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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TIAA-CREF INSURANCE APPEALS	) No. 478,2017 **PUBLIC VERSION**) No. 479,2017) No. 480,2017) No. 481,2017)) Court Below–Superior Court of the) State of Delaware) C.A. No. N14C-05-178 JRJ (CCLD))

ANSWERING BRIEF OF PLAINTIFFS BELOW / APPELLEES TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; AND COLLEGE RETIREMENT EQUITIES FUND TO DEFENDANT BELOW / APPELLANT ARCH INSURANCE COMPANY'S OPENING BRIEF REGARDING CONSENT TO SETTLE AND REDUCTION OF INSURANCE LIMITS

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NATURE OF THE PROCEEDINGS

Defendant-Appellant Arch Insurance Company ("Arch") argues lack of consent to escape liability for TIAA-CREF's[1] settlements that Arch insists are not substantively covered and whose reasonableness Arch has never contested. However, after a full trial on the merits, the jury found both that Arch had waived any right to require such consent, and that TIAA-CREF was excused from seeking Arch's consent as such a request would have been futile.

Recognizing the high burden it faces in seeking to overturn the jury's verdict, Arch relies on inapplicable legal theories to suggest that the question should never have been submitted to the jury in the first place. According to Arch, because its letter denying coverage contained a boilerplate reservation of rights, TIAA-CREF was still obligated to seek Arch's consent before settling any claim. Not so, as its substantive repudiation of its coverage obligations relieved TIAA-CREF of compliance with the consent condition. But, even if Arch is permitted to avoid the consequences of its coverage repudiation, its overall conduct – including

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[1] "TIAA-CREF" refers to TIAA-CREF Individual & Institutional Services, LLC; TIAA-CREF Investment Management, LLC; Teachers Advisors, Inc.; Teachers Insurance and Annuity Association of America; and College Retirement Equities Fund ("CREF").

[redacted]

closing its claim files for the Underlying Action[2] for which it was not being asked to pay, remaining silent for years after receiving numerous updates and being advised of the settlements without its consent in both Underlying Actions, denying coverage in response to TIAA-CREF's request that it authorize settlement, and admitting that the purportedly mandatory consent requirements were not always mandatory, but sometimes "didn't matter" – substantively relieved TIAA-CREF of any obligation to go through the empty exercise of requesting Arch's consent to settle.

Arch's other arguments on the consent issue fare no better. First, the jury instructions on both waiver and futility were in accord with applicable law, while Arch's proposals invaded the jury's role in weighing the evidence. Second, the Superior Court did not abuse its discretion – much less deny Arch a fair trial – by admitting evidence of Arch's file closures; it was relevant to Arch's intent to relinquish its consent rights. Third, other insurers' deposition testimony (whom Arch chose not to cross-examine at the time) merely confirmed Arch's admission that there were circumstances under which consent was not required.

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[2] The "Underlying Actions" are *Rink v. CREF*, No. 07-CI-10761 (Ky. Cir. Ct.) (the "*Rink* Action") (JA1285-96), and *Bauer-Ramazani v. TIAA-CREF, et al.*, No. 1:09-cv-00190 (D. Vt.) (the "*Bauer-Ramazani* Action") (JA1513-48).

[redacted]

Finally, Arch's appeal from the Superior Court's application of the "shavings provision" is contrary to the policy's plain language. It only reduces Arch's limits in proportion to the largest reduction obtained by any settling insurer of that insurer's limits, not the full value of any alleged claim. The Superior Court correctly reduced Arch's liability by [redacted] Arch is not entitled to a further windfall.

[redacted]

SUMMARY OF ARGUMENTS

1. Denied. As the Superior Court correctly held, disputed questions of material fact regarding whether Arch had waived the right of consent or TIAA-CREF was excused from seeking Arch's consent barred summary judgment.

2. Denied. That the total *Rink* losses fell well below Arch's attachment point was relevant to the question of whether TIAA-CREF was excused from seeking Arch's consent. TIAA-CREF was not obligated to present the jury with a special interrogatory on each and every factual issue supporting its futility and waiver defenses.

3. Denied. Regardless of whether silence alone could evidence a waiver of Arch's consent rights, the Superior Court correctly instructed the jury to consider Arch's "actions or inactions in determining whether it would have been futile for TIAA-CREF to seek Arch's consent or whether Arch waived its rights." JA6648.

4. Denied. Arch's undisputed decision to close all of its *Rink* claims files was properly admitted, even if that closure was not directly communicated to TIAA-CREF, as it reflected Arch's intent and there was evidence that TIAA-CREF understood that Arch had closed both *Rink* claim files. Further, that Arch's file closure letter (which contained an express reservation of rights) related only to

[redacted]

Arch's upper level policy supported TIAA-CREF's position that Arch did not similarly reserve its rights with respect to the lower level policy.

5. Denied. A substantive denial of coverage relieves a policyholder of further compliance with conditions precedent to coverage. An insurer may not evade that result by adding boilerplate language suggesting it might be willing to reverse its decision. At the very least, the jury was entitled to consider whether Arch's denial letter – which by its express terms implicated both Underlying Actions and came in response to TIAA-CREF's request for authority to settle – supported a finding of waiver or futility.

6. Denied. The Superior Court correctly rejected Arch's proposed jury instructions, which would have invaded the jury's role in weighing the evidence, in favor of instructions that accurately set forth the legal standards for waiver. Further, Arch did not preserve for appeal any objection to the Court's failure to include any additional or alternative language in the final waiver instructions.

7. Denied. The Superior Court's futility instruction correctly reflected applicable law. Moreover, because the jury found that TIAA-CREF showed by clear and convincing evidence that Arch had waived any right of consent, even if the futility instruction constituted error – which it did not – that error was harmless.

8. Denied, for reasons in point 4 above.

[redacted]

9. Denied. There was no prejudice in submitting deposition testimony from other insurers, as Arch was present to cross-examine at the depositions, Zurich's policy incorporates the same consent language, and ACE's policy language was more expansive. Any error was harmless as Arch's own witness admitted that its policy's consent provision did not always require consent.

10. Denied. As the Superior Court correctly held, the plain language of Arch's shavings provision entitles Arch to a reduction in limits based only on the percentage difference between a settling insurer's payment and *its policy limits*.

[redacted]

STATEMENT OF FACTS

A. The Insurance Policies at Issue

The TIAA-CREF companies offer retirement investment products to individuals in the academic and research communities. In 2007 and 2009, respectively, TIAA-CREF entities were sued in the *Rink* and the *Bauer-Ramazani* Actions, alleging that class plaintiffs had been harmed by TIAA-CREF's delays in processing of transfer or withdrawal requests. JA1285-96; JA1513-23.

To protect against precisely such risks, TIAA-CREF purchased professional liability insurance from Insurers.[3] For the 2007-08 policy year, the relevant coverage, subject to a [redacted] deductible, was as follows:

2007-08 Policies	Insurer	Limit of Liability
Primary	Illinois National	[redacted]
First Excess	St. Paul Mercury	[redacted]
Second Excess	ACE	[redacted]
Third Excess	Arch (No. [redacted] the "Arch Policy")	[redacted]
Fourth Excess	Zurich	[redacted]

JA0348-546. Arch also issued Policy No. [redacted] in the 2007-08 program, providing [redacted] (the "High Excess Policy").

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[3] "Insurers" are the defendants in this case prior to appeal: Illinois National Insurance Company ("Illinois National"), Ace American Insurance Company ("ACE"), Arch, and Zurich American Insurance Company ("Zurich").

