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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE AEARO TECHNOLOGIES LLC INSURANCE LITIGATION	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 APPELLEES ACE AMERICAN INSURANCE COMPANY AND MS TRANSVERSE SPECIALTY INSURANCE COMPANY, F/K/A TRANSVERSE SPECIALTY INSURANCE COMPANY, F/K/A ROYAL SURPLUS LINES INSURANCE COMPANY

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Dated: February 13, 2025

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NATURE OF PROCEEDINGS

Appellees ACE American Insurance Company ("ACE") and MS Transverse Specialty Insurance Company, f/k/a Transverse Specialty Insurance Company, f/k/a Royal Surplus Lines Insurance Company ("Transverse" or "Royal Surplus") provided coverage to various Aearo Entities[1] or their affiliates.[2] 3M Company ("3M") acquired the Aearo Entities in 2008.

Until 2015, Aearo manufactured specialized earplugs known as Combat Arms Earplugs Version 2 ("CAEv2"). Following a qui tam action that was brought against and settled by 3M, hundreds of thousands of lawsuits were brought against 3M and the Aearo Entities claiming that the CAEv2 earplugs were defective and caused personal injury. Those lawsuits were consolidated into the largest MDL in United States history. 3M controlled the defense of and paid to defend the MDL. After experiencing significant losses, 3M caused the Aearo Entities (but not 3M) to file for bank-

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[1] The Aearo Entities (or "Aearo") include Plaintiffs Aearo Technologies LLC, Aearo Holding LLC, Aearo Intermediate LLC, and Aearo LLC.

[2] Other insurers who provided primary coverage to certain Aearo Entities include Twin City Fire Insurance Company ("Twin City"), Liberty Surplus Insurance Corporation ("Liberty"), and General Star Insurance Company ("General Star"). Twin City is filing a separate brief pursuant to the Court's December 18, 2024 Order Consolidating Appeals and Setting Consolidated Briefing Schedule. Liberty and General Star have settled with Plaintiffs. The other appellees are excess insurers who did not participate in summary judgment proceedings below.

ruptcy, which was dismissed because it was not filed in good faith: Aearo was "financially healthy" and its debts were supported by 3M, an "even more financially healthy, Fortune 500 multinational conglomerate." *In re Aearo Techs. LLC*, 2023 WL 3938436, at *22 (Bankr. S.D. Ind. June 9, 2023).

Plaintiffs—3M and the Aearo Entities—filed a coverage lawsuit in the Superior Court seeking a declaration that the Aearo Entities' insurers, including ACE and Transverse, have defense and indemnification obligations in connection with the CAEv2 litigation. Significantly, the Policies issued by ACE and Royal Surplus each contain self-insured retention ("SIR") provisions ("SIR Provisions"), which the Named Insured must satisfy before the insurer has any coverage obligation. Applying the unambiguous language of the SIR Provisions in the ACE and Royal Surplus Policies, the Superior Court denied Plaintiffs' motion for summary judgment, holding that neither insurer was obliged to provide coverage where the SIR was satisfied by a third party rather than the Named Insured.[3]

The Aearo Entities and 3M appealed.

[3] Plaintiffs are wrong that the Superior Court denied summary judgment to ACE and Royal Surplus. (*See* Supp. Br. at 7 n.3). The Superior Court did not rule on ACE's and Royal Surplus's joinders to Twin City's motion for summary judgment.

SUMMARY OF ARGUMENT

ACE and Transverse respond as follows to the Summary of Argument in Plaintiffs' Supplemental Brief:

1. *Denied*. The unambiguous language of the Royal Surplus and ACE Policies requires that the SIR be satisfied through payments made by the Named Insured, not by another entity, including 3M. That is consistent with the Policies as a whole. That other tasks specified in the Policies—like providing notice of claims—may be performed by the insured's agents does not mean that other entities may satisfy the SIR.

2. *Denied*. The ACE Policy's SIR Provision expressly provides that the SIR "shall not be satisfied by payment" by "any other insurer, person or entity." It also provides that "the 'Self Insured Retention' under this policy must be satisfied by ***actual payment by you***." (Emphasis added.) That language makes even clearer the provision's unambiguous requirement that 3M was not permitted to satisfy the SIR for the Named Insured.

The Royal Surplus Policy SIR Provision unambiguously requires that the SIR is the amount which "you are obligated to pay." "You" is defined in each Policy to mean only the Named Insured. Accordingly, the Named Insured, Aearo, and not a separate entity such as 3M, is expressly "obligated to pay" the SIR. 3M's ar-

gument improperly seeks to disregard the plain language of the Royal Surplus Policy and rewrite the policy based on omission of language it otherwise argues is insufficient.

3. *Denied*. Because the policy language is unambiguous, the Court should not consider extrinsic evidence of its meaning. Moreover, the clear policy language serves important policy interests including predictability, mitigation of moral hazard, and the ability for insurers to identify and price the covered risk. Plaintiffs and their *amicus* are also wrong that applying the SIR Provisions as written would be "commercially unreasonable," and they conflate the separate corporate existences of 3M and the Aearo Entities. Plaintiffs do not dispute that 3M and the Aearo Entities are separate entities and that they were not related when the ACE Policy and Royal Surplus Policy were underwritten and issued—which occurred *before* 3M acquired Aearo in 2008. Plaintiffs cannot have it both ways by taking advantage of their separateness for purposes of seeking bankruptcy protection, yet insisting that they are indistinguishable to evade the Aearo Entities' contractual obligations.

4. *Denied*. The Superior Court correctly applied the unambiguous language of Bankruptcy Clauses that Plaintiffs mistakenly characterize as "savings clauses." In fact, those provisions apply to situations of bankruptcy, insolvency, and financial distress not present here (as made clear by the bankruptcy court's findings in dismissing the Aearo bankruptcy, and Plaintiffs' shifting positions on whether the

Aearo Entities satisfied the SIRs). Indeed, the relevant ACE provision is entitled "Bankruptcy; Payment of Self Insured Retention," and the relevant Royal Surplus provision is entitled "Non Drop Down: Bankruptcy or Insolvency of the Named Insured." The clear intention of the Bankruptcy Clauses is not to negate the Policies' SIR Provisions, but rather to clarify that the insurer is not responsible for payment of the SIR. The Bankruptcy Clauses are designed to protect the insurer, not to allow the insured to evade the SIR Provisions.

5. *Denied*. As described above, the Bankruptcy Clauses are not actually savings clauses; they do not apply under the facts of this case; and they exist for the protection of the insurers. Moreover—consistent with the universal understanding of the insurance industry— satisfaction of an SIR is a condition precedent to coverage, given its purpose to require that the insured share risk. A contrary reading would nonsensically give the insured an option to share the risk.

* * *

Plaintiffs' Opening Brief is directed to the Twin City appeal, but, for completeness, ACE and Transverse also respond as follows to the Summary of Argument in Plaintiff's Opening Brief:

1. *Denied*. *See* Nos. 1-3 above.

