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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT VIKING PUMP, INC.'S REPLY BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Rather than confront Viking's argument that the plain terms of the Joint Excess Policies[1] require vertical exhaustion, the Excess Insurers continue to cling to a handful of New York cases addressing a different issue in a different context, which they claim somehow override the plain language of their policies and require application of horizontal exhaustion.[2] As Viking showed in its Opening Brief, and the Excess Insurers have now conceded (EI Ans. Br. at 21)[3], the New York cases cited by the Excess Insurers and relied upon by the Superior Court for application of horizontal exhaustion do not involve horizontal exhaustion but, rather, are contribution disputes between insurers concerning losses falling within a single policy period. As the Excess Insurers must also concede, both horizontal and vertical exhaustion are concepts that are implicated only in the context of allocating losses spanning multiple policy periods. The Excess Insurers fail to

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1 As in its Opening Brief, Viking will refer to the excess policies sitting above the shared Liberty primary and umbrella policies in the years 1972-85 as the "Joint Excess Policies."

2 In the context of the Superior Court's trigger ruling, the Excess Insurers argue that issue should be determined by the evidence presented "and not by citing to case law." EI Ans. Br. at 4. In fact, it is the Excess Insurers who have shown slavish attachment to case law where the issue of vertical versus horizontal exhaustion is instead governed by the policies' terms.

3 The Excess Insurers' December 10, 2014 Answering Brief (Trans. ID 56455968) is abbreviated herein as "EI Ans. Br." Viking's December 10, 2014 Answering Brief (Trans. ID 56454418) is abbreviated herein as "Viking Ans. Br." Warren's December 10, 2014 Answering Brief (Trans. ID 56453419) is abbreviated herein as "Warren Ans. Br." Travelers' December 10, 2014 Answering Brief (Trans. ID 56454227) is abbreviated herein as "Tr. Ans. Br." And Viking's November 6, 2014 Opening Brief (Trans. ID 56301646) is abbreviated herein as "Viking Op. Br."

explain why the contribution cases they continue to cite dictate a horizontal exhaustion rule in light of the clear policy language here and the stark differences between those cases and this one. The Excess Insurers' silence on this point speaks volumes. New York's highest court has repeatedly confirmed the primacy of policy language in resolving coverage disputes, and as both the Court of Chancery and the Superior Court recognized, the policy language here contemplates vertical exhaustion of coverage. The Excess Insurers now argue for the first time in this appeal that even if each of the Joint Excess Policies only requires exhaustion of the directly underlying Liberty umbrella policy in the same policy year, those Liberty umbrella policies themselves require exhaustion of all underlying insurance. The jury found and the Superior Court held that all of Liberty's 1972 to 1985 umbrella policies are exhausted. The Excess Insurers did not appeal that ruling; they have therefore waived it. In any event, the assertion that the Liberty primary polices are not exhausted simply rehashes the Excess Insurers' argument about Viking's and Warren's asserted failure to pay the 1980-85 primary policy deductibles, which should fail for the reasons set out in Viking's Answering Brief.[4]

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[4] The Excess Insurers have appealed the Superior Court's exhaustion ruling only as to the 1980-85 Liberty primary policies, which the Excess Insurers claim were improperly exhausted by misapplication of the policies' deductibles. The Excess Insurers have raised no other challenges to the Superior Court's ruling that all of Liberty's primary and umbrella policies from 1972 to 1985 are exhausted.

Finally, the Excess Insurers' argument that the Court of Chancery's all sums allocation ruling does not foreclose application of horizontal exhaustion, because the concepts are not in conflict, misses the point. The Court of Chancery's all sums ruling contemplated that Viking was entitled to access its excess coverage upon exhaustion of the directly underlying policies, without exhausting lower-level coverage in other triggered years. And this Court's own description of all sums allocation similarly recognizes an insured's right to tap individual "towers" of insurance for any given occurrence, rather than having to exhaust coverage horizontally by layer. The California cases on which the Excess Insurers rely for their claim that horizontal exhaustion can be harmonized with all sums allocation were decided based on excess policy language that, unlike the policy language at issue here, required exhaustion of the directly underlying policies *and* "any other underlying insurance."[5] At bottom, even if all sums allocation and horizontal exhaustion can theoretically be applied together under some policies, such a regime is not consistent with the language of these policies or with how the Court of Chancery intended its all sums ruling to apply in this case.[6]

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[5] *See Kaiser Cement & Gypsum Corp. v. Ins. Co. of Pa.*, 126 Cal. Rptr. 3d 602, 614 (Cal. Ct. App. 2011); *Community Redevelopment Agency of Los Angeles v. Aetna Cas. & Sur. Co.*, 57 Cal. Rptr. 2d 755, 760 (Cal. Ct. App. 1996).

