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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TIAA-CREF INSURANCE APPEALS	)	
	)	No. 478, 2017
	)	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]

PUBLIC VERSION

DEFENDANT BELOW, APPELLANT ARCH INSURANCE COMPANY'S REPLY BRIEF REGARDING CONSENT TO SETTLE AND REDUCTION OF INSURANCE LIMITS

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I. Introduction.

Defendant below, Appellant Arch[1] submits this reply brief in support of its appeal regarding the consent to settle and reduction of insurance limits requirements. It is undisputed and stipulated that TIAA did not even seek, let alone obtain, Arch's consent before settling the *Rink* and *Bauer* actions. This omission breached the Arch Policy's consent provision, and there was no legally sufficient evidence to support TIAA's argument that it was excused from the consent requirement. There was no issue of material fact to prevent judgment for Arch as a matter of law, and a reasonable juror could not have found that TIAA satisfied its burden to prove consent was excused.

In its answering brief, TIAA cherry-picks facts out of context, mischaracterizes others, and ignores the most critical facts that warrant judgment for Arch. Additionally, TIAA fails to adequately confront the abundance of case law in Arch's opening brief and instead attempts to distinguish those cases by identifying immaterial differences without explaining how each difference was decisive or why it warrants a different outcome.

Meanwhile, there are several points that TIAA either admits or does not dispute, which focus the questions before this Court:

[1] Capitalized terms have the same meaning provided in Arch's opening brief.

[redacted]

- TIAA does not dispute that it ***stipulated*** to the fact that TIAA did not seek or obtain Arch's consent prior to settling *Rink* or *Bauer*.[2]
- TIAA ***admits*** it bore the burden of proving waiver of or excusal from the consent requirement.[3]
- TIAA does not dispute that consent is a condition precedent or that non-compliance (absent excusal) relieves Arch of any potential coverage.[4]
- TIAA does not dispute that it must demonstrate excusal from consent for both the *Rink* **and** *Bauer* settlements because, if TIAA breached its consent requirement for just one settlement, there would not be enough loss to reach Arch.[5]
- TIAA now actually ***admits it abandoned*** the argument that Arch waived its consent ***defense*** (as opposed to its consent ***right***).[6] Consequently, this Court need not consider evidence of anything that took place after *Rink* and *Bauer* were settled.

With respect to the issues remaining after these admissions and concessions, TIAA's grounds for excusal continue to suffer from the shortcomings discussed in

[2] AA000214-AA000216 ¶¶ 75, 86.

[3] TIAA's Answering Br. 22.

[4] *Id.*; Arch's Opening Br. 23.

[5] TIAA's Answering Br. 22; Arch's Opening Br. 25.

[6] TIAA's Answering Br. 25 & n.8.

[redacted]

Arch's opening brief. One of the most critical flaws is that TIAA continues to outright ignore Arch's explicit, written request to participate in settlement discussions for *Bauer*. This specific request for a seat at the table confirms Arch's intent to exercise its right to consent and cannot be reconciled with a finding that Arch clearly manifested an intent to waive consent or that a request for consent was futile.

Another crucial flaw is the misconception that an excess insurer's file closure implies waiver or supports repudiation of a policy, particularly where the file's closing was unknown to TIAA and Arch expressly reserved all its rights.

TIAA can only prevail if consent is excused for ***both*** *Rink* and *Bauer*, and the two charts below illustrate how TIAA's asserted excuses for each settlement are legally insufficient:

[redacted]

RINK	
Closure Letter • Excess insurer closing file does not waive or make consent futile. • Express reservation of rights. • Addressed different policy. **Size of *Rink* Settlement** • Question not submitted to jury. • "[A]lone or combined," language required consent to settle *Rink*. • No issue of fact that *Rink* alone or if combined with *Bauer* might reach Arch. ***Bauer* Letter** • TIAA abandoned waiver for consent *defense* (*Rink* settled before letter). • Not an actual disclaimer. • Reservation of rights. • Argument limited to §3420(d) cases. • Letter addressed coverage for different policies and not for *Rink*.	**Internal File Closure** • Excess insurer closing file does not waive or make consent futile. • Closure unknown to TIAA. • Reservation in acknowledgment letter. **Not Objecting to Settlement** • TIAA abandoned waiver for consent *defense*. • TIAA agreed to use best efforts to consummate final settlement. • Final approval not subject to Arch's consent. **Silence/ Inaction** • TIAA abandoned waiver for consent *defense*. • No waiver by silence without duty to speak.

BAUER	
***Bauer* Letter** • Not an actual disclaimer. • Requested to participate in settlement, confirming intent to exercise right to consent. • Contained reservation of rights. • Letter applied to different policies. **Silence/ Inaction** • TIAA abandoned waiver for consent *defense*. • No waiver by silence without duty to speak.	**Not Objecting to Settlement** • TIAA abandoned waiver argument for consent *defense* (including post-settlement conduct). • TIAA agreed to use best efforts to consummate final settlement. • Final approval not subject to Arch's consent.

[redacted]

TIAA's waiver and "futility" arguments should never have been presented to a jury and instead should have been found to be legally insufficient. As there was no issue of material fact or any legally sufficient evidence to support relieving TIAA from compliance with the Arch Policy's consent requirements, Arch was entitled to judgment as a matter of law.

II. Nothing Prevents Arch from Challenging the Legal Sufficiency of Each Piece of Evidence.

TIAA begins its answering brief with a baseless argument that Arch is somehow prohibited from picking apart TIAA's grounds for waiver and excusal. TIAA attempts to support this novel argument with a case that simply states the need to review "all the evidence" when deciding a motion for new trial on the basis of the verdict being "against the great weight of the evidence." *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979). While the jury verdict here ***was*** against the great weight of evidence, TIAA fails to recognize that Arch is appealing a number of decisions from the Superior Court in addition to the verdict, including the denial of Arch's summary judgment motion. Indeed, TIAA almost exclusively focuses on the jury without addressing the summary judgment motion and the absence of any issues of material fact, which should have prevented this case from being presented to a jury at all.

