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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VIKING PUMP, INC. AND WARREN PUMPS LLC INSURANCE APPEALS	) No. 518, 2014) No. 523, 2014) No. 525, 2014) No. 528, 2014	**CORRECTED VERSION** **PUBLIC VERSION**
	) CASES BELOW:) SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, Consolidated C.A. No. N10C-06-141 FSS [CCLD]) -and-) COURT OF CHANCERY OF THE STATE OF DELAWARE, Civil Action No. 1465-VCS	

APPELLANT WARREN PUMPS LLC'S OPENING BRIEF

Of Counsel:

Robin L. Cohen
Keith McKenna
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
Telephone: (212) 506-1700

Jennifer C. Wasson (No. 4933)
Michael B. Rush (No. 5061)
POTTER ANDERSON & CORROON LLP
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for Plaintiffs Below/Appellants Warren Pumps LLC

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NATURE OF THE PROCEEDINGS

Plaintiff Warren Pumps LLC ("Warren") appeals from two post-trial rulings in this action, both of which constituted reversible error, [redacted]

Warren and fellow plaintiff Viking Pump, Inc. ("Viking") are defendants in thousands of asbestos bodily-injury claims (the "Asbestos Claims"), the costs of which were paid by certain insurers, including Liberty Mutual Insurance Company ("Liberty"), for decades. [redacted] those policies neared exhaustion, and Plaintiffs turned to the follow-form excess liability insurance policies above them.

Over the course of the next seven years, the Excess Insurers disputed almost every aspect of Plaintiffs' claims for coverage, [redacted]

[redacted]

After a four-week trial before Superior Court Judge Fred Silverman, the jury found for Plaintiffs on virtually every issue. [redacted]

[redacted]

In post-trial rulings, however, the Superior Court committed two reversible errors. [redacted]

[redacted]

[redacted]

[redacted]

Second, in a post-trial opinion issued on October 31, 2013, the Superior Court held that sixteen of the Excess Policies followed form to the Liberty umbrella policies' obligation to pay defense costs, but not to their obligation to pay those costs in addition to the policy limits. The Superior Court erred in that determination as a matter of law, as none of the Excess Policy language negates the Excess Insurers' agreement to follow form to the Liberty umbrella policy terms. Moreover, twelve of the sixteen Excess Policies at issue contain provisions that would require them to pay defense costs in addition to limits regardless of whether they follow form.

SUMMARY OF ARGUMENTS[1]

This Court should reverse the rulings addressed herein, and issue an Order directing that the Final Judgment in this case be amended to provide that (1) [redacted] and (2) the sixteen Excess Policies which the Superior Court held provided for the payment of defense costs within the limits of the policies instead must pay such costs in addition to their policy limits.

1. [redacted]

[1] The decisions Warren appeals from are attached as Exhibit A-E to this brief.

[redacted]

2. [redacted]

[redacted]

[redacted]

3. The Superior Court erred as a matter of law in holding that sixteen of the follow-form Excess Policies count the payment of defense costs against their policy limits. As a matter of law, the fact that provisions in a "follow form" excess policy state that the policy does not follow form to the underlying "amount and

limits" – meaning that the excess policies provide different amounts of coverage at different layers than the underlying policies – does not negate the agreement to pay defense costs in addition to the policy limits if such costs are paid on that basis in the underlying coverage. Further, the "ultimate net loss" provisions in certain of those sixteen Excess Policies independently require payment of defense in addition to limits. The Superior Court erred particularly in holding that an Excess Policy issued by defendant Lexington provides for the payment of defense costs within limits, because that policy, by endorsement, expressly follows form to another excess policy that the Superior Court held does provide for the payment of defense costs in addition to the policy limits.

STATEMENT OF FACTS

A. The Policy Provisions Relevant To This Appeal

The Excess Policies at issue in this appeal apply at various attachment points above the limits of Liberty umbrella policies covering policy periods from February 1972 to January 1986. *See* JA1969.[2] As is common in complex, multi-layer insurance programs, in order to provide seamless coverage across the program, the Excess Policies "follow form" to the Liberty umbrella policies – that is, each Excess Policy incorporates by reference and adopts the Liberty policies' terms and conditions unless it expressly provides otherwise.

This appeal involves two aspects of the language of the relevant insurance policies: [redacted] and those governing the payment of defense costs.

