Corporation (since renamed Aearo LLC) and "any subsidiary corporation thereof," which includes Aearo Technologies LLC. A00945; A00959; A00269 ¶ 7; A00273–A00274; A03784 ¶¶ 9–10; A03790; A03792.

The policy requires Royal Surplus to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' … ." A00986 (§ 1.1.a). Royal Surplus also must pay "[e]xpenses incurred in the investigation, settlement or defense of a claim." A00981 (End. 33(3)). Payment of legal expenses "will not reduce the limits of insurance." A00990 (Supplementary Payments).

Royal Surplus's "obligation … applies only to that amount of damages in excess of the 'Retained Limit'" of $250,000 (also referred to as a "Self-Insured

Retention"). A00981 (End. 33(2, 5)). The "Retained Limit" is defined as "the amount shown below" ($250,000) "which you are obligated to pay … ." A00981 (End. 33(1)). "Expenses incurred in the investigation, settlement or defense of a claim" are "included in" (can be used to satisfy) the "Retained Limit." A00981 (End. 33(3)).

The Royal Surplus Policy also includes a Savings Clause that provides: "[I]f the self-insured retention is not available or collectible because of (a) the bankruptcy or insolvency of the named insured or (b) the inability or failure for any other reason of the named insured to comply with the provisions of the retention endorsement, then this policy should apply (and amounts payable hereunder shall be determined) as if such self insured retention were available and collectible." A00976 (End. 28).

B. The ACE Policy

The "ACE Policy" (Policy No. G23857054) was in effect from September 30, 2007 to September 30, 2008 and was issued to Named Insureds Aearo Holding Corporation and Aearo Company (since renamed Aearo Holding LLC and Aearo Technologies LLC). A01380; A01405; A00269 ¶¶ 8, 11; A00276–A00277; A00286–A00287.[4]

[4] The ACE Policy also insures "any organization … over which you or your subsidiary currently maintain ownership or majority interest," which includes the (continued…)

The policy obligates ACE to reimburse "Allocated Loss Adjustment Expense," which includes "any expenses, costs, or interest incurred in connection with the investigation, administration, adjustment, settlement or defense of any claim or 'suit' to which this policy applies," including "fees and expenses to attorneys for legal services." A05269 (End. 16 § V.23.a). "Payments for 'Allocated Loss Adjustment Expense' will not reduce the limits of insurance." A05270 (End. 16 § V.23).

The ACE Policy has a $250,000 "Self Insured Retention" and provides that "Allocated Loss Adjustment Expense" is included "within" that retention—*i.e.*, defense cost payments count toward the retention. A01438 (End. 30 § B). The SIR "must be satisfied by actual payment by you" and "shall not be satisfied by payment by the insured of any deductible of any other policy or payments made on behalf of the insured by any other insurer, person or entity." A05268 (End. 16 § IV.III.10).

The ACE Policy also includes a Savings Clause that provides: "In the event of bankruptcy or insolvency of any insured, or the inability, failure, or refusal to pay the 'Self Insured Retention' by any insured, we will not be liable under the policy to any greater extent than we would have been liable had the insured not

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current Aearo Intermediate LLC and Aearo LLC (both subsidiaries of Aearo Holding LLC). *Id.*; A04912; A00236; A03784 ¶ 10; A03792.

become bankrupt or insolvent or had such inability, failure or refusal not occurred, and this policy will not apply as a replacement for the 'Self Insured Retention'. You will continue to be responsible for the full amount of the 'Self Insured Retention' before the limits of insurance under this policy apply." A05267 (End. 16 § IV.I.1).

Neither Royal Surplus nor ACE has paid any of the more than $370 million incurred to defend the Earplug Suits. A00935.

II. Proceedings Below

A. The Summary Judgment Ruling

On July 16, 2024, the Superior Court granted Twin City's motion for summary judgment, holding that the named insured under the Twin City Policy, Aearo LLC, was required to pay the $250,000 SIR using funds from its own account. Opening Br. at 15; Ex. A at 13.