2. *Denied. See* Nos. 1 and 2 above.

3. *Denied. See* Nos. 1-3 above.

4. *Denied*. This argument is specific to the Twin City policy and inapplicable to the ACE or Royal Surplus Policies.

5. *Denied*. *See* No. 3 above.

6. *Denied*. *See* No. 5 above.

7. *Denied*. *See* No. 4 above.

STATEMENT OF FACTS

I. ACE AND ROYAL SURPLUS ISSUE POLICIES TO AEARO.

A. The Royal Surplus Policy.

Royal Surplus was Aearo Corporation's earliest insurer during the period that it sold the CAEv2. Royal Surplus issued policy No. KHA011654 to the Aearo Corporation for the period September 30, 1998 to September 30, 2000. (The "Royal Surplus Policy.") (*See* A4957, A4973.) The declarations page of the Royal Surplus Policy identifies "AEARO CORPORATION" as the named insured. (A4973.) The Royal Surplus Policy provides coverage for certain bodily injury and property damage that occurs during the policy period. (A5020.) The Policy provides that there is "no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' … to which this insurance does not apply." (*Id.*)

"You," under the Royal Surplus Policy, is defined at the beginning of the policy Coverage Form as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy." (A5020.) The "Schedule of Named Insured(s)" appearing at Endorsement 1 identifies "Aearo Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control." (A4984.) The Royal Surplus Policy additionally provides in a "Broad Named Insured" endorsement that:

> The Named Insured, in addition to including those entities designated in the declarations, shall also include: All subsidiary and affiliated entities or successors, as may now or hereafter exist by way of acquisition, merger, formation or transformation and in which the Named Insured has at least 51% ownership or interest.

(A4995.) 3M is not a Named Insured under the Royal Surplus Policy.

The Royal Surplus Policy includes a $250,000 retained limit SIR for each occurrence, with an aggregate limit for all occurrences of $1,500,000, applied annually. (*See id.* at A5015.) The "'Retained Limit' is the amount … which you are obligated to pay and only includes damages otherwise payable under this policy." (*Id.* ¶ 1.) Further, Transverse's obligation to pay damages for "bodily injury" applies only to the amount of damages in excess of the "Retained Limit." (*Id.* ¶ 2.) Additionally, the Royal Surplus Policy requires that Aearo Corporation, or its "loss adjusting representative," provide an annual written summary of all "occurrences," claims, or suits which have or may result in payments within the "Retained Limit." (*Id.* ¶ 6.)

In an endorsement entitled "Non Drop Down: Bankruptcy or Insolvency of the Named Insured" ("Royal Surplus Bankruptcy Clause"), the Royal Surplus Policy also provides that:

> 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.

(A5010.)

B. The ACE Policy.

ACE issued a single commercial general liability policy to "Aearo Holding Corporation" covering September 30, 2007 to September 30, 2008 (the "ACE Policy"). (A4879, A4885.) The ACE Policy covers certain bodily injury and property damage that occurs during the policy period. (A4885, A4888.) The "Named Insured" under the ACE Policy is specifically defined to include only Aearo Holding Corporation and Aearo Company, as well as specific types of entities owned or controlled by those Named Insureds. (A4912.). Conspicuously, there is no "Named Insured" provision extending coverage to entities that own Aearo or acquire Aearo in the future—which here occurred *after* the ACE Policy was issued. 3M is not a Named Insured under the ACE Policy. (*Id.*)

ACE has no obligation to defend or indemnify unless the ACE Policy's Named Insured satisfies the ACE Policy's $250,000 SIR. (*See* A4925 (stating amount of Self Insured Retention Aggregate).) "Self Insured Retention" is defined as "those sums that you or any insured shall become legally obligated to pay as damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies." (A4929.)

In particular, the ACE Policy provides:

> 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.

(A4927 (emphasis added).) "You" is specifically defined as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy." (A4888.)

The ACE Policy does not have a "savings clause" but instead has a clearly denominated "Bankruptcy" clause ("ACE Bankruptcy Clause") (A4926.) ACE's Bankruptcy Clause does not contain any of the language typically found in a "savings clause" but instead provides in full:

> 1. Bankruptcy; Payment of Self Insured 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, [ACE] will not be liable under the policy to any greater extent than [ACE] 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" before the limits of insurance under this policy apply. In no case will [ACE] be required to pay the "Self Insured Retention" or any portion thereof.
>
> Bankruptcy of the insured or the insured's estate will not relieve [ACE] of any of [ACE's] obligations under this insurance.

(A4926.)

II. THE UNDERLYING PRODUCTS LIABILITY LITIGATION TARGETED AND WAS LITIGATED BY 3M

A. 3M was the subject of extensive litigation for the production and sale of CAEv2.

The Aearo Entities developed specialized CAEv2 earplugs. (Superior Court Opinion ("Op.") at 1-2; A127.) In 2008, 3M acquired the Aearo Entities for approximately $1.2 billion. (*Id.* at 2; A128.)

In 2015, the CAEv2 earplugs were allegedly discontinued. (A444 ¶ 19, A482 ¶ 155.) In May 2016, a qui tam complaint was brought against 3M (but not the Aearo Entities) alleging that Aearo Technologies knew about dangerous design defects in the CAEv2. *See United States ex rel. Moldex-Metric, Inc. v. 3M Co.*, 3:16-cv-1533, ECF No. 1 (D.S.C. May 12, 2016).[4] In 2018, 3M (but not the Aearo Entities) paid $9.1 million to resolve the qui tam lawsuit. *See id.* at ECF No. 23-1 p. 3 ¶ 1. On December 21, 2018, the first of the individual underlying CAEv2 lawsuits was filed. *See Robin Kennedy v. 3M Co.,* 5:19-cv-00128, ECF No. 1-1 (C.D. Cal. Jan. 23, 2019)

[4] The Court may take judicial notice of the qui tam action, which was also cited to the Superior Court. (A5043-44.) *See* D.R.E. 201(b)(2); *see also, e.g., Nelson v. Emerson*, 2008 WL 1961150, at *2 n.2 (Del. Ch. May 6, 2008) (taking notice of federal court filings).

(the "Kennedy Complaint").[5] The Kennedy Complaint named only 3M and not any of the Aearo Entities as a defendant. *Id.*

Following the Kennedy Complaint, thousands more plaintiffs sued 3M, and on April 3, 2019, all the cases were directed by the Judicial Panel on Multidistrict Litigation to be centrally managed in the United States District Court for the Northern District of Florida (the "MDL Litigation"). (*See* A439 ¶ 5, A450.) The MDL Litigation became the largest multidistrict litigation in United States history, including over 280,000 cases. (A439 ¶ 6.) Additionally, approximately 2,000 cases have been filed in Minnesota state court (together with the MDL Litigation, the "CAEv2 Litigation") (A441 ¶ 10.)

