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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 CASE BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N23C-06-255 SKR (CCLD)

ANSWERING BRIEF OF DEFENDANT-BELOW/APPELLEE TWIN CITY FIRE INSURANCE COMPANY

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NATURE OF PROCEEDINGS

This insurance coverage dispute concerns whether, under a policy issued to one entity (Aearo Corporation, hereinafter, "Aearo"), payments made by another entity (indirect parent and co-appellant 3M Company, "3M") may satisfy a self-insured retention that, by its terms, requires payment by the insured and cannot be satisfied by payments by "another." The Superior Court correctly held that the answer to this question is "no."

Contrary to the Appellants' exaggerations, that ruling is not an unprecedented decision that departs from "decades of well-established jurisprudence." Rather, it is consistent with (indeed, mandated by) bedrock principles of interpretation, both in Delaware and elsewhere, that apply plain words such as "another" according to their ordinary meaning, and that have enforced similar retention provisions consistent with that plain meaning.

This action is Appellant 3M's attempt to bootstrap for its own benefit coverage under the Policy that it did not purchase and under which it has never been an insured.[1] 3M contends that it spent more than $372 million to defend thousands of underlying lawsuits asserting bodily injury arising from the use of the

[1] Twin City sought summary judgment on multiple grounds, including that 3M could not properly be subrogated to the rights of Aearo under the Policy. The Superior Court did not reach these alternative arguments because of its ruling on the self-insured retention. (Opening Brief on Appeal of Plaintiffs-Below/Appellants ("Opening Brief"), Ex. A the ("Order")).

Combat Arms Earplug (collectively, "CAE Lawsuits").[2] As the clear "target defendant" in the CAE Lawsuits, 3M exercised control over, and paid the entire costs of, that defense. It is undisputed that the only appellant that is an insured under the Policy – Aearo – has not paid a dime for the defense of the CAE Lawsuits, nor will it ever be called upon to do so.

The Policy provides that defense costs "will continue to be borne by the insured until the 'self-insured retention' has been exhausted . . ." (A01004.) Because Aearo has not paid any defense costs, the Superior Court correctly held that it had not satisfied the self-insured retention that must be exhausted before Twin City's coverage obligations can attach. Accordingly, Twin City has no obligation to pay the defense costs that 3M has paid.

Appellants argue that, because 3M made payments on Aearo's behalf as a corporate parent, those payments operate to erode the retention. But, as the Superior Court held, the Policy unambiguously provides that it is the insured's obligation to pay the retention and that the retention is *not* reduced by "[a]ny payment made on your behalf by another, including any payment from any other applicable insurance." (A01020.) Accordingly, payments made by 3M "on behalf of" Aearo unambiguously do not erode the self-insured retention.

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[2] Although Appellants contend that Aearo also seeks to recover damages, it is difficult to see how that could be the case. Aearo has paid nothing and has represented to the Superior Court that it does not have a bank account. (A03754.)

This result is consistent with the retention's purpose. Self-insured retentions are utilized in excess policies where the insured has agreed to retain a portion of the risk for itself. Here, the insured (Aearo) agreed that it would accept responsibility for the first $250,000 per occurrence. The Superior Court's ruling that 3M's payments do not count against that limit appropriately places responsibility for the retention with Aearo, which agreed to bear that risk.

Appellants' interpretation, in contrast, would turn the retention on its head. Rather than requiring the insured to retain risk, Appellants contend that "another" entity can satisfy the retention so long as it is a member of the same corporate family. Nothing in the policy language supports that argument, nor have Appellants identified any other court that has accepted this far-flung theory. 3M and Aearo are distinct corporate entities, and a payment by 3M does not affect Aearo's accounts; there is no reason that a payment by 3M is a payment by Aearo for purposes of the retention.

Moreover, while Appellants are correct that the Court should interpret the Policy as a whole, nothing in the remainder of the Policy contravenes the unambiguous retention provision. On the contrary, the Policy clearly identifies where obligations can be handled by others (*e.g.,* providing claim notices) and where, as here, the obligation rests entirely with the insured and cannot be satisfied by "another." In issuing the Policy and calculating an appropriate premium, Twin

City reasonably expected that it would be Aearo, and not any other entity, which would be required to exhaust the self-insured retention. There certainly was not any expectation that 3M (for whom $250,000 represents next to nothing) could be called upon to satisfy the retention, where 3M had no relationship to Aearo at the time of contracting (and for seven years thereafter).

Finally, Appellants contend that the Maintenance Clause excuses Aearo's performance of the retention. Once again, Appellants have it backwards. That provision affirms that Aearo was required to *maintain* the retention by any means necessary. Only where Aearo was *unable* to do so does the clause operate to provide that coverage is reduced by the amount of the retention, though not eliminated entirely. But that is not the case here. Appellants do not dispute that Aearo could have satisfied the retention (*i.e.*, it has assets, could have opened a bank account and made defense payments). It simply *chose* not to do so. The maintenance provision is not an escape clause that excuses Aearo's decision not to meet its contractual obligations.

This Court should affirm the Superior Court's grant of summary judgment in favor of Twin City.

ANSWER TO THE SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly interpreted and applied the self-insured retention, which provides that payments by "another" do not erode the retention. The result the Superior Court reached is mandated by the plain language of the retention and the language of the Policy as a whole. The Policy reflects the parties' agreement, consistent with the purpose of self-insured retention provisions, that the first dollar of risk would remain *with the insured* and would not be assigned to a third party, such as 3M.

2. Denied. The Superior Court correctly interpreted the entire Policy; the Superior Court's focus was not merely on the word "you," as appellants now claim, but rather on the entire definition of the "self-insured retention," which provides that payments by "another" do not erode the retention. The Court correctly found that 3M is a distinct legal and corporate entity from Aearo, the insured. To the extent that Appellants – for the first time on appeal – have identified new provisions of the Policy that they believe warrant a different result, the Superior Court did not err in failing to specifically identify those provisions that Appellants did not identify below; in any event, these other provisions are fully consistent with and reinforce the court's reading. Moreover, the court properly recognized that the retention is not a mere "pointless formality" as Appellants urge, but rather serves an important function in requiring the insured to

assume a portion of the risk. That risk is not borne at all by the insured under Appellants' interpretation. Appellants are also incorrect (as shown below) that other case law has interpreted similar language in a manner that is inconsistent with the Superior Court's ruling.

3. Denied. The Court read the word "you" in connection with other language in the policy, including the provision that payments "made by another" do not erode the retention. Appellants' attempts to interpret the word "you" in isolation from the remaining provisions that define the self-insured retention lead Appellants to a flawed interpretation.