Royal Surplus and ACE joined Twin City's motion. A04878–A04955; A04956–A05030. As to those insurers, the Superior Court held—as it did with Twin City—that the hundreds of millions in defense costs "paid by 3M do not count towards the Self-Insured Retention." Ex. A at 13; *see also id.* at 16. However, the Superior Court denied summary judgment as to Royal Surplus and ACE, holding that there were genuine issues of material fact regarding whether

$411,696.70 in defense costs paid by Aearo Technologies LLC satisfied the retention of those policies. *Id.* at 16–17.

B. The Motion for Reargument Ruling

On July 22, 2024, Aearo and 3M moved for reargument on the discrete issue of whether the "Savings Clauses" in the Royal Surplus and ACE Policies applied to preserve coverage. A05283–A05297. The summary judgment ruling had only addressed the language of the Twin City Savings Clause without discussing the language of the Royal Surplus and ACE Savings Clauses. A05284–A05285. The Superior Court denied reargument, stating that while its prior ruling "focused its analysis on the Twin City Policy, its reasoning extended to the other two policies as well." Ex. C at 2.

Aearo and 3M filed a timely Notice of Interlocutory Appeal on September 25, 2024. A05570–A05576. This Court accepted Aearo and 3M's petition for interlocutory appeal as to the SIR ruling against the primary insurers other than Twin City, including Royal Surplus and ACE, and consolidated this appeal with the separate appeal against Twin City. Order Granting Consolidation at 7–8.

ARGUMENT

I. Payments Made by Aearo's Parent Company Satisfy the Retentions in the Royal Surplus and ACE Policies

A. Question Presented

Whether the Superior Court erred in finding that the Royal Surplus and ACE Policies unambiguously foreclosed payments from the insured's parent company from satisfying the $250,000 SIR. A03745–A03748.

B. Scope of Review

A decision on summary judgment is reviewed *de novo*. *Wilmington Tr. Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 916 (Del. 1996). Summary judgment may be granted only "where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

C. Merits of the Argument

For the same reasons that this Court should reverse the ruling below as to Twin City, it should hold that the Royal Surplus and ACE Policies permit 3M to satisfy the SIR for its wholly owned subsidiaries. In context, the term "you" in the SIR provisions merely distinguishes payment that is the insured's responsibility from that of the insurer. And the words "other insurer, person or entity" in the ACE Policy refer to payments by unaffiliated third parties. At the very least, this is a reasonable interpretation of the policies and, thus, controls.

1. The Policies Do Not Preclude 3M from Paying the SIR

The Superior Court unreasonably interpreted the Royal Surplus and ACE Policies as unambiguously precluding payments from the insured's parent company, 3M, from satisfying the SIR. That holding contravened black-letter Delaware and Indiana law (discussed in the Opening Brief) requiring that (1) an insurance policy be read as a whole, (2) policy language must be read to reach commercially reasonable and not absurd results, and (3) any ambiguity must be interpreted in favor of coverage. Opening Br. at 18–19 (citing cases).

The Royal Surplus Policy defines "Retained Limit" to be "the amount shown below, which you are obligated to pay." A00981 (End. 33). Similarly, the ACE Policy provides that the SIR "must be satisfied by actual payment by you." A05268 (End. 16 § IV.I.1). The Superior Court relied upon the fact that "you" is defined in both policies as a "Named Insured" to hold that payment by the non-insured parent company, 3M, could not satisfy the SIR in either policy. Ex. A at 13, 15–16.

However, read in the context of the policies as a whole, as required, the reference to "you" in the SIR provisions simply distinguishes a payment that is the insured's responsibility from a payment that is the insurer's responsibility. Supporting that construction, immediately after the Royal Surplus and ACE Policies state that "you" refers to the Named Insured, they provide the contrasting

statement that the "words 'we', 'us' and 'our' refer to the company providing this insurance." A00986; A01383.