[redacted]

TA0740. The coverage for the 2009-10 policy year was similarly structured, with Arch providing $[redacted] in limits sold by Illinois National, St. Paul Mercury Insurance Company ("St. Paul Mercury") and ACE, and a [redacted] deductible. JA0573-598; TA0741.

The excess policies follow form, *i.e.* adopt the same terms and conditions, as the primary policy, except for limited express terms contained therein. JA0496; JA0511; JA0529. Thus, all policies promise to pay for "Loss," including settlements and defense costs, for any "Wrongful Act." JA0352-55.

The Arch Policy (in both years) also contains the following provision:

> With respect to any Claims(s) that, alone or combined, might result in payment pursuant to the insurance coverage afforded under this Policy, no costs, charges or expenses for investigation or defense of any Claim shall be incurred, or settlements made, without [Arch's] consent, such consent not to be unreasonably withheld.

JA0513; JA0581. It further provides that Arch may elect to participate in the defense or settlement of even those Claims that do not impact its coverage layer. JA0512; JA0581.

The Arch Policy provides that its coverage obligations are triggered even where an insured settles with an underlying insurer for payment of less than full limits. JA0518 § 1. It also contains a "shavings provision," which reduces Arch's

[redacted]

coverage for the settled claim by the percentage difference between the settling insurer's payment and policy limits. *Id.* § 3.

B. Arch Denies Coverage and Waives Its Right to Consent

1. The *Rink* Settlement

TIAA-CREF gave notice of the *Rink* Action to Insurers on November 29, 2007, and asked for their consent to TIAA-CREF's chosen underlying defense counsel. JA1278-96; JA5770-71 at 33:7-35:23; JA1330-41 (providing hourly rates). Arch never objected to the proposed defense arrangements, nor chose to participate in the defense. JA5771 at 35:16-36:8; JA5773 at 43:19-22.

To the contrary, on January 29, 2008, Arch informed TIAA-CREF that it had closed its *Rink* file (the "File Closure Letter"). JA1326-29. While Arch's File Closure Letter referenced only the High Excess Policy number, TIAA-CREF's risk manager, Ira Cohen, testified that he believed that Arch had closed its files for the "*Rink* matter" under both of Arch's 2007-08 policies. JA5772 at 38:1-39:11 (Cohen did not "make a distinction" between files; "I just felt that they were closing their file on Rink in total"); JA5774 at 47:15-48:3. And Arch had closed both *Rink* files, as Arch's claims handler testified. JA5916 at 43:7-13; JA5956-57 at 83:16-84:13; TA0831 at 110:11-14. Mr. Cohen understood that closure to mean

[redacted]

that Arch "didn't care what we did with the file anymore, you know, we were on our own." JA5772 at 38:1-21.

Contrary to Arch's contention on this appeal that the reservation of rights contained in the File Closure Letter reserves rights under *both* 2007-08 Arch Policies (which is irreconcilably inconsistent with its assertion that the Letter relates only to the High Excess Policy), its claims handler admitted that Arch did not reserve any rights with respect to the lower level Arch Policy at issue. JA5960 at 87:9-19.

Once closed, Arch did not re-open any *Rink* file or assign anyone to handle the *Rink* claim, even after TIAA-CREF advised Insurers of such "watershed" developments as class plaintiffs' [redacted] settlement demand, the court's grant of class certification and upcoming mediation, and class plaintiffs' claim that they would be seeking [redacted] in damages at trial. Any one of those events would have impacted both of Arch's layers. *See* JA1346-99; JA2932; JA5922 at 49:10-19; JA5925-26 at 52:2-53:18; JA5962-63 at 89:9-90:13; JA5967-81 at 94:5-108:21; JA5772-77 at 41:11-58:2. Neither did Arch ever seek further information, or seek to participate in the mediation or defense of the claim in the face of those demands. *Id.* Finally, Arch received, but did not substantively respond to, a 2012 memorandum from defense counsel fully analyzing the *Rink* claims and likelihood

[redacted]

of trial success just prior to its settlement. JA2919-39; JA5776-77 at 55:13-58:2; JA5925-26 at 52:2-53:18; JA5978-81 at 105:2-108:21.

In May 2012, after receiving no input from Arch, and still believing – correctly – that Arch had closed its file, CREF entered into a class action settlement agreement of the *Rink* Action (the "*Rink* Settlement"). JA0599-665. On June 7, 2012, TIAA-CREF sent the *Rink* Settlement agreement to Insurers, including Arch (JA1400-69), along with a memorandum describing the reasons for settling, including the court's "strong bias for plaintiff's counsel," the overbroad and prejudicial class notice it ordered, and the comparatively low cost of settlement. JA1465.

At the time, TIAA-CREF calculated that the total defense costs, settlements, and other fees for *Rink* would likely total just over [redacted] – well below Arch's [redacted] attachment point. *Id.*; *see also* JA1402 (TIAA-CREF advised that, even if 100% of class members made claims, maximum total settlement amount expected to be paid would be [redacted] Accordingly, TIAA-CREF's risk manager sought – and received – consent to settle the *Rink* Action only from Illinois National. JA5777 at 58:6-60:21; JA1732 at 74:18-77:16. Ultimately, CREF paid [redacted] in connection with *Rink*, including [redacted] in settlement, [redacted] in defense costs, and [redacted] in class counsel and

[redacted]

other costs. TA0742-45. Even that higher-than-expected amount, however, was almost [redacted] below Arch's attachment point.

Arch's claims handler, who admitted that he always followed the coverage position of the primary carrier,[4] never objected to the *Rink* settlement or complained of any supposed failure to seek Arch's consent prior to entering into it, but merely placed it in his file. JA5991-92 at 118:4-119:12; JA5778 at 62:9-65:13; JA5943 at 70:11-13. He testified that, when Arch received the *Rink* Settlement, it was "well below our attachment" and "[w]e assumed we were getting this for notice purposes only." TA835-36 at 135:18-136:17. Arch did not inquire about or attend the September 2012 preliminary approval hearing, or assert any objections in connection therewith. JA5778 at 62:9-65:13. Indeed, to this day, Arch *has never claimed that the Rink Settlement was in any way unreasonable.*

In January 2013, Illinois National denied coverage for the *Rink* Action, contending that the settlement payments constituted uninsurable disgorgement. TA0758-67. Arch did not respond at that time, but, as discussed below, on June 7, 2013, adopted Illinois National's denial of *both* the *Rink* and *Bauer-Ramazani* claims, on the same grounds. TA0779; TA0764 n.1. Arch did not assert any lack

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[4] JA6020 at 147:5-9; JA5984-85 at 111:12-112:3; JA5999 at 126:7-21; JA6020 at 147:5-9; TA0831 at 51:8-15.

[redacted]

of consent defense until it filed its Answer to TIAA-CREF's Amended Complaint in April 2015. JA4730-4772.

2. The *Bauer-Ramazani* Settlement

On January 3, 2010, TIAA-CREF gave notice of the *Bauer-Ramazani* Action to the 2009-10 Insurers, including Arch, and sought consent to its choice of counsel. JA1507-48. Arch did not object or respond to that request. JA6000 at 127:19-23; JA5783-84 at 84:6-86:5. Rather, Arch's claims witness, Mr. Salzman, admitted at trial that, in these circumstances, Arch will "rely on the primary to consent or not" (JA5999 at 126:7-21), and that "even though the policy provision said that you had to get consent" to defense counsel, in this case, "it didn't matter." JA6001 at 128:1-8. Neither did Arch respond to subsequent updates sent by TIAA-CREF regarding class certification and other "significant developments." JA1579-1674; JA5784-85 at 87:20-92:17; JA6005-08 at 132:3-135:18 (Arch claims handler regularly checked litigation docket).