[redacted]

With respect to the payment of defense costs, each Liberty umbrella policy provides that (i) the insurer must defend third-party claims for personal injuries

[2] "JA" refers to the Joint Appendix submitted by the parties in connection with their various appeals in this action.

which potentially occurred during the policy period and (ii) "the amounts so incurred . . . are payable by the [insurer] in addition to the applicable limit of liability of this policy." *See, e.g.*, JA2842-43 (emphasis added). Accordingly, the $3 million Liberty umbrella limits are reduced, or "eroded," *only* by amounts Liberty paid for settlements or judgments, not amounts paid for Plaintiffs' defense.

As discussed *infra*, the Superior Court ultimately held that 16 of the 34 Excess Policies at issue follow form to the Liberty umbrella policies' obligation to pay Plaintiffs' costs of defending potentially covered claims, but not to the Liberty obligation to pay such costs in addition to the policy limits. JA1744-61, 1763, 1771-74. Those sixteen Excess Policies each fall into one of three groups.

The Excess Policies in the first group[3] expressly cover both "expenses," which includes the costs of defense, and settlements and judgments, but limit their liability only to a specified amount of "ultimate net loss." *See* JA1753-55; *see also, e.g.*, JA3580. That phrase is not defined, and the policies do not otherwise state that expenses fall within "ultimate net loss." To the contrary, each policy specifically refers to the *indemnity* limits of the underlying Liberty coverage as the

[3] This first group consists of (i) Central National Insurance Company of Omaha ("Central National") Policy no. CNZ14-19-51 (JA3740-48); (ii) Central National Policy no. CNZ14-19-89 (JA3875-81); (iii) Century Indemnity Company Policy no. CIZ425741 (JA4294-300); (iv) Old Republic Insurance Company Policy no. OZX11405 (JA3882-95); (v) Puritan Insurance Company Policy no. ML651258 (JA3605-20); (vi) Lexington Insurance Company ("Lexington") Policy no. GC403427 (JA2568-88); (vii) Lexington Policy no. CE5503312 (JA3109-35); and (viii) Granite State Insurance Company Policy no. 6279-0163 (JA3575-88).

"ultimate net loss" above which the Excess Policy attaches. *See, e.g.*, *id.* Additionally, the first group of Excess Policies state that they are subject to the same terms as the Liberty umbrella policy "except as regards the premium, the amount and limits of liability." *See, e.g.*, JA3582.

The Excess Policies in the second group[4] contain the same relevant provisions as the first group, including referring to the indemnity-only limits of the underlying coverage as "ultimate net loss," while leaving that phrase otherwise undefined. *See* JA1755-57; *see also, e.g.*, JA2395. They differ from the first group of Excess Policies only in that they do not expressly provide for the payment of expenses, including defense costs. Instead, that payment obligation is incorporated by reference into the second group of Excess Policies by their agreement to follow form to the underlying Liberty coverage, which includes a duty to pay defense costs outside limits. *See, e.g.*, *id.*

The Excess Policies in the third group[5] do not contain the phrase "ultimate net loss." *See* JA1757-59; *see also, e.g.*, JA4421. They also do not contain any

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[4] This second group consists of London Policy nos. K24961 (JA2405-77); UGL0160 (JA2847-904); UGL0162 (JA2922-79); and CX5026 (JA2371-404).

[5] The Superior Court identified this third group of Excess Policies as consisting of (i) California Union Insurance Company Policy no. ZCX003889 (JA3621-28); (ii) INA Policy no. XCP145194 (JA4164-71); (iii) INA Policy no. XCP156562 (JA4420-26); and (iv) Lexington Policy no. 5510143 (JA3371-79). However, as discussed more fully below, Policy no. 5510143 contains an endorsement adopting the terms of London Policy no. UKL0340 (JA3323-70), which the Superior Court held pays defense in addition to limits.

provision placing defense costs within the policy limits, or barring incorporation of the underlying policy provisions regarding the "amount and limits of liability." *See, e.g., id.*

For purposes of clarity and ease of reference, the similarities and differences between the three groups of policies are summarized in the following chart:

Policy Group	Ultimate Net Loss Provision	Excludes "Amount and Limits of Liability" from Follow Form	Contains Express Provision Re Payment of Expenses
Group 1 (8 policies)	Yes	Yes	Yes
Group 2 (4 policies)	Yes	Yes	No
Group 3 (4 policies)	No	No	No

B. The Asbestos Claims And Liberty's Payments

Warren owns a pump manufacturing business that has been in continuous operation since 1897. WA171:10-172:15.[6] [redacted]

[6] "WA" refers to the separate appendix of record materials submitted by Warren.