B. The defense costs that Plaintiffs seek were incurred by 3M in the CAEv2 litigation.

Although the Policies were issued to the Aearo Entities (and before 3M acquired Aearo), 3M incurred the defense costs at issue. 3M—and not the Aearo Entities—controlled the defense of the CAEv2 Litigation. For instance, when the CAEv2 Litigation was first brought before the MDL Panel, 3M alone appeared and argued in favor of consolidation. *See In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 366

[5] As described above, *supra* note 4, the Court may take judicial notice of the fact of filing of the Kennedy Complaint, which was also cited below. (A5043-44.)

F. Supp. 3d 1368, 1369 (U.S. Jud. Pan. Mult. Lit. 2019). Further, following consolidation, 3M represented that "***no argument would be raised***" disputing that 3M bore principal liability. *See In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2022 WL 17853203, at *4 (N.D. Fla. Dec. 22, 2022) (emphasis added).

Moreover, the MDL Court found that the Aearo Entities were parties to the litigation in "***name only***" and that 3M was "***directly and independently responsible***" for liability in the CAEv2 Litigation. *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2022 WL 3345969, at *1 (N.D. Fla. Aug. 14, 2022) (emphasis added). The court cited numerous "examples" of 3M's control over the litigation. *Id.* at *2. In other words, defense of the CAEv2 Litigation was planned, executed and paid for by 3M, and not the Aearo Entities.

C. A bankruptcy court found that 3M, not the Aearo Entities, paid the Aearo Entities' defense costs.

On July 26, 2022, following significant losses in the MDL Litigation, 3M changed its defense strategy by having the Aearo Entities file for Chapter 11 Bankruptcy (the "Bankruptcy Case"). Despite Plaintiffs' current position that 3M and the Aearo Entities are essentially the same, 3M attempted to take advantage of their separateness by having the Aearo Entities, but not 3M, file for bankruptcy. The Bankruptcy Case proceedings illustrated that 3M and the Aearo Entities were separate. The bankruptcy court recognized the financial health of the Aearo Entities as separate entities and that 3M had appointed independent directors to Aearo's board

to negotiate the terms of the bankruptcy with 3M. *In re Aearo Techs. LLC*, 2023 WL 3938436, at *5 (Bankr. S.D. Ind. June 9, 2023).

On June 9, 2023, the bankruptcy court dismissed the Bankruptcy Case, finding that "3M undertook full responsibility for the defense of the CAEv2 Actions" and that "3M has also exclusively borne all defense costs relating to the MDL[.]" *Id.* at *4. In contrast to Plaintiffs' current position, the bankruptcy court also found that the Aearo Entities "had made no contribution to CAEv2-related defense costs." *Id.*

ARGUMENT

I. THE POLICY LANGUAGE UNAMBIGUOUSLY REQUIRES THE SELF-INSURED RETENTION TO BE SATISFIED BY ACTUAL PAYMENT BY THE NAMED INSURED.

A. Question Presented.

Do the ACE Policy and the Royal Surplus Policy unambiguously require that each Policy's SIR be satisfied by the Aearo Entity identified as the Named Insured, and not by a third party, including 3M? (A01505-510; A04878-882; A04957-960.)

B. Scope of Review.

"[T]he interpretation of contractual language, including that of insurance policies, is a question of law. This Court reviews questions of law *de novo*." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001). Review of the grant or denial of summary judgment is also *de novo*. *See, e.g., Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

C. Merits of Argument.

1. The unambiguous language of the Policies' SIR Provisions is controlling and provides that the SIR must be satisfied by payment by the Named Insured, not 3M.

Proper application of the Policies' SIR Provisions begins and ends with their plain language. "[W]here the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning. Clear and unambiguous language in an insurance contract should be given 'its ordinary and usual meaning.'" *O'Brien*, 785 A.2d at 288; *see also, e.g.*, *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 993

(Ind. Ct. App. 2014) (same). Here, both Policies' SIR Provisions unambiguously provide that the SIR must be satisfied by the policy's Named Insured.

The ACE Policy's SIR Provision provides that "[t]he '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.***" (A4927 (emphasis added).) Accordingly, the ACE Policy unambiguously requires that the SIR be satisfied by a "Named Insured," and that no payment by "any other insurer, person or entity" may satisfy the SIR.

Moreover, the ACE Policy expressly provides that the SIR "must be satisfied by actual payment *by* ***you***"—the Named Insured (A4927) (emphasis added). "You" is defined in the ACE Policy as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." (A4888.) The "Named Insured" is defined to include "Aearo Holding Corporation" and "Aearo Company," in addition to certain entities owned or controlled by them. (A4912.) 3M is not "Aearo Holding Corporation" or "Aearo Company," and Aearo does not own or control 3M.

The Royal Surplus Policy similarly provides that the "'Retained Limit' is the amount … which ***you*** are obligated to pay and only includes damages otherwise payable under this policy." (A5015 ¶ 1 (emphasis added).) Accordingly, the SIR

Provision is only satisfied by payment of damages or costs associated with the defense of claims covered by the Royal Surplus Policy. "You" is defined in the Royal Surplus Policy as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." (A5020.) Further, the policy provides that Transverse's obligation to pay damages for "bodily injury" applies only to damages in excess of the Retained Limit. (*Id.* ¶ 2.) As such, the unambiguous language of the Royal Surplus Policy requires that the Named Insured is responsible for satisfaction of the SIR.

Plaintiffs acknowledge that insurers may require SIR provisions to be satisfied only by the named insured. (*See* Appellants' Opening Br. ("Opening Br.") at 26-27.) Plaintiffs nevertheless argue that specific language is required to accomplish that result, such as a reference to the insured's "own account." (*See id.*; *see also* Appellants' Supplemental Opening Brief ("Supp. Br.") at 17.) However, Plaintiffs cite no Delaware authority holding that such magic language is necessary to supplement unambiguous policy language requiring payment by the Named Insured. *See Holifield v. XRI Investment Hldngs LLC*, 304 A.3d 896, 934-35 (Del. 2023) (concluding that "parties need not employ . . . exact language" approved in prior cases to achieve the same result). Moreover, the ACE Policy language is even more specific than the language at issue in the cases Plaintiffs cite. *See below* § I.C.2.ii.

As a fallback position, Plaintiffs suggest that they should benefit from "any ambiguity" in the Policies but fail to explain how there is more than one reasonable interpretation of the SIR Provisions. (Supp. Br. at 15.) Regarding the ACE Policy, for example, Plaintiffs argue it is at least "ambiguous as to whether 3M is distinctly different" from Aearo to constitute an "'other' entity." (Supp. Br. at 19.) This argument has zero textual support and defies common sense. Both Policies were drafted *before* 3M acquired Aearo, and Plaintiffs do not argue that 3M and Aearo are the same entity—nor could they possibly do so.[6]

Further, "an insurance contract is not ambiguous simply because the parties do not agree on the proper construction. Instead, a contract is only ambiguous when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings." *O'Brien*, 785 A.2d at 288; *see also, e.g., Thomson*, 11 N.E.3d at 993 (same). In Delaware, "extrinsic evidence is not to be used to interpret contract language where that language is plain and clear on its face." *Id.* (citations and quotations omitted). The same is true under Indiana law. *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 354, 359 (Ind. Ct. App.

