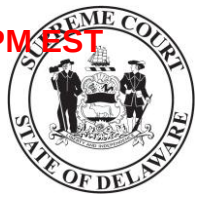

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VIKING PUMP, INC. AND WARREN PUMPS LLC INSURANCE APPEALS	No. 518, 2014 No. 523, 2014 No. 525, 2014 No. 528, 2014 CASES BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, Consolidated C.A. No. N10C-06-141 FSS [CCLD] -and- COURT OF CHANCERY OF THE STATE OF DELAWARE, Civil Action No. 1465-VCS	PUBLIC VERSION: DATED: JANUARY 6, 2015

APPELLANT TRAVELERS CASUALTY AND SURETY COMPANY'S REPLY BRIEF

OF COUNSEL:

Kathleen D. Monnes
Joseph K. Scully
John W. Cerreta
DAY PITNEY LLP
242 Trumbull St.
Hartford, Connecticut 06103
Telephone: (860) 275-0103
Facsimile: (860) 275-0343

Neal J. Levitsky (No. 2092)
Seth A. Niederman (No. 4588)
FOX ROTHSCHILD LLP
919 North Market Street, Suite 300
Wilmington, Delaware 19899-2323
Telephone: (302) 654-7444
Facsimile: (302) 656-8920

Dated: December 22, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

REPLY

I. Viking and Warren have no rights to Houdaille's excess coverage.

A. Under the excess policies' express consent-to-assignment provisions, the purported transfers to Viking and Warren were invalid and without effect.

In their responsive briefs, both Viking and Warren acknowledge that the Aetna XN Policies, like the other excess policies issued to Houdaille, expressly require insurer consent to any "[a]ssignment of interest under th[e] polic[ies]." TA1132, TA1167; *see also* TA1123, 1157 (materially identical language in underlying Liberty umbrella policies). And plaintiffs make no claim to have ever sought (or received) any excess carrier's consent to assignment of Houdaille's insurance rights. These undisputed facts ought to dispose of this case.

As explained in Travelers' opening brief, New York courts have applied consent-to-assignment provisions to invalidate "post-loss" coverage transfers in cases where (1) the claims at issue remain "speculative and contingent" at the time of transfer, and (2) the conduct and "characteristics of the assignee[s]" increase the insurer's risk. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 394 F. Supp. 2d 585, 596 (S.D.N.Y. 2005); *see* Travelers Opening Br. at 24-27 (citing cases). Both of these considerations—speculative claims and increased risk—apply with full force to Houdaille's multiple alleged transfers of coverage for latent third-party

"bodily injury . . . claims" that would not (and did not) "manifest themselves" until many years after coverage was triggered. *See Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172, 1179 (Ind. 2008); *Henkel Corp. v. Hartford Accident & Indem. Co.,* 62 P.3d 69, 75 (Cal. 2003); *see also* Travelers Opening Br. at 23 (citing additional cases). The Court should enforce the consent-to-assignment requirements as written and should reverse the judgment below.

1. Existing New York law supports the enforceability of the policies' consent-to-assignment provisions.

In an effort to avoid the clear terms of the excess policies, plaintiffs ask this Court to reject *U.S. Filter*, *Henkel*, and similar decisions on the ground that they conflict with "settled" New York law permitting "post-loss" coverage transfers (that is, transfers occurring after the initial coverage is triggered) even in the absence of insurer consent. Viking Responsive Br. at 20-21, 26-27, 30 (quoting *Ardon Constr. Corp. v. Firemen's Ins. Co.*, 185 N.Y.S. 2d 723, 728-29 (N.Y. Sup. Ct. 1959)). There is, however, no such settled New York law. *See* Travelers Opening Br. at 24-27.

The New York cases approving unauthorized post-loss transfers have traditionally involved "fixed," "measurable," and fully accrued property-damage claims under first-party fire-insurance policies. *Id.* at 20-22; *see, e.g.*, *Ardon*, 185 N.Y.S. 2d at 727-29 (property damage under "standard form . . . fire insurance

policy"). By their terms, those decisions do not apply where, as here, the transferred coverage rights are "speculative and contingent." *See SR Int'l*, 394 F. Supp. 2d at 594-96 (discussing factors that New York courts consider in "addressing whether post-loss assignments of insurance claims will be recognized").