[redacted]

Nothing in *Storey* prevents Arch from explaining why the evidence is factually and legally insufficient. Arch's opening brief demonstrates that TIAA's waiver/futility arguments should have been dismissed by summary judgment and also demonstrates that the totality of TIAA's evidence adds up to nothing. There is no reason to view the totality of evidence as greater than the sum of its deficient parts, particularly where TIAA never demanded anything from Arch until filing this action. The sum of a thousand zeros is still zero. TIAA relied on evidence that was insufficient as a matter of law in order to build a house of cards for the jury. TIAA's argument would create an unworkable precedent and vitiate the summary judgment standard, resulting in unnecessary trials based on legally insufficient evidence.[7]

III. TIAA Failed to Satisfy Its Burden to Prove the Size of the *Rink* Settlement Excused Consent.

TIAA admits it bore the burden of proving that the quantum of the *Rink* settlement excused the consent requirement.[8] Therefore, TIAA effectively abandoned this argument by not even attempting to present this question to the

[7] Also, certain evidence TIAA presented at trial and now on appeal was not raised by TIAA when it opposed summary judgment, including TIAA purportedly seeking "settlement authority," Arch not objecting to court approval, and other insurers' deposition testimony. Such evidence, as well as trial testimony, should not be considered in reviewing the denial of Arch's summary judgment motion.

[8] TIAA's Answering Br. 22.

jury.[9] TIAA attempts to avoid this lapse by inappropriately incorporating the issue into the "futility" question.

While TIAA did argue the settlement size as a basis to find that consent was futile, this was only one of multiple reasons argued by TIAA to support futility.[10] Even if the settlement size could be ***one way*** to demonstrate that consent was futile, TIAA will readily agree that the settlement size was not a ***necessary element*** to establish futility. Given that the jury did not ***necessarily*** decide that consent was excused by the size of the *Rink* settlement, TIAA cannot now claim this specific issue was actually decided in its favor—particularly when TIAA had the burden of proof and did not include it among the special interrogatories or in the jury instructions.[11] *Cf. Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951) ("A general verdict…without special findings does not indicate which of the means charged…were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction…, such a verdict does not establish that defendants used all of the means charged or any particular one."); *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 49-50 (3d Cir. 1981) (no collateral estoppel unless issue was "necessarily decided").

[9] AA000310.

[10] Trial Tr. 220:14-228:6 (Closing Arguments) (Dec. 9, 2016), JA6359-JA6372.

[11] AA000310; JA6530-JA6532.

[redacted]

Moreover, the jury could not have appropriately considered the settlement size. The jury instructions expressly state that futility must be "based on the insurer's conduct."[12] The settlement's size is not in any way predicated on Arch's conduct. Even putting the instructions aside, all of TIAA's "futility" cases found futility based on the party's conduct, and no case remotely suggests that something other than the party's conduct could establish that consent was futile.[13]

Even if TIAA did prove the settlement's size excused consent (although it did not), Arch was in any event entitled to judgment as a matter of law on this issue. As discussed in Arch's summary judgment motion,[14] Arch's consent provision expressly applies "[w]ith respect to any Claim(s) that, ***alone or combined, might*** result in payment pursuant to the insurance coverage afforded under this Policy."[15] This requires Arch's consent to settle *Rink* if the *Rink* action "alone" or when "combined" with the *Bauer* action "might" reach Arch's [redacted] attachment point. This language is tailor-made for this very situation

[12] JA6530.

[13] *See* case law cited in TIAA's Answering Br. 39-40. TIAA's admitted efforts to lump the settlement size into the futility question further demonstrate the erroneous nature of TIAA's futility theory. Futility does not simply equate to "uselessness" but instead requires impossibility of performance or repudiation. *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 2015 N.Y. Misc. LEXIS 872, at *28 (N.Y. Sup Ct. Mar. 24, 2015).

[14] JA4987-JA4991.

[15] AA000310; JA6530-JA6532 (emphasis added).

[redacted]

and easily distinguishes the one case cited by TIAA. *Sun-Times Media Group, Inc. v. Royal Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *3-4, 12 (Del. Super. June 20, 2007) (concerning consent provision without "alone or combined" language). Unsurprisingly, TIAA no longer cites to *Stryker Corp. v. XL Insurance Co.*, 57 F. Supp. 3d 823 (W.D. Mich. 2014), even though TIAA heavily relied on this decision in opposing Arch's summary judgment motion.[16] Presumably, this is because the decision has since been reversed by the Sixth Circuit. *Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 842 F.3d 422 (6th Cir. 2016). In *Stryker*, the Sixth Circuit expressly rejected the insured's argument that it did not need to seek consent from an excess insurer for a settlement below the excess insurer's attachment point. *Id.* at 426-30 (also rejecting insured's attempt to excuse consent with waiver and futility arguments because insured "did not seek excess coverage until long after entering into its settlements, so it cannot be said that [the excess insurer] wrongly denied liability or refused to provide a defense at that time").

In addition, and contrary to the Superior Court's view,[17] there were no issues of fact as to whether *Rink* alone or when combined with *Bauer* "might" reach Arch. TIAA even admitted that *Rink* alone might even reach [redacted] (while

[16] JA3262, JA3264, JA3270.

[17] JA5295-JA5298 at 6:17-9:19.

[redacted]

arguing for the relevance of Arch's Closure Letter).[18] It is also readily apparent that *Rink* and *Bauer*, when combined, might reach Arch's layer. After all, TIAA is suing Arch precisely because the combined losses from *Rink* and *Bauer* exceeded Arch's attachment point. Without any disputed facts regarding the potential for *Rink* and *Bauer* to reach Arch, the consent provision's application to the *Rink* settlement was a legal question, and TIAA should never have been given an opportunity to ask the jury to interpret an unambiguous contract provision. *Dubay v. Trans-Am. Ins. Co.*, 429 N.Y.S.2d 449, 452 (App. Div. 1980) (issue of whether policy terms apply to facts not in dispute is "purely a question of law" and proper for summary judgment).