Further supporting this interpretation, the Royal Surplus and ACE Policies use the term "you" to describe obligations that are frequently performed on behalf of the policyholder by agents or parents, including:

- "***[Y]ou***" "must … [i]mmediately record the specifics of the claim or 'suit' and the date received.'" A00992 (§ IV.2.b.(1)); A05268 (End. 16 § IV.II.2.e.i.) (emphasis added).

- "***[Y]ou***" "must … [i]mmediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'" A00992 (§ IV.2.c.(1)); A05268 (End. 16 § IV.II.2.f.ii.) (emphasis added).

- "If a claim is made or 'suit' is brought against any insured, ***you*** must … [n]otify us as soon as practicable." A00992 (§ IV.2.b.(2)); A05268 (End. 16 § IV.II.2.e.ii) (emphasis added).

These functions are routinely handled by employees of a policyholder's parent company, or by insurance brokers or attorneys on the insured's behalf. Opening Br. at 20–22; United Policyholders *Amicus* Br., Dec. 10, 2024, Appeal No. 381, 2024 at 11–15. No reasonable policyholder would expect coverage to be forfeited because notice was provided by the insured's parent—any more than they would expect to lose coverage because the SIR was paid by the insured's parent. The Superior Court's construction is thus contrary to bedrock law requiring that insurance policies be read as a whole, and prohibiting "interpretations that are commercially unreasonable or that produce absurd results." *Manti Holdings, LLC*

v. Authentix Acquisition Co., 261 A.3d 1199, 1211 (Del. 2021); Opening Br. at 21–22 (citing cases).

Notably, courts have interpreted policy language referring to "you" or the "insured" paying the SIR merely to mean that this payment is the insured's responsibility (as opposed to the insurer's), and so permits the insured to satisfy the SIR through payment by another insurer or a contractual indemnitor. *See Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So. 3d 494, 503 (Fla. 2014) (indemnitor can satisfy the SIR of policy stating that "retained limit must be paid by the insured"); *Nationwide Mut. Ins. Co. v. Certain Underwriters at Lloyd's, London*, 2016 WL 3648610, at *3 (N.D. Cal. July 7, 2016) (similar); *see also* Opening Br. at 25–28. And, like Twin City, both Royal Surplus and ACE failed to use language available in the insurance marketplace requiring payment of the SIR from the named insured's "own account." *See* Opening Br. at 27–28. Thus, a reasonable policyholder would not interpret the word "you" to exclude coverage where its parent company pays the SIR.

2. 3M Is Not an "Other Entity" Under the ACE Policy

The Superior Court also erred in relying on a provision in the ACE Policy, which provides that the SIR cannot be satisfied with third-party recoveries (such as from another insurer or a contractual indemnitor). The ACE Policy reads:

> The "Self Insured Retention" under this policy must be satisfied by actual payment by you. The "Self Insured Retention" shall not be

> satisfied by payment by the insured of any deductible of any other policy or payments made on behalf of the insured by any other insurer, person or entity. The "Self Insured Retention" under this policy shall not be satisfied by any insurance coverage whatsoever. In the event that "bodily injury" … covered by this policy is also covered by any other insurance, even if such other insurance is provided by us, the insured must make actual payment of the "Self Insured Retention" under this policy without regard to whether the insured must pay other "Self Insured Retentions" under any other policy even if such other policy is issued by us and even if the damages claimed are deemed to have been caused by one "occurrence".

A05267 (End. 16 § III.10). The Superior Court stated that "arguably" the ACE Policy "expressly exclude[s] payments made by another on the insured's behalf from counting towards the Self-Insured Retention" and, apparently, decided that 3M was an "other … entity" that could not satisfy the SIR. Ex. A at 13 & n.62.