4. Denied. The Policy pays covered "claim expenses" once the retention has been met and claim expenses paid *by the insured* can erode the retention. But there is nothing in the Policy that provides that claim expenses erode the retention simply because they have been incurred by another (in this case, 3M). Indeed, it would defeat the purpose of a *self-insured* retention entirely if a third party could meet its requirements to satisfy the retention merely by having a third party incur or pay defense costs (or claim expenses).

5. Denied. Although it is unnecessary to delve into purpose where, as here, the policy language is plain and unequivocal, the Superior Court correctly recognized that the purpose of the self-insured retention is to require that *the insured* bear a portion of the risk. Appellants contend that this purpose was served

because 3M allegedly "bore" that risk by paying sufficient costs to cover the retention. That misses the point; Aearo is a different legal entity from 3M, which never contracted with Twin City, and Aearo did not bear any of the risk here, where 3M paid all of the claim expenses that are at issue. A loss to 3M, or a payment by 3M, is not the same as a loss to Aearo or a payment by Aearo. Payments by 3M, for example, do not show up on the books and records of its subsidiaries, including Aearo. Appellants' interpretation would turn the retention on its head because it would expressly permit someone else to make payments to satisfy the retention with no financial consequences at all to the insured.

6. Denied. The Superior Court interpreted the self-insured retention correctly. The Policy is an "Excess Commercial General Liability Policy." Like other excess coverage, the Policy does not apply until the underlying layer of coverage – the retention – has properly exhausted. The result in this case is not an improper or unfair forfeiture of coverage; rather, coverage has not been triggered because Aearo (of its own choice) failed to exhaust the underlying retention as the Policy requires.

7. Denied. The Superior Court correctly held that the Maintenance Clause, which Appellants mistakenly refer to as a "savings clause," does not apply here. The Maintenance Clause generally requires the insured to "do whatever is required, including provision of sufficient funds, to maintain" the retention in full

effect. (A01015, § IV.9.) Where the insured is unable to pay the retention, *e.g.*, due to bankruptcy or insolvency, the Maintenance Clause may operate to excuse its performance. But that is not the case here. Aearo had ample assets from which to satisfy the retention, but simply made no effort to do so. The Maintenance Clause is not a "get-out-of-jail free" card that permits Aearo to ignore its obligations.

STATEMENT OF FACTS

A. The Twin City Policy.

Twin City issued a single excess liability policy, No. 10 ECS OA0384 (the "Policy") to "Aearo Corporation," for the period September 30, 2000 to September 30, 2001, ultimately extended to November 12, 2001. (A01516–17.) Aearo is the only insured under the policy. None of the other 3M parties are insureds; 3M, whose acquisition of Aearo post-dates the policy by seven years (A03818), is a stranger to the insurance contract.

The Policy is not a "primary" policy. Rather, the Policy expressly provides that it is an "Excess General Liability Insurance Policy," which differs from primary insurance in several key respects. Most critical for purposes of this appeal, the Policy does not provide first-dollar coverage. The Policy pays for covered costs and expenses only after the named insured itself has fully satisfied its self-insured retention of $250,000 per occurrence, subject to an aggregate maximum of $1,500,000. (A01023.) Twin City's obligation, if any, does not attach until that retention has properly been satisfied:

> The insured will also have the obligation of paying any defense counsel selected by or on behalf of the insured and all defense costs. These costs will continue to be borne by the insured until the 'self-insured retention' has been exhausted solely by the payment of 'claim expenses' and that portion of judgments or settlements to which this policy would have applied in the absence of the 'self-insured retention.'

(A01004, § I.1.b.)

The Policy also provides explicit instruction as to how the retention is satisfied, namely, only through the payment of qualifying "claim expenses" or "damages" by the insured itself:

> "[S]elf-insured retention" means the amount *you or any insured must pay* as damages and "claim expenses". . .

(A01020, § V.26.b. (emphasis added)). Payments made by any entity that is not an insured (*i.e.*, 3M) unambiguously do not erode the retention:

> Your obligation to pay the "self-insured retention" shall apply fully and separately to each "policy period" and *shall not be reduced by:*
> . . .
> *Any payment made on your behalf by another*, including any payment from any other applicable insurance.

(*Id.* (emphasis added)). Payments made by "another," *i.e.*, 3M, therefore, do not erode the self-insured retention.[3] Nor does an insured satisfy the self-insured retention through costs that it has allegedly "incurred" but not paid. Finally, the Policy provides that the insured (Aearo) is responsible to maintain the self-insured retention so that it can be satisfied. These provisions reflect a critical condition of

[3] Nor is the insured's obligation to pay the self-insured retention transferable to any other entity, including 3M: "Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured." There was never any request for such consent, nor was such consent given. (A01016.)

the Policy, which requires that the insured would itself bear a specified amount of loss before the excess coverage that the Policy furnishes would attach.

It is undisputed that Aearo has never borne that loss.

B. The Earplug Lawsuits.

Beginning in about 2018, 3M (along with Aearo in some but not all cases) began to be named as a defendant in the CAE Lawsuits, which were consolidated in Minnesota state court and in a multidistrict litigation in the United States District Court for the Northern District of Florida, styled *In re: 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885 (N.D. Fla.) (the "Florida MDL"). (A01485-86.) The number of lawsuits in the Florida MDL grew to about 300,000 individual lawsuits by 2021, with another 2,000 lawsuits pending in Minnesota. (A01486.)

From the very beginning, 3M was the real defendant and controlled the defense of the CAE Lawsuits. 3M asserted that it had exclusive liability for CAE Lawsuits at each of the sixteen bellwether trials and argued in favor of apportionment of 100% of fault at those trials to 3M. (A01487.) 3M also paid for the defense of the CAE Lawsuits in full.[4] (*Id.*). Aearo LLC was neither directing nor paying for the defense of those lawsuits.

[4] During the initial stages of the CAE Lawsuits, a different 3M subsidiary, Aearo Technologies, did allegedly pay $411,696.70 in defense costs. (A00923;

After initial trials went against it, 3M opted to change its litigation strategy, placing the Aearo subsidiaries (including Aearo) into bankruptcy on July 26, 2022 and trying to shift liability from 3M to those entities. That strategy was unsuccessful; Judge Graham of the United States Bankruptcy Court for the Southern District of Indiana ultimately dismissed their bankruptcy cases after concluding that the Aearo entities were not under financial duress and did not need to reorganize. (A01490–91.) Prior to dismissal of their chapter 11 cases, however, each Aearo entity filed separate financial schedules, showing separate assets and liabilities, each distinct from one another and all different from 3M. (A03604–05.) Aearo's filings show that it had assets including a receivable from Aearo Technologies (Aearo's subsidiary) valued at $334,917, more than enough to satisfy a per occurrence retention. (A03639.)