In this case, the underlying asbestos personal-injury claims for which plaintiffs seek coverage arise out of exposure to asbestos decades ago, during the years when the excess policies were in force.[1] But mere exposure to asbestos or subclinical "molecular damage" does not immediately (and may not ever) manifest itself in a physical illness or symptom. To the contrary, asbestos-related diseases are subject to long latency periods, and a person who has been exposed to asbestos generally has no compensable tort claim unless and until the onset of some symptom or disease. *See generally Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 432 (1997) ("with only a few exceptions, common law courts have

[1] Contrary to Viking's suggestion, *see* Viking Br. at 22-23, the jury's finding on the issue of when bodily injury occurs for purposes of insurance coverage was subject to extensive post-trial briefing, resulting in the Superior Court's post-trial opinion holding that bodily injury occurs upon "significant exposure" to asbestos and held that "the verdict stands as to injury-in-fact." *Viking Pump, Inc. v. Century Indem. Co.*, 2013 Del. Super. LEXIS 615, at *54-58 (Del. Oct. 31, 2013); *see also Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S. 2d 48 (App. Div. 2008) (insured must prove actual bodily injury during the policy period, as opposed to mere subclinical alteration of tissue cells).

denied recovery to those who" have been exposed to asbestos, but "are disease and symptom free"). Because of this long latency period, and quite unlike a claim under a fire-insurance policy, none of the claims for which Viking and Warren now seek coverage were in any sense fixed or even knowable at the time of the purported assignments. *See* TA1101 (first asbestos claim against Warren not filed until 1987); TA1180 (first asbestos claim against Viking not filed until mid-1990s). Rather, all of Viking's and Warren's asbestos liabilities—and all of their claims for coverage—remained unasserted, unripe, and inchoate. Indeed, at the time of the purported transfer, there was no way of identifying who among the people exposed to asbestos would eventually develop a compensable tort injury, yet alone the amount of damages associated with that tort injury.

As a result, the traditional rule permitting assignment of an "absolute debt" for a fixed and certain fire-insurance claim, *see, e.g., Goit v. Nat'l Prot. Ins. Co.*, 25 Barb. Ch. 189, 195 (N.Y. Sup. Ct. 1855), does not apply to the speculative third-party bodily-injury claims here. Moreover, outside the fire-insurance context, New York courts have frequently enforced consent-to-assignment provisions to block post-loss transfers, including attempted post-loss assignments

of health-insurance rights,[2] marine-insurance rights,[3] and business-interruption coverage.[4] In their briefs, plaintiffs have nothing to say about any of these decisions. *Compare* Travelers Opening Br. at 24-27 (discussing these cases), *with* Viking Br. at 20-27 (ignoring them). But ignoring unfavorable New York caselaw will not make it go away. The fact is, the so-called "well-settled New York" rule allowing unauthorized post-loss assignments as a matter of course, *see* Viking Br. at 20-21, does not actually exist under New York law.

Indeed, the inaccuracy of plaintiffs' characterization of New York law can be seen in the principal precedent upon which plaintiffs rely: the Second Circuit's decision in *Globecon Group, LLC v. Hartford Fire Insurance Co.*, 434 F.3d 165 (2d Cir. 2006). *See* Viking Br. at 20-22. Plaintiffs cite *Globecon* for the proposition that New York deems consent-to-assignment provisions unenforceable whenever a transfer is "made . . . 'after the insured-against loss has occurred.'" *Id.*

---

[2] *See New Medico Assocs., Inc. v. Empire Blue Cross & Blue Shield*, 701 N.Y.S.2d 142, 144 (App. Div. 1999) (enforcing anti-assignment clause against post-loss transfer); *Spinex Labs. Inc. v. Empire Blue Cross & Blue Shield*, 622 N.Y.S.2d 154 (App. Div. 1995) (same); *Cole v. Metro. Life Ins. Co.*, 708 N.Y.S.2d 789, 790 (App. Div. 2000) (same).

[3] *Oberton v. Steamship Owners Mut. Prot. & Indem. Ass'n*, 1992 U.S. Dist. LEXIS 2183, at *10 (S.D.N.Y. Feb. 19, 1992) ("there is no merit to plaintiff's argument that assignment is permitted in this instance because Oberton's injury took place before the assignment").

[4] *See SR Int'l*, 394 F. Supp. 2d at 594-96 (surveying cases).

at 20-21 (quoting *Globecon*, 434 F.3d at 170). Plaintiffs neglect to mention, however, that *Globecon* itself recognized an important caveat to this rule: "*fixed* losses" are generally assignable notwithstanding a consent requirement, while transfers of "*speculative* losses" remain barred by anti-assignment provisions. *Globecon*, 434 F.3d at 172 (emphasis added) ("The distinction Judge Mukasey made [in *SR International*] seems to us to be the correct one under New York law, and indeed under insurance law generally.").