IV. Without an Established Duty to Speak, All Evidence of Arch's Silence Is Legally Insufficient.

As a threshold matter, all evidence of Arch's post-settlement silence/inaction has been rendered moot by TIAA's admission that it abandoned the argument that Arch waived its consent ***defense*** (as opposed to its consent ***right***).[19] The consent ***right*** refers to Arch's right to consent in advance of a settlement, whereas the consent ***defense*** refers to Arch's right to raise a defense to coverage after TIAA already settled without obtaining Arch's consent. By admittedly abandoning waiver for the consent ***defense***, TIAA can no longer be permitted to rely on any

[18] JA5271-JA5272 at 54:21-57:6.

[19] TIAA's Answering Br. 25 & n.8.

conduct by Arch that took place after TIAA already settled without consent. Post-settlement conduct could only impact Arch's ***defense*** after TIAA already settled without consent and cannot concern Arch's ***right*** to exercise the consent provision for a prospective settlement.

In any event, Arch stands on the summation of New York law in Point II of its opening brief, which establishes that silence or inaction cannot constitute waiver in the absence of a duty to speak.[20] TIAA superficially attempts to distinguish Arch's cases because they either do not concern a consent provision or each case contains a single factual difference.[21] However, TIAA does not even attempt to explain how these factual differences were material to the rationale in those cases or why such differences warrant a different outcome here. The materiality of those differences is certainly not self-evident, and each appears to be a distinction without a difference. Therefore, TIAA fails to adequately distinguish Arch's cases. *State v. Robinson,* 2006 Del. Super. LEXIS 175, at *12 (Del. Super. Ct. May 1, 2006); *E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515, 530 (3d Cir. 2006) ("[W]e will not reach out to distinguish the prior case on the basis of factual differences that were not 'material' to the earlier holding."), *vacated on other grounds*, 551 U.S. 1129 (2007).

[20] Arch's Opening Br. 27-32.

[21] TIAA's Answering Br. 26-27 & n.10-11.

Under these circumstances, TIAA cannot disregard over a century of New York jurisprudence on the limitations of waiver. TIAA even cites to a case from New York's highest court stating that waiver cannot be inferred from an insurer's silence or inaction.[22] *Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 54 N.E. 23, 26 (N.Y. 1899).

TIAA also cannot salvage its silence argument by relying on *Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co. of N.Y.*, 291 N.E.2d 380 (N.Y. 1972). *Isadore* involved an insurer's actual breach of a present duty to defend, and the insurer's inaction amounted to a failure to protect the insured from economic coercion. *Id.* at 382-83. A decade later in *Servidone Constr. Corp. v. Security Ins. Co.*, New York's highest court confirmed this limited application by explaining that, in *Isadore*, the insurer's inaction only raised a triable issue of waiver based on "economic coercion" if the insurer knew of the insured's strained financial circumstances. 477 N.E.2d 441, 444 (N.Y. 1985). *Servidone* then refused to follow *Isadore* because there was no evidence that the insurer's unjustified failure to defend the insured in any way coerced or contributed to the insured's decision to settle. *Id.* Therefore, this matter is worlds apart from the circumstances of *Isadore*. There is no evidence that TIAA had strained finances. Arch also never had a duty to defend TIAA, and as an excess insurer, Arch did not commit a breach

[22] TIAA's Answering Br. 42.

[redacted]

as it could never have an obligation to pay until the underlying insurance was exhausted. *See also Armstrong v. Agricultural Ins. Co.*, 29 N.E 991, 993 (N.Y. 1892) (when insured does not yet have right to demand payment, then insured also has no right to know whether insurer would pay upon contract's maturity).

TIAA also mischaracterizes Arch's discussion of New York Insurance Law § 3420(d) and equitable estoppel as a "red herring."[23] The discussion provides helpful context for the general rule that an insurer's silence cannot constitute waiver and then lays out the exceptions, which clearly do not apply here.[24] Although TIAA now concedes that Section 3420(d) cases are inapplicable,[25] TIAA has previously relied and continues to rely on cases applying the heightened statutory duty of Section 3420(d) to make meritless arguments.[26]

[23] TIAA's Answering Br. 27.

[24] Arch's Opening Br. 29-32.

[25] TIAA's Answering Br. 34-41.

[26] In its answering brief, TIAA attempts to circumvent Arch's reservation language by citing *DeSantis*, which expressly applied duties under Section 3420(d). *See* TIAA's Answering Br. 34 (citing *DeSantis Bros. v. Allstate Ins. Co.*, 664 N.Y.S.2d 7 (App. Div. 1997)). Furthermore, although TIAA now admits it bears the burden of proof, TIAA previously attempted to place this burden on Arch by citing cases subject to Section 3420(d)'s duties. *See* AA000275-AA000277 (citing *Tully Const. Co. v. TIG Ins. Co.*, 842 N.Y.S.2d 528 (App. Div. 2007)).

[redacted]

V. TIAA Cannot Avoid the Legal Insufficiency of the File Closure Evidence.

As discussed in Arch's opening brief, there are a host of reasons why Arch's file closures cannot waive consent or render the consent requirement futile.[27] Putting aside the undisputed fact that TIAA did not even know that Arch closed its file with respect to the Arch Policy actually at issue, the simple fact that Arch closed its file could never meet New York's standard for waiver (or futility/repudiation). Waiver must be "clear, unmistakable and without ambiguity," "cannot be created by oversight or negligence," and "should not be lightly presumed." *Travelers Indem. Co. v. Northrop Grumman Corp.*, 2013 U.S. Dist. LEXIS 161552, at *33 (S.D.N.Y. Oct. 31, 2013). When an excess insurer closes a file because it believes the loss is unlikely to reach its attachment point, there is no unambiguous or unmistakable evidence of intent to waive. Excess insurers routinely close files on this basis, and there are no realistic grounds to presume an excess insurer does so with the intent to waive all future rights in the event the potential loss is greater than originally anticipated.

Despite the obvious insufficiency of a file closure as the predicate for waiver or futility, any implication of waiver or futility is impossible in the face of Arch's

[27] Arch's Opening Br. 29-32.

[redacted]

express reservation of rights (in both the Closure Letter[28] and Arch's acknowledgment letter[29]).