During the pendency of the Aearo bankruptcy, 3M continued its normal business operations and continued to act separately and independently from Aearo and the other subsidiaries in bankruptcy. This included paying dividends to equity holders. All told, 3M paid approximately $2.5 billion in dividends to shareholders during the bankruptcy cases. (A03177; A03205.) 3M clearly did not regard those payments as payments by its subsidiaries; otherwise, such payments, which were

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A00927-28.) It is undisputed that Aearo did not pay those costs, and there are no allegations that defense costs were paid by any other entity.

not authorized by the bankruptcy court, would have violated the terms of the Aearo bankruptcy cases, including the automatic stay.

On June 9, 2023, the bankruptcy court granted the motions to dismiss the Aearo bankruptcy cases. As part of that ruling, Judge Graham found that, "Aearo had not actively participated in the Pending CAEv2 Actions in any meaningful way." (A01873.) In addition, Judge Graham expressly found that all the Aearo Entities "had made no contribution to CAEv2-related defense costs," and that "there is no evidence that 3M has threatened to shift responsibility for these costs to Aearo."[5] *Id.* Following the dismissal of the Aearo bankruptcy cases, 3M entered into a settlement to resolve liability for the CAE Lawsuits and brought this lawsuit. At no point has Aearo made any payment towards satisfaction of the self-insured retention.

Appellants initiated this coverage action on June 28, 2023. The parties filed cross-motions for partial summary judgment on January 19, 2024, and the Superior Court heard oral argument on July 9, 2024. (A00013; A00058-66.) The Superior Court granted Twin City's motion on July 16, 2024 and entered final judgment

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[5] These factual findings are preclusive as a matter of law. *E.g.*, *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000) ("[C]ollateral estoppel precludes relitigation of [an] issue in a subsequent suit or hearing concerning a different claim or cause of action involving a party to the first case."). "[M]utuality is not a prerequisite to the assertion of collateral estoppel." *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995).

with respect to Twin City on September 3, 2024. (A00004, A00012.) This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF THE POLICY PROVIDES THAT PAYMENTS BY "ANOTHER," INCLUDING 3M, DO NOT SATISFY THE SELF-INSURED RETENTION.

A. Question Presented.

Whether the Superior Court erred in holding that the Policy's self-insured retention definition unambiguously foreclosed payments from the insured's parent company or wholly-owned subsidiary from satisfying the $250,000 per occurrence retention.

B. Scope of Review.

Twin City agrees that the Superior Court's grant of summary judgment is reviewed *de novo*. To the extent that Appellants contend that the Court did not have "sufficient facts to enable it to apply the law" and award summary judgment, Twin City notes that Appellants never asserted below that the facts were insufficient to determine Twin City's Motion. The Court should not entertain those arguments for the first time on appeal.

C. Merits of the Argument – the Policy Unambiguously Requires That Aearo Satisfy the Self-Insured Retention.

The Superior Court correctly held that Appellants cannot satisfy the self-insured retention with payments from 3M, which is not an insured under the Policy. In reaching this holding, the Superior Court correctly accounted for both

the plain language of the retention, which provides that payments "made on your behalf by another" do not erode the retention, as well as the Policy as a whole and the purpose of the retention provision.

The starting point for contractual interpretation is the parties' intent as reflected in the contractual text. Appellants lean heavily on suggestions of ambiguity to assert that this Court should interpret the Policy against Twin City. But that interpretive crutch has no place here. First, any argument that the Policy is ambiguous is newly raised on appeal and therefore waived. *Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 676 n.18 (Del. 2020) ("The ambiguity argument was not raised below and is therefore waived."). Nonetheless, Courts may not strain to find ambiguity and particularly where, as here, contractual language is clear, that is the end of the inquiry. *See Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *11 (Del. Super. Ct. Sept. 10, 2021) ("Delaware courts must interpret unambiguous insurance policies according to their ordinary meaning . . . [A] court may not destroy or twist the words of a clear and unambiguous contract.") (quotations and citations omitted); *Am. States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272, 1273 (Ind. Ct. App. 1991) ("[W]e may not extend insurance coverage beyond that provided in the contract, nor may we rewrite the clear and unambiguous language of an insurance contract.").

The language here could not be clearer. 3M is not the same entity as Aearo; it is "another." Appellants argue that 3M is not "another" because 3M is "responsible" for Aearo and therefore is not "distinctly different." Appellants have no support for this argument. Instead, they cite a single, unpublished, non-precedential criminal law case from a Minnesota court having nothing to do with insurance or contract law. *See Minnesota v. Moore*, 2021 WL 4059689, at *3 (Minn. Ct. App. Sept. 7, 2021) (holding that "another" within the meaning of manslaughter statute was not limited to intended victim of crime but included another person "who is not the perpetrator.").

There is no question that under Delaware law or otherwise, 3M is "another." Common parlance recognizes that "another" refers to any person who is other than the one specified. Not only is 3M a stranger to the contract, having had no relationship at all with Aearo at the time of contracting, but this Court has repeatedly recognized that the corporate form creates clear and deeply respected distinction between corporate entities. *See Culverhouse v. Paulson & Co.*, 133 A.3d 195, 199 (Del. 2016) ("Delaware courts take the corporate form and corporate formalities very seriously[.]") (quotations and citation omitted); *accord Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1222 (Del. 2021). *See also Cuppels v. Mountaire Corp.*, 2020 WL 3414848, at *8 (Del. Super. Ct. June 18, 2020) ("MC purposefully established MFODI and MFI in order to

obtain the multiple benefits that derive from the corporate structure, and corporate formalities should not be cavalierly disregarded."). Appellants have treated 3M as "distinctly different" when it is advantageous to do so, such as with the payment of billions of dollars in dividends by 3M while Aearo was in bankruptcy. (A03204–05; A03542–A03553.) That treatment (all of which occurred while the CAE Lawsuits were pending) could not be more distinct.[6] The existence of a corporate relationship between 3M and Aearo does not eliminate the distinction between them; it confirms that 3M is "another" entity under the Policy.