[redacted]

This case began in 2005, when Viking filed a complaint in the Court of Chancery. It subsequently added Warren as a defendant, and Warren and Viking later brought the Excess Insurers into the case. In 2009, the Chancery Court ruled that New York law governs interpretation of the Excess Policies. *See* JA0918-23.

In 2010, the Chancery Court transferred the litigation to the Superior Court, where the case was heard to its conclusion by Judge Silverman. [redacted]

[redacted]

[redacted]

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7 [redacted]

8 [redacted]

9 [redacted]

[redacted]

On November 15, 2011, the Superior Court denied all pending summary judgment motions and directed the parties to proceed to trial on "all factual disputes." JA1062 ¶ 9. In its pretrial rulings and directions to the parties, the Superior Court made clear that the parties would be allowed to submit evidence on and argue to the jury only issues that were actually disputed. WA124, 126, 128.

[redacted]

1. [redacted]

[redacted]

2. [redacted]

a. [redacted]

[redacted]

[redacted]

b. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

10 [redacted]

[redacted]

3. [redacted]

[redacted]

E. [redacted]

[redacted]

[redacted]

11 [redacted]

[redacted]

[redacted]

F. The Jury Verdict

Later that day, the jury rendered what the Superior Court characterized as "[s]ubstantially . . . a Plaintiffs' verdict." JA1727. [redacted]

G. [redacted]

After the trial, Plaintiffs moved for entry of final judgment, while the Excess Insurers sought judgment as a matter of law on various issues, [redacted]

12 [redacted]

In contrast, the Superior Court held that questions regarding the scope of the Excess Insurers' defense obligations should have been decided as a matter of law. The Court then held that 33 of the 34 Excess Policies "followed form" to the Liberty policies' obligation to pay the costs of defending potentially covered Asbestos Claims, but that sixteen of those Policies – the three groups of Excess Policies discussed above – did not follow form to Liberty's obligation to pay defense costs in addition to policy limits. JA1753-59.

With respect to the first and second group Excess Policies, the Superior Court concluded that language stating that those policies do not incorporate the

Liberty umbrella policies' "amount and limits of liability" bars incorporation of the umbrella policy language stating that defense costs "are payable . . . in addition to" policy limits. JA1754-55,1757. The Superior Court also reasoned that, because "ultimate net loss" was undefined, it must be read to include both defense and indemnity payments: "[B]y not defining 'ultimate net loss,' or otherwise limiting its definition, the clause includes all costs associated with a claim." JA1757.

The Superior Court did not provide any explanation for its conclusion that the group three Excess Policies pay defense costs within limits. JA1757-59. In particular, it made no mention of the fact that those policies contained neither language barring incorporation of underlying policies' "amount and limit of liability," nor the phrase "ultimate net loss," nor any other reference to whether defense costs would be paid within or outside the limits of the policies.

H. [redacted]

[redacted]

[redacted]

I. [redacted]

In his final order issued on August 20, 2014, Judge Silverman confirmed the denial of Warren's [redacted] and the Excess Insurers' [redacted] JA1890 ¶ 3. He then denied the parties their constitutional[13] right of access to the Superior Court to enforce the

[13] *See* Del. Constitution art. I, § 9 ("All courts shall be open; and every person for an injury done him or her . . . shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land. . . . ").

Judgment or seek any other relief permitted by law: "The Prothonotary **SHALL** accept no further filings. This case is closed." JA1891 (emphasis in original).

[redacted]

[redacted]

14 [redacted]

ARGUMENT

I. [redacted]

A. Question Presented

[redacted]

B. Standard And Scope Of Review

Legal issues, including insurance policy interpretation, are reviewed *de novo*. *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997).

C. Merits Of The Argument

1. [redacted]

[redacted]

