**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| AEARO TECHNOLOGIES LLC, *et al.*, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | C.A. No. N23C-06-255 SKR CCLD |
| | ) | |
| ACE AMERICAN INSURANCE COMPANY, *et al.*, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

Submitted: September 5, 2024
Decided: September 26, 2024

**ORDER DENYING PLAINTIFFS' APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL**

This 26th day of September, 2024, upon consideration of Plaintiffs' Application for Certification of Interlocutory Appeal of the Court's July 16, 2024 Memorandum Opinion and Order Ruling on Plaintiffs' and Certain Defendants' Motions for Partial Summary Judgment Regarding the Primary Insurers' Defense Obligations (the "Application"),[1] any opposition thereto,[2] Delaware Supreme Court Rule 42, and the record in this case, it appears to the Court that:

[1] ("Pls.' App.") (D.I. No. 271). In its Application, Plaintiffs mistakenly referred to "the Court's July 15, 2024 Memorandum Opinion and Order," but the decision was entered on July 16, 2024.
[2] Defendant ACE American Insurance Company's Opposition to Plaintiffs' Application For Certification of an Interlocutory Appeal (D.I. No. 275); Liberty Surplus and Transverse's Opposition to Plaintiffs' Application for Certification of an Interlocutory Appeal and Joinder in Ace American Insurance Company's Opposition to Plaintiffs' Application (D.I. No. 276).

1. Plaintiffs Aearo Technologies LLC, Aearo Holdings LLC, Aearo Intermediate LLC, and Aearo LLC (collectively the "Aearo entities" or "Aearo") and 3M (together with Aearo, "Plaintiffs") developed, manufactured, and sold a line of earplug products that allegedly caused hearing-related injuries. Numerous product liability suits were filed across various jurisdictions which culminated in a comprehensive $6 billion settlement. Thereafter, Plaintiffs filed suit in this Court against the several insurance companies that sold them general liability policies. Plaintiffs seek declarations that those insurance companies are obligated to pay for defense and indemnification costs in connection with the product liability suits.

2. On January 19, 2024, Plaintiffs moved for partial summary judgment against its five primary insurers seeking a declaration on the primary insurers' defense and indemnification obligations.[3] One of the primary insurers, Defendant Twin City Fire Insurance Company ("Twin City"), also filed a motion for partial summary judgment, which was joined by the other primary insurers.[4] Twin City contends that Aearo failed to satisfy the self-insured retention that is necessary to trigger any coverage obligation, because the retention was not paid by Aearo, and

[3] Plaintiffs' Motion for Partial Summary Judgment (D.I. No. 148); Plaintiffs' Opening Brief in Support of Their Motion for Partial Summary Judgment ("Pls.' Mot.") (D.I. No. 149). The five primary insurers are Royal Surplus Lines Insurance Company, Twin City Fire Insurance Company, General Star Indemnity Company, Liberty Surplus Insurance Corporation, and ACE American Insurance Company.

[4] Opening Brief in Support of Twin City Fire Insurance Company's Motion For Partial Summary Judgment ("Def. Twin City's Mot.") (D.I. No. 152).

cannot be satisfied through payments by 3M.[5] On July 16, 2024, the Court issued a Memorandum Opinion and Order denying Plaintiffs' motion and granting Twin City's motion.[6] In denying Plaintiffs' motion, the Court held, in relevant part, that (1) costs paid by 3M do not count towards the self-insured retention when the relevant policies expressly provide that either "you" or the "insured" — which is Aearo — must pay the retention; and (2) the so-called "savings clause" does not excuse the requirement to exhaust the self-insured retention.[7] Plaintiffs now seek to certify an interlocutory appeal[8] of the Court's July 16, 2024 decision.[9]

3. The standard for certifying an interlocutory appeal is set forth in Delaware Supreme Court Rule 42 ("Rule 42"). It is well-established that "[i]nterlocutory

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[5] *See* Def. Twin City's Mot. at 18–23.
[6] Memorandum Opinion and Order ("Mem. Op.") (D.I. No. 243).
[7] Mem. Op. at 13–16.
[8] The proposed order submitted by Plaintiffs include the following two questions for interlocutory appeal:

> 1. Whether 3M Company's payment of costs in defense of the Combat Arms Litigation, as the parent company of its wholly owned subsidiaries, including Aearo Technologies LLC and its affiliates, satisfy the self-insured retention of the insurance policies discussed in the Order.
> 2. Whether satisfaction of the self-insured retention of the insurance policies discussed in the Order is a material "condition precedent" that is required for coverage, or whether any failure to satisfy the retention from the subsidiary's own account should be excused to prevent a forfeiture of coverage.