1. Read as a Whole, the Policy Requires Aearo – and Only Aearo – to Satisfy the Self-Insured Retention.

Unable to grapple with this unambiguous language, Appellants also contend that *other* provisions of the Policy dictate that this limitation on exhaustion of the retention only applies to "an unaffiliated third-party, such as from another insurer." Notably, Appellants were unable to find a single case – in Delaware, Indiana, or anywhere else – which reads a retention in this way, where payments by

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[6] *Amicus* United Policyholders tries to tie Aearo to 3M by citing, not to anything in the record, but to external financial websites. (*Amicus Curiae* Brief of United Policyholders in Support of Appellants and Reversal ("*Amicus*") at 8 n.5.) There is no evidence in the record that Aearo and 3M operated with a "consolidated financial statement" – a point Appellants conceded before the Superior Court. (A04791–92.) On the contrary, the evidence that is in the record, including financial filings in the bankruptcy cases, confirms that even if there were consolidated reports at some point, each entity had distinct assets and liabilities. (A03604–57.)

"unaffiliated third parties" do not count against the retention, but permitting satisfaction by corporate relatives.

Twin City agrees that the Policy must be interpreted as a whole so as to give effect to all of its provisions. But nothing in the Policy contradicts the Superior Court's reading of the retention. To the contrary, all provisions of the Policy reinforce the conclusion that Aearo has exclusive responsibility to bear the costs of the retention.

a. The Insuring Agreement Confirms the Superior Court's Interpretation.

Appellants note that payment of "claim expenses" can exhaust the retention and that the insuring agreement provides that the Policy covers claim expenses "incurred on behalf of" the insured. From those provisions, Appellants leap to the *ipse dixit* conclusion that payments made on behalf of the insured can exhaust the retention if paid by an entity that "shares an identity of interest" with the policyholder, such as a parent or subsidiary. This argument was not presented to the Superior Court, and appellants have accordingly waived it. *E.g., Shawe v. Elting*, 157 A.3d 152, 162 (Del. 2017).

In any event, Appellants' argument lacks merit because this reading is not logical at all. A payment by 3M does not mean that it has been "effectively" paid by Aearo. The billions of dollars in dividends that 3M paid shareholders during the Aearo bankruptcies were not "payments by" Aearo, and Aearo's assets are not

diminished nor is a payment recorded on Aearo's books and records anytime 3M makes a payment.[7] The insuring agreement makes no distinction between costs paid (or incurred) by an "affiliated" entity versus an unaffiliated one. Nor is there anything else in the text that points to such a distinction (and Appellants identify nothing).

Appellants' argument also erroneously analyzes the insuring agreement in isolation insofar as they ignore other critical terms, including the definition of the "self-insured retention." That definition provides that it is the amount that Aearo must pay, and that payments by "another" do not satisfy the retention. (A01020.) To adopt Appellants' interpretation, therefore, the Court would have to conclude that it would be reasonable for the insured to ignore the Policy definitions completely and imply into the insuring agreement a distinction between affiliates and non-affiliates that is nowhere found in the Policy. Not surprisingly, Appellants offer no authority that has ever embraced that interpretation.

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[7] *Amicus* tries to bolster this argument by asserting, without support, that a subsidiary is "funded entirely by its parent" such that costs borne by the parent are felt by the subsidiary (Aearo). (*Amicus* at 8.) Not only is this unsupported (and irrelevant), in this case it is demonstrably untrue. In dismissing the Aearo bankruptcy case, Judge Graham expressly concluded that 3M was not passing along the costs of moral hazard (e.g., defense costs) along to Aearo, noting, "there is no evidence that 3M has threatened to shift responsibility for these costs to Aearo." (A03248.)

b. Use of the Word "You" Does Not Dictate a Different Result.

Appellants also assert that the Policy uses the word "You" in the context of other obligations, which relate primarily to notice and recordkeeping that are frequently satisfied by persons other than the insured; Appellants contends that the same rule should apply here. The alternative, Appellants argue, is that that Twin City's interpretation of the Policy would require "the named insured itself [to] perform virtually every policy obligation," such as providing notice.

That hyperbole misses the point entirely. The retention does state that it is the amount "You" must pay before Twin City is obligated to provide coverage. But the relevant language does not end there. Unlike other provisions of the Policy, the retention definition expressly places the obligation on the insured, providing that it "shall not be reduced by" payments made by "another." The Policy is carefully constructed in a manner that does not create the parade of "impossible" obligations that Appellants imagine. On the contrary, the Policy makes a critical distinction between obligations to satisfy the retention (which the Policy says cannot be satisfied through others' payments) and other obligations (which do not have such an express delineation). The structure of the Policy supports, not contradicts, the Superior Court's interpretation.

c. The term "another" is not limited to "non-affiliated" entities.

Appellants next contend that the phrase "including any payment from any other applicable insurance" means that the word "another" should be understood to apply only to "unaffiliated third parties." But that arbitrary limitation is not found anywhere in the Policy.

The use of the word "including" is not intended to have a limiting effect at all, but rather suggests that what follows is simply one example of a broad class. *See, e.g., Forecast Homes v. Steadfast Ins. Co.*, 105 Cal. Rptr. 3d 200, 204 (Cal. Ct. App. 2010) (retention language providing that payments by others "including" additional insureds broadened the class of parties' whose payments are not counted). Here, where the other provisions defining the retention make clear that the insured bears the responsibility to satisfy the retention, the reference to payment from other insurance is not intended to narrow that requirement. Rather, it clarifies that the insured is not permitted to pass along responsibility for the retention because insurance proceeds – even if made from a policy owned by the insured – would not serve to reduce the retention. Nowhere does the Policy distinguish between affiliated and unaffiliated parties, nor does it otherwise indicate that corporate parents are not "another" just because they are not insurers.

Appellants' argument also does not logically follow from the text of the "including" clause. The Policy language says other payments do not erode the

retention, "including other applicable *insurance*." (A01020, § V.26.b.) In other words, the Policy specifies what does not count in terms of *sources of payment* – it says nothing about *which parties* can satisfy the retention. A self-insured retention is called a "retention" because the insured is required to *retain* risk. The language prohibiting the use of proceeds from other insurance confirms that the retention requires *the insured* to bear the loss reflected in the retention; the "including" language, in other words, says nothing about affiliates versus unaffiliated entities. Rather, it confirms that Aearo must use its own assets.[8]

Even if the Policy did refer to payments "by an insurer" there is no reason why that would lead the insured to read that as limiting the exclusion to payments by "unaffiliated third parties." That distinction is itself a false one. Various companies, including 3M, have captive insurers. *See, e.g., In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46, 53, 62 (Minn. Ct. App. 2002), *aff'd in part,*

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[8] In full "sky-is-falling" bravado, *Amicus* warns of "devastating repercussions" if the Court holds that the corporate entity that enters into an insurance contract can be required to comply with its terms, including a self-insured retention. (*Amicus* at 12-13.) Not so. Not only does *Amicus* cite no evidence to support this dramatic hypothesis, but the evidence in this case is directly contrary. Appellants assert that a *different* subsidiary, Aearo Technologies, paid $411,697 in defense costs, which belies any notion that subsidiary entities cannot make payments as necessary to satisfy retention obligations.