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[6] Plaintiffs' *amicus* similarly argues ambiguity because "Aearo reasonably expected payments by its 100% corporate parent" to satisfy the SIR. (Amicus Br. at 18.) That cannot possibly be true. The Policies were issued before 3M acquired Aearo—there was no corporate parent. And what a party subjectively "expects" is irrelevant to ambiguity.

1995) ("Where the terms of a contract are clear and unambiguous, the terms are conclusive and this court will not construe the contract or look at extrinsic evidence; rather we will merely apply the contractual provisions.").

The SIR Provisions are clear that *only* the Named Insured can satisfy each Policy's SIR. Because the SIR Provisions are unambiguous, their plain language controls.

2. Plaintiffs' interpretation is wrong because it disregards clear language of the SIR Provisions and is inconsistent with the rest of the Policies.

i. Plaintiffs are wrong that other language in the Policies implies Plaintiffs' preferred interpretation of the SIR Provisions.

Despite their clarity, Plaintiffs contend that the SIR Provisions should not be interpreted as written. Notably, much of Plaintiffs' reasoning is specific to the Twin City Policy and is inapplicable to the ACE or Royal Surplus Policies and is otherwise unavailing. Plaintiffs note that under the Twin City Policy, the SIR may be exhausted by "claim expenses," which "are defined in the Policy to include amounts incurred 'on behalf of' the policyholder." (Opening Br. at 19.) There is no similar provision in the ACE Policy or the Royal Surplus Policy—indeed, as described in Section I.C.2.ii below, the ACE Policy expressly precludes satisfaction of the SIR through payments "made on behalf of the insured by any other insurer, person or entity." (A4927.) Likewise, Plaintiffs argue that the Twin City Policy's provision precluding

payments made by "another" is limited to payments by other insurers because that term in the Twin City Policy was followed by "including other applicable insurance." (Opening Br. at 24.) However, that argument is specific to the Twin City Policy, and the ACE Policy's analogous provision expressly precludes payments not just by another insurer, but rather by "any other insurer, ***person or entity***." (A4927 (emphasis added).) Plaintiffs have no legitimate argument that 3M and the Aearo Entities are not separate and distinct corporate entities, as discussed further below.

Regarding the ACE Policy and the Royal Surplus Policy, Plaintiffs misleadingly argue that reading the Policies "as a whole" implies a broad definition of the term "You," such that other entities besides the Named Insured may satisfy the SIR. (Supp. Br. at 2-3, 6, 15-17.) In fact, interpreting "You" according to its plain meaning—i.e., as referring to the Named Insured—is consistent with the Policies as a whole.

First, Plaintiffs are wrong that the Policies imply a broader definition of "You" because other policy provisions require the insured to perform tasks that may be performed by third parties like lawyers and brokers, such as providing notice of claims and keeping records. (*See* Opening Br. at 20; Supp. Br. at 15-17.) That certain functions assigned to the Named Insured may be performed by others in different contexts does not mean that the SIR may be satisfied by third parties, especially when the express language of the SIR Provisions precludes it.

Moreover, it is irrelevant that "insurance brokers or attorneys" may provide notices or maintain records because they are the insured's *agents*. (*See* Supp. Br. at 16.) A corporation necessarily acts through employees or agents. *In re Dole Food Co., Inc. Stockholder Litig.*, 110 A.3d 1257, 1261 (Del. Ch. 2015). Accordingly, even if an insured acts through a broker or lawyer, it is still the insured that is acting.

By contrast, a separate corporate entity, especially a subsidiary's *parent*, does not necessarily act as the subsidiary's agent. Moreover, although Plaintiffs assert that policy compliance "functions are routinely handled" by a subsidiary's parent (Supp. Br. at 16), neither Plaintiffs nor their *amicus* cite legal authority or facts from this case. Indeed, 3M was *not* acting as the Aearo Entities' agent. Instead, 3M was the true party in interest throughout the CAEv2 Litigation, and 3M—not the Aearo Entities—directed that litigation's defense. *See above* at Fact Sections II.B-C.

Additionally, the purpose of notice and recordkeeping policy provisions is not undermined when another entity performs those functions. By contrast, as described below, an important purpose of an SIR is to incentivize risk avoidance by ensuring that the insured also bears some risk. The insured's incentive to avoid risk is directly relevant to the insurer's decision to underwrite the risk and set the rates that determine a policy premium. Allowing a third party to satisfy the SIR removes that risk from the insured, undermining the SIR's purpose and interfering with the underwrit-

ing process. Further, even if an insurer acquiesces to another entity performing contractual duties for the Named Insured, that does not constitute a waiver of the plain requirements of an SIR provision. *See, e.g., Travelers Indemn. Co. v. Arena Group 2000, L.P.*, 2007 WL 935611, at *6 (S.D. Cal. 2007) (rejecting argument that waiver of a separate funding provision implied a waiver of the requirement that the SIR be satisfied by the named insured).

Second, both Policies expressly define "You" as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." (A4888, A5020.) Plaintiffs' broader interpretation of "You" requires either that language be added to that express definition or that the definition be ignored. That violates black-letter principles of contract interpretation. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1230 (Del. 2021) ("[T]he Court is unwilling to add language to which the parties did not agree."); *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020) ("Implying terms that the parties did not expressly include risks upsetting the economic balance of rights and obligations that the contracting parties bargained for[.]") (quoted in Opening Br. at 27). Plaintiffs cannot reconcile the Policies' definition of "You" with Plaintiffs' contrary interpretation of the SIR Provisions. *See also Forecast Homes,*

Inc. v. Steadfast Ins. Co., 181 Cal. App. 4th 1466, 1476 (Cal. Ct. App. 2010) ("Because the word 'you' was previously defined to be the named insured, it logically follows the named insured must pay defense costs to satisfy the SIR.").

ii. The ACE Policy includes additional clear language specifically requiring the Named Insured to satisfy the SIR.

As described above, the Policies clearly and unambiguously require that their SIR Provisions be satisfied by the Named Insured and no additional magic language is required to achieve that result. Moreover, as Plaintiffs acknowledge, the ACE Policy includes additional, specific policy language providing that the SIR "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.***" (*See* Supp. Br. at 17-19; A04927 (emphasis added).) Plaintiffs cannot explain away that clear language.