On April 23, 2013, Illinois National denied coverage for the *Bauer-Ramazani* Action, raising the same disgorgement defense asserted in *Rink*. TA0763-67. Illinois National further asserted that "many of the issues in this letter are also applicable to the Rink lawsuit," and reserved the right to contend that

[redacted]

both Underlying Actions "constitute one Claim" under the 2007-08 Primary Policy. TA0764 n.1.

One month later, on May 31, 2013, TIAA-CREF explicitly asked for "settlement authority" from the 2009-10 Insurers, including Arch, in advance of an upcoming June 12, 2013 mediation. TA0773. Rather than providing or denying consent to settlement in any amount, Arch simply denied coverage one week later, expressly adopting Illinois National's coverage denial for both the *Rink* and *Bauer-Ramazani* Actions (the "Denial Letter"). TA0779 ("adopt[ing] the coverage issued on behalf of [Illinois National] . . . within the April 23, 2013 letter"); TA0764 n.1; JA6031-42 at 158:20-169:16; JA5785 at 92:6-17. TIAA-CREF's risk manager understood from that letter "what they were telling me was [Arch] is not paying my claim." JA5787 at 99:5-10.

On January 31, 2014, TIAA-CREF entered into a class action settlement agreement in the *Bauer-Ramazani* Action, pursuant to which TIAA-CREF paid [redacted] in settlement and [redacted] for class counsel fees (the "*Bauer-Ramazani* Settlement;" with the *Rink* Settlement, the "Settlements"). JA0673-701 at ¶¶ 4, 30; TA0709. On February 25, 2014, TIAA-CREF advised the 2009-10 Insurers, including Arch, that the total loss related to the *Bauer-Ramazani* Action,

[redacted]

including [redacted] in TIAA-CREF's own defense costs, was expected to be (and ultimately was) just over [redacted] JA1707-15; TA0742-57.

Arch did not – and has not to this day – objected to the reasonableness of the *Bauer-Ramazani* Settlement, nor did it attend or participate in the court's subsequent fairness hearing, but again merely placed the notice in its file. JA6009-11 at 136:11-138:8; JA5788-89 at 105:5-106:11. As with *Rink*, Arch did not raise a consent defense until filing its Answer to TIAA-CREF's Amended Complaint almost a year later, in April 2015. JA4730-4772.

C. The Court and Jury Reject Arch's Lack of Consent Arguments

1. Denial of Arch's Summary Judgment Motion

In an October 20, 2016 summary judgment opinion (the "SJ Decision"), the Superior Court ruled that the *Bauer-Ramazani* Action was related to the *Rink* Action and that both cases thus fell within the coverage of the 2007-08 tower, with the effect that the Arch 2007-08 layer would be reached. JA5225-32.

The Court also denied both TIAA-CREF's and Arch's cross-motions for summary judgment on Arch's consent defense, holding that they raised factual issues for the jury. JA5236-38. The Court thereafter denied Arch's motion for re-argument, as Arch incorrectly contended that the SJ Decision indicated only one limited fact was in dispute. TA0710-14. The Court later clarified:

[redacted]

> I don't agree that by denying plaintiffs' motion I effectively rejected [TIAA-CREF's] argument that Arch possibly unreasonably withheld consent, that was not the Court's intent. And I don't think that's a fair reading of the opinion. . . . And I, in hindsight, . . . I should have been more precise and should have said 'for example,' and lesson learned.

JA5264 at 27:9-28:6.

2. Denial of Arch's Pre-Trial Motions and the Jury Verdict

Prior to trial, Arch moved *in limine* to exclude from trial both the File Closure Letter (as it referenced only the High Excess Policy) and the undisputed fact that Arch actually closed both of its *Rink* files (of which TIAA-CREF was supposedly unaware). AA000001-7; AA000014-20. On November 18, 2016, the Court denied Arch's motions, noting not only that Arch had fundamentally misread its SJ Decision in claiming that only one fact was in dispute, but also that the Court "disagree[d]" that the file closure evidence was "irrelevant or unfairly prejudicial." JA5305; JA5283 at 4:13-19; JA5264 at 27:9-28:6.

Trial commenced on December 5, 2016,[5] on the reasonableness of TIAA-CREF's defense costs, Zurich's consent and notice defenses, and Arch's consent defense. JA6515-20. At the charging conference on December 8, 2016, the Court rejected Arch's proposed jury instructions regarding consent and waiver

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[5] Just prior to trial, St. Paul Mercury agreed to settle TIAA-CREF's claims for [redacted] of its 2007-08 policy limits [redacted] JA6678.

[redacted]

(AA000260-71, 278-80) on the ground that they improperly sought to instruct the jury on the facts rather than the law. JA6116 (jury instruction "not the place" to "get into the particular facts. I need statements of law."). After incorporating language suggestions requested by Arch to alleviate concerns about post-settlement conduct impacting a finding of futility (JA6102-03; JA6124; JA6128-29), the Court concluded that a futility instruction was proper and that there was enough evidence in the record to support a finding for TIAA-CREF on that count. JA6115. While the Court applied a preponderance of the evidence standard to futility, the Court gave what it termed a "gift" to Arch of "erring on the side of putting plaintiffs to a higher burden" with a clear and convincing standard applied to waiver, despite doubting that standard was proper. JA6118; *see also* JA6330-32.

On December 12, 2016, the jury found for TIAA-CREF on all issues relating to Arch. In particular, it found that TIAA-CREF had shown by a preponderance of the evidence that it would have been futile to seek Arch's consent to the Settlements, and by clear and convincing evidence that Arch waived its right of prior consent to those Settlements. JA6518-20.

3. Denial of Arch's JMOL and Entry of Judgment

On June 29, 2017, the Court denied Arch's renewed motion for JMOL or a new trial ("Arch's JMOL"). JA6642-50; *see also* JA5878-5905 (reserving decision on first JMOL during trial). After noting that the jury was "very attentive and engaged," the Court properly held that Arch's "boilerplate general reservation of rights" does not "preclude the jury from considering Arch's other actions or inactions in determining whether it would have been futile for TIAA-CREF to seek Arch's consent or whether Arch waived its rights, notwithstanding its purported reservation." JA6642; JA6648.

The Court also rejected Arch's other claims of error, holding that: 1) the File Closure Letter was not prejudicial, as Arch's own witness testified that it only applied to the High Excess Policy; 2) Arch's file closure "is relevant in itself" as it "sheds light on Arch's subsequent inactions," including Arch's silence in response to case updates and the Settlements; 3) the jury was not confused or misled by other insurers' testimony, as it was reminded "at every stage of the trial" of their distinction and policy differences; 4) futility is a legally recognized counter to Arch's consent defense; and 5) even if clear and convincing evidence were the proper standard for futility, any error was harmless, as the jury found that Arch waived its consent rights under that higher standard. JA6649-50.

[redacted]

On October 23, 2017, the Court issued a final judgment and decision declaring, in relevant part, that Arch was obligated to indemnify TIAA-CREF for its Losses and that Arch was entitled to a [redacted] reduction in its limits of liability pursuant to the shavings provision. JA6651-6682. The Court rejected Arch's attempt to obtain a further windfall reduction: "The fact that TIAA-CREF may have also settled any claim for prejudgment interest against St. Paul does not change the fact that St. Paul Mercury paid [redacted] of its limits of liability." JA6678.