TIAA attempts to overcome this by continuing to rely on the easily distinguishable case, *General Star National Insurance Co. v. Universal Fabricators, Inc.*, 427 F. App'x 32, 34 (2d Cir. 2011). TIAA would have this Court believe that, based on *General Star*, the sheer act of closing a file can create waiver or futility. However, when examining *General Star*, it is abundantly clear that the deciding factor in waiving consent was the excess insurer telling the primary insurer to "handle [the matter] as [it] s[aw] fit." *Id.* *General Star* makes it a point to quote this express instruction from the excess insurer. It was this ***express*** waiver that was determinative, not the extraneous detail that the excess insurer then closed it file.

Unsurprisingly, TIAA argues the opposite conclusion and downplays the import of the direct instruction to handle the matter as it saw fit. Yet, after deciding that consent was waived, the *General Star* decision goes on to reject the excess insurer's separate but related argument that the insured lacked authority to settle. Again, *General Star* rejects the excess insurer's defense precisely because it authorized the primary insurer to "handle things as it saw fit." *Id.* At 35. This

[28] JA1326-JA1329.

[29] JA2917-JA2918.

[redacted]

demonstrates that *General Star*'s rationale was based in express instructions and authority, not some presumption implied by closing a file.[30]

General Star is further distinguishable because it did not involve any reservation of rights whereas Arch's Closure Letter contained an express reservation,[31] thereby eviscerating any possible intent to waive. With an express reservation, this matter is more analogous to *ACHS Mgmt. v. Chartis Prop. Cas. Co.*, which also concerned an excess insurer's similar closure letter that (unlike *General Star*) did not instruct anyone to handle the matter without its input. 2014 N.Y. Misc. LEXIS 619, at *2 (N.Y. Sup. Feb. 10, 2014) (permitting insurer to raise coverage defense because of closure letter's reservation of rights). TIAA cannot dispense with *ACHS* just because it concerns a different coverage defense instead of consent.[32] The rationale regarding the effect of reservation language fits this situation equally well.

[30] A review of previous decisions in the same action that led up to the *General Star* decision sheds light on another distinguishing characteristic. The Second Circuit previously determined that the lack of the excess insurer's consent was already subject to waiver based on heightened statutory duties under Section 3420(d). *General Star Nat'l Ins. Co. v. Universal Fabricators, Inc.*, 585 F.3d 662, 674 (2d Cir. 2009). Notably, TIAA concedes that Section 3420(d) cases are inapplicable to its waiver arguments. TIAA's Answering Br. 27-28.

[31] JA1326-JA1329.

[32] TIAA's Answering Br. 30 n.13.

[redacted]

TIAA's other attempts to invalidate the Closure Letter's reservation language also have no merit. As discussed in Arch's opening brief, New York courts routinely reject waiver arguments ***as a matter of law*** in the face of such language.[33] While TIAA attempts to distinguish some of these cases,[34] it again only points to immaterial differences that certainly do not suggest an exception for closure letters. TIAA's own cases also do not support invalidation of the Closure Letter's general reservation language. First, the holding in *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 58 N.Y.S.3d 38, 39 (App. Div. 2017), cannot be applied to an ordinary and innocuous closure letter. *JPMorgan/Vigilant* disregarded reservation language precisely because the insurers there ***consistently denied coverage***, which was found to be a repudiation. *Id.* This rationale cannot be extended to the Closure Letter, which gave no indication that Arch would deny coverage in the event of a large enough loss to reach Arch's layer.[35]

[33] Arch's Opening Br. 37-38.

[34] TIAA's Answering Br. 31-32 n.16. For example, TIAA tries to distinguish *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 139-40 (N.Y. 1966), because the insured also agreed in writing that there was no waiver. However, nothing in *Proc* suggests this was the deciding factor or that the insurer's reservation language alone was insufficient. In any event, TIAA's own witness testified he understood the reservation to mean that Arch was not giving up any rights, which is just as conclusive as an insured's agreement in writing. Trial Tr., JA5807-JA5808, at 179:22-180:9 (Test. of Ira Cohen) (Dec. 6, 2016).

[35] JA1326-JA1329.

[redacted]

The rationale in *JPMorgan Chase & Co. v. Travelers Indem. Co.* also cannot apply to the Closure Letter. 2009 WL 137044, at *5 (N.Y. Sup. Ct. Jan. 12, 2009). TIAA argues the Closure Letter waived Arch's ***right*** to consent to a future settlement, while *JPMC/Travelers* concerns the preservation of a coverage ***defense*** that was already known to the insurer. *Id.* Arch cannot be expected to specifically identify every potential future right in its reservation language. *Cf. XL Specialty Ins. Co. v. Lakian*, 243 F. Supp. 3d 434, 442 (S.D.N.Y. 2017) ("Surely, [the insurer] needed not articulate every possible coverage defense in its…letter."). It is also clear that *JPMC/Travelers* involved a particular set of rules established for deficient notices requiring insurers to inform insureds when they consider a notice to be deficient so that the insured has an opportunity to cure the deficiency.

As for *Viking Pump Inc. v. Liberty Mut. Ins. Co.*, each New York case on which that decision relied to purportedly show that the reservation was ineffective concerned wrongful death or bodily injury that subjected the insurers to duties under Section 3420(d) to promptly disclaim with specificity.[36] 2007 WL 1207107, at *28-29 (Del. Ch. Apr. 2, 2007). *Viking Pump* also relied on a New York insurance regulation (*id.* at *28 n.124) even though New York courts have

[36] *N.Y. Funeral Chapels, Inc. v. Globe Indem. Co.*, 33 F. Supp. 2d 294, 300 (S.D.N.Y. 1999) (estoppel based on Section 3420(d)); *Haslauer v. N. Country Adirondack Coop. Ins. Co.*, 654 N.Y.S.2d 447 (App. Div. 1997) (insurance for wrongful death).

[redacted]

expressly refused to consider this regulation for purposes of waiver and estoppel. *Sirignano v. Chi. Ins. Co.*, 192 F. Supp. 2d 199, 207 (S.D.N.Y. 2002); *Blanar v. State Farm Ins. Cos.*, 824 N.Y.S.2d 702, 703 (App. Div. 2006).