Enforcing the retention is not "pointless," as *Amicus* offers. At bottom, the complaint of *Amicus* (and Appellants) is that satisfaction of the retention according to its terms might require 3M to alter the way in which 3M manages its defense spending. Corporations are free to manage their defense as they want, of course, but that it not a basis to abridge Twin City's rights under the self-insured retention.

rev'd in part, 667 N.W.2d 405 (Minn. 2003) ("Lakeside Insurance Limited, a 'captive' insurance company owned by 3M, provided 3M's primary occurrence insurance policy . . . 3M then obtained claims-made policies from . . . a 'captive' insurer that was wholly owned by 3M"). The inference that Appellants ask this Court to draw simply does not follow.

d. The Contractual Liability Exclusion is Irrelevant.

Finally, Appellants contend that the Policy uses the word "another" in the personal and advertising injury exclusion in such a way that it does not include corporate affiliates. The retention is intended to require Aearo and not any other party to satisfy the retention. Accordingly, the word "another" must be interpreted broadly. However, to the extent that Appellants contend that the use of the word "another" elsewhere in the Policy dictates otherwise, including the personal and advertising injury exclusion, they are mistaken.

For starters, Appellants fail to address that the word "another" also appears in the definition of "insured contract," such that an insured contract includes a contract "under which you assume the tort liability of another party" to pay for bodily injury or property damage. (A01018.) That definition is critical because, while the Policy includes a "Contractual Liability" exclusion that bars coverage for most "damages by reason of the assumption of liability in a contract," there is an exception for liability assumed pursuant to an "insured contract." (A01005.) The

same is true for the "Employer's Liability" exclusion. (A01006.) Appellants ignore these provisions of the Policy, but they would not dispute that corporate affiliates are "another" for purpose of determining whether a contract is an "insured contract" that is potentially covered under the Policy. Far from suggesting that affiliates fall outside the scope of "another," its use elsewhere in the Policy confirms the Superior Court's interpretation.

The personal and advertising injury exclusion that the Appellants cite does not suggest a different result; it is simply irrelevant. The Policy generally excludes coverage for personal and advertising injury arising from breach of contract. That exclusion, however, has an exception for injury arising from an implied contract to use "another's" idea. Appellants hypothesize (with no support) that a "subsidiary or parent would never be making a claim against Aearo LLC for personal or advertising injury." (Opening Brief at 24.) Whether or not such a claim would ever be brought is far from clear; in the Aearo bankruptcy case, for example, there were numerous claims asserted between 3M and its subsidiaries, including Aearo. (A03639; A03647.) And intercompany claims, including intellectual property related claims, are far from unheard of in corporate bankruptcy cases.

But whether or not such claims are *likely* is beside the point. In the event that such a claim were asserted, Aearo undoubtedly would seek coverage for it and would assert that the exception should be read broadly to include causes of action

by affiliates. In the context of the contractual liability exclusion, in other words, the word "another" would be given a broad reading, not a narrow one. This use of "another" serves to confirm, not contradict, the Superior Court's interpretation.

The Appellants' distinction between "affiliated" and "unaffiliated" entities is not found anywhere in the Policy, and their interpretation would defeat the purpose of the retention entirely, which was to ensure that Aearo – not an entity that had no affiliation during contracting – would retain certain risk.

2. 3M's Disregard of Clear Contractual Language is Inconsistent With Caselaw From Around the Country.

Moreover, decisions from around the country consistently recognize that a self-insured retention is interpreted according to its plain terms, and that Courts will enforce that obligation as written. Not surprisingly, Appellants fail to cite a single case for the proposition that payments by a corporate parent satisfy a retention the insured is required to satisfy itself; rather, courts honor retention provisions which state that payments by "another" do not count. *See, e.g., Walsh Constr. Co. v. Zurich Am. Ins. Co.*, 72 N.E.3d 957, 958, 965 (Ind. Ct. App. 2017); *Forecast Homes*, 105 Cal. Rptr. 3d at 204.

Forecast Homes is directly on point. In *Forecast Homes*, a homebuilder faced with multiple construction defect lawsuits attempted to satisfy self-insured retentions under policies issued to subcontractors for which Forecast was an additional insured. The policies at issue contained a provision, similar to the

Policy, stating that the insured must pay the retention: "Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention." *Forecast Homes*, 105 Cal. Rptr. 3d at 208 (cleaned up). Forecast asserted that the self-insured retention was a limitation on coverage, should be construed against the insurer, and therefore should be interpreted to permit satisfaction by an additional insured. The Court of Appeal rejected that argument. Instead, the court recognized the rules of contract interpretation require that unambiguous terms be given effect, and held that it could not rewrite the retention provision. Consequently, payments by the "parent" general contractor did not satisfy the retention because only payments by the insured would erode it. *Id.* at 209-10.

This case warrants the same result; the retention provision similarly requires payment by the insured. Appellants attempt to distinguish *Forecast Homes* on the basis that the retention there provided that payments by additional insureds would not erode the retention. But that difference does not have the significance that Appellants contend. Indeed, if anything, the restrictions at issue here are even broader because they provide that *any* payment made by "another" will not erode the retention. The Policy need not identify each specific entity whose payments do not satisfy the retention because use of the word "including" denotes a broad category of persons or items, where one specific instance is an example, not a

limiting principle. *See, e.g., Moses v. State Farm Fire & Cas. Ins. Co.*, 1991 WL 269886, at *3 (Del. Super. Ct. Nov. 20, 1991) (use of word "including" suggests "everything that follows is merely a part of the class").

Indeed, the *Forecast Homes* decision recognizes that this explicit categorization is unnecessary. A second form of policy at issue in *Forecast Homes*—an older version—did not go quite as far in making explicit that the retention had to be paid directly by the named insured; considering the policy language as a whole, however, the court concluded the result was the same. *See* 105 Cal. Rptr. 3d at 208 (relying on policy language including "it is a condition precedent to our liability that *you* [the named insured] make actual payment") (cleaned up). Nothing in the Policy provides that payments by an "affiliated" company (much less one that had no relationship at the time of contracting) are treated any differently than payments from an "unaffiliated" company, other insurance, or any other payment not made by the insured. That sound reasoning from *Forecast Homes* applies equally here.