Indeed, the language in the ACE Policy's SIR Provision is even more specific than language in other cases holding that an SIR must be satisfied by the named insured. For instance, in *Forecast Homes*, "[t]he SIR endorsement required that the named insured 'make actual payment' of the SIR amount and provided that '[p]ayments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention.'" *Forecast Homes*, 181 Cal. App. 4th at 1476 (holding that insurer had no duty to defend where named insured did not pay

SIR as required). That mirrors the language in the ACE Policy, which requires the SIR to be "satisfied by actual payment" by the named insured and provides that the SIR is not satisfied by "payments made on behalf of the insured by any other insurer, person or entity." (A04927.)

Plaintiffs criticize the ACE Policy for not including magic language requiring that the SIR be satisfied from Aearo's "own account." (Supp. Br. at 17.) However, in *Intervest Construction*, the court explained that the policy language in *Forecast Homes* was "even more explicit" than a mere requirement that the SIR be satisfied from an insured's "own account." *Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co.*, 133 So. 3d 494, 501 (Fla. 2014); *see also Nationwide Mut. Ins. Co. v. Certain Underwriters at Lloyd's, London*, 2016 WL 3648610, at *3 (N.D. Cal. July 7, 2016) (describing the language in *Forecast Homes* as "the sort of policy language an insurer may utilize to establish with complete clarity that the insured must pay an SIR amount out of its own pocket"). As described above, that language mirrors the restrictive language in the ACE Policy's SIR Provision.

Plaintiffs' reliance on *Nationwide* is also misplaced because of other restrictive language in the ACE Policy. For instance, in *Nationwide*, in contrast to the ACE Policy, there was "no express statement similar to the one in *Forecast* that payments by others do *not* satisfy the SIR." *Nationwide*, 2016 WL 3648610, at *3. Addition-

ally, unlike the ACE Policy, the policy in *Nationwide* did not require "actual payment" of the self-insured retention by the insured. *Id.* (*See* A4927 (ACE Policy requiring "actual payment by you").) Further, in *Nationwide*—unlike the ACE and Royal Surplus Policies—the policy did not define "You." *Id.* (*See* A4888, A5020.)

Plaintiffs' interpretation of the ACE Policy would require the Court to ignore or modify the restrictive language in the ACE Policy's SIR Provision. However, "Delaware courts have consistently held that an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive." *O'Brien*, 785 A.2d at 287; *see also, e.g., Thomson*, 11 N.E.3d at 994 ("We 'should construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless.'") (quotation omitted). With respect to the ACE Policy, Plaintiffs' interpretation disregards the SIR Provision's express requirement that the SIR may be satisfied only by the Named Insured's "actual" payment and not through payments "on behalf of the insured by any other insurer, person or entity." (A04927.)

Accordingly, this Court should also reject Plaintiffs' invitation to interpret "other . . . person or entity" to refer only to "an entity that lacks a common financial identity with the insured." (*See* Supp. Br. at 18.) The Court should not add such a limitation, which is not even suggested by the unambiguous policy language. Further, as described below, Plaintiffs' insistence that 3M is not an "other . . . entity"

disregards 3M's and the Aearo Entities' distinct corporate existences, contrary to black-letter corporate law.

iii. The Royal Surplus Policy specifically requires the Named Insured to satisfy the SIR.

3M's arguments are also misguided with respect to the Royal Surplus Policy. No additional language is necessary to effectuate the clear and unambiguous requirement in the Royal Surplus Policy that the SIR be satisfied by the Named Insured. Plaintiffs inconsistently argue that (i) omission of certain language from the Royal Surplus Policy supports their position, but (ii) contend that even that language is insufficient in the context of Twin City or ACE. (*See* Supp. Br. at 6-7.) The Superior Court, in enforcing the unambiguous policy language, instead correctly held that the requirements in both the ACE Policy and the Royal Surplus Policy that the Named Insured is obligated to pay the SIR is not a "pointless formality" and should be enforced because, as described below, it is necessary to achieve the purpose of an SIR. (*See* Op. at 15.) Significantly, although the Royal Surplus Policy's SIR Provision requires that "you"—i.e., the Named Insured—is "obligated to pay" the SIR, it separately provides that annual reporting of claims may be performed by "you or your loss adjusting representative." (A5015). In other words, where the Royal Surplus Policy allows a requirement in the endorsement to be satisfied by another entity, it so provides. The SIR Provision's payment obligation contains no such permissive language.

3. Policy considerations, to the extent they are relevant, support the Superior Court's interpretation of the unambiguous policy language.

As described above, the unambiguous language of both Policies requires the Named Insured to satisfy each Policy's SIR Provision, and the Superior Court properly rejected Plaintiffs' efforts to avoid Aearo's contractual obligations.

Plaintiffs are also wrong that the insurers' interpretation of their Policies' SIR Provisions are "commercially unreasonable" and contrary to their underlying "purposes." (*See* Supp. Br. at 16-17, 19-20.) Indeed, public policy is irrelevant here—like canons of construction favoring the insured, public policy considerations apply only to resolve ambiguous policy language. *See, e.g., Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982); *Liberty Ins. Corp. v. Ferguson Steel Co.*, 812 N.E.2d 228, 230 (Ind. Ct. App. 2004). If policy language is unambiguous—as it is here—then it must be applied as written, even if Plaintiffs contend that it would have been wiser for the parties to have struck a different bargain. *See Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), which explains that "[t]he terms of an insurance policy should be interpreted most favorable to the insured ***if there is an ambiguity in the policy.***" (emphasis added)) (cited in Opening Br. at 24).) The Court should not "torture policy terms to create an ambiguity where an ordinary reading leaves no room for uncertainty." *O'Brien*, 785 A.2d at 288; *see also Forecast Homes*, 181 Cal. App. 4th at 1475-76 (rejecting insured's argument that

"SIR endorsements . . . are subject to a heightened level of scrutiny"). Indeed, "[t]he power to interpret contracts does not extend to changing their terms and we will not give insurance policies an unreasonable construction to provide additional coverage." *Thomson*, 11 N.E.3d at 994 (quoting *Nat'l Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631, 634 (Ind. Ct. App. 2007)).

Even if it were necessary to venture beyond the Policies' plain language, Plaintiffs' counter-textual interpretation of the SIR Provisions is without justification. First, interpreting the SIR Provisions as written would not be impracticable because the Aearo Entities lacked "separate insurance or litigation personnel" post-acquisition. (*See* Opening Br. at 21.) The Aearo Entities should not be excused from complying with their contractual obligations because of Plaintiffs' own organizational and personnel choices. Nothing prevented the Aearo Entities from negotiating more permissive policy language when the Policies were issued. Further, particularly as a sophisticated company with significant resources, it was 3M's responsibility to ensure compliance with the Aearo Entities' legacy insurance program.[7] Moreover,

[7] Plaintiff's *amicus* similarly argues that if the Policies' plain language is enforced, "Delaware corporations will be required to parse extensive minutiae about which of their subsidiaries' insurance policies require payments from which accounts[.]" (Amicus Br. at 12.) But Delaware corporations (especially conglomerates with many subsidiaries, like 3M) are fully capable of evaluating their own insurance requirements (which are not "minutiae"), and Plaintiffs' *amicus* does not seriously contend otherwise.