Proposed Order Granting Plaintiffs' Application for Certification of interlocutory Appeal (D.I. No. 271).
[9] *See* Pls.' App. (D.I. No. 271). Plaintiffs also plan to immediately appeal the granting of Twin City's motion, pursuant to the Court's order granting the stipulated request for entry of judgment pursuant to Rule 54(b). *See* Order for Entry of Judgment Under Rule 54(b) With Respect To Twin City (D.I. No. 270).

appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[10] The Court may certify an interlocutory appeal under Rule 42 only when the order to be certified decides "a substantial issue of material importance that merits appellate review before a final judgment."[11] Consistent with the general principles stated above, the Court specifically considers the following eight factors:

> (A) The interlocutory order involves a question of law resolved for the first time in this State;
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> (B) The decisions of the trial courts are conflicting upon the question of law;
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> (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by [the Delaware Supreme Court] in advance of an appeal from a final order;
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> (D) The interlocutory order has sustained the controverted jurisdiction of the trial court;
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> (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;
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> (F) The interlocutory order has vacated or opened a judgment of the trial court;

[10] Del. Sup. Ct. R. 42(b)(ii).
[11] Del. Sup. Ct. R. 42(b)(i).

(G) Review of the interlocutory order may terminate the litigation; or

(H) Review of the interlocutory order may serve considerations of justice.[12]

In addition to the above factors, the Court will also consider "its own assessment of the most efficient and just schedule to resolve the case."[13] Ultimately, the Court needs to answer the question of "whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice."[14] Notably, if "the balance is uncertain," the Court will refuse to certify the interlocutory appeal.[15]

4. The Court must first determine whether the subject matter of an interlocutory appeal is a "substantial issue of material importance."[16] Under Rule 42, a "substantial issue of material importance" is a question that goes to the merits of the case, and not to collateral matters.[17] The Application challenges the Court's interpretation of language in the relevant insurance policies concerning whether the $250,000 self-insured retention requirement contained in those policies were satisfied. Plaintiffs contend that the retention requirement was met by 3M's

[12] Del. Sup. Ct. R. 42(b)(iii).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Del. Sup. Ct. R. 42(b)(i).
[17] *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 772312, at *3 (Del. Super. Mar. 1, 2021).

payments or excused by the so-called "savings clause."[18] The Court disagreed and found that, under the language of the policy, the retention may only be paid by Aearo, and that Plaintiffs failed to show that the retention requirement was excused.[19] The Court, employing contract interpretation principles, considered and determined under which of the primary policies, if any, Plaintiffs have the right to receive reimbursement for their defense costs. Generally, "issues of contract interpretation are not worthy of interlocutory appeal."[20] While, no doubt, materially important to Plaintiffs, the Court's rulings did nothing more than employ well-tread principles of contract construction to the facts of the case. Hence, the challenged rulings in this case do not constitute a "substantial issue of material importance."[21] This should end the analysis of the Application, but the Court will consider the remaining factors for the sake of completion.

5. Even if the subject of the interlocutory appeal was a "substantial issue of material importance,"[22] the analysis would not stop there. The Court would consider the specific factors listed under Rule 42(b)(iii) and balance whether the likely

[18] Pls.' Mot. at 28–30 (D.I. No. 149).
[19] Mem. Op. at 13–16.
[20] *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *3 (Del. Ch. Feb. 28, 2018) (internal citations omitted).
[21] Del. Sup. Ct. R. 42(b)(i); *see also Rite Aid Corp. v. Ace Am. Ins. Co*., 2020 WL 6058294, at *2 (Del. Super. Oct. 13, 2020) (holding that the mere fact that no reported decisions interpret the specific policy language at issue does not create a "substantial issue of material importance" out of a mere contract dispute).
[22] Del. Sup. Ct. R. 42(b)(i).