That reading is unreasonable for the reasons explained in the Opening Brief. Opening Br. at 22–24. In plucking the phrase "other … entity" from the SIR, the Superior Court ignored the full context of the provision, including its extensive references to other insurance policies. *See, e.g., In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) ("We interpret contracts 'as a whole and we will give each provision and term effect'"). Read in its full context, "other insurer, person or entity" refers to an entity that lacks a common financial identity with the insured—such as another insurer or indemnitor—not to a parent company that *fully owns* the insured and ultimately bears its financial losses. Opening Br. at 18–19.

Aearo's construction is also supported by the plain meaning of "other," which means "'[d]ifferent from that or those implied or specified' or as '[a]dditional; extra'" or "'[d]ifferent or distinct from that already mentioned; additional, or further.'" *State of Minnesota v. Davis*, 2014 WL 801605, at *9 (Minn. Ct. App. Mar. 3, 2014) (citing American Heritage Dictionary and Black's Law Dictionary). A parent company responsible for its wholly owned subsidiary's financial and insurance functions is simply not "distinct" or "different" from its wholly owned subsidiary to the degree that it would unambiguously be considered an "other" entity for purposes of the SIR. Opening Br. at 23. At minimum, the ACE Policy is ambiguous as to whether 3M is sufficiently different from its wholly owned Aearo subsidiaries to constitute an "other" entity under the SIR. *See* Opening Br. at 24–25.

3. Aearo's Interpretation Is Most Consistent with the Purposes of SIR Provisions

Interpreting the Royal Surplus and ACE Policies to require payment of the SIR from Aearo's own account does not further the purposes of SIR provisions. The Superior Court noted that one purpose of an SIR is to avoid "moral hazard" and encourage the insured to take risk-saving measures. Ex. A at 15 n.65; United Policyholder *Amicus* Br. at 7–10. But the supposed "moral hazard" incentive applies equally under Aearo's reading given that the Superior Court acknowledged that any SIR would be satisfied if 3M paid the money to Aearo, which then paid

the SIR from its own bank account. Opening Br. at 31–32. Whether funds originating from a 3M bank account are first funneled through an Aearo bank account, or instead are paid by 3M to defense counsel directly, has no effect on "moral hazard"—it is satisfied in both situations.

Moreover, Aearo's interpretation is fully consistent with the other primary purpose of SIRs—to provide a "buffer" preventing ACE and Royal Surplus from having to defend and indemnify small claims. United Policyholders *Amicus* Br. at 10–11; *see also* Allan D. Windt, 3 Insurance Claims & Disputes § 11:31 (6th ed. Mar. 2024) ("[I]t should not make any difference whether the amount of the SIR is paid by the insured, another insurer, an unrelated third party, or no one.").

II. Alternatively, Coverage Is Available for Amounts Exceeding the SIR Provisions, Which Function as a Setoff

A. Question Presented

Whether the Superior Court erred in holding that failure to comply with the SIR provisions results in a forfeiture of coverage, rather than a setoff in the amount of the SIR. A03745–A03748; A05284–A05290.

B. Scope of Review

A summary judgment decision is reviewed *de novo*. *Wilmington Tr. Co.*, 690 A.2d at 916. Summary judgment can be granted only when "the moving party is entitled to a judgment as a matter of law" and there is "no genuine issue as to any material fact." *Id.*

C. Merits of the Argument

Even if the SIR provisions in the Royal Surplus and ACE Policies unambiguously required payment from Aearo's own account, ACE and Royal Surplus would, at most, be entitled to a setoff in the amount of the SIR. That is because the policies' Savings Clauses preserve coverage for losses in excess of the SIR under the circumstances here. Additionally, the ACE and Royal Surplus Policies do not clearly identify payment of the SIR as a "condition precedent" to coverage, which is required under black letter law before there can be a forfeiture of coverage.