This distinction—between fixed and assignable choses in action, on the one hand, and unknown, inchoate coverage rights, on the other—closely tracks the distinction later drawn by the Indiana Supreme Court in *U.S. Filter*. As the *U.S. Filter* court explained, inchoate coverage rights for unknown and unreported "bodily injury" claims are simply too "speculative" and too "contingent" to "generate an assignable coverage benefit" in the face of an express anti-assignment provision. *See U.S. Filter*, 895 N.E.2d at 1180. In fact, when the *U.S. Filter* court set out this holding, the case that it cited and relied upon to support its conclusion was none other than the Second Circuit's decision in *Globecon*. *Id.* (citing *Globecon*, 434 F.3d at 172-73). Clearly, the rule of *U.S. Filter* is consistent with, and is indeed grounded in, established New York law.

Aside from *Globecon*, plaintiffs also point to a single New York intermediate appellate decision that permitted an unauthorized transfer of coverage for latent third-party bodily-injury claims. *See* Viking Br. at 23-24 (citing *Arrowood Indem. Co. v. Atl. Mut. Ins. Co.*, 948 N.Y.S.2d 581 (App. Div. 1st Dep't 2012)). The decision in *Arrowood*, though, does not in any way settle the question presented here. As noted in Travelers' opening brief, the *Arrowood* panel's opinion relies heavily on the Chancery Court's opinion in this case and contains little by way of independent analysis. 948 N.Y.S.2d at 582-83; *see* Travelers Opening Br. at 27 n.13. More troubling, the *Arrowood* opinion also contains no discussion (indeed, no acknowledgment) of existing New York caselaw upholding consent-to-assignment provisions in the post-loss context. *Id.*; *see supra*, at 5. As a matter of New York law, *Arrowood* has no binding statewide precedential effect on New York's appellate courts. *See, e.g., Oswald v. Oswald*, 963 N.Y.S.2d 762, 763 (App. Div. 3d Dep't 2013). ("we decline to follow the Second Department's determination"); *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 920 (App. Div. 2d Dep't 1984) ("We find the Third Department decisions little more than a conclusory assertion of result . . . and decline to follow them."). This Court should decline to follow it here.[5]

[5] Plaintiffs also rely on an Ohio federal district court's "instructive" application of

2. Houdaille's multiple and competing assignments of coverage materially increase the excess insurers' risk.

Apart from the speculative and contingent nature of the claims, Houdaille's many and varied agreements, amendments, and attempted assignments of its inchoate excess coverage rights (not just to Viking and Warren, but also back to Houdaille and to John Crane) materially increase the excess carriers' exposure under the policies. Travelers Opening Br. at 28-31; *see S.R. Int'l*, 394 F. Supp. 2d at 596; *Henkel,* 62 P.3d at 75.

The plaintiffs, like the Chancery Court below, offer assurances that the excess carriers will not, in fact, face any increased risks from these multiple purported assignments. Viking Br. 27-30; *Viking Pump, Inc. v. Century Indem. Co.,* 2 A.3d 76, 76 (Del. Ch. 2009). Fending off coverage claims from John Crane will be no issue, the plaintiffs promise, because "***John Crane has no rights under the Excess Policies whatsoever.***" Viking Br. at 28. But merely asserting that John Crane has no rights—even in bold and italicized font—does not necessarily make

---

New York law in *Elliott Co. v. Liberty Mutual Insurance Co.*, 434 F. Supp. 2d 483 (N.D. Ohio 2006). *See* Viking Br. at 25. The relevant portion of *Elliott*, however, contains almost no analysis at all. *Id.* at 490-91. The court simply declined to apply the California Supreme Court's decision in *Henkel* because, in its view, "*Henkel* . . . conflict[s] with [New York] precedent." *Elliott*, 434 F. Supp. 2d at 490-91. The only New York precedent cited by the court in support of this claim was another opinion by a different federal district court judge. *Id.* (citing *Texaco A/S v. Commercial Ins. Co.*, 1995 U.S. Dist. LEXIS 1518 (S.D.N.Y. Feb. 7, 1995)).

it so. John Crane may well take a different view of its rights. And thoughts on John Crane's rights expressed in Viking's appellate brief or in *dictum* from the Chancery Court (or, for that matter, in *dictum* from this Court) are unlikely to have any preclusive effect on John Crane. *See Norman v. State*, 976 A.2d 843, 868 (Del. 2009) (collateral estoppel applies only where "the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action").