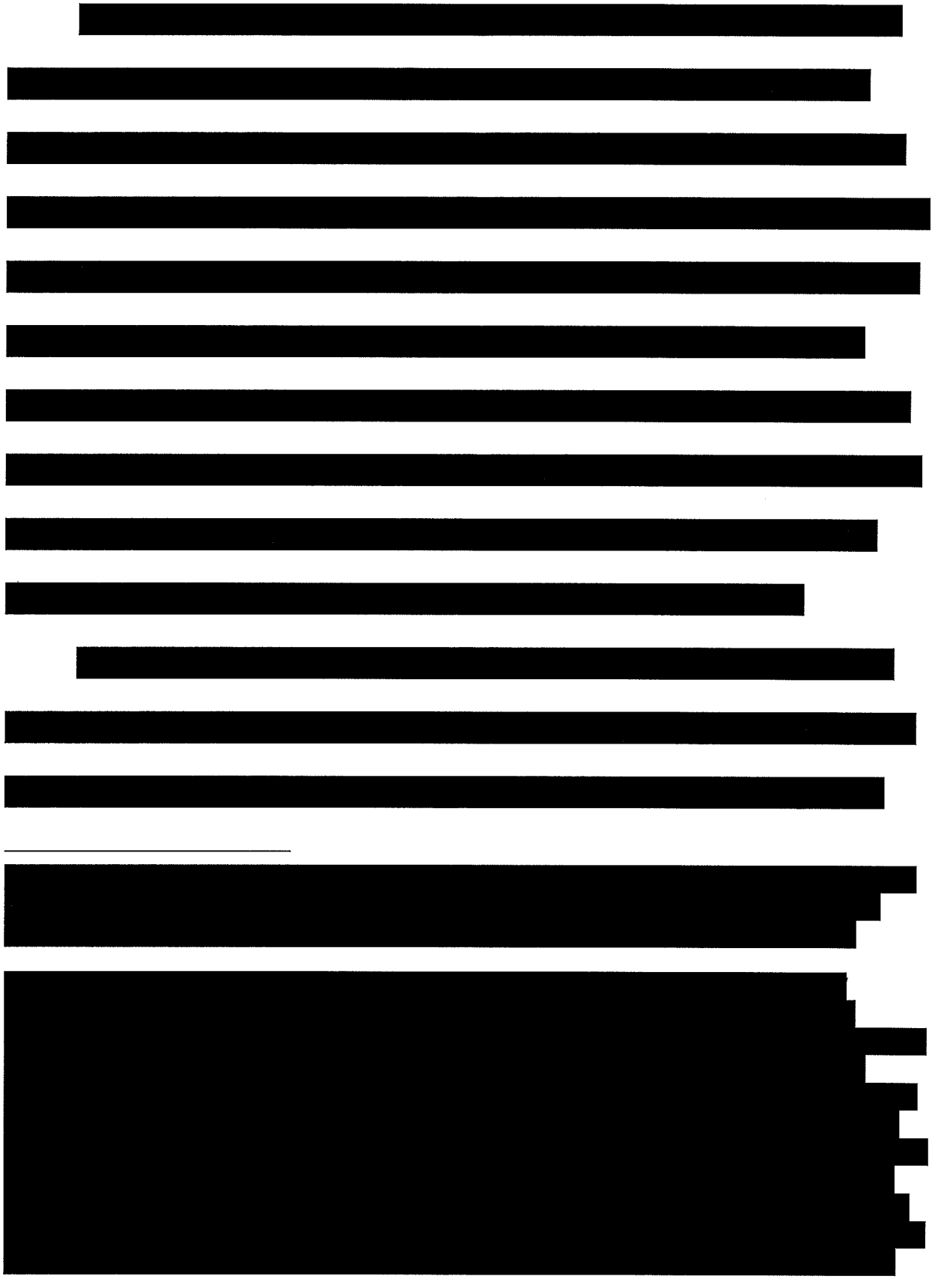
[redacted]

[redacted]

15 [redacted]

[redacted]

16 [redacted]



[redacted]

2. [redacted]

[redacted]

[redacted]

[redacted]

18 [redacted]

[redacted]

> [redacted]

[redacted]

[redacted]

19 [redacted]

[redacted]

A. Questions Presented

1. [redacted]

2. [redacted]

B. Standard And Scope Of Review

This Court defers to a lower court's "findings of fact if substantial evidence supports them and they are not clearly wrong." *Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061-62 (Del. 2010).

C. Merits Of The Argument

1. [redacted]

[redacted]

2. [redacted]

[redacted]

[redacted]

3. [redacted]

[redacted]

III. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT SIXTEEN EXCESS POLICIES DO NOT PAY DEFENSE COSTS IN ADDITION TO THE POLICY LIMITS

A. Question Presented

Do defense cost payments under the sixteen Excess Policies relevant to this appeal count toward the reduction of the applicable policy limits? JA1753-59.

B. Standard And Scope Of Review

Insurance policy interpretation and other legal issues are subject to *de novo* review. *Phillips Home Builders*, 700 A.2d at 129.