The *Walsh* decision is equally instructive. There, the Indiana Court of Appeals considered an endorsement that stated that the retention was the amount "you or any insured must pay" before coverage attaches. *See Walsh*, 72 N.E.3d at 963. It did not contain the clarifying language found in the Policy which expressly states that payments by "another" do not erode the retention. Yet, the Indiana

Court of Appeals found this language to be more than sufficient to conclude that the insured had to pay amounts itself to satisfy the retention. *See id.* In reaching this conclusion, the Court expressly noted that the retention represents a risk to be borne by the insured, not a third party: "A policy subject to a SIR, in contrast, obliges *the policyholder itself* to absorb expenses up to the amount of the SIR, at which point the insurer's obligation is triggered." *See id.* at 962 (*quoting Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 410 n.2 (Ind. Ct. App. 2008)). The operative Policy language is not merely consistent with that objective – the additional clarifying language confirms that the risk must remain with the insured and cannot pass to *any* third party.

Appellants attempt to distinguish *Walsh* by noting that the retention in *Walsh* was a "condition precedent." Nothing in the *Walsh* decision indicates that interpretation of the retention provision turned on whether the retention constituted a condition precedent to coverage.[9] But even if it were, that would not make a

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[9] Appellants' assertion that conditions precedent are disfavored is without authority; numerous cases have recognized just the opposite. *See, e.g., Allianz Ins. Co. v. Guidant Corp.,* 884 N.E.2d 405, 420 (Ind. Ct. App. 2008) ("It is apparent, therefore, that it is the responsibility of the policyholder to prove this condition precedent to coverage—SIR exhaustion—and unless and until it is able to do so, the duty to defend is not triggered."); *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 1011 (Ind. Ct. App. 2014) (quoting *Allianz*); *Zurich Am. Ins. Co. v. N.Y. Marine & Gen. Ins. Co.*, 2021 WL 424007, at *2 (Del. Super. Ct. Feb. 8, 2021) ("The Zurich American Policy contains a Self-Insured Retention ('SIR') endorsement that conditions coverage upon the exhaustion of a $500,000 retention."). Appellants' attempts to distinguish *Walsh* on the basis that the

difference because the retention here is one, too. "There are no particular words that must be used in order to create a condition precedent . . . any phrase that conditions performance suffices." *Thomas v. Headlands Tech Principal Holdings, L.P.*, 2020 WL 5946962, at *5 (Del. Super. Ct. Sept. 22, 2020) (cleaned up) (citing *Cato Cap. LLC v. Hemispherx Biopharma, Inc.*, 70 F. Supp. 3d 607, 619 (D. Del. 2014)). Consequently, where a policy provides that there is no coverage "until" some event or condition has been satisfied, this creates a condition precedent.[10] "'If performance under the contract is not to become due until occurrence of an event,' that event is a condition precedent." *S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, 2020 WL 6018738, at *18 (Del. Ch. Oct. 12, 2020), *aff'd,* 267 A.3d 370 (Del. 2021).[11]

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retention was located in an endorsement that was added to, and intended to modify, the policy is of no moment. The Indiana court's rationale did not turn on that statement, nor have Appellants identified any provisions of the Policy that limit or otherwise modify the retention.

[10] To be sure, where a policy provision states it is a "condition precedent" to coverage, it is required to be treated as such. *See, e.g., Forecast Homes,* 105 Cal. Rptr. at 205; *Osborn Constr. Co. v. Zurich Am. Ins. Co.*, 356 F. Supp. 3d 1085, 1089 (W.D. Wash. 2018).

[11] Twin City does not believe that a conflict exists, however, to the extent that Indiana law could control, the outcome is the same. *See, e.g., Allianz*, 884 N.E.2d at 420 ("It is apparent, therefore, that it is the responsibility of the policyholder to prove this condition precedent to coverage—SIR exhaustion—and unless and until it is able to do so, the duty to defend is not triggered."); *Thomson*, 11 N.E.3d at 1011 (quoting *Allianz*).

That is precisely what the Policy provides. Much like the policy in *Walsh*, the insuring agreement expressly provides that the "insured will also have the obligation of paying any defense counsel . . . and all defense costs. These costs *will continue to be borne by the insured until the 'self-insured retention' has been exhausted* . . ." (A01532.) The plain language of the Policy, which provides that there is no coverage "until" the self-insured retention is properly satisfied, leaves no doubt that exhaustion of the self-insured retention is a condition precedent to coverage. The rationale of *Forecast Homes* and *Walsh* apply here with full force.

Appellants' principal response is that the retention language excluding payment by "another" does not apply here because it does not explicitly state that the insured must make payment from its own account. *See Travelers Indem. Co. v. Arena Group 2000, L.P.*, 2007 WL 935611, at *5 (S.D. Cal. Mar. 8, 2007); *Ruffin v. Burton*, 34 So.3d 301, 303 (La. App. 4 Cir. 2009).

Arena Group, however, merely found that language requiring payment by the insured of a retention "from its own account" prevented an insured from using other insurance payments. Nowhere did the *Arena Group* court state the retention was ambiguous in the absence of such language. And *Ruffin* dealt with the allowance of an automobile accident claim; it did not discuss, analyze or apply the retention provision at all. Neither case stands for the proposition that payments by a non-insured corporate parent are generally applicable to satisfy a retention, nor

do they state that such a provision must contain identical language to be enforceable. Indeed, Appellants' own authorities recognize that such language is unnecessary. *See Nationwide Mut. Ins. Co. v. Certain Underwriters at Lloyd's London*, 2016 WL 3648610, at *3 (N.D. Cal. July 7, 2016) ("[A] provision expressly rejecting payments by others is not necessarily required").

Accordingly, Appellants' assertion that an insurer must identify limitations on coverage with clarity misses the point. *See* Opening Brief at 27. It misses the point because the retention is a condition precedent that acts as a layer of primary coverage, not a coverage limitation or exclusion. But even more important, it misses the point because Twin City *did* identify the restrictions on erosion of the satisfaction with the broadest and clearest language possible. By stating that the retention "shall not be reduced by . . . [a]ny payment made on your behalf by another," the Policy unambiguously *does* state that payments by a distinct corporate entity (that had no relationship to the insured at the time of contracting) could not reasonably be expected to erode the retention. (A01548.) Nothing more is required.