[redacted]

ARGUMENT

I. THE CONSENT ISSUE WAS PROPERLY SUBMITTED TO THE JURY AND THE VERDICT WAS PROPERLY UPHELD

A. Counterstatement of the Question Presented (Points I-IV)[6]

1. Did the Superior Court correctly recognize that questions of fact precluded resolving the consent issue in Arch's favor as a matter of law? (Points I-IV). JA5236-38; JA0286-319; JA3236-77; JA4799-4824.

2. Could a reasonable jury conclude based on the totality of the evidence at trial that Arch, by its words and actions, waived or excused any right to demand that TIAA-CREF seek its prior consent to the Settlements? (Points I-IV). JA6515-6520; JA6642-6650; AA000394-419; AA000148-55; AA000319-24.

3. Did the Superior Court abuse its discretion in refusing to overturn the jury's verdict or grant a new trial? (Points I-IV). JA6642-6650; AA000394-419.

B. Standard and Scope of Review

Delaware gives enormous deference to jury verdicts, which will not be disturbed unless "the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result." *Storey v. Camper*, 401

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[6] To avoid unnecessary duplication, TIAA-CREF has consolidated its response to certain sections from Arch's brief covering similar issues, and included separate subsections herein clearly indicating and corresponding to each of Arch's points.

[redacted]

A.2d 458, 465 (Del. 1979); *In re Viking Pump, Inc.,* 148 A.3d 633, 656 (Del. 2016). Moreover, a jury verdict may not be overturned in favor of a new trial unless it is "against the great weight of the evidence." *Id.* at 465. A refusal to order a new trial is reviewed under an abuse of discretion standard. *Young v. Frase*, 702 A.2d 1234, 1236 (Del. Super. Ct. 1997).

This Court reviews *de novo* a court's decision to grant or deny judgment as a matter of law. *Kardos v. Harrison*, 980 A.2d 1014, 1016 (Del. 2009). Such judgment may be granted only where, viewing the evidence in favor of the non-moving party, "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Morgan v. Scott*, 2014 WL 4698487, at *3 (Del. Sept. 22, 2014). Although the Court generally reviews *de novo* the Superior Court's decision on summary judgment, a trial court's denial of summary judgment is given a high level of deference and is rarely disturbed. *Reserves Mgmt. Corp. v. R.T. Props., LLC*, 80 A.3d 952, 955 (Del. 2013); *Brunswick Corp. v. Bowl-Mor Co., Inc.,* 297 A.2d 67, 69 (Del. 1972).

[redacted]

C. Merits of the Argument

1. Arch Impermissibly Fragments the Evidence Presented to the Jury

Point I of Arch's argument sets forth legal authority for a point that no one disputes: that TIAA-CREF bore the burden of proving that Arch had waived or TIAA-CREF had been excused from seeking Arch's consent to the Settlements. Yet rather than offer some reason – as it cannot – why the full body of evidence at trial did not support the jury's conclusion that TIAA-CREF met that burden, Arch fragments its arguments, arguing that each point of evidence would be insufficient on its own to support a finding of waiver or futility. Such a fragmented analysis of the record is wholly inconsistent with this Court's holding in *Storey* that a jury verdict may not be set aside "unless, *on a review of all the evidence,* the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result." 401 A.2d at 465 (emphasis added).

The jury here did not rule on the import of isolated facts. Rather, it concluded, based on evidence that the *Rink* Settlement alone would not reach Arch's layer (Arch Point I), that Arch failed to demand a right of consent of any kind through years of communications regarding the claims (Arch Point II), and that Arch had closed its files and denied coverage (Arch Points III-IV), that Arch had waived and TIAA-CREF was excused from any obligation that it seek Arch's

[redacted]

consent prior to settling the Underlying Actions. That verdict was supported by the full body of evidence presented to the jury, in accord with the applicable law, and properly upheld by the Superior Court, and for that reason alone should be affirmed.

2. The Jury Was Entitled to Consider the Size of the *Rink* Settlement on the Question of Futility (Point I)

Arch's first fragmented assault on the sufficiency of the evidence is to claim that evidence of the amount of the *Rink* Settlement went neither to the question of waiver nor futility and could not support the jury's verdict as it was not reflected in a separate stand-alone jury interrogatory.[7] (Arch. Br. 25-26). Arch cites no authority for that proposition, noting only that "the Superior Court found Arch's consent provision to be unambiguous but said issues of fact existed as to whether the condition was satisfied." *Id.* at 26. It thus glosses over the fact that the Court itself recognized during the pre-trial conference that, among those "questions of fact" for the jury, was the precise issue of "whether the *Rink* Case alone might

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[7] This argument is meritless. The jury was not presented with interrogatories on *any* fact raised at trial, but only the ultimate conclusion that all facts supported. And, as plaintiffs' counsel made clear during trial, the size of the *Rink* settlement bore directly on the question of futility. JA6364-65 at 225:12-226:14.

[redacted]

result in payment pursuant to insurance coverage afforded under the Arch policy." JA5297.

As the Superior Court correctly instructed the jury, as a matter of law, TIAA-CREF is excused from seeking Arch's prior consent to a settlement where doing so would be "futile or pointless." JA6530-31. There can be no more "pointless" exercise than seeking consent to a settlement where none was required because the insurer's layer would not be reached. *See, e.g., Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265 at *12 (Del. Super. Ct. June 20, 2007) (consent to settle provision only required consent of "parties actually funding the settlement"). Accordingly, the jury was entitled to consider TIAA-CREF's contention that, in light of the amount of the *Rink* Settlement, seeking Arch's consent would have been pointless, excusing it from doing so. JA5988-90 at 115:2-117:22; JA6647.

3. The Jury Was Entitled to Consider Arch's Silence on the Issue of Waiver and Futility (Point II)

Arch's argument that TIAA-CREF could not have proven that Arch waived its consent "defense" as a matter of law by waiting until this action before raising it (Arch Br. at 28-32) conflates waiver of the procedural right to assert a coverage defense with substantive waiver of the right that would give rise to that coverage

[redacted]

defense in the first place. In its motion for summary judgment, TIAA-CREF argued that Arch waived its right to assert a consent "defense" because it had failed to timely notify TIAA-CREF that it would assert that defense, but that motion was denied. JA5237. However, that is not the "waiver" issue plaintiffs ultimately asked the jury to decide. Rather, the jury considered whether Arch's subsequent inaction – that it merely placed the documents in its file after learning that the Settlements were effectuated without its consent – supported the conclusion that Arch had voluntarily relinquished its right to "veto" any settlement by refusing to give its consent.[8] The jury and Court correctly held that it was. Any assertion that Arch cared about its consent rights was belied by its own conduct, making no effort to assert or enforce them.

That conclusion was in complete accord with New York law on *substantive* waiver by insurer inaction. *See Albert J. Schiff Assocs., Inc. v. Flack*, 417 N.E.2d 84, 87 (N.Y. 1980) (waiver exists if there is direct *or circumstantial proof* that insurer intended to abandon defense). As noted in Arch's own cases, waiver may

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[8] The verdict form asked whether Arch waived its policy's "consent ***condition***." (JA6518 (emphasis added); compare jury interrogatory asking whether Zurich "waived its notice ***defense***" JA6516 (emphasis added)). While jury instructions were originally proposed relating to the waiver of Arch's consent "defense," they were not submitted for decision. AA000275-80 (9A-B); JA6528-32.