Moreover, at least on the face of the documents at issue, John Crane is a much more plausible candidate to be an assignee of Houdaille's excess insurance than is, say, Viking. The agreement under which Viking claims to have obtained Houdaille's coverage—the Viking AAA—does not even mention, much less purport to assign, any of Houdaille's excess insurance rights. *See* Travelers Opening Br. at 34-35 (discussing terms of Viking AAA).

[redacted]In light of this clear language, the excess carriers are, at the very least, at risk of facing future coverage claims from John Crane.[6] In addition, there is also a risk

[6] Plaintiffs' observation that "the relevant Liberty umbrella policies . . . exclude coverage for John Crane," *see* Viking Br. at 28, is thus beside the point. The

that the "predecessor corporation," Houdaille, could someday "be revived" and initiate its own claim for coverage. *See Henkel*, 62 P.3d at 75. Forcing the excess carriers to face down these potential claims from multiple and competing assignees plainly increases their exposure and costs under Houdaille's excess policies. *Id.*; *see S.R. Int'l*, 394 F. Supp. 2d at 596.

And even leaving aside John Crane and Houdaille, the claims of the two purported assignees in this litigation—Viking and Warren—themselves increase the excess carrier's risk. While Viking now argues (in its responsive brief) that dividing up Houdaille's coverage between two competing claimants has not "imposed any new obligations on insurers," *see* Viking Br. at 29, that assertion is belied by the arguments in Viking's opening brief in its own consolidated appeal, *see* Viking Opening Br. at 44-45. In particular, Viking's appeal claims that, as a result of the competing transfers to Viking and Warren, the excess carriers must now ensure that these "co-insureds" receive an "equitabl[e]" distribution of coverage, without any undue "disparate . . . treatment." Viking Opening Br. at 44-45 (claiming that excess carriers are improperly permitting Warren to "unilaterally deplete this shared, finite asset"). The excess carriers, however, agreed to cover

---

increased risk to the excess carriers arises from Houdaille's multiple and competing transfers of *its own* rights under the excess policies, including its attempted assignment in the John Crane AAA.

Houdaille, not the plaintiffs here, and the excess carriers certainly never agreed to assume new duties to maintain an "equitable" apportionment of coverage between these newly competing co-insureds.

These new duties, moreover, are sure to be costly and burdensome. As the history of this litigation demonstrates, Viking's and Warren's views of "equity," "fairness," and "disparate treatment" are bound to come into conflict. No matter how the excess carriers divvy up the coverage, their choices will likely draw the ire of one or another of the competing "co-insureds" as each struggles to maximize its share of this "finite asset." *E.g.*, Viking Opening Br. at 44-45. To saddle the excess carriers with the "additional burden[s]" of dealing with these conflicts and maintaining equitable apportionment will necessarily increase the carriers' exposure and litigation costs. *See Henkel*, 62 P.3d at 75. It is precisely that sort of increased risk that the excess policies' consent-to-assignment requirements were designed to protect against. The Court should enforce those bargained-for contractual provisions, and should reverse the judgment below.[7]

---

[7] While the increased risks to the insurers are clear and obvious on this record, it is not the case that the excess carriers "bear[] the burden of proof on this issue." Warren Br. at 33; *see also* Viking Br. at 29-30. Quite the opposite, it is the plaintiffs who bear "the burden of establishing" that the excess policies' consent-to-assignment provisions are "void as against public policy." *See Matter of Prevratil*, 990 N.Y.S.2d 697, 707 (App. Div. 2014).

3. Viking plainly has no separate coverage rights as a "former division" of Houdaille.

There is also no merit to Viking's separate claim—not joined by Warren—that Viking is exempt from the "anti-assignment clause[s]" because it "is the very same entity named as an insured under the policies at issue." Viking Br. at 13. Viking is plainly *not* "the very same entity," for the simple reason that, when the excess policies were issued, there was no such thing as a "Viking . . . entity." Viking as an entity did not exist until January of 1985, when Viking Pump-Houdaille, Inc. ("VPH") was formed as a corporation. TA1027. Prior to that, the Viking Pump brand was nothing more than an unincorporated division within Houdaille. 9 *Fletcher Cyclopedia of the Law of Corporations* § 4233.50 ("An unincorporated operating division of a corporate business is not a recognized legal entity."). As the Chancery Court correctly explained in the litigation below, that "division . . . [was] legally indistinct from the corporation in which it function[ed]"—that is, the Houdaille corporation—and "the concept of a 'former division' is legally empty." *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 Del. Ch. LEXIS 43, at *108 (Del. Ch. Apr. 2, 2007).[8]

[8] Viking's citation to *In re Reif*, 174 N.E.2d 492 (N.Y. 1961), does nothing to help its argument. *See* Viking Br. at 13. *Reif* is a veil-piercing case in which a newly formed corporation was held liable as "an alter ego of [its] promoters." *Id.* at 495.