Appellants' remaining cases are equally unpersuasive. In both *Intervest* and *Nationwide*, the relevant provisions stated that the insured was responsible for paying the self-insured retention, but did not place restrictions on where the funds had to come from. Accordingly, those courts held that, absent a restriction on the

source of funding, payments could come from other insurance. *See Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So.3d 494, 502-03 (Fla. 2014); *Nationwide*, 2016 WL 3648610, at *4. In neither case did the policy at issue contain language remotely similar to the Policy here, nor did either case deal with permitting another entity – not the insured – to make payment on the basis that it was "affiliated" with the insured. Appellants have offered no authority, in other words, supporting the result they ask the Court to reach here.

3. The Superior Court's Decision Gave Proper Meaning and Effect to the Self-Insured Retention.

Finally, as part of a last-gasp effort to shoehorn their conduct into coverage, Appellants now allege that the Superior Court's interpretation of the retention was not "consistent with the purposes of SIR provisions." (Opening Brief at 30.) This argument fails for several reasons. Appellants did not raise this argument before the Superior Court and this Court has repeatedly held that arguments not raised below cannot be raised for the first time on appeal. Nor should this Court countenance any argument that it should ignore the policy language to find the contractual "purpose," because courts have held time and time again that giving effect to clear contractual language is the best expression of "purpose." *See, e.g., Sycamore Partners*, 2021 WL 4130631, at *11; *Am. States Ins. Co.*, 576 N.E.2d at 1273. Appellants cannot attempt to give the retention a hidden purpose that

contradicts the plain words of the contract. Nor can they under the guise of intent attempt to redefine "another" to mean something it does not.

In any event, Appellants' argument also fails because the Superior Court's interpretation gave proper effect to the retention. The Superior Court recognized that a retention is a critical provision of an insurance policy; the insured retains a portion of the risk in exchange for a reduced premium. *See, e.g., In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 124 n.7 (S.D.N.Y. 2004) ("Policyholders frequently employ SIRs to forego increased premiums where they face high frequency, low severity, losses."). The reduced premium is due to (1) the fact that small losses, which fall into the retention, are borne by the insured and do not trigger the insurer's obligations, and (2) the reduction in moral hazard that results from the insured bearing responsibility for some or all of a loss. It is for this reason that a self-insured retention is often regarded as the primary layer of insurance and – as is the case here – the first layer of insurance above it is excess insurance. The Policy is identified explicitly as an "Excess Commercial General Liability Insurance Policy," because it is understood that the self-insured layer will retain the initial risk.

Appellants' interpretation would turn that relationship on its head. According to Appellants, the purpose of the retention is met by having a corporate parent "pay" because any "loss" flows up to that parent. (Opening Brief at 31).

But, even if that were true, it would be irrelevant to the insurance relationship, to which the corporate parent is a stranger. Even if the effect on the corporate parent were the same, the significance for the *insured* (which is what matters) clearly is not. The benefit to the insurer of the self-insured retention is not merely that it is not responsible for amounts falling within the retention. The benefit is also the reduction in moral hazard that results from having the insured bear the risk; this applies both during the policy period as well as afterwards (*i.e.*, decisions regarding spending to defend and resolve claims).

If 3M pays all costs and Aearo pays nothing, Aearo has retained none of the risk and borne none of the costs, even though Aearo expressly contracted with Twin City that it would do so. There has been no reduction in moral hazard at all.[12] But if Aearo pays the self-insured retention, it clearly *has* retained risk in accordance with its contractual obligations. This difference determines whether Twin City has received the benefit for which it bargained for writing excess insurance over a retention, rather than primary insurance. Twin City's interpretation provides certainty as to who bears risk, whereas Appellants would

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[12] *Amicus* argues that 3M's payments satisfy this moral hazard concern because Aearo, as a subsidiary, has a fiduciary duty to 3M. (*Amicus* at 7–10.) *Amicus* cites no authority for that proposition but even were it true, it would be irrelevant to the moral hazard issue. Aearo has taken on no risk at all particularly because Aearo will not be asked to repay those amounts.

have that issue turn on fortuitous corporate transactions that may not occur for years.

To obscure this point, Appellants try to trivialize the legal distinction between 3M and Aearo by suggesting that 3M could have transferred funds to Aearo, which could have paid the retention from those funds. Aearo already had assets from which it could have paid the retention but, in any event, this does not render the question of who pays the retention immaterial. Such a transfer would have to be recorded in 3M's accounts, often as generating a receivable that would either have to be repaid or that would create an ongoing liability. Taking on that liability does not leave Aearo in the same place it would have been as if 3M simply pays for all defense costs. And, if Aearo did receive funds from 3M, Aearo would have to make a decision about what to do with those funds, *i.e.*, whether to use them to pay the retention or for some other purpose.[13] In other words, the interpretation of the retention that Appellants would give to it not only contradicts its plain terms; it also serves the opposite of its intended purpose. When Aearo is forced to pay the retention, there are financial consequences as a result of Aearo bearing risk. But when 3M "pays" the retention, Aearo has not retained any risk at

[13] This concern is not merely academic. Aearo was, at the time of contracting, an operating company with myriad business costs and concerns. (*See* A02317.) Therefore, Aearo would have had to make decisions about how to allocate its financial resources.

all. The Superior Court was correct in holding that the unambiguous Policy language comports with its purpose.

II. THE "MAINTENANCE CLAUSE" DOES NOT EXCUSE AEARO'S DECISION TO IGNORE ITS SIR OBLIGATIONS

A. Question Presented

Appellants raise whether the Superior Court erred in holding that the Maintenance Clause of the Policy – inaccurately referred to by Appellants as a "Savings Clause" – did not apply to the defense costs, such that Aearo was not entitled to coverage from Twin City.

B. Scope of Review

Twin City agrees that questions of law are reviewed *de novo* by this Court. To the extent that Appellants suggest that there are insufficient facts that would make summary judgment inappropriate, Twin City disagrees, and notes that Appellants did not raise the existence of any disputed or incomplete facts with the court below.

C. Merits of the Argument – the "Maintenance Clause" Does Not Apply Where, as Here, Aearo LLC Had the Resources to Satisfy the Retention, But Simply Decided Not to Do So.

The Maintenance Clause provides that Aearo must take all steps necessary to maintain the retention, but that in the event it is not recoverable notwithstanding those efforts, then such failure does not prevent coverage:

> 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. If the "self-insured retention" becomes invalid, suspended, unenforceable or uncollectable for any reason, including

> bankruptcy or insolvency, we shall be liable only to the extent we would have been had such "self-insured retention" remained in full effect.