Even if TIAA's file closure argument could overcome the foregoing obstacles, it is still subject to threshold defects—namely, that the Closure Letter addressed a different insurance policy than the one to which TIAA seeks to apply the waiver and that the file closure for the Arch Policy at issue was unknown to TIAA.[37] TIAA hastily responds to the different-policy issue in a manner tantamount to asking this Court to simply ignore the flaw (instead of ignoring the inapplicable Closure Letter).[38] TIAA's "form over substance" argument makes little sense in the face of the strict waiver standard requiring waiver to be unambiguous, unmistakable, and not lightly presumed. *Travelers Indem. Co.*, 2013 U.S. Dist. LEXIS 161552, at *33. A letter that addresses one policy cannot manifest an unambiguous and unmistakable intent to waive rights under an entirely different policy (certainly not without a heavy presumption).

In response to the file closure being unknown, TIAA argues that the waiver inquiry focuses on Arch's state of mind (conveniently without citing any case law

[37] Arch's Opening Br. 34, 39-40.

[38] TIAA's Answering Br. 28.

[redacted]

in support).[39] However, the standard for proving waiver is not proof of actual intent. Rather, the standard requires evidence demonstrating the insurer's "clear ***manifestation*** of intent." *Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512, 514 (N.Y. 1988) (emphasis added); *Estee Lauder Inc. v. OneBeacon Ins. Grp.*, 63 N.E.3d 66, 66 (N.Y. 2016). TIAA argues its knowledge is only relevant to the reliance required for equitable estoppel.[40] However, TIAA will readily admit that there is no ***express*** waiver by Arch, so TIAA must resort to evidence of waiver implied by conduct. Yet, TIAA fails to acknowledge that ***implied*** waiver requires some elements of estoppel—namely justifiable reliance. This has been the state of New York waiver law for over a century. *Armstrong v. Agricultural Ins. Co.*, 29 N.E. 991, 992-93 (N.Y. 1892) (elements of estoppel in implied waiver); *Allen v. Dutchess Cnty. Mut. Ins. Co.*, 95 A.D. 86, 87-89 (N.Y. App. Div. 1904) (same); *First Nat'l Bank v. Gridley*, 112 A.D. 398, 406-07 (N.Y. App. Div. 1906) (equivocal act not communicated to other party cannot imply waiver); *Redfield v. Critchley*, 252 A.D. 568, 572 (N.Y. App. Div. 1937) (elements of estoppel required to imply waiver by conduct); *Skylark Enters., Inc. v. Am. Cent. Ins. Co.*, 201 N.Y.S.2d 174, 175 (Sup. Ct. 1960) (waiver requires conduct by insurer that deceives insured to sleep on his rights "in the nature of an estoppel"); *Bank of N.Y.*

[39] TIAA's Answering Br. 29.

[40] TIAA's Answering Br. 29.

[redacted]

v. Murphy, 645 N.Y.S.2d 800, 802 (App. Div. 1996) ("justifiable reliance" is "necessary element" of ***both*** waiver and estoppel).

TIAA even cites to a case that requires some of the elements of estoppel when waiver is ***not expressed***. *Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 54 N.E. 23, 26 (N.Y. 1899). Since ***implied*** waiver also requires justifiable reliance, the *Gelfman* case is particularly applicable as it explains that evidence of an insurer's internal conduct is insufficient where the insured could not purport to have relied thereon. *Gelfman v. Capitol Indem. Corp.*, 39 F. Supp. 3d 255, 271 (E.D.N.Y. 2014).

Consequently, the file closing cannot be used to support waiver or futility, given the substance of the Closure Letter, Arch's reservation of rights, the letter's reference to a different policy, and the fact that the file's closing was unknown to TIAA. TIAA had the burden of proof on this issue, and the facts are not in dispute.

VI. The *Bauer* Letter Cannot Support Waiver or Futility, Particularly Because It Did Not Actually Disclaim Coverage and Specifically Confirmed Arch's Intent to Exercise Its Consent Right.

The *Bauer* Letter cannot reasonably support waiver or futility. According to TIAA, the *Bauer* Letter was a denial of coverage that relieved TIAA of the obligation to seek consent.[41] Even if this legal theory is valid, its application to the *Bauer* Letter is fundamentally flawed because the *Bauer* Letter does not ***actually***

[41] TIAA's Answering Br. 32-33.

[redacted]

disclaim coverage. This shortcoming in TIAA's theory was clearly spelled out in Arch's opening brief, explaining that the *Bauer* Letter, among other things, was expressly subject to change and specifically invited continued discourse with TIAA regarding the coverage issues.[42] However, TIAA did not respond to these points.

The *TLC* case, which expressly distinguishes some of TIAA's cases by name on this basis,[43] is particularly instructive on this point. *TLC Beatrice Int'l Holdings, Inc. v. CIGNA Ins. Co.*, 2000 U.S. Dist. LEXIS 2917, at *12-23 (S.D.N.Y. Mar. 16, 2000). In *TLC*, the Court rejected the very argument asserted by TIAA, stating that "even if as a general proposition an insurer's disclaimer of coverage may relieve an insured of its contractual obligation to seek the insurer's consent as a precondition to settling, in the present case the [insured] has not demonstrated that [the insurer] actually disclaimed coverage." *Id.* at *13. *TLC* then goes on to reject the insured's attempt to treat certain coverage letters as disclaimers of coverage because those letters (like the *Bauer* Letter) were

[42] Arch's Opening Br. 44-45 (citing *Bauer* Letter, JA4716-JA4719).

[43] Because the disclaimer was only preliminary, *TLC* expressly distinguished both *Texaco A/S (Denmark) v. Commercial Ins. Co.*, 160 F.3d 124, 128 (2d Cir. 1998) and *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1092 (2d Cir. 1986). *TLC* also expressly distinguished *Stephens v. State Farm Mut. Automobile Ins. Co.*, 508 F.2d 1363, 1366 (5th Cir. 1975), which was used to support another decision quoted by TIAA: *Shook v. Hertz Corp.*, 349 A.2d 874, 877 (Del. Super. 1975). In fact, TIAA's "hat in hand" block quote from *Shook* actually was quoted from *Stephens*.