Plaintiffs acknowledge that "language available in the insurance marketplace" may require an SIR to be satisfied by the named insured and no other entity. (*See* Opening Br. at 17.) That demonstrates the commercial reasonableness of such a requirement.

Additionally, Plaintiffs are trying to have it both ways by arguing on the one hand that requiring Aearo to satisfy the SIR would be commercially unreasonable, while, on the other hand (1) unsuccessfully filing for bankruptcy protection as to the Aearo Entities only, purportedly based on Aearo's distinct financial interests and independent corporate status from 3M; and (2) arguing below that Aearo Technologies LLC did in fact satisfy the self-insured retention by "directly pay[ing] more than $400,000 in defense costs." (A251; *see also* A922-23; Op. at 17.) Plaintiffs cannot simultaneously contend that Aearo's satisfaction of the SIR would be commercially unreasonable but also argue the issue is "irrelevant" because Aearo in fact did directly pay the SIR. (A251.) Of course, questions of fact regarding whether those payments were actually made, as well as other issues including to which policies any payments applied and whether Plaintiffs tendered the lawsuits to the insurers, preclude summary judgment in Plaintiffs' favor even if 3M were allowed to satisfy the SIR Provisions. (*See* Op. at 17-18.)

Fundamentally, Plaintiffs do not dispute that SIR provisions mitigate moral hazard. Indeed, "[i]t is because of this concept of 'moral hazard' that insurers have

developed policies of underinsurance, caps on liability, and large deductibles, in order to make the insured more responsible for his own actions and, therefore, more careful[.]" *See McNeilab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525, 556 n.33 (D.N.J. 1986); *see also* Restatement of the Law of Liability Insurance ("Restatement") § 1, cmt. d (2019). When a separate entity agrees to cover the costs of litigation, incentives for the insured party to behave properly, litigate efficiently, and reach a cost-effective resolution are undermined. As noted above, these incentives, driven by the SIR, are critical to an insurer's decision to underwrite and price a risk. That remains true even though the Aearo Entities are wholly owned by 3M—which was not the case when the Policies were written. Even if 3M and the Aearo Entities have some common financial interests, that is not necessarily true of all parents and subsidiaries. There is no basis to undertake a detailed inquiry into the financial relationship between an insured and a related party to interpret the unambiguous terms of an SIR provision. Moreover, the Bankruptcy Case illustrates that 3M and the Aearo Entities are not one and the same financially. Had 3M's gambit succeeded, its effect would have been to shield 3M from the consequences of Aearo's risk.

Plaintiffs' contrary position incorrectly conflates the separate corporate existences of 3M and the Aearo Entities. Besides being irrelevant, Plaintiffs are wrong that "[a] parent company responsible for its wholly owned subsidiary's financial and

insurance functions is simply not 'distinctly different' than that wholly owned subsidiary." (Opening Br. at 23.) Even putting aside that this supposed "distinctly different" requirement has no contractual basis, "Delaware law rejects the theory that 'a parent and its wholly owned subsidiaries constitute a single economic unit[.]'" *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *26 (Del. Ch. 2014)) (quoting *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578 (Del. Ch. 1994)). Given the clarity of this principle, no further definition of the Policies' language was required to clarify that the Named Insured is distinct from other entities. (*See* Opening Br. at 23 (arguing that provision in the Twin City Policy should be interpreted in favor of the insured because it was not defined).)

Plaintiffs' disregard of the corporate form undermines their argument that allowing 3M, rather than the Aearo Entities, to satisfy the Policies' SIR Provision does not increase moral hazard. Plaintiffs insist that "the ultimate financial risk is borne by 3M regardless of whether 3M deposits the money in any account created specifically for Aearo LLC or pays to defend its wholly owned subsidiary directly." (Opening Br. at 32.) Plaintiffs are wrong under the facts of this case. As the bankruptcy court found, 3M and Aearo are financially distinct entities. Moreover, when the Policies were issued, 3M had not yet acquired Aearo and was a complete stranger to the Policies.

The law does not treat corporate parents and subsidiaries as unified entities. In Delaware and elsewhere, corporate separateness is presumed. *See, e.g., Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 5994971, at *5 (Del. Ch. Nov. 13, 2018) ("[T]here exists a presumption of corporate separateness, even when a parent wholly owns its subsidiary and the entities have identical officers and directors."). Plaintiffs do not argue that the Court should "pierce the corporate veil" to provide coverage, consider the Aearo Entities and 3M "alter egos," or anything similar. Plaintiffs identify nothing in the record to support that the entities are the same. Only in limited circumstances will a court pierce the corporate veil between parent and subsidiary, and none are at issue here. *See Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686-87 (Del. 1959) (declining to "disregard the separate existence of a subsidiary corporation" in the "absence of fraud"); *see also Grasty v. Michail*, 2004 WL 396388, at *1 (Del. Super. Ct. 2004) (holding that the corporate veil will generally be pierced only "upon a showing of fraud or some inequity"); *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234 (Ind. 1994) ("[T]he mere fact of a subsidiary-parent relationship is not, without more, sufficient reason to pierce the corporate veil.") Similarly, "Delaware law rejects the theory that 'a parent and its wholly owned subsidiaries constitute a single economic unit' such that 'a

parent cannot be liable for interfering with the performance of a wholly owned subsidiary.'" *New Empire Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 143 (Del. Ch. 2023) (quotation omitted).

That 3M and Aearo have distinct financial interests is illustrated by the Bankruptcy Case where only the Aearo Entities and not 3M sought bankruptcy protection. Moreover, as described above, the bankruptcy court found that "3M undertook full responsibility for the defense of the CAEv2 Actions" and that it had "exclusively borne all defense costs relating to the MDL." *In re Aearo Techs., LLC*, 2023 WL 3938436, at *4. Of course, 3M engineered the bankruptcy process to deal with massive liability to which it—not just the Aearo Entities—was subject. *See id.* at *5 (noting 3M's statements to investors that 3M "made the decision to adopt a new legal strategy . . . to use well-established Chapter 11 procedures to resolve this litigation" and in 3M's 10-K stating that "the Aearo entities and the company adopted a change in [legal] strategy.") At the same time, however, the bankruptcy court's analysis recognized that Aearo was a separate corporation with its own interests. Indeed, for that reason, Aearo appointed independent directors to negotiate the bankruptcy process with 3M. *Id.* at *5.

Finally, interpreting the Policies' SIR Provisions as written, requiring their satisfaction by the named insured, promotes all parties' interests in predictability. That is illustrated by the facts of this case, where 3M did not acquire Aearo until

after the Policies were priced and issued. The Plaintiffs' interpretation of the Policies would allow an entity that is not an agent of the insured and that is a stranger to the insurance contract to interfere with the risk-sharing function of an SIR Provision. That is not a result that any party bargained for.