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be found where the insurer possessed "sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense." *Gelfman v. Capitol Indem. Corp.*, 39 F. Supp. 3d 255, 269 (E.D.N.Y. 2014).[9]

Moreover, longstanding New York insurance law clearly provides that an insurer's silence can impact its consent to settle rights. As New York's highest court held more than forty years ago:

> "***Neglect and failure to act protectively*** when the insured is compelled to make settlement at his peril; ***and unreasonable delay by the insurer***, in dealing with a claim, may be one form of refusal to perform which could justify settlement by the insured."

Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co. of N.Y., 31 N.Y. 2d 342, 347 (N.Y. 1972) (emphasis added).

In contrast, the cases on which Arch relies (Arch Br. at 29) do not involve consent rights at all, much less create a conclusive rule that an insurer's silence or inaction are irrelevant to the highly factual inquiry of whether an insurer waived its

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[9] *See also Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *29 (Del. Ch. Apr. 2, 2007); *JPMorgan Chase & Co. v. Travelers Indem. Co.*, 2009 WL 137044, at *5 (N.Y. Sup. Ct. Jan. 12, 2009) ("*JPMC/Travelers*"), *aff'd*, 897 N.Y.S.2d 405 (N.Y. App. Div. 2010); *JP Morgan Chase & Co. v. Twin City Fire Ins. Co.*, 2009 WL 889957 (N.Y. Sup. Ct. Mar. 3, 2009) ("*JPMC/Twin City*").

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rights under any individual case.[10] Nor do Arch's cases stand for the global proposition that Arch had no obligation to speak or to assert its right to consent even if it did not intend to pay on that basis (Arch Br. at 30-31), as they involved entirely different and highly specific obligations with which the insurer was not required to comply.[11]

Similarly, Arch's reliance on cases addressing the import of insurer silence under New York Insurance Law Section 3420(d) or principles of equitable estoppel (Arch Br. at 30-31) is a red herring, as TIAA-CREF did not assert that either

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[10] *See, e.g.*, *Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemishce Industrie*, 784 F.3d 78, 95-96 (2d Cir. 2015) (non-insurance contract containing express no waiver provision); *Illinois Nat'l Ins. Co. v. Tudor Perini Corp.*, 2013 WL 443956, at *4 (S.D.N.Y. Feb. 5, 2013) ("no facts" indicated insurer intended to give up late notice defense), *aff'd,* 564 Fed. Appx. 618 (2d Cir. 2014); *Compis Servs. Inc. v. Hartford Steam Boiler Inspection and Ins. Co.*, 708 N.Y.S.2d 770, 772 (N.Y. App. Div. 2000) (no waiver of statutory limitations period based on all facts, including insured's written acknowledgment that both parties retained all rights); *Allen v. Dutchess Cty. Mut. Ins. Co.*, 88 N.Y.S. 530, 531-32 (N.Y. App. Div. 1904) (hundred year old case holding only that insurer may wait until insured files belated suit before asserting missed limitations period).

[11] *See, e.g.*, *City of Utica of N.Y. v. Genesee Mgmt., Inc.*, 934 F. Supp. 510, 523 (N.D.N.Y. 1996); *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 139 (N.Y. 1966) (insurer not required to communicate belief that insured's damages demand was fraudulent); *Travelers Indem. Co. of Am. v. S. Gastronom Corp.*, 2010 WL 1292289, at *3 (E.D.N.Y. Apr. 1, 2010) (insurer not required to issue reservation of rights letter prior to initial factual investigation), *aff'd*, 427 Fed. App'x 30 (2d Cir. 2011); *Compis*, 708 N.Y.S.2d at 772 (no duty to advise insured of policy terms).

concept applies. In fact, one of the cases on which Arch relies in that regard, *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 15 N.E.3d 1194 (N.Y. 2014) (Arch Br. at 30) *supports* the jury's consideration of Arch's inaction as a factor in the waiver determination. After holding that waiver could not be established as a matter of law in a non-Section 3420(d) case "simply as a result of the passage of time," the New York Court of Appeals remanded the case for a factual determination as to whether "triable issues of fact exist" showing that the insurers intended to abandon a late notice defense. *Id.* at 1198. On remand, New York's Appellate Division held that a reasonable jury could conclude on such facts that insurers were long aware of that defense yet "manifested an intent not to assert [it]." *Long Island Lighting Co. v. Am. Re-Insur. Co.*, 998 N.Y.S.2d 169, 171-72 (N.Y. App. Div. 2014). That is precisely the basis on which the Court admitted, and the jury properly considered, Arch's years of inaction in this case.

4. Arch's Decision to Close Its File Was Properly Considered By the Jury And Supports Its Verdict (Point III)

Arch's insistence that the File Closure Letter cannot support a finding of waiver or futility because it references only Arch's High Excess Policy (Arch Br. at 34) is the quintessential elevation of form over substance. By its own claims handler's admission, *Arch closed both Rink files at the time it sent that letter.*

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JA5957 at 83:8:13. And there is no requirement that indicia of waiver be communicated to the other party, as the waiver inquiry appropriately focuses on Arch's own conduct and state of mind. The question is not whether Arch *told* TIAA-CREF that it had taken that step, which conceivably might be relevant to the reliance required for an equitable estoppel claim, but whether Arch had actually done so, thus supporting a conclusion that it had waived any intent to demand a right of consent, and that such a request would have been futile.[12]

Contrary to Arch's suggestion (Arch Br. at 35), the holding in *General Star National Insurance Co. v. Universal Fabricators, Inc.*, 427 F. App'x 32, 34 (2d Cir. 2011) is directly applicable on this point, and cannot be distinguished on the ground that the letter sent by the excess carrier there stated that the primary carrier

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[12] For that reason, Arch's reliance on *Gelfman* (Arch Br. at 40) for the proposition that uncommunicated notes or internal documents cannot effect a waiver of rights is inapt, as the *Gelfman* court considered that question in connection with a claim of equitable estoppel, which requires reliance. 39 F. Supp. 3d at 271 (also finding that notes did not actually make representation plaintiffs claimed to have relied upon). Neither can Arch find support in *First National Bank v. Gridley*, 98 N.Y.S. 445, 450 (N.Y. App. Div. 1906), which dealt with the specific laws of negotiable instruments. And Arch's "justifiable reliance" cases (Arch Br. at 39, 63-64) involve elements of estoppel because they involve claims of estoppel. *See Fox-Knapp, Inc. v. Emp'rs Mut. Cas. Co.*, 725 F. Supp. 706, 711 (S.D.N.Y. 1989).

should proceed as it saw fit.[13] To the contrary, the Second Circuit found that the excess carrier had "anticipated that the underlying action would not implicate its coverage" and closed its file, thus "relinquish[ing] its ability to demand compliance with its policy provision requiring written consent to a compromise agreement." *Id.* The key for the court was not merely the information conveyed to the underlying insurer, but that the letter was evidence of the excess carrier's intentional relinquishment of a known right. The jury was fully entitled to conclude that the File Closure Letter, read in conjunction with the actual closure of the full *Rink* file under both 2007-08 Arch Policies, reflects the same intent.[14]

Moreover, Arch's contention that the boilerplate reservation of rights contained in the File Closure Letter preserved its right to demand consent is directly contradicted by the New York Appellate Division's holding less than one year ago in *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 58 N.Y.S.3d 38, 39

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[13] The cases Arch claims are "closer" to the facts at issue here than *General Star* do not involve any waiver of consent rights, *see ACHS Mgmt. v. Chartis Prop. Cas. Co.,* 2014 WL 534440, at *1-2 (N.Y. Sup. Ct. Feb. 10, 2014) (delay in providing disclaimer does not preclude right to rely on previously asserted policy exclusion), or do not involve a file closure letter like that here. *Preston v. N. Ins. Co.*, 231 N.Y.S.2d 93, 94-95 (N.Y. Sup. Ct. 1962) (insurer issued actual denial letter, which noted it was closing its file because of defense at issue).