Thus, in order for Viking to now have rights under the Houdaille excess policies, Viking must demonstrate both (1) that the agreements between Houdaille and VPH manifest a mutual intent to assign and receive Houdaille's excess coverage, and (2) that the excess policies' express anti-assignment provisions are unenforceable as a matter of New York public policy. *See* Travelers Opening Br. at 33-35 & 19-32. Viking cannot raise any separate claim for coverage as an insured "former division."

4. At a minimum, the Court should certify the question of the consent-to-assignment provisions' enforceability to the New York Court of Appeals.

Because the excess policies' consent-to-assignment provisions are valid and enforceable under New York law, and because the excess carriers never consented to the alleged transfers of Houdaille's coverage, the Court should apply the policies' consent requirements and reverse. At a bare minimum, though, the Court should certify the question of the consent-to-assignment provisions' enforceability to the New York of Appeals. *See* Travelers Opening Br. at 32.

In an effort to avoid certification, plaintiffs contend that certifying this issue to the New York high court would be inappropriate because "Florida law governs

---

The decision has nothing at all to do with Viking's novel claim that corporate divisions are separate legal entities.

the 1985 Viking AAA." *See* Viking Br. at 31. That is a *non sequitur*. It is true, of course, that Florida law governs the Viking AAA. TA1040. And this Court must apply Florida law in order to determine whether the Viking AAA manifests an "intention on one side to assign a right" to excess coverage and "an intention on the other to receive" that right. Travelers Opening Br. at 34 (citing *SourceTrack, LLC v. Ariba, Inc.*, 958 So.2d 523, 526 (Fla. Dist. Ct. App. 2007)). But if (as plaintiffs claim) the Viking AAA does manifest this mutual intention, then the question becomes whether to enforce the consent-to-assignment provisions contained in the *excess policies*. As Warren correctly points out, "[n]o party has appealed from the [Chancery] Court's determination that the Excess Policies are governed by New York law." Warren Br. at 2 n.2. The enforceability of the agreements' consent-to-assignment provisions therefore gives rise to a question of New York public policy that only the New York Court of Appeals can definitively settle. This Court should ask the Court of Appeals to settle the question here.

Nor is there any merit to the plaintiffs' suggestion that the issue raised by the excess carriers is "defined [too] broadly and vaguely" to be appropriate for certification. *See* Viking Br. at 30. There is nothing at all vague or abstract about the question this case presents: Does New York public policy permit enforcement of the excess policies' consent-to-assignment requirements to block transfers of

coverage for unknown, unreported asbestos bodily-injury claims? The Court can and should certify that straightforward question to the New York high court. If, for whatever reason, the Court would like further guidance in crafting the question, then it need look no further than two recent federal cases asking both the Supreme Court of Louisiana and the Supreme Court of Kentucky to weigh in on similar issues related to the enforceability of "anti-assignment clause[s]." *See Wehr Constructors, Inc. v. Assurance Co. of Am.*, 2012 Ky. LEXIS 495, at *1-2 (Ky. Oct. 25, 2012), *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 512 (5th Cir. 2010) (asking whether and under what circumstances "an anti-assignment clause in a homeowner's insurance policy . . . bar[s] an insured's post-loss assignment of the insured's claims"). Much as in those cases, the unsettled question of New York public policy presented here is clearly appropriate for certification.

B. In the alternative, the Court should hold that the pertinent agreements do not even manifest an intent to assign Houdaille's excess coverage.

In the alternative, this Court can also reverse the Chancery Court's assignment holding at the threshold—without ever venturing into questions of New York public policy—because no transfer of Houdaille's excess coverage was ever contemplated under the pertinent assignments and agreements.

1. Nothing in the Viking AAA assigns excess coverage to Viking.

Although Viking claims to have obtained Houdaille's excess coverage under

the Viking AAA, *see* Viking Br. at 14-16, the fact is that nowhere in the Viking AAA are excess policies (or even insurance rights generally) ever mentioned among the assets to be transferred. *See id.* at 16. Instead, the Viking AAA purports to transfer only those [redacted] to conduct the Viking Pump business, *see* TA1036 (emphasis added), an assignment that Viking views as "broad" enough to "include[] insurance rights." *See* Viking Br. at 16.