II. THE POLICIES' BANKRUPTCY CLAUSES (WHICH ARE NOT "SAVINGS CLAUSES") DO NOT NEGATE THE UNAMBIGUOUS LANGUAGE OF THE SIR PROVISION.

A. Question Presented.

Are the Aearo Entities entitled to coverage under the ACE Policy and the Royal Surplus Policy, notwithstanding the failure of the Named Insureds under those Policies to satisfy the SIR Provisions, because of separate provisions in each Policy making clear that the insurer is not responsible for satisfaction of the SIR? (A01505-510; A04878-882; A04957-960.)

B. Scope of Review.

This Court's review is *de novo*. *See above* at Section I.B.

C. Merits of Argument.

1. The Self-Insured Retention Is a Condition Precedent to Coverage.

Plaintiffs wrongly insist that any failure to satisfy the SIR Provision merely results in a setoff against the insurer's coverage obligation in the amount of the SIR. However, Plaintiffs' argument—that the Policies' Bankruptcy Clauses allow the insured to not satisfy the SIR yet still obtain coverage—would defeat the fundamental purpose of the Policies' SIR Provisions and SIR requirements in general: to require the insured to share the risk.

The Policies' SIR Provisions are clearly conditions precedent to coverage because that is the very point of an SIR. Otherwise, the SIR would merely give the

insured an option to pay the SIR and receive full coverage or to have its coverage reduced by the amount that it chooses not to satisfy the SIR. However, the insured receives a reduced premium in exchange for accepting an SIR, which is set based on the expectation that the insured must satisfy the entire SIR before the insurer has any coverage obligation. *See Walsh Constr. Co. v. Zurich Am. Ins. Comp.*, 72 N.E.3d 957, 963 (Ind. Ct. App. 2017) ("[A]n insured maintains a SIR in order to reduce the cost of premiums on its insurance policy.") (quotation omitted). Accordingly, an SIR is distinct from a deductible, which is not normally a condition precedent to coverage and which may require the insurer to provide indemnification, subject to reimbursement by the insured. *See id.* at 962. Converting the SIR from a condition precedent for coverage into an option for the insured upends the parties' bargain.

It is black-letter law that satisfaction of an SIR is a prerequisite to coverage. "[A]s between an insurer and a single insured, the insurer's responsibilities arise only 'after the self-insured retention amounts specified in the policies are satisfied.'" *Walsh*, 72 N.E.3d at 963 (quoting *Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571, 576-77 (Ind. 2007); *see also Harford Mut. Ins. Co. v. Clariant Corp.*, 2009 Del. Super. LEXIS 905, at *17 (Del. Super. Ct. June 25, 2009) ("Until the amount of the self-insured retention is reached, the insurer is not obligated to adjust or defend the claim against the insured."); *Thomson*, 11 N.E.3d at 1010-11 (requiring the insured to show that "the SIR for each 'occurrence' has been

satisfied before any of [the insurer's] obligations . . . are triggered"); *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 420 (Ind. Ct. App. 2008) ("[I]t 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."); *Forecast Homes*, 181 Cal. App. 4th at 1474 (an SIR "refers to a specific sum or percentage of loss that is the insured's initial responsibility and must be satisfied *before* there is any coverage under the policy.") (quotation omitted); Restatement § 1(12) ("Unless otherwise stated in the insurance policy, an insurer has no duty to defend or indemnify the insured until the insured has paid any applicable self-insured retention.")

Indeed, "[i]t is well recognized that self-insurance retentions are the equivalent to primary liability insurance, and that policies which are subject to self-insured retentions are 'excess policies' which have no duty to indemnify until the self-insured retention is exhausted." *Forecast Homes*, 181 Cal. App. 4th at 1474 (quoting *Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1276-77 (9th Cir. 1998)); *see also S. Healthcare Svcs., Inc. v. Lloyd's of London*, 110 So. 3d 735, 739 (Miss. 2013) (comparing deductible and SIR and stating "[w]ith a SIR, the insured is usually responsible for its own defense until the SIR is exhausted."); *Mt. Hawley Ins. Co. v. Van Hampton*, 2023 WL 6725735, at *3 (S.D. Tex. Oct. 12, 2023) ("The Policy language does more than determine when Mt. Hawley must pay under the

Policy; it sets a requirement that Mt. Hawley need not pay unless the insured pays the retention amounts."); 14 Couch on Ins. § 200:27 (same); Scott M. Seaman and Charlene Kittredge, *Excess Liability Insurance: Law & Litigation*, 32 Tort & Ins. L. J. 653, 656 (1997). Where, as here, an insurer's liability is limited to "ultimate net loss in excess of a plaintiff's retained limit," it follows that the insurer's "liability will only arise after plaintiff has exhausted its SIR" which is a "characteristic[] of excess rather than primary insurance." *Beloit Liquidating Tr. v. Century Indemn. Co.*, 2002 WL 31870525, at *2 (N.D. Ill. Dec. 20, 2002); *see also In re Apache Prods. Co.*, 311 B.R. 288, 297 (Bankr. M.D. Fla. 2004).

Plaintiffs are therefore wrong that an SIR must be expressly described as a "condition precedent" to qualify as such. (*See* Opening Br. at 34-36). Given the purpose of an SIR, it may constitute a condition precedent even if the words "condition precedent" are not used in the contract. *See Mt. Hawley Ins. Co.*, 2023 WL 6725735, at *3 ("'Condition precedent' is a way of describing this requirement, but these are not magic words essential for enforcing the requirement."); *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *20 (Del. Super. Ct. July 29, 2021) ("Although '[t]here are no particular words that must be used to create a condition precedent,' a condition precedent must be expressed clearly and unambiguously." (quoting *Thomas v. Headlands Tech Principal Holdings, L.P.*, 2020 WL 5946962, at *5 (Del. Super. Ct. Sept. 22, 2020))).

Plaintiffs erroneously rely on *Liberty Mutual Insurance Co. v. Wheelwright Trucking Co.*, 851 So.2d 466 (Ala. 2002), in which the court held that payment of the SIR at issue "cannot be viewed as a condition precedent to [the insurer's] obligation under the policy" and affirmed a summary judgment order applying a "setoff in the amount of the SIR." *Id.* at 487. *Wheelwright* is distinguishable. In *Wheelwright*, the court focused on policy language providing that the insurer is "liable for losses covered under the Policy up to the Limits of Insurance in excess of the [SIR] . . . whether or not such [SIR] is recoverable or collectible." *Id.* In other words, the purpose of the policy language in *Wheelwright* was to establish the insurer's obligation to cover losses in excess of the SIR. By contrast, as discussed below, the language of the Bankruptcy Clauses in this case protects the insurer from responsibility for satisfying the SIR. Additionally, the policy in *Wheelwright* did not include (or, if it did, the Court's opinion did not consider) restrictive language like that in the ACE Policy and Royal Surplus Policy imposing an affirmative obligation on the insured to make payment satisfying the SIR. *See above* at Section I.C.2.ii and I.C.2.iii.