[14] That TIAA-CREF's risk manager believed the Letter to reflect that Arch closed its entire *Rink* file also supports the jury's verdict. JA5772 at 38:1-39:11.

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(N.Y. App. Div. 2017) ("*JPMorgan/Vigilant*") that such language does not prevent a finding that the right to consent has been waived.[15] Other courts have also rejected insurers' after-the-fact attempts to rely on boilerplate reservation of rights language in an effort to preserve rights not specifically identified. *See also JPMC/ Travelers*, 2009 WL 137044, at *5 ("boilerplate reservation" failed to give indication that notice was deficient); *Viking Pump*, 2007 WL 1207107, at *28 ("[T]he law places an outer time limit on the effectiveness of a general reservation of rights. . . . [The insurer] must inform the insured as soon as practicable after it has ascertained facts upon which it bases its reservation.").[16]

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[15] Arch insists that the File Closure Letter relates solely to the High Excess Policy, which means, as its claims handler admitted, that the Letter does not reserve any right to demand consent under the lower-level Arch Policy at issue. *See* JA5956-60 at 83:19-87:19.

[16] Arch's reservation of rights cases (Arch Br. at 37-38) involve neither a waiver of consent to settle rights, nor any indication that a claim file was being closed; rather the insurer was still investigating. *See, e.g., Proc*, 217 N.E.2d at139-40 (***insured agreed in writing*** that settlement discussions would not constitute waiver); *Satyam Imports, Inc. v. Underwriters at Lloyd's Via Marsh, S.A.*, 2003 WL 22349668, at *4 (S.D.N.Y. Oct. 4, 2003) (letter reserving rights requested documents and interview for continuing investigation); *Globecon Grp., LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 169 (2d Cir. 2006) (earlier letter noted insurer investigating); *Gelfman*, 39 F. Supp. 3d at 269 (no waiver where insurer repeatedly reserved rights and asserted notice defense immediately after learning relevant facts); *Water Transport Co. v. Boston Towing & Transport Co., Inc.*, 1993 WL 625536, at *5-6 (S.D.N.Y. Apr. 7, 1993) (still investigating); *see also XL Specialty Ins. Co. v. Lakian*, 243 F. Supp. 3d 434, 442 (S.D.N.Y. 2017) (insurer letter reserving rights

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5. Arch's Coverage Denial Supports the Jury's Finding of Waiver and Futility (Point IV)

Arch's Denial Letter conclusively established that Arch waived its consent rights with respect to the *Bauer-Ramazani* Action, the only suit for which Arch is being asked to pay. Notably, Arch's brief makes not a single mention of black letter insurance law in both New York and Delaware providing that an insurer's denial of coverage for an underlying claim relieves the insured of any obligation to seek the insurer's consent to settle that claim. *See, e.g., JPMorgan/Vigilant*, 58 N.Y.S.3d at 38 (insurers' insistence that similar claims were uninsurable constituted denial of liability that justified settlement without consent); *Sun-Times*, 2007 WL 1811265 at *12 ("Because the [insurers] reserved their rights with respect to coverage and later denied coverage, they should not have 'veto power' over the settlement process.").[17] As the Delaware Superior Court held:

> [A] claimant should not be required to approach his insurer, hat in hand, and request consent to settle with another when he has already

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was not denial or coverage letter, but *preemptive* step to prevent insured from breaching consent provision by defaulting in underlying case).

[17] *See also Isadore Rosen*, 31 N.Y. 2d at 347; *AJ Contracting Co. v. Forest Datacom Servs., Inc.*, 767 N.Y.S.2d 411, 412 (N.Y. App. Div. 2003); *Rajchandra Corp. v. Title Guar. Co.*, 163 A.D.2d 765, 769 (N.Y. App. Div. 1990); *Texaco A/S (Den.) v. Commercial Ins. Co. of Newark NJ*, 160 F.3d 124, 128 (2d Cir. 1998); *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 (S.D.N.Y. 1986).

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> been told, in essence, that the insurer is not concerned, and he is to go his way. It is difficult to see why an insurer should be allowed, on the one hand, to deny liability and thus, in the eyes of the insured, breach his contract and, at the same time, on the other hand, be allowed to insist that the insured honor all his contractual commitments.

Shook v. Hertz Corp., 349 A.2d 874, 877 (Del. Super. Ct. 1975) (citation omitted).

The evidence submitted to the jury was in accord with these standards. The jury was entitled to consider the circumstance and nature of Arch's conduct in considering waiver and futility, including that its denial was sent directly in response to TIAA-CREF's request for authority to settle in advance of a *Bauer-Ramazani* mediation (TA0773; TA0779); and that Arch's corporate representative for these claims admitted that Arch does not always require consent, even with the same policy language they are relying on now. JA5999-6000 at 126:7-128:8.

Nor can Arch avoid the jury's verdict by arguing that its Denial Letter only denied coverage under the 2009-10 policy. (Arch Br. at 43). The jury was completely justified in rejecting Arch's unsupported assertion that it would not have denied coverage for the *Bauer-Ramazani* Action on grounds of disgorgement, based on identical policy language in the 2007-08 and 2009-10 Policies. Indeed, after the *Bauer-Ramazani* Action was deemed to fall under the 2007-08 Policy, Arch *did* continue to assert the same substantive grounds for denying coverage of the Underlying Actions. Moreover, the Denial Letter specifically notes that the

grounds for denying the claim are "also applicable to the Rink Lawsuit," which had been brought solely under the 2007-08 policy. TA0779; TA0764 n.1.

Further, the generic reservation of rights in the Denial Letter does not support a verdict for Arch on the consent defense as a matter of law. (Arch Br. at 44). Indeed, the most recent and directly applicable authority holds that a general reservation of rights will not preserve or resurrect consent rights where other conduct – including unreasonable delay in handling claims and insistence that similar claims were not covered – indicated an intent to forego reliance on policy conditions. *See JPMorgan/ Vigilant*, 58 N.Y.S.3d at 38; *see also JPMC/ Travelers*, 2009 WL 137044, at *5; *Viking Pump*, 2007 WL 1207107, at *28-29; *DeSantis Bros. v. Allstate Ins. Co.,* 664 N.Y.S.2d 7, 8 (N.Y. App. Div. 1997).[18]

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[18] Arch's cases (Arch Br. at 48-50) regarding unasserted defenses do not deal with consent rights, nor hold that a reservation of rights alone will irrevocably preserve any defense as a matter of law. Rather, the insurers there either *did* previously raise the defense claimed to be unasserted, *see, e.g., Home Décor Furniture and Lighting, Inc. v. United Nat'l Grp.*, 2006 WL 3694554, at *7 (E.D.N.Y. Dec. 14, 2006) (insurer clarified three months after initial letter raising late notice that it intended to assert late notice of occurrence defense); *Heiser v. Union Cent. Life Ins. Co.*, 1995 WL 355612, at *4 (N.D.N.Y. June 12, 1995) (insurer claimed letter had asserted income misrepresentation defense); *Constitution Reins. Corp. v. Stonewall Ins. Co.*, 980 F. Supp. 124,131 (S.D.N.Y. 1997) (previous letters referenced late notice), or the insurer was still investigating, *see, e.g., Tudor Ins. Co. v. First Advantage Litig.*, 2012 WL 3834721, at *11 (S.D.N.Y. Aug. 21, 2012).