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"preliminary" and "not final." *Id.* at *14. The Court explained that one letter "expressly invited [the insured] to provide legal or factual information that might reveal [the insurer]'s preliminary position to have been inaccurate, and added that [the insurer] would consider such information." *Id.* at *15. This is precisely the type of language included in the *Bauer* Letter.[44] Consequently, the *Bauer* Letter was not a disclaimer and could not excuse TIAA from seeking consent.

A similar result occurred in *City of Utica v. Genesee Management*, where the Court rejected an insured's attempt to use a so-called disclaimer letter to support waiver of a condition precedent. 934 F. Supp. 510, 521 (N.D.N.Y. 1996). The Court declined to construe the letter as a direct disclaimer of coverage because the letter (like the *Bauer* Letter) invited the insured to "explain why [it] believe[d] that this contract should respond to this situation" and asked the insured to forward "any other information [the insured] believed [the insurer] should consider." *Id.* Again, the *Bauer* Letter contained the same type of language.[45] Strangely enough, TIAA attempts to distinguish *City of Utica* by pointing out that the letter invited the insured to provide other information it wished the insured to consider and therefore was not a disclaimer.[46] But this is not a difference but rather a similarity

[44] JA4718.

[45] JA4718.

[46] TIAA's Answering Br. 35 n.19.

between *City of Utica* and the *Bauer* Letter, and it actually proves Arch's point: the *Bauer* Letter did not relieve TIAA of its consent obligation ***precisely because*** it included the same type of open-ended language, which prevents it from being construed as a disclaimer.[47]

TIAA also continues to ignore Arch's explicit, written request in the *Bauer* Letter to participate in settlement discussions for *Bauer*.[48] Throughout this action, TIAA has never disputed this fact and chose instead to flatly ignore it, even though the undisputed fact is fatal to its excusal argument. Arch again raised this issue on appeal in its opening brief,[49] but TIAA again does not even attempt to respond. This language from the *Bauer* Letter was a direct request for TIAA to comply with a very specific right—the same right that TIAA argues was waived or made futile by the *Bauer* Letter. Therefore, the *Bauer* Letter confirms Arch's intent to exercise its right to consent. This undisputed fact easily eliminates any notion (1) that Arch clearly manifested intent to waive its right to consent to the *Bauer* settlement, or (2) that it appeared futile to seek Arch's consent to settle *Bauer*. Findings of waiver or futility simply cannot be reconciled with the *Bauer* Letter's request to

[47] The conclusion that the *Bauer* Letter was not an actual disclaimer is bolstered by the fact that the letter expressly applied only to Arch's policies for the 2009-10 policy year, which are not at issue. *See* JA4717-JA4718.

[48] JA4719.

[49] Arch's Opening Br. 44-45.

[redacted]

participate, which was the last communication between Arch and TIAA before TIAA settled *Bauer*.[50]

Since the *Bauer* Letter did not actually disclaim coverage and because Arch explicitly sought to participate in settlement discussions, this matter is materially different from the all cases cited by TIAA to argue that disclaimer results in waiver or futility of consent. *JPMorgan/Vigilant*, 58 N.Y.S.3d at 39 (insurers "consistently" insisted there was no coverage with no mention of request to participate in settlement); *Texaco*, 160 F.3d at 129-30 (involving "unequivocal" and "blanket" denial of coverage; also distinguished in *TLC*); *Luria Bros.*, 780 F.2d at 1091-92 (insurers "disclaimed all liability"; distinguished in *TLC*)[51]; *Rajchandra Corp. v. Title Guar. Co.*, 558 N.Y.S.2d 1001 (App. Div. 1990) (not involving explicit request to participate but instead emphasized that insurer "w[as] content to remain on the sidelines"); *Shook*, 349 A.2d at 877 (focusing on

[50] TIAA also cannot credibly argue that the *Bauer* Letter was a response to TIAA's request for settlement authority. TIAA stipulated to the fact that TIAA did not seek Arch's consent before settling (AA000216 ¶86) and did not dispute this at the summary judgment stage. As discussed in Arch's answering brief to TIAA's own appeal, and contrary to TIAA's own stipulation, TIAA now mischaracterizes an e-mail update as a request for settlement authority (Arch's Answering Br. 8-9). In any event, the *Bauer* Letter expressed Arch's intent to participate in settlement discussions, and TIAA then negotiated and inked the settlement without any further communication with Arch.

[51] *Luria Bros.* actually concerns whether the settlement was covered and reasonable and does not appear to even involve a consent-to-***settle*** provision. *Id.*

[redacted]

repudiation and insurer's denial of all liability and quoting case that was distinguished by *TLC*).[52]

With respect to *Isadore*, Arch already distinguished this case earlier in this brief. To recap, *Isadore* excused consent because the insurer already breached its present duty to defend, and the insurer's inaction (with knowledge of the insured's financial condition) forced the insured to settle due to economic coercion. 291 N.E.2d at 382-83.

Rather than directly confronting the fact that the *Bauer* Letter is not an actual disclaimer and that the letter specifically informs TIAA that Arch intends to exercise its right to consent, TIAA instead argues that the *Bauer* Letter's "generic reservation of rights…does not support…the consent ***defense***."[53] However, TIAA already admitted that it abandoned its waiver arguments regarding Arch's consent ***defense***.[54] Moreover, TIAA's "generic" reservation argument obviously cannot

[52] As a threshold matter, given that TIAA already asserts that New York law governs waiver and consent issues (TIAA's Opening Br. 41-47), TIAA should not be permitted to rely on Delaware cases (like *Shook* or *Sun-Times*) to support what it purports to be "black letter insurance law." *Sun-Times* is also distinguishable on other grounds. Although *Sun-Times* refused to provide an insurer with "veto power" over settlement, the Court explained this was implied by the policy's ***cooperation*** clause. 2007 WL 1811265 at *12. The Court then rejected a defense based on a consent provision but for an entirely different reason. *Id.* at *12-13.