(A01015.) The first sentence provides that the insured is required to "do whatever is required" to ensure there are resources available to pay the retention. The following sentence then states that, if (and only if) the retention cannot be collected despite those efforts, coverage continues to the same extent as if the retention had been in effect and enforced. The Superior Court correctly recognized that Aearo did not show (and cannot show) that Aearo was "unable to pay the Self-Insured Retention due to the retention's lack of availability, collectability, invalidity, or suspension." (Order at 16.) Accordingly, the Maintenance Clause has no application here.

Appellants do not contend that Aearo lacked assets with which to pay. Instead, they claim that the Maintenance Clause means that the retention is satisfied so long as the insurer receives a dollar-for-dollar reduction against its coverage obligations. That turns the meaning of the Maintenance Clause on its head and renders the first sentence virtually meaningless in violation of well-established law. The Maintenance Clause is not a deductible or a set-off provision that excuses performance; rather, it confirms the insured's obligation to maintain the retention. Alternatively, Appellants contend that the Maintenance Clause

excuses Aearo's observance of the retention because it did not have a bank account. The Superior Court properly rejected both arguments.

1. The Maintenance Clause is Not a Setoff Provision.

Appellants contend that the retention is not a "condition precedent" to coverage and, accordingly, Aearo's failure to satisfy it merely results in a setoff against coverage obligations. But, as explained above, the retention in the Policy is a condition precedent because the Policy states unambiguously that Twin City has no obligation unless and until the retention is satisfied. (*See* pp. 28–30, *supra*.)

Moreover, Appellants' construction would render meaningless the first sentence of the maintenance provision, which requires the insured to "do whatever is required . . . to maintain the 'self-insured retention' in full effect." If an insured that does not satisfy the retention can receive the exact same coverage that it would have had it performed its obligation to make the retention available, then that requirement is no requirement at all.

Delaware law consistently rejects contractual interpretation that fails to give meaning to all parts of a contract, particularly where, as here, there is no ambiguity. Yet that is what Appellants demand – they are asking that the Court ignore the language that requires Aearo to maintain the retention and hold that, even if Aearo fails to perform, it should nonetheless receive coverage minus the amounts that fall

into the retention – amounts Twin City was never obligated to pay anyway. Delaware law does not permit such a result.

Appellants' argument attempts to eliminate the distinction between a self-insured retention and a deductible. The Policy has the former, not the latter. There are critical differences between the two. *See, e.g., Monroe Guar. Ins. Co. v. Langreck*, 816 N.E.2d 485, 495-96 (Ind. Ct. App. 2004). A policy with a deductible (usually a primary policy) frequently pays first-dollar coverage, but then "deducts" a specified amount from any recovery by the insured. The setoff that Appellants propose here is no different. A self-insured retention is different because it specifies a certain "retained" amount that the insured is responsible to pay before the insurer has any obligation. *See, e.g., In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d at 124 n.7 ("A SIR differs from a deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply . . . With a deductible, the insurer has the liability and defense risk from the beginning and then deducts the deductible amount from the insured coverage."). This type of retention is commonly found in umbrella or excess policies (such as the Policy) that expressly sit above a retained limit. To reward Aearo here for its purposeful failure to meet its retention obligations would,

in essence, convert the retention obligation in the Policy to a deductible. There is no support for doing so.[14]

2. The Superior Court Correctly Held the Maintenance Clause Does Not Excuse Aearo's Failure to Satisfy the Retention Here.

Finally, the Superior Court correctly held that the Maintenance Clause is inapplicable because Aearo did not show – and cannot meet its burden to show – that the retention is invalid, unenforceable or uncollectable.

Aearo offered no reason for why it failed to establish a bank account (or other means for paying the retention), nor did it offer any excuse for why establishing means for payment did not fall squarely within its obligation to maintain the retention in full effect. Appellants incorrectly characterize the decision below by asserting the Superior Court focused exclusively on Aearo's lack of a bank account to reach its holding. The Superior Court discussed that circumstance because that was the *sole* rationale Aearo offered for why the retention was allegedly unavailable. (A03754–56.) To the extent Appellants now

[14] Indeed, the only authority Appellants cite for this novel proposition is entirely off point. *See Liberty Mut. Ins. Co. v. Wheelwright Trucking Co.*, 851 So.2d 466, 486 (Ala. 2002). In *Wheelwright*, the Alabama courts provided insurers with a setoff in the amount of an unpaid retention. In that case, the court expressly noted that the insured had been in bankruptcy, where "its resulting inability to pay the $250,000 self-insured retention" did not deprive the insured of coverage. The maintenance provision expressly provided that, where there was an inability to pay, the insurer would pay the amounts it otherwise would be obligated to pay if the retention were honored. *See id.* There is no parallel here.

suggest that there was other evidence of unavailability or uncollectability that the Superior Court ignored, Appellants cite none and their arguments are misplaced. Indeed, Aearo offered no evidence to the contrary before the Superior Court.[15]

Moreover, Appellants have completely ignored the undisputed evidence demonstrating that Aearo had assets that were more than sufficient to maintain and satisfy the retention. For example, it is undisputed that Aearo had a $334,917 receivable from wholly-owned subsidiary Aearo Technologies LLC. (A03639.) That receivable was more than sufficient to satisfy a $250,000 retention. There is no evidence that this was uncollectible. To the contrary, Appellants' evidence was that Aearo Technologies had a bank account and allegedly made $411,696.70 in payments from that account for defense costs in the Earplug Lawsuits. (A00922.) The Superior Court correctly held that Aearo failed to demonstrate that the retention was uncollectable, unenforceable, invalid or otherwise suspended. Aearo (along with its corporate affiliates) simply made the decision not to comply with

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[15] Appellants suggest – for the first time on appeal – that Aearo may not have been permitted to open a bank account by its ultimate parent company, 3M. There is little logic to that argument where other Aearo subsidiaries (*e.g.*, Aearo Technologies) had their own accounts. But it is also an improper allegation of fact raised for the first time on appeal. At any rate, Twin City disputes any attempt, on appeal, to assert that 3M made attempts to prevent Aearo from fulfilling its policy obligations, or that this would excuse performance of obligations to maintain the retention in any event.

the Policy terms. There is nothing inequitable about enforcing those terms as written with respect to Aearo in this case.

CONCLUSION

Twin City respectfully requests that the Court affirm the judgment of the Superior Court.

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