benefits of interlocutory review outweigh the probable costs.[23] The factors asserted by Plaintiffs as relevant to this case are: (1) the appeal "involves a question of law resolved for the first time in this State;" and (2) "[r]eview of the interlocutory order may serve considerations of justice."[24]

6. In its decision denying Plaintiffs' motion, the Court rejected Plaintiffs' contention that 3M's payment should count on behalf of Aearo because 3M is the parent company of the Aearo entities.[25] The Court also rejected the contention that the so-called "savings clause" is meant to preserve coverage when the retention is not met.[26] Plaintiffs contend that the Court resolved a question of law of first impression by determining that "retention provisions providing for payment by 'you' or 'insured' could not be satisfied by payment by the insured's parent company."[27] Plaintiffs further contend that whether the so-called "savings clause" preserve coverage in such cases constitutes a question of law of first impression.[28]

7. The Court's interpretation of unencountered insurance policy language does not invoke a novel question of law.[29] "When a court uses well-settled

[23] Del. Sup. Ct. R. 42(b)(iii).
[24] Pls.' App. at 16.
[25] Mem. Op. at 14–15.
[26] *Id.* at 15–16.
[27] Pls.' App. at 19–21.
[28] Pls.' App. at 21–23.
[29] *See Northrop*, 2021 WL 772312, at *4 ("[T]he mere tackling of an unencountered insurance policy exclusion does not make a court's interpretation thereof a novel decisional enterprise."); *Rite Aid Corp. v. Ace Am. Ins. Co*., 2020 WL 6058294, at *2 (Del. Super. Oct. 13, 2020) (holding

interpretive tools derived from equally well-settled law, application of those rules and principles to a 'new' contractual term does not wade that court into waters previously-uncharted."[30] In rendering its decision, the Court followed established principles of contract interpretation under Delaware and Indiana law, which holds that the unambiguous plain language of an insurance policy provision governs its interpretation.[31] Consistent with those principles, this Court held that it would be "contrary to the *plain language* of the [relevant policies]" to allow Aearo "to credit to itself those defense costs paid for by 3M, a non-policy holder who is not bound by the relevant policies' restriction and requirements."[32] As to the so-called "savings clause," the Court held that Plaintiffs failed to make the requisite showing, required by the plain language of the provision, that they could not pay the self-insured retention "due to the retention's lack of availability, collectability, invalidity, or suspension."[33] In reaching this conclusion, the Court relied upon established legal

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that the mere fact that no reported decisions interpret the specific policy language at issue does not create a "substantial issue of material importance" out of a mere contract dispute).

[30] *See Northrop*, 2021 WL 772312, at *4.

[31] *See, e.g., O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001); *U.S. Automatic Sprinkler Corp. v. Erie Ins. Exch.*, 204 N.E.3d 215, 223 (Ind. 2023).

[32] *See* Mem. Op. at 15 (emphasis added).

[33] *See id.* at 15–16; Affidavit of Susan Broin in Support of Plaintiffs' Motion for Partial Summary Judgment on Primary Insurers' Defense Obligations (D.I. No. 150), Ex. 2, Twin City Policy at 19 of 39 (§ IV.9) ("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."(internal quotations omitted).

principles and thus did not resolve a question of first impression. Hence, the interlocutory appeal is not permitted on this ground.

8. The Court next turns to Plaintiffs' contention that the interlocutory review is beneficial because it serves consideration of justice. On this factor, Plaintiffs argue that "interlocutory review would (1) establish the applicable law in Delaware; (2) determine a key threshold issue in a case involving hundreds of millions of dollars of insurance coverage; (3) answer important questions that well could determine the outcome of other cases; and (4) avoid duplicative proceedings and promote judicial efficiency."[34] The Court addresses each in turn.