Plaintiffs also erroneously rely on *Phillips v. Noetic Specialty Insurance Company*, 919 F. Supp. 2d 1089, 1098 (S.D. Cal. 2013) and *Lasorte v. Those Certain Underwriters at Lloyd's*, 995 F. Supp. 2d 1134, 1143 (D. Mont. 2014) (*See* Supp.

Br. at 26-27). In *Phillips*, the SIR was not satisfied because of the insured's insolvency, not because the SIR was satisfied by an entity other than the named insured. Moreover, the policy in *Phillips* included language not at issue here, including that the "[b]ankruptcy or insolvency of the insured . . . will not relieve us of our obligations under this policy." *Id.* at 1097. In *Lasorte*, the issue was also not who was responsible for payment of the SIR, but rather whether the SIR could be "exhausted" by payment of a stipulated judgment, which is also not at issue in this case. 995 F. Supp. 2d at 1140. As such, neither case is on point.

To argue that Delaware law disfavors a "strict interpretation" of policy language resulting in a "forfeiture of coverage," Plaintiffs cite cases holding that an insured's failure to provide notice of a claim or to obtain an insurer's consent to settle a claim precludes coverage only where the insurer was prejudiced. (*See* Opening Br. at 37). As an initial matter, enforcing the SIR Provisions as written does not result in a forfeiture of coverage. Because the SIR is a condition precedent, the insured's failure to satisfy it results in a failure to trigger coverage in the first place, in the same way that an excess insurer's obligation is not triggered until primary coverage is exhausted. In other words, an insured does not forfeit something it did not have in the first instance.

Moreover, the requirement that an insured provide notification of a claim or obtain consent before settling is distinguishable from the requirement that an insured

satisfy an SIR. That is because noncompliance with a notice or consent provision does not present the moral hazard problems that an SIR is intended to address. As such, just because courts have held that noncompliance with those provisions does not preclude coverage absent prejudice does not mean that the same is true with respect to noncompliance with an SIR.

2. The Policies' Bankruptcy Clauses Are Inapplicable in this Case.

The unambiguous language of each of the Bankruptcy Clauses makes clear that their purpose is to protect the insurer from responsibility to cover losses within the SIR, not to negate the SIR Provision. The ACE Policy 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 become bankrupt or insolvent or had such inability, failure or refusal [by the insured to pay the SIR] not occurred, and this policy will not apply as a replacement for the [SIR]. You will continue to be responsible for the full amount of the [SIR] before the limits of insurance under this policy apply. In no case will we be required to pay the [SIR] or any portion thereof.

(A4926.)

In other words, the ACE Policy simply makes clear that it is not ACE's responsibility to satisfy the SIR. Nowhere does the Bankruptcy Clause state that satisfaction of the SIR is not a prerequisite to coverage. Plaintiffs' interpretation transforms the provision from one that protects ACE and limits its liability into one that

expands ACE's liability contrary to the language and intent of the ACE Policy's SIR Provision. In other words, even if the Bankruptcy Clause did apply (which it does not), the clause does not provide the relief that Plaintiffs seek. Nothing in the clause relieves Aearo of the obligation to satisfy the SIR, or the consequences of failing to do so. Instead, the clause states that the ACE Policy's limits will in no way increase by having to pay for the SIR that the named insured fails to do, because it is either insolvent or in bankruptcy.

Likewise, the Royal Surplus endorsement is not a "savings clause" but instead is clearly identified as a "Non Drop Down Bankruptcy or Insolvency of the Named Insured" endorsement. (A5010.) Nothing in the text of the Bankruptcy Clause in the Royal Surplus Policy excuses the Named Insured's failure to satisfy the SIR. This endorsement does not invalidate or remove the terms and provisions of the SIR Provision, nor does it provide for an expansion of the coverage afforded under the Royal Surplus Policy. Instead, and consistent with the endorsement language, it clearly directs that the attachment point of the Royal Surplus Policy does not "drop down" below the limit set by the SIR, such that it does not increase the limits under the Royal Surplus Policy. (*See id.*)

The SIR Provisions plain language makes clear that the Bankruptcy Clauses are not savings clauses. A true savings clause preserves the operation of a contractual or statutory provision notwithstanding a circumstance that may otherwise defeat it.

For example, a contract may include a savings clause providing that notwithstanding anything to the contrary, a contractual interest rate will never exceed the maximum permitted by law. *See, e.g.*, 47 C.J.S. Interest & Usury § 165. Likewise, a savings clause may provide for the survival of a particular provision even after an agreement is terminated. *Manti Holdings*, 261 A.3d at 1233-34 (Valihura, J., dissenting). By contrast, the Bankruptcy Clauses include no language providing that any part of the Policies remains in force despite the Named Insured's failure to satisfy the SIR. Instead, the Bankruptcy Clauses simply make clear that under no circumstances is the insurer responsible for satisfaction of the SIR. The effect of Plaintiffs' interpretation would not be to preserve any policy provision, but instead to negate the SIR Provision's requirement that the SIR be satisfied by the Named Insured.

In addition, the Bankruptcy Clauses are inapplicable under the circumstances of this case. The ACE Policy provision appears under a heading entitled "Bankruptcy; Payment of Self Insured Retention" and refers specifically to the insured's "bankruptcy or insolvency" as well as its "inability, failure, or refusal to pay the [SIR]." (A4926.) Likewise, the Royal Surplus Policy clause appears in a provision entitled "Non Drop Down: Bankruptcy or Insolvency of the Named Insured." (A5010.) However, there is no evidence that the Aearo Entities were insolvent or unable to pay the SIR. To the contrary, the Aearo Entities' Chapter 11 Bankruptcy was dismissed after the bankruptcy court conclusively found that the Aearo Entities

were not in financial distress and were "financially healthy." *In re Aearo Techs. LLC,* 2023 WL 3938436, at *17. In addition, Plaintiffs have never argued that Aearo "refus[ed]" to pay the SIR and in fact asserted (without documentary support) that Aearo did make payments satisfying the SIR. (*See* A251; A922-23.) In particular, and notwithstanding 3M's contrary representations to the bankruptcy court, Plaintiffs now contend that Aearo paid $411,696.70 in defense costs, undermining their post hoc reliance on the Bankruptcy Clauses.

In other words, nothing in the Bankruptcy Clauses is intended to defeat the plain language of the SIR Provisions and the SIR's function as a condition precedent to coverage.

CONCLUSION

For the foregoing reasons, the Court should affirm.

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Case Details

Case Number	Case Name
381,2024C	In Re Aearo Technologies LLC Insurance Appeals
423,2024C	In Re Aearo Technologies LLC Insurance Appeals