The fatal problem with Viking's proposed interpretation is that it contradicts the plain and ordinary meaning of the word "required"—that is, "essential" and "indispensable." *See, e.g.*, *Oxford Dictionary of English* 1509 (3d ed. 2010). [redacted] *See* Viking Br. at 16-17. Unlike those required assets, excess insurance is in no sense essential or indispensable to the business of manufacturing pumps. Indeed, the parties' intent to keep Houdaille's insurance coverage with Houdaille is only confirmed by the subsequently executed IDEX Stock Purchase Agreement, [redacted] Because the pertinent agreements fail to manifest any unambiguous "intention on one side to assign a right" to excess coverage or "on the other to receive" that right,

this Court should reverse the Chancery Court's grant of summary judgment. *SourceTrack*, 958 So.2d at 526; *see also Riverbend Cmty., LLC v. Green Stone Eng'g., LLC*, 55 A.3d 330, 334 (Del. 2012).

2. The Warren ASA also fails to effect any assignment of the excess policies.

Similarly, Warren's claim that the amendment to the Warren ASA unambiguously manifests an intent to assign Houdaille's excess coverage, *see* Warren Br. at 34-35, is also off the mark. Contrary to Warren's assertion, the [redacted] is subject to at least two "reasonable readings." *See* Warren Br. at 34. The amendment could reasonably be interpreted as a grant of rights to coverage under the Liberty umbrella policies—[redacted] *See* TA969-70. Or, as Warren posits, the language might also contemplate a grant of access to *any and all* of Houdaille's [redacted] including all of Houdaille's excess-layer coverage. *See* Warren Br. at 35. Because "reasonable minds could differ as to the . . . meaning" of the language, the Chancery Court's entry of summary judgment for Warren was error. *See Riverbend*, 55 A.3d at 334. The "fact-finder" should have an opportunity to assess the parties' intent based on "admissible extrinsic evidence." *See id.*

II. Injury spanning multiple policy periods is subject to pro rata allocation.

The Court should also reverse the Chancery Court's conclusion that the excess policies are subject to joint-and-several allocation.

A. New York *is* a pro rata jurisdiction.

According to the plaintiffs, the excess carriers' allocation argument rests on the mistaken "assertion that 'New York is a pro rata jurisdiction.'" Warren Br. at 20 (citing Travelers Br. at 38). But plaintiffs cannot—and do not—deny that existing New York allocation caselaw overwhelmingly favors the pro rata rule.

The New York Court of Appeals has twice endorsed pro rata allocation for policies containing standard "during the policy period" language of the sort included in all of the excess policies here. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 693 (N.Y. 2002); *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co.*, 991 N.E.2d 666, 676 (N.Y. 2013). Numerous lower court decisions in New York have followed these precedents and adopted pro rata allocation. *E.g., Serio v. Pub. Serv. Mut. Ins. Co.*, 759 N.Y.S.2d 110, 114-16 (App. Div. 2003). And federal precedent applying New York law also uniformly recognizes pro rata allocation as the governing New York standard. *E.g., Olin v. Certain Underwriter's at Lloyd's*, 468 F.3d 120, 126 (2d Cir. 2006); *see Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 15 (1st Cir. 2008) ("courts in New

York. . . have adopted the pro rata approach"). In short, just about every decision discussing New York allocation law—with the exception of the Chancery Court's decision below—applies some form of pro rata allocation. That is why New York has long been recognized as "a pro rata jurisdiction." *See* Maniloff & Stemplel, *General Liability Insurance Coverage: Key Issues in Every State* 481 (2d ed. 2012). It is also why "no New York court has adopted the interpretation of policy language in, or holding of," the Chancery Court's decision below. *Mt. McKinley Ins. Co. v. Corning Inc.*, 2012 N.Y. Misc. LEXIS 6531, at *12-14 (Sup. Ct. Sept. 7, 2012) (disapproving decision below as contrary to established New York law). This Court should reject the decision below as the extreme outlier that it is.

B. The presence of non-cumulation language provides no basis for abandoning pro rata allocation.

In order to justify its break from settled New York precedent, the Chancery Court's decision below "critiqu[ed] the Court of Appeals[']" reasoning in *Con. Ed.*, "mock[ed] the Second Circuit's" consistent pro rata caselaw, and then distinguished away all of this precedent based on the excess policies' non-cumulation and prior-insurance provisions. *Id.* at *12-13; *see Viking Pump*, 2 A.3d at 118-25. On appeal, plaintiffs repeat the claim that the excess policies' non-cumulation language distinguishes *Con Ed.*, *Diocese of Brooklyn*, and other

established pro rata precedents. *See* Warren Br. at 20-21.[9] That is incorrect.