Here, the jury reasonably concluded that the Denial Letter's boilerplate reservation of rights could not overcome the factual record supporting waiver and futility.[19]

Finally, Arch cannot be allowed to divert attention from the ample evidence supporting the jury's verdict by "refuting" arguments never raised at trial that played no role in that verdict. In particular, TIAA-CREF did not ask the jury to specifically determine whether TIAA-CREF was entitled to an automatic finding of waiver (under Section 3420 or otherwise) because Arch had unduly delayed asserting its lack of consent defense or raised other specific defenses to coverage. Arch Br. at 45-46. Rather, TIAA-CREF argued to the jury that, once Arch was informed of (either) settlement and knew it had not given consent, its failure to object, to update its Denial Letter, or to raise the consent defense, and to simply place the settlement documents in its file, combined with all other facts presented at trial, demonstrated that it had decided to forego its right to consent to

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[19] *City of Utica* (Arch Br. at 45) is not to the contrary, as the insurer there *only* reserved its rights, and did not disclaim coverage, while it sought information to determine its coverage obligations. 934 F. Supp. at 521-22. Arch's other cases (Arch Br. at 45 n.118) address the difference between an initial "reservation of rights letter," where an insurer reserves its rights to later disclaim coverage, and an actual disclaimer, a difference relevant to an insurer's obligation to timely disclaim under Section 3420(d), not applicable here. *See Cent. Mut. Ins. Co., Inc. v. Willig*, 29 F. Supp. 3d 112, 117-18 (N.D.N.Y. 2014); *Tudor Ins. Co. v. McKenna Assocs.*, 2005 WL 1138386, at *5 (S.D.N.Y. May 11, 2005) (unlike here, reservation of rights letter "does not purport to exercise right to disclaim coverage").

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Settlements it *never* suggested were unreasonable.[20] Because the factual record fully supports such a verdict,[21] Arch's appeal therefrom should be rejected in all respects.

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[20] Contrary to Arch's suggestion, even outside the context of Section 3420(d), there is authority holding that after an insurer has gained actual or constructive knowledge of the circumstances supporting a particular defense, even a condition precedent, it has to raise it on a timely basis or the defense is waived, especially if it has raised other defenses. *See JPMC/Travelers*, 2009 WL 137044, at *5 (professional liability claim); *Benjamin Shapiro Realty Co. v. Agr. Ins. Co.*, 731 N.Y.S.2d 453, 454 (N.Y. App. Div. 2001) (property damage claim); *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628443, at *3 (Del. Super. Ct. Apr. 20, 1995) (environmental remediation); *In re Balfour Maclaine Int'l Ltd.*, 873 F. Supp. 862, 871 (S.D.N.Y. 1995) (coffee loss under cargo insurance policy).

[21] Doing a factual inquiry is exactly what the Court of Appeals suggested in *Estee Lauder Inc. v. OneBeacon Insurance Group, LLC*, 63 N.E.3d 66 (N.Y. 2016), cited by Arch. (Arch Br. at 47-48). In fact, the court held that the insurer did not waive defenses not asserted in its disclaimer letter as a matter of law because it had raised those very same defenses in earlier communications with its insured.

II. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY ON THE LEGAL STANDARDS FOR WAIVER AND FUTILITY

A. Counterstatement of Question Presented (Points V-VI)

1. Did the Court properly instruct the jury as to the legal elements of waiver? (Point V). JA6530-32; *See* JA6102-29 (no waiver instruction objections).

2. Did the Court correctly instruct the jury that TIAA-CREF was excused from seeking consent if the jury found such a request would have been pointless or futile, and that TIAA-CREF bore the burden of proving that excuse by a preponderance of the evidence? (Point VI). If not, was the erroneous instruction harmless in light of the jury's verdict regarding waiver? JA6530-32; JA6518; AA000319-24; AA000394-419; JA6642-50.

B. Standard and Scope of Review

The Court reviews *de novo* a trial court's refusal to give a requested jury instruction, *Chrysler Corp. v. Chaplake Holdings, Ltd.,* 822 A.2d 1024, 1034 (Del. 2003), and the appropriate burden of proof. *Lynch v. The City of Rehoboth Beach,* 894 A.2d 407 (Del. 2006).

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C. Merits of the Argument

1. The Court Properly Instructed the Jury on Waiver

The Superior Court instructed the jury with respect to waiver as follows:

> Waiver is the voluntary relinquishment of a legal right. A waiver may be expressly made or implied from conduct or other evidence. The party alleged to have waived a right must have known about the right and intended to give it up.
>
> If you find that TIAA-CREF proved by clear and convincing evidence that Arch's conduct demonstrates an intent to voluntarily relinquish its rights under the consent provisions in the insurance policies, you should find that it waived its right to consent to TIAA-CREF's settlements in *Rink* and *Bauer-Ramazani*.

JA6531-32. This instruction was consistent with the definition of waiver, which may be express or implied. *See Schiff*, 417 N.E.2d at 87. It also applies the more stringent burden of proof by clear and convincing evidence, over TIAA-CREF's objection. JA6118.

After its proposed instruction (AA000345-47) was rejected by the Court in favor of the Court's proposal (JA6097-98), Arch never specifically requested that any aspect of its prior proposal be included in the newly-formed instruction (JA6097-29). Therefore, that part of its appeal that argues error in the failure to include excerpts from the original instruction (Arch Br. at 52-53) was not

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preserved.[22] Arch's current challenge to that instruction also fails because it requests not to instruct the jury on the law, but to invade the jury's province of weighing the evidence. *See* JA6116. Arch asserts that the Court committed reversible error because its instruction gave the jury "approval" or "unconditional authority" to consider such evidence as Arch's failure to assert a right of consent and its denial of coverage. Arch Br. 53-54. But the jury was entitled to consider both of those factors in connection with both the waiver and futility arguments. Thus, Arch's assertion that the waiver instruction constituted reversible error should be denied.

2. The Court Properly Instructed the Jury on Futility

Arch essentially argues that there is no such thing as a separate futility defense apart from waiver. Arch Br. at 55-57. That is wrong as a matter of Delaware and New York law. In *JPMorgan/Vigilant*, for example, the lower court held that"***[a]s with the consent to settle requirement***, an insurer also releases its insured from the duty to cooperate by denying coverage ***or taking measures that render cooperation futile***." 39 N.Y.S.3d 864, 870 (N.Y. Sup. Ct. 2016), *aff'd*, 58 N.Y.S.3d 38 (emphasis added) (where insurers' statements and conduct left "no

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[22] *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995); *Steiner v. Killeen*, 1999 WL 1223780, at *3 (Del. Super. Ct. Nov. 3, 1999).

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doubt they were disclaiming coverage," policyholders did not breach consent or cooperation provisions); *see also Isadore Rosen*, 31 N.Y.2d at 347 (unreasonable delay in taking action on claim is functional equivalent of denial and excuses compliance with consent provision).

This reasoning is consistent with the fundamental principle of New York contract law that "'[o]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.'" *J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 790 N.Y.S.2d 197, 199 (N.Y. App. Div. 2005) (citation omitted); *Arrowhead Capital Fin., Ltd. v. Seven Arts Pictures, PLC*, 957 N.Y.S. 2d 263, 263 (N.Y. Sup. Ct. 2012), *aff'd,* 972 N.Y.S.2d 899 (N.Y. App. Div. 2013).[23] None of these cases finds that futility is a mere adjunct of a waiver defense. Arch Br. at 56.