[53] TIAA's Answering Br. 34 (emphasis added).

[54] TIAA's Answering Br. 25 & n.8. This includes abandonment of any argument that the *Bauer* Letter effectively waived Arch's consent ***defense*** pertaining to TIAA's earlier failure to seek consent for the *Rink* settlement.

[redacted]

apply to Arch's very ***specific*** request to participate in the *Bauer* settlement discussions, which confirmed Arch's intent to exercise its ***specific*** right to consent to a future settlement. The undisputed fact that Arch identified this particular right easily distinguishes the cases cited by TIAA to support its generic/boilerplate reservation argument.[55]

Although the issue of whether the *Bauer* Letter could waive un-asserted ***defenses*** had been rendered moot by TIAA's admission that it abandoned its waiver argument for coverage ***defenses***,[56] Arch nonetheless points to its summation of New York law in Point IV of its opening brief, which establishes that a disclaimer does not waive un-asserted defenses when there is reservation-of-rights language broad enough to include the un-asserted defense.[57] TIAA cannot

[55] Those cases are also distinguishable on other grounds. *JPMorgan/Vigilant*, 58 N.Y.S.3d at 39 (based on repudiation theory); *JPMC/Travelers*, 2009 WL 137044, at *5 (concerning preservation of coverage ***defense*** already known to insurer instead of future ***right***; and involving particular set of rules for deficient notices meant to provide insureds with opportunity to cure); *Viking Pump*, 2007 WL 1207107, at *28-29 & n.124 (relying on New York cases subject to §3420(d) and an insurance regulation that New York courts refuse to consider for waiver); *DeSantis Bros.*, 664 N.Y.S.2d at 7 (expressly applying duty under §3420(d)).

[56] TIAA's Answering Br. 25 & n.8. TIAA attempts to cite non-bodily injury cases that do not fit into this rule (TIAA's Answering Br. 36 n.20), but all those cases predated *Estee Lauder*, where New York's highest court reversed the appellate court's attempt to waive defenses un-asserted in a disclaimer based on common law when §3420(d) did not apply. 63 N.E.3d at 66-67 (reversing 130 A.D.3d at 497-80). Also, the courts in TIAA's cases primarily relied on prior case law involving bodily injury and subject to §3420(d).

[57] Arch's Opening Br. 48-50.

[redacted]

wholesale distinguish the eleven cases cited by Arch on this point just because they involved a condition precedent other than consent, particularly given that TIAA does not explain why this difference was material.[58] Arch also reiterates that a disclaimer's waiver of un-asserted defenses is based on heightened duties under Section 3420(d) that undisputedly do not apply here.[59]

VII. TIAA's Failure to Seek Consent Before Settling Cannot Be Excused by the Need for Court Approval.

TIAA also argues that Arch waived consent by not objecting to the settlements in between the time that TIAA executed the binding settlement agreements and the time the settlements received court approval.[60] As a threshold matter, TIAA already admitted to abandoning its argument that Arch waived its consent ***defense***,[61] which includes Arch's post-settlement conduct after TIAA already settled without consent. In any event, New York courts have rejected this argument as a matter of law.

In *Vigilant Insurance Co. v. Bear Stearns Cos.*, New York's highest court rejected the contention that a triable issue of fact existed simply because the

[58] TIAA's other attempts to distinguish these cases are inadequate. TIAA only addresses four of the eleven cases and again does not explain why the purported differences are material.

[59] Arch's Opening Br. 46-48.

[60] TIAA's Answering Br. 12, 15, 35.

[61] TIAA's Answering Br. 25 & n.8.

settlement was not yet court-approved when the insured informed the insurers of the settlement agreement, explaining that the insured did not include in the agreement any provision making the settlement subject to the insurers' approval. 884 N.E.2d 1044, 1047-48 (N.Y. 2008).

The argument was also rejected as a matter of law in *TLC*, where the Court similarly pointed out that the settlement agreement was not made subject to the insurer's consent and emphasized that the agreement obligated the insured to "use its best efforts to see that the Settlement was consummated." 2000 U.S. Dist. LEXIS 2917, at *16-21. In the settlement agreements for *Rink* and *Bauer*, TIAA was bound to use best efforts to obtain court approval, and the agreements did not make the settlements subject to Arch's consent.[62]

VIII. TIAA Cannot Overcome the Jury Instructions' Reversible *and* Plain Errors, and TIAA's Justification of the Futility Question Actually Proves It Should Have Been Subject to a Stricter Standard.

TIAA contends Arch did not preserve its objection to missing jury instructions on waiver (such as silence/duty to speak). However, Arch ***did*** object to their absence by including them in its own proposed instructions in response to those proposed by TIAA. Once the Superior Court rejected the additional waiver instructions, Arch did not have a continuing duty to object to the same issue. In fact, the Superior Court ruled that the parties did not have to "continuously re-

[62] JA0628-JA0629, JA0695.

[redacted]

assert[] an objection."[63] Even if unpreserved (although it was preserved), the issue could still be appealed for plain error. *Med. Ctr. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995). The rejected instructions concern waiver arguments that should have been rejected at the summary judgment stage.[64] Therefore, the jury should not have been permitted to weigh such evidence without being informed of the correct law. Prejudice is clearly demonstrated by the Superior Court's subsequent determination that evidence of Arch's silence is what justified the jury's verdict.[65]

With respect to the futility question, TIAA's answering brief actually proves Arch's point. While Arch argued futility is intertwined with theories of waiver and repudiation, TIAA conveniently only disputed the ***waiver*** half and did so by highlighting cases that further fuse futility with ***repudiation***. Arch reiterates that *J. Petrocelli* is a repudiation case. *J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 790 N.Y.S.2d 197, 199 (App. Div. 2005). Meanwhile, *Arrowhead* specifically relies only on *J. Petrocelli* to support futility. *Arrowhead Capital Fin., Ltd. v. Seven Arts Pictures, PLC*, 957 N.Y.S.2d 263 (Sup. Ct. 2012).[66]

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[63] JA5519-JA5520, at 90:21-91:1.