As an initial matter, and contrary to plaintiffs' claims, the Court of Appeals' decision in *Hiraldo v. Allstate Insurance Co.*, 840 N.E. 2d 563 (N.Y. 2005), provides no guidance at all on the question of allocation. *Hiraldo* simply holds that non-cumulation clauses limit an insured who is "exposed . . . continuously during the terms of . . . three policies" to a single per-occurrence limit. *See id.* at 563. As even the Chancery Court acknowledged in the decision below, *Hiraldo* does not discuss or "explain[] the applicable allocation method." *See Viking Pump*, 2 A.3d at 125 n.172. The case thus offers no guidance on the question presented here. A more instructive decision on the interaction between non-cumulation language and allocation is the Second Circuit's recent decision in *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89 (2d Cir. 2012). Plaintiffs contend that the Second Circuit's allocation holding in *Olin* "does not bear even a family resemblance to pro rata allocation," *see* Warren Br. at 27, but that is not so. In fact, *Olin* demonstrates how Condition C—the provision included in 17 of the

[9] *See also* Warren Br. at 19 n.12 (also claiming that the Chancery Court's analysis has been misunderstood and was not intended to mock or criticize New York courts' views on New York law).

excess policies here—can operate and apply consistent with pro rata allocation.[10]

As the *Olin* court noted, Condition C consists of both a "prior insurance provision" (its first paragraph) and a "continuing coverage provision" (its second paragraph):

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof, the limit of liability hereon . . . shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.

---

[10] Plaintiffs' repeated criticism of Travelers for "revers[ing] course" and "[b]elatedly" embracing the Second Circuit's reasoning in *Olin*, *see* Warren Br. at 25-26, is both unfair and unfounded. First, Travelers never "*conceded*...that the Non-Cumulation Provisions were inconsistent with the application of pro rata allocation...." *Id.* at 25. Far from it, Travelers expressly argued that there were scenarios in which "the Non-Cumulation Provision would apply to an asbestos products loss even in a pro rata jurisdiction" and explained how the Liberty Non-Cumulation Provision would apply in a pro rata jurisdiction under a hypothetical posed by then Vice-Chancellor Strine. *See* Warren's Answering Appendix at 561-65. Travelers did not address Condition C because the hypothetical did not implicate that provision. And citing the relevant *Olin* decision would have been impossible because the Second Circuit handed it down more than two years after the briefing in the Chancery Court. The arguments by Travelers to the Chancery Court concerning the application of non-cumulation provisions in a pro rata jurisdiction were prescient of the Second Circuit's reasoning in *Olin* simply because that reasoning is dictated by well-established New York pro rata law. Lastly, even if it were not consistent with the position that Travelers took throughout the underlying litigation, Travelers' reliance on the *Olin* court's reasoning in this appeal would be entirely appropriate. *See, e.g., Joseph v. United States*, 2014 U.S. LEXIS 7835, at *3 (Dec. 1, 2014) (Kagan, J., concurring, respecting denial of certiorari) (noting that appellate courts routinely accept new arguments in cases where intervening precedent "provides an appellant with a new theory or claim").

> Subject to the foregoing paragraph and to all the other terms and conditions of this Policy, in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, Underwriters will continue to protect the Assured for Liability in respect of such personal injury or property damage without payment of additional premium.

704 F.3d at 99-100 (quoting Condition C).

According to the Second Circuit, Condition C's "continuing coverage" provision indicates that, in certain circumstances, the insurer will "indemnify the insured for personal injury . . . *continuing after the termination of the policy*." *Id.* at 99-100 ("'in the event that personal injury or property damage . . . is continuing at the time of termination of this Policy, Underwriters will continue to protect the Assured. . . .'"). Thus, the continuing-coverage provision "extends liability temporally" and obligates the insurer to cover additional pro rata shares of the loss in the event that damage occurs in more than one contiguous policy period. *Id.* at 103.

The *Olin* court then proceeded to apply the continuing-coverage provision in light of this understanding. The court first divided all of the property damage at issue into equal shares and allocated "$3.3 million in damages to each year" on a pro rata basis. Then, under the continuing-coverage provision, the court required the insurer to assume responsibility for additional shares "after the policy terminated." *Id.* at 101-02. Finally, the Court also applied the first paragraph of

Condition C—the prior-insurance provision—which served as an "express[] limit" on the "the continuing-coverage provision['s]" scope. *Id.* Operating in tandem, the two paragraphs effectively served to "sweep[] a continuing loss" into the insurer's "earliest triggered policy." *Id.* at *104.