9. First, Plaintiffs repeat the argument that there is no Delaware precedent that governs the interpretation of the specific insurance policy language at issue.[35] As addressed above, the Court's resolution of the issues related to the self-insured retention does not involve a novel enterprise.[36]

10. Second, the Court recognizes that the amount in controversy is large, but the magnitude of potential damages does not automatically meet the standard for interlocutory appeal, in light of the other factors.[37]

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[34] Pls.' App. at 23.
[35] Pls.' App. at 24.
[36] *See supra* note 29.
[37] *See Northrop*, 2021 WL 772312, at *6 ("That sizeable damages loom doesn't vary this far more just course [to prepare for and conduct trial.]"); *Rite Aid Corp. v. Ace Am. Ins. Co*., 2020 WL 6058294, at *2 (Del. Super. Oct. 13, 2020) ("The Court agrees that the Opioid Lawsuits are numerous and the amount in controversy is large, but that does not convert this matter into an

11. Third, Plaintiffs argue that the interlocutory review would answer important questions that could determine the outcome not only in this case, but in other cases as well.[38] However, Plaintiffs do not indicate that the interlocutory review would resolve other cases *currently* before the Court.[39] Therefore, even if Plaintiffs are right that the final decision here would also affect the outcomes in many *future* lawsuits involving insurance policies with similar retention provisions, it does not provide a reason for the appeal to occur before a final judgment.

12. Fourth, Plaintiffs raise the importance of avoiding piecemeal litigation.[40] However, that argument cuts both ways. On the one hand, the Court recognizes that if the Supreme Court were to decide whether Twin City's self-insured retention was satisfied or excused, it would make sense for issues related to similar insurance policies to be determined together. On the other hand, issues remain in this case as to whether defense costs were incurred after Plaintiffs obtained written consent and provided adequate notice.[41] Therefore, even if the interlocutory appeal results in a ruling that 3M's payments could count toward self-insured retentions, further

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extraordinary one meriting interlocutory review. The Court must use the same approach for each request for certification and not elevate one over the other because of the amount in controversy.").

[38] Pls.' App. at 25–27.

[39] *See Unisuper, Ltd. v. News Corp.*, 2006 WL 207505, at *4 (Del. Ch. Jan. 19, 2006) (certifying appeal concerning whether contract should be unenforceable as a matter of law, which concerned "issues that the Court of Chancery is dealing with in other matters *currently* before the Court" (emphasis added)).

[40] Pls.' App. at 28.

[41] *See* Mem. Op. at 18–19.

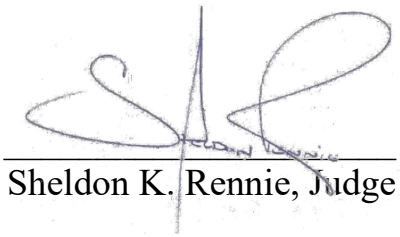
discovery and litigation would ensue. Hence, this consideration does not conclusively swing in favor of granting an interlocutory appeal. Accordingly, Plaintiffs have not demonstrated that interlocutory review is warranted based on the considerations of justice factor.[42]

13. Finally, the Court does not believe that certification of this interlocutory appeal would promote the "most efficient and just schedule to resolve the case."[43] As the Court explained above, an interlocutory review would not terminate the present litigation. After a final judgment is reached, Plaintiffs will have the opportunity to fully present to the Supreme Court the specific issues proposed in the interlocutory appeal, as well as any other issues for appeal that may arise at that time. At this point, Plaintiffs have not demonstrated that any exceptional circumstances warrant interlocutory review or that any unjust prejudice would result without interlocutory appeal. However, certifying the interlocutory appeal here would "disrupt the normal procession of litigation" and "cause delay" in the litigation.[44] On balance, the limited benefits of the interlocutory appeal do not outweigh its certain costs.[45]

[42] *See* Del. Sup. Ct. R. 42(b)(iii)(H).
[43] Del. Sup. Ct. R. 42(b)(iii).
[44] Del. Sup. Ct. R. 42(b)(ii).
[45] *See id.*

For the foregoing reasons, the Court finds that Plaintiffs have failed to meet the strict standards for certification under Rule 42, and its Application for Certification of Interlocutory Appeal is **DENIED**.

**IT IS SO ORDERED.**



Sheldon K. Rennie, Judge