[64] Arch's Opening Br. 29-32, 46-50.

[65] JA6647-JA6649.

[66] While *Shook* concerns Delaware law, it supports futility with a block quote from a case that actually confirmed it pertains to an insurer "repudiat[ing] a policy." 349 A.2d at 877. As for *Mine Safety*, Arch has repeatedly pointed out in this action that *Mine Safety* applies Pennsylvania law. 2016 WL 498848 (Del. Super. Jan. 22,

TIAA also points to *Isadore*, which used the word "waiver" throughout the decision, confirming the entanglement of futility and waiver. 291 N.E.2d at 381-83. Therefore, the futility question improperly permitted TIAA to circumvent the strict standards associated with waiver and repudiation (*e.g.*, repudiation can only be evidenced by overt communications directly from the insurer at the time of settlement, not mere evidence of uselessness).[67]

IX. Certain Evidence Was So Impermissible that the Superior Court's Abused Its Discretion by Permitting It.

TIAA's arguments regarding irrelevant and prejudicial evidence make little sense. Regarding the then-unknown file closure, New York law confirms that waiver/futility cannot be based on evidence unknown to TIAA when it settled. This is particularly true, given that TIAA justified its futility argument based on repudiation cases, and repudiation must be predicated on the insurer's direct communication, not information learned from third parties. *Stanford Square L.L.C. v. Nomura Asset Capital Corp.*, 228 F. Supp. 2d 293, 299-300 (S.D.N.Y. 2002).

2016). Yet, TIAA insists on continuing to cite it without acknowledging its governing law. Also, *JPMorgan/Vigilant* cannot be applied outside the context of ***cooperation*** clauses, given that the Court placed the burden on the insurer to prove lack of cooperation, which required the insurer to demonstrate it acted diligently to seek cooperation and that the insured "willfully obstructed" those efforts. 39 N.Y.S.3d 864, 870 (Sup. Ct. 2016).

[67] Arch's Opening Br. 56-59.

As for the Closure Letter, which was obviously irrelevant to the Arch Policy at issue, TIAA cannot justify the abuse of discretion by arguing it was harmless error. The harm attributed to the Closure Letter cannot be examined in isolation. It is a cumulative test, in which the Court should consider whether there was prejudice in view of ***all*** the Superior Court's errors (not a particular error standing alone). *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 248 (Del. 1961); *Torres v. State*, 979 A.2d 1087, 1101-02 (Del. 2009). Moreover, the Closure Letter's relevance cannot be based on the false notion that Arch did not reserve rights for *Rink* as to the applicable policy. Arch reserved rights on this file in its acknowledgement letter.[68]

As for other insurers' testimony, TIAA does not even respond to Arch's argument that these witnesses' depositions were improperly used as expert testimony to interpret an unambiguous consent provision and to speculate whether Arch would have consented.[69] Instead, TIAA claims such testimony "merely

[68] JA2917-JA2918. TIAA also incorrectly argues Arch was required to object to the TIAA witness's testimony regarding the Closure Letter. Arch previously filed a motion *in limine* regarding the Closure Letter, and the Superior Court instructed Arch not to make continuing objections to the same evidence. JA5519-JA5520, at 90:21-91:1.

[69] TIAA is wrong again in arguing that Arch waived the right to object to Zurich's testimony. The Superior Court had already ruled against Arch's attempt to keep out evidence on the basis that it was then-unknown to TIAA, and there was no need to make continuing objections on the same basis. JA5519-JA5520, at 90:21-91:1.

[redacted]

reinforced" an "admission" by Arch's witness that consent provisions "do not always apply." TIAA's characterization of this witness's testimony is misleading and taken out of context. Arch's witness was referring to the selection of defense counsel, not to consent to settle (and in a situation where TIAA at least asked for Arch's consent on choice of counsel).[70] Moreover, while it makes sense for an excess insurer to rely on a primary insurer's choice of counsel, their interests are frequently not aligned for purposes of settlement consent, as a primary insurer might have little expectation of keeping the exposure within its limit. TIAA also over-simplifies the difference between Arch's and ACE's consent provisions. While ACE's language is theoretically broader, Arch's language was tailor-made for this very situation where two lawsuits, when ***combined, might*** reach Arch's attachment point.[71]

TIAA's claim that "Arch had a full opportunity to explore these differences at the witnesses' depositions" is unrealistic. Arch had absolutely no reason to expect that TIAA would use the other insurers' testimony regarding their own practices and policies to speculate at trial as to what ***Arch*** would have done if asked for consent or how ***Arch's*** consent provision should be interpreted.

[70] JA5999-JA6001.

[71] JA6530-JA6532.

[redacted]

X. Even if There is Potential Coverage, the Shavings Provision Must Account for Prejudgment Interest or Else There Is No Possibility of Exhaustion.

TIAA does not dispute that its settlement with St. Paul also resolved significant prejudgment interest claims. Instead, TIAA's sole response is that the shavings provision does not support further reduction of the limit (to [redacted]) based on claims for extra-contractual damages. However, the definition of "Limit Reduction Agreement" requires that "the sole basis for such agreement and release is the compromise of good faith coverage issues."[72]

Given that prejudgment interest is extra-contractual and not a coverage issue, the portion of the settlement attributable to interest does not constitute a Limit Reduction Agreement. Therefore, if interest is not factored into the discount, then the settlement cannot constitute a Limit Reduction Agreement. Without a valid Limit Reduction Agreement, TIAA will never meet its burden to prove exhaustion of the underlying insurance, which would eliminate any and all coverage under the Arch Policy.[73]

[72] JA0518.

[73] JA0518.

[redacted]

CONCLUSION

For the reasons above and in Arch's opening brief, Arch respectfully requests that this Court reverse the Superior Court's decision on Arch's motion for summary judgment and grant judgment in favor of Arch or otherwise award Arch judgment as a matter of law. Alternatively, given the reversible errors committed by the Superior Court, Arch respectfully requests a new trial regarding consent.

In the event there is potential coverage under the Arch Policy, Arch respectfully requests a finding that Arch's limit is further reduced to [redacted].

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