C. Merits Of The Argument

As a matter of well-established New York law, an excess insurer whose policy follows form to a policy with a defense payment obligation must pay defense costs in the same manner as the followed policy, unless the excess policy expressly and unequivocally provides to the contrary. *See, e.g.*, *Chunn v. N.Y.C. Housing Auth.*, 866 N.Y.S.2d 145, 147 (App. Div. 2008); *Axis Reins. Co. v. Bennett*, 2008 U.S. Dist. LEXIS 53921, at *11-13 (S.D.N.Y. June 26, 2008).[20] Indeed, the very purpose of "follow form" coverage is to ensure uniformity of coverage in complex insurance programs without the need for a "minute policy-by-

[20] *See also, e.g.*, *In re Silicone Breast Implant Ins. Coverage Litig.*, 652 N.W.2d 46, 66 (Minn. Ct. App. 2002) (rejecting argument that defense costs eroded excess policy limits where the excess "policies followed form to the relevant underlying policy, which provides for payment of defense costs outside policy limits"), *aff'd in relevant part, rev'd in part on other grounds*, 667 N.W.2d 405 (Minn. 2003).

policy analysis" to determine the nature and extent of coverage. *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 922 N.Y.S.2d 220, 222 (N.Y. 2011). For this very reason, the Superior and Chancery Courts described the 1972 to 1985 Excess Policies as "a seamless, layered plan" and "a comprehensive, multi-year insurance program." JA1688, JA0979 n.165.

In this case, there is no language in the Excess Policies which the Superior Court held pay defense costs within limits that negates their obligation to follow form to the umbrella's express promise to pay such costs in addition to the policy limits. The Superior Court's ruling to the contrary constituted reversible error.

That is particularly true with respect to the group three Excess Policies, which both contain independent language that confirms the existence of a defense payment obligation[21] and omit any language negating their "follow form" defense payment obligations. In particular, those Policies do not bar incorporation of the "amounts and limits" language on which the Superior Court relied in finding that the group one and group two Excess Policies pay defense within limits.[22]

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[21] *See, e.g.*, *Hartford Acc. & Indem. Co. v. PEIC*, 862 F. Supp. 160, 165 (S.D. Tex. 1994) (holding that policy language stating that "the insurance shall not apply to any expenses for which insurance is provided in the primary insurance" would be "redundant" if the insurer had no obligation for defense "expenses"); *Silicone*, 652 N.W.2d at 65 (noting that "a reasonable person would not understand" language such as that contained in the group three Excess Policies to "exclude payment of defense costs").

[22] Moreover, the Superior Court's failure to explain the basis for its conclusion that the group three Excess Policies "carry defense obligations within the policy's applicable limits" (JA1763) would constitute an independent ground for reversal even under an abuse of discretion standard,

The Superior Court's conclusion that the group one and group two Excess Policies pay defense within limits was equally flawed. Those Policies' statements that they do not follow form to the Liberty "amount and limits" provision ensures only that each such policy has its own stated limits, without reference to the type (*e.g.*, "each occurrence" or "aggregate") or amount of the underlying policy limits. *See, e.g., Gulfport-Brittany LLC v. RSUI Indem. Co.*, 339 F. App'x 413, 416 (5th Cir. 2009) (applying similar/same excess language in holding that the excess insurance limit of liability was as set forth in "[t]he scheduled limit in the [excess] policy"). This language does not alter the obligation of a follow-form excess insurer – particularly one that is part of a "seamless" multi-year, multi-layer program – to provide coverage for the same risks in the same manner as the underlying insurer. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 2013 WL 1195277, at *8 (S.D.N.Y. Mar. 25, 2013) (holding that "amount and limits" exception meant only that excess policy did not apply the same sublimits to a particular type of coverage subject to such sublimits in the underlying policy, and rejecting argument that the exception meant that the excess insurer did not follow form to the agreement to cover the *type* of liability which was the subject of the underlying policy sublimit).

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much less the *de novo* standard applicable here. *See, e.g., Ball v. Division of Child Support Enforcement*, 780 A.2d 1101, 1104 (Del. 2001) ("the failure to provide reasons for a judicial determination constitutes an abuse of discretion").

Indeed, the Excess Insurers conceded that their follow-form policies incorporate the "non-cumulation of liability" provisions that (i) appear in the Liberty umbrella policy "Limits of Liability" section and (ii) define how the policy limits apply when a single "occurrence" triggers multiple, successive policies. *See, e.g.*, 1975 Liberty Umbrella Policy (JA2843); JA0977-79 (quoting and discussing Liberty non-cumulation provision). That concession is irreconcilably inconsistent with their argument that the "amount and limits" language bars incorporation of an underlying provision dealing with any aspect of the policy limits.