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[23] *See also Shook*, 349 A.2d at 877 ("The futility of requiring plaintiffs to obtain consent to make settlement under the provisions of the policy, the coverage of which [insurer] denies, is obvious."); *Mine Safety Appl. Co. v. AIU Ins. Co.*, 2016 WL 498848, at *5 (Del. Super. Ct. Jan. 22, 2016) (request for consent futile if insurers would not have consented or "would have denied coverage" regardless of claim's merits); 13 Couch on Ins. § 192:113 (if the circumstances show notice "will have no effect, giving such notice is a futile act and failure to give notice is excused").

Neither can Arch avoid coverage – particularly for settlements whose reasonableness Arch does not dispute[24] – based on its argument that TIAA-CREF did not know that a consent request would have been futile at the time. Besides the fact that the evidence at trial was replete with "overt communications" prior to the Settlements of which TIAA-CREF was aware (Arch Br. at 56), and TIAA-CREF had contemporaneously discerned from what Arch said and did that it was not going to pay, nothing in the case law permits an insurer that has determined that it will deny coverage to avoid the consequences of that decision by concealing it.[25]

Finally, even if Arch were correct that futility can only be measured by what TIAA-CREF knew at the time, that still would not warrant reversal because the futility instruction included such a limitation: "A policyholder is not required to obtain an insurer's consent to a settlement if, ***at the time of that settlement***, the request for consent appeared to be futile, or pointless based on the insurer's conduct." JA6530 (emphasis added). The verdict form included the same temporal

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[24] Arch's policy bars it from withholding its consent "unreasonably." JA0513.

[25] In contrast, the cases cited by Arch for the imposition of a requirement of "reasonable reliance" to a futility defense involve instances in which the supposedly "repudiating" party actually intended to proceed with its obligations under the contract. *See* Arch Br. at 56. Arch cannot claim that it intended to pay for the Settlements except for the lack of consent, as it is still pressing other defenses to coverage (*i.e.* disgorgement) but did not raise lack of consent for years.

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requirement. JA6518. Arch is not entitled to challenge the sufficiency of that limitation by speculating that the jury may have ignored it, basing its verdict on "what we know now." (Arch Br. at 57).[26]

Finally, as the Superior Court held, even if the application of a preponderance of the evidence standard to the futility issue constituted error (which it did not), that error was harmless, in light of the jury's finding of waiver applying the higher standard of proof, contrary to TIAA-CREF's objections. JA6649-50.[27]

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[26] That is particularly true given the fact that Arch did not object to the introduction of evidence regarding post-settlement actions or statements. *See Med. Ctr. of Del.*, 661 A.2d at 1060.

[27] *See, e.g., Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 54 N.E. 23, 26 (N.Y. 1899); *Sillman v. Twentieth Century-Fox Film Corp.*, 144 N.E.2d 387, 393 (N.Y. 1957) (quoting *Gibson*) ("waiver must be established by the person claiming it by a preponderance of evidence").

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE RELEVANT TO CONSENT

A. Counterstatement of the Question Presented (Point VII)

1. Was Arch denied a fair trial by the introduction into evidence of the File Closure Letter, the admitted closure of all of its *Rink* files, and deposition testimony regarding consent requirements? JA6642-50; AA148-55; AA394-419.

B. Standard and Scope of Review

Evidentiary rulings are subject to a review for abuse of discretion and will not be reversed unless the error "constituted significant prejudice depriving the appellant of a fair trial." *Gillen v. Cont'l Power Corp.*, 105 A.3d 989, 2014 WL 7009942, at *5 (Del. 2014) (TABLE).

C. Merits of the Argument

Contrary to Arch's assertion, the File Closure Letter and its closure of all of its *Rink* files were neither irrelevant nor prejudicial, and the Superior Court did not err – much less deny Arch a fair trial – by admitting them into evidence. First, Arch's argument that the jury could consider only those facts known to TIAA-CREF at the time is wrong, as already set forth above. Arch Br. at 63-64. Nor, contrary to Arch's arguments, was there the slightest indication that the jury was or could have been "confused" about the statements contained in the File Closure Letter. To the contrary, the Letter was expressly described to the jury as

[redacted]

referencing only Arch's higher layer policy; TIAA-CREF properly used that very limitation to show the lack of any reservation of rights on the lower file. *See, e.g.*, JA5916-19 at 43:14-46:23; JA5957-60 at 84:2-87:19. As the Court noted, it was "keenly aware" and "vigilant" to ensure there was no jury confusion on this subject. JA6649.[28]

The Court also did not err in admitting testimony from the ACE and Zurich claims handlers regarding their view that, in the same circumstances, they had foregone their right to consent.[29] Indeed, that testimony merely reinforced that of Arch's own claims handler, who admitted that its consent provisions "do not always apply." JA5999-6000 at 126:7-128:8. Arch's assertion that the other insurers' consent provisions differed from that in the Arch policy also fails. First, the Zurich policy followed form to the language of the Arch Policy below it, and thus incorporated the Arch provision. JA0529 § I. Second, the ACE policy incorporated the primary policy consent provision, which was *more* expansive than Arch's in that it required consent to "any claim." JA0494; JA0363 § V.D.4.

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[28] Arch cannot complain about Mr. Cohen's testimony (Arch Br. at 62), as Arch chose not to object to the questions or cross-examine him on this point.

[29] Further, Arch waived any right to object to testimony from Zurich's claims handler (Mr. Mandarino) as it did not object to TIAA-CREF's designation of that testimony prior to trial or at any time until after trial. *See* TB0180-82.

[redacted]

Third, Arch had a full opportunity to explore these differences at the witnesses' depositions, and to present that evidence to the jury, but chose not to do so. In any event, as the Superior Court held, the jury was not confused or misled, but was reminded "at every stage of the trial" of the distinctions between insurers. JA6649. There is no basis on which that conclusion can be deemed to be an abuse of discretion.

IV. THE SUPERIOR COURT CORRECTLY APPLIED ARCH'S SHAVINGS PROVISION

A. Counterstatement of the Question Presented (Point VIII)

1. Was Arch entitled to a further reduction in its coverage obligation, contrary to the plain language of the shavings provision? (JA6678; TA0942-43.)

B. Standard and Scope of Review

The Court reviews policy language interpretation questions *de novo*. *Viking Pump*, 148 A.3d at 659-60.

C. Merits of the Argument

Arch's assertion that it is entitled to a reduction of [redacted] in its coverage obligations, rather than the [redacted] reduction granted by the Superior Court, is directly contrary to the policy's plain language. The shavings provision states that in the event TIAA-CREF accepts a discount on the "***Underlying Limit***. . . the unexhausted Limit of Liability under [Arch's] Policy shall be reduced by at least the largest percentage savings of the Underlying Insurance's ***Limit(s) of Liability***." JA0518 (emphasis added). Nothing in that language remotely supports Arch's position that any further principal reduction is warranted based on the possibility of extra-contractual damages. The Superior Court correctly held that the settlement with St. Paul Mercury resulted in St. Paul Mercury paying [redacted] less than its policy limits, entitling Arch to the same percentage discount. JA6678.

[redacted]

CONCLUSION

For the reasons set forth above, TIAA-CREF respectfully requests that this Court deny Arch's appeal in all respects.

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