The result in *Olin* provides a useful example how Condition C may apply under pro rata allocation. Importantly, however, the non-cumulation provisions included in the Liberty umbrella policies—which apply to most of the excess policies in this case—do *not* contain *any* continuing-coverage provision of the sort included in Condition C:

> Non-Cumulation of Liability — Same Occurrences — If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, then each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [the insurer] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.

E.g., TA1156.

Unlike the continuing-coverage language discussed in *Olin*, this non-cumulation provision says nothing at all about "continu[ing] to protect" the insured for injury "continuing at the time of termination of th[e] Policy." *Compare Olin*, 704 F.3d at 99-100. Instead, the non-cumulation provision

provides only for a "reduc[tion]" in coverage based on payments under "previous policies." *See id.* at 99-100, 105 n.21. The provision thus does nothing to "extend liability temporally" to additional pro rata shares of a loss. *Compare Olin*, 704 F.3d at 102-03. And it provides no warrant for "reject[ing] pro rata allocation" or for modifying its application with respect to policies following form to the Liberty umbrella. *Id.*[11]

CONCLUSION

The Court should reverse the judgment.

FOX ROTHSCHILD LLP

/s/ Neal J. Levitsky
Neal J. Levitsky, Esquire (No. 2092)
Seth A. Niederman, Esquire (No. 4588)
919 North Market Street, Suite 300
Wilmington, Delaware 19899-2323
Tel: (302) 654-7444 / Fax: (302) 656-8920

– and –

[11] Indeed, both *Con. Ed.* and *Corning* demonstrate that coverage-reducing non-cumulation provisions, which are clearly designed to *limit* a policy's potential exposure, generally do not warrant abandonment of pro rata allocation under New York law. *See Con. Ed.*, 98 N.Y. 2d at 223 (discussing "other insurance" non-cumulation provision); *Corning*, 2012 N.Y. Misc. LEXIS 6531, at *19-20 (same). The same result should apply under the coverage-reducing non-cumulation language in the Liberty umbrella policies.

Kathleen D. Monnes, Esquire
Joseph K. Scully, Esquire
DAY PITNEY LLP
242 Trumbull St.
Hartford, Connecticut 06103
Tel: (860) 275-0103 / Fax: (860) 275-0343

Attorneys for Defendant,
Travelers Casualty and Surety Company
f/k/a The Aetna Casualty and Surety
Company

Dated: December 22, 2014
Public Version: January 6, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached pleading was served this 6th day of January, 2015, on the following individuals via LexisNexis FileandServeXpress:

Jennifer Wasson, Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801

Lisa A. Schmidt, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

Francis J. Murphy, Esquire
Murphy & Landon
1011 Centre Road, Suite 210
Wilmington, Delaware 19805

John S. Spadaro, Esquire
John Sheehan & Spadaro LLC
724 Yorklyn Road, Suite 375
Hockessin, Delaware 19707

Thaddeus J. Weaver, Esquire
Dilworth Paxson LLP
704 King St., Suite 500
P.O. Box 1031
Wilmington, DE 19801

Anthony G. Flynn, Esquire
Timothy J. Houseal, Esquire
Young Conaway Stargatt & Taylor LLP
1000 West Street, 17th Floor
Wilmington, Delaware 19801

James W. Semple, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801

Paul Cottrell, Esquire
Tighe & Cotrell, P.A.
704 North King Street, Suite 500
Wilmington, Delaware 19801

John D. Balaguer, Esquire
824 N. Market Street, Suite 902
Wilmington, DE 19899

Robert M. Greenberg, Esquire
Tybout, Redfearn & Pell
750 S. Madison Street, Suite #400
Wilmington, Delaware 19899-2092

Richard M. Beck, Esquire
Klehr Harrison Harvey Branzburg
& Ellers, LLP
919 North Market Street, Suite 1000
Wilmington, Delaware 19899-2323

Richard A. Barkasy, Esquire
Schnader Harrison Segal & Lewis LLP
824 N. Market Street
Suite 1001
Wilmington, DE 19801-3011

Collins J. Seitz, Jr., Esquire
Garrett B. Moritz, Esquire
Nicholas D. Mozal, Esquire
Seitz Ross Aronstam & Moritz LLP
100 South West Street, Suite 400
Wilmington, DE 19801

/s/ Neal J. Levitsky
Neal J. Levitsky, Esquire (No. 2092)