1. The Savings Clauses Result in a $250,000 Setoff, Not Forfeiture

Like the Twin City Policy, the Royal Surplus and ACE Policies contain Savings Clauses that preserve coverage for amounts exceeding the SIR even assuming that 3M's payments could not satisfy the SIR. *See* Opening Br. at 35–38. The Royal Surplus Savings Clause broadly and expressly preserves coverage for amounts in excess of the $250,000 SIR if the insured is unable *or fails* to comply with the provisions of the SIR endorsement for *any* reason:

> For all purposes of this policy, if the self insured retention is not available or collectible because of (a) the bankruptcy or insolvency of the named insured ***or*** (b) the inability ***or failure for any other reason*** of the named insured to comply with the provisions of the retention endorsement, then this policy should apply (and amounts payable hereunder shall be determined) as if such self insured retention were available and collectible.

A00976 (End. 28) (emphasis added). Thus, if the SIR is not paid for any reason, the Royal Surplus Policy expressly still applies as if the SIR were "available and collectible"—*i.e.*, subject to a $250,000 offset.

Likewise, the ACE Policy provides that the inability, *failure*, or *refusal* to pay the SIR does not result in a forfeiture of coverage for amounts exceeding the retention:

> In the event of bankruptcy or insolvency of any insured, ***or*** *the inability,* ***failure***, ***or refusal*** *to pay the "Self Insured Retention" by any insured*, we will not be liable under the policy to any greater extent than we would have been liable had the insured not become bankrupt or insolvent or had such inability, *failure or refusal* not

> occurred, and this policy will not apply as a replacement for the "Self Insured Retention". You will continue to be responsible for the full amount of the "Self Insured Retention" before the limits of insurance under this policy apply.

A05267 (End. 16 § IV.I.1) (emphasis added).

Thus, like the Twin City and Royal Surplus Policies, if the SIR is not paid, ACE will continue to be liable under the Policy, just not to "any greater extent" than ACE "would have been liable … had such inability, failure or refusal not occurred." Ignoring this plain text, the Superior Court held that its analysis of the Twin City Savings Clause applied to the ACE and Royal Surplus Policies as well. Ex. C at 3-4. But the Superior Court's analysis of the Twin City Savings Clause was erroneous for the reasons stated in Aearo's Opening Brief. The Superior Court's extension of that reasoning to the ACE and Royal Surplus Savings Clauses fails for similar reasons.

The Superior Court's holding rested on the premise that the Savings Clauses do not modify the policyholder's obligation to pay the SIR, which the Court construed to be a prerequisite to coverage. Ex. C. at 4-5. To support this conclusion, the Superior Court pointed to the language in the ACE Savings Clause providing: "You will continue to be responsible for the full amount of the 'Self Insured Retention before the limits of insurance under this policy apply." *Id*.; A05267 (End. 16 § IV.I.1). But read in context, this language simply means that if the policyholder fails or refuses to pay the SIR, the insurer will only be required to

pay amounts that exceed the SIR. *See Phillips v. Noetic Specialty Ins. Co.*, 919 F. Supp. 2d 1089, 1098 (S.D. Cal. 2013) ("[P]olicy language stating that the insolvency of the insured 'will not increase our obligations under the policy' suggests that [the insurer] has an immediate duty under the policy to indemnify its insured for any losses incurred during the policy period *regardless* of the status of the SIR.") (emphasis in original).

The Superior Court's contrary interpretation once again overstated the significance of the word "you"—this time in the Savings Clauses—which, as discussed above, is used in the policies to describe obligations regularly performed on behalf of policyholders by their parent or agents. *See* pages 14–16, *supra*. The Superior Court also overlooked the import of the word "responsible," which is defined as being the "cause" of something.[5] Thus, construed as a whole, this language in the Savings Clauses merely confirms that the policyholder ("you" in the policy) instead of the insurer ("us" in the policy) is "responsible" for the first $250,000 of any loss, including by *causing* that amount to be paid by its parent company. No language in the Savings Clauses can be read to impose any requirement as to how the policyholder fulfills that responsibility—much less

[5] *Responsible,* Mirriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/responsible.

unambiguously requires the policyholder to pay the SIR from its own bank account.