Thus, the "amount and limits" exception to the follow-form obligation has no application to the underlying Liberty promise to pay defense costs in addition to the policy limits because that promise does not set a limit on the amount of defense costs payable under the policies. To the contrary, the Liberty umbrella policy provisions make clear that defense costs are payable "in addition" to policy limits. *See* JA0967 n.139 (under New York law, insurer must "'establish that the words and expressions used not only are susceptible of the construction sought by [the insurer] but that it is the only construction which may be placed on them'") (quoting *Vargas v. INA*, 651 F.2d 838, 840 (2d Cir. 1981)).

But even if the group one and group two Excess Policies did not incorporate Liberty's obligation to pay defense outside of limits, those policies independently provide for payment of defense costs on that basis. Both the group one and group

two Excess Policies place only one type of payment – "ultimate net loss" – within policy limits. That term is not defined in the Policies – but *is* used to refer to the underlying indemnity-only Liberty limits. *See, e.g.*, JA3580, 2395. As a matter of law, contractual terms must be interpreted consistently throughout an agreement. *See, e.g.*, *Hartol Prods. Corp. v. Prudential Ins. Co.*, 47 N.E.2d 687, 689 (N.Y. 1943). Thus, "ultimate net loss" cannot mean "indemnity payments *only*" in one clause of the "Limit of Liability – Underlying Limits" section, but "indemnity payments *and defense costs*" in another clause of that same provision. The only reasonable interpretation is that "ultimate net loss" excludes defense "expenses," which are payable in addition to the policy limits. *See Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770 (Ohio Ct. Common Pleas 1995).

The excess policy in *Owens-Corning* – like the group one Excess Policies here – provided for the payment of "expenses" as well as "damages," but only subjected payments of "ultimate net loss" to the policy limits. *Id.* at 800-01. And in that case, as here, the policy language showed that "ultimate net loss" was "equivalent to 'damages.'" *Id.* at 801 n.48. The court thus held that, under "a plain reading of the policy language, the amount which [the insurer] is obligated to pay for defense expenses is in excess of its policy limits." *Id.*; *see also Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1335 (S.D.N.Y. 1995) ("If expenses are covered by the policies, and *if the duty to pay such expenses is not*

encompassed within the definition of ultimate net loss, it follows that the insurer's liability for expenses is in excess of whatever sums it must pay for ultimate net loss.") (emphasis added); *In re Silicone*, 652 N.W.2d at 66 ("because [the] definition of ultimate net loss does not include defense costs," insurer must pay those costs in addition to policy limits).

Finally, the Superior Court erred in ruling that Lexington Policy no. 5510143 pays defense within policy limits. That policy contains an endorsement requiring that the policy follow the terms and conditions of a Lloyd's London policy "To be advised." JA3375. That is a reference to Policy no. UKL0340,[23] which the Superior Court held provides defense cost coverage outside of policy limits. JA1763. As the Superior Court recognized elsewhere in the same opinion, policy endorsements override preprinted form language as a matter of law. JA1751 n.255 (citing *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 628 (N.Y. 1994)); *see also, e.g., N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 124 (2d Cir. 2001). Accordingly, the Superior Court's failure to enforce the Lexington follow-form endorsement must be reversed.

[23] Policy nos. 5510143 and UKL0340 cover the same policy period at the same attachment point and participate in a "quota-sharing" arrangement pursuant to which each policy contributes a stated percentage toward the same covered losses. *See, e.g.*, JA3373, 3333-37.

CONCLUSION

For the reasons set forth above, Warren respectfully requests that this Court reverse the Superior Court's rulings on [redacted] and issue an Order directing that the Final Judgment Order be amended to provide that (1) [redacted] and (2) the Excess Policies identified by the Superior Court as providing for the payment of defense costs within limits instead are required to pay those costs in addition to the limits of their policies.

OF COUNSEL:

Robin L. Cohen
Keith McKenna
KASOWITZ, BENSON,
TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
Telephone: (212) 506-1700

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POTTER ANDERSON &
CORROON LLP

By: */s/ Jennifer C. Wasson*
Jennifer C. Wasson (No. 4933)
Michael B. Rush (No. 5061)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for Plaintiff Below, Appellee and Cross-Appellant Warren Pumps LLC