The Superior Court's construction of the Savings Clauses also violated a cardinal rule of contract interpretation by rendering language in the Savings Clauses meaningless. Specifically, if the insured being "responsible" for the SIR meant that the insured itself was obligated to pay the full SIR from its own account as a prerequisite to coverage, including where there has been a "failure" or "refusal" to pay, it would be nonsensical for the Savings Clause to explain that in the event of such failure or refusal, ACE would not have liability "greater" than it would have absent such failure or refusal, because that would already be the case under the ACE Policy.[6]

2. The SIR Is Not a Condition Precedent to Coverage

As discussed in the Opening Brief, conditions precedent are disfavored and must be "expressly" or "explicitly" identified in a contract. Opening Br. at 33–35 (citing cases); *see also Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 889 (Ind. Ct. App. 1990) ("Conditions precedent are disfavored and must be

[6] ACE and Royal Surplus have attempted to cabin the effect of their Savings Clauses to bankruptcy. But this argument ignores the plain policy text, which expands the reach of both Savings Clauses *beyond* "bankruptcy or insolvency" to "the inability or failure for any other reason of the named insured to comply with the provisions of the retention endorsement" (Royal Surplus) or "the inability, failure, or refusal to pay the 'Self Insured Retention' by any insured" (ACE). A00976 (End. 28); A05267 (End. 16 § IV.I.1).

stated explicitly."). The Royal Surplus Policy does no such thing; it merely defines the "Retained Limit" as "the amount shown below, which you are obligated to pay." A00981 (End. 33). Courts have interpreted this or similar "obligation to pay" language to hold that policies do not require payment from the insured's own account and can be satisfied through payment by another insurer. *See* page 16, *supra*; *see also Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79, 90 (5th Cir. 2012) (SIR using "must be paid" language satisfied by other insurer's payment).

The ACE Policy, too, does not deem payment of the SIR to be a "condition precedent." The policy never refers to the SIR as a "condition precedent." Further, the policy's insuring agreement provides that ACE "will pay those sums that the insured becomes legally obligated to pay as damages … to which this insurance applies, and which are in excess of the 'Self Insured Retention' stated in the Declarations." A05265 (End. 16 § I.I.1.a).

Because neither policy expressly designates payment of the SIR as a condition precedent to coverage, there is no basis to insert such a limitation into the policy after the fact. *See, e.g.*, *Larian v. Momentus Inc.*, 2024 WL 386964, at *9 (Del. Super. Ct. Jan. 31, 2024) ("Parties to a contract must use unambiguous, express language to create a condition precedent capable of producing a forfeiture."); *Phillips*, 919 F. Supp. 2d at 1098 ("Defendant had the opportunity to

include terms requiring payment of the SIR to serve as a condition precedent to coverage, but failed to do so. As such, the Court will not create such an obligation where it does not already exist."); *Lasorte v. Those Certain Underwriters at Lloyd's*, 995 F. Supp. 2d 1134, 1143 (D. Mont. 2014) ("If the insurer intends to make actual payment in cash of the Self Insured Retention a condition precedent to liability … then it can include specific language to that effect in the policy"). This is particularly true here, where ACE and Royal Surplus inserted Savings Clauses into their respective policies that a reasonable policyholder would interpret as *non-forfeiture* provisions.

Accordingly, any failure to comply with a requirement that the SIR be paid from Aearo's own account would be a non-material breach that would not forfeit coverage; rather, it would result in a $250,000 offset. *See* Opening Br. at 36–37.

CONCLUSION

Aearo and 3M respectfully request that this Court reverse the portion of the Superior Court's order holding that payments by 3M could not satisfy the SIR of the Royal Surplus and ACE Policies, and remand to the Superior Court for further proceedings.

[Signature on next page.]

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