[6] Viking also joins the portion of Warren's reply brief addressing the Excess Insurers' defense obligations and incorporates those arguments as if fully stated here.

ARGUMENT

I. THE SUPERIOR COURT'S HORIZONTAL EXHAUSTION RULING IS REVERSIBLE ERROR AND SHOULD BE SET ASIDE[7]

A. The Joint Excess Insurers Continue To Ignore The Plain Language Of Their Policies, Which Only Require Exhaustion Of The Directly Underlying Policies In The Same Policy Year.

The Excess Insurers insist on framing an issue of contractual interpretation as one that should be decided as a matter of law without regard to the language of their own insurance contracts. They criticize Viking for "cit[ing] no New York precedent that *requires* vertical rather than horizontal exhaustion." EI Ans. Br. at 20 (emphasis in original). In fact, New York law does require application of vertical exhaustion here, but not because of some abstract legal rule; rather, it is compelled by the terms of the policies themselves.

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[7] Travelers' Answering Brief does not dispute any of the points made in Viking's Opening Brief on horizontal exhaustion. Instead, Travelers argues that the Court should not even reach the issue of horizontal exhaustion if it reverses the Court of Chancery's rulings below on Viking's rights as an insured and all sums allocation. Trav. Ans. Br. at 8-10. For the reasons explained in Viking's and Warren's Answering Briefs, those rulings were well-grounded in the law and relevant contracts, and should not be reversed. In particular, Travelers' suggestion that New York law dictates pro rata allocation where a policy pays for losses resulting from injury "during the policy period" is not supported by the law it cites. In *Con Ed*, the New York Court of appeals refused to adopt one allocation method as a matter of law. Although it found the "during the policy period" language "consistent" with pro rata allocation, it expressly distinguished this Court's decision in *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001) as involving "different policy language." *Consol. Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 694 (N.Y. 2002). That "different policy language" is incorporated into each of the Excess Policies here and dictates a different result from *Con Ed*. *See* Warren Ans. Br. at 20-25.

New York law, like Delaware's, looks first to contract language to resolve coverage disputes like this one. JA0954 ("New York precedent requires that the court apply traditional principles of insurance contract interpretation to the policies at issue and then apply the approach that results from that interpretive exercise."); *Fieldston Prop. Owners Ass'n v. Hermitage Ins. Co.*, 945 N.E.2d 1013, 1017 (N.Y. 2011). The Superior Court correctly found that "there is policy language supporting Plaintiffs' argument for vertical exhaustion." JA1743. The court did not identify any language supporting horizontal exhaustion. That fact compels reversal of the court's horizontal exhaustion ruling.

The Excess Insurers downplay the significance of the Superior Court's finding regarding policy language, arguing that just because their policy language "support[s]" vertical exhaustion "do[es] not mean that the policies' plain language *mandates* vertical exhaustion or prohibits horizontal exhaustion." EI Ans. Br. at 22 (emphasis in original). This argument flips the *contra proferentum* rule on its head. It was not Viking's burden to show that the policy language "mandates" vertical exhaustion and "prohibits" horizontal exhaustion. Quite the opposite: under well-settled law, it was the Excess Insurers' burden to show that horizontal exhaustion is the *only* reasonable interpretation of their policies. *See* JA0967 ("The *contra proferentum* rule requires that a 'construction favorable to the insurer will only be sustained where it is the sole construction which can fairly be placed

upon the words employed.'") (quoting *Cantanucci v. Reliance Ins. Co.*, 349 N.Y.S.2d 187, 191 (N.Y. App. Div. 1973)). Viking only needed to show that the Joint Excess Policies can be reasonably read to apply vertical exhaustion (*see* JA0967), which the Superior Court's finding itself establishes.[8]

But Viking has done more. As Viking demonstrated in its Opening Brief, the policy language here does indeed mandate that the insured has the right to access vertically its excess insurance coverage once the directly underlying policies are exhausted. With minor variations not relevant here, the Joint Excess Policies are triggered once specified "underlying insurance" is exhausted. *See* Viking Op. Br. at 22-23 n.13. All of the policies expressly describe this "underlying insurance" as the *directly* underlying policies in the same policy year. *Id.* None of the Joint Excess Policies lists lower-level policies from other policy years as "underlying insurance." The Excess Insurers do not dispute this point, nor do they come to grips with it. Because the Superior Court properly held that the Liberty umbrella policies from 1972 to 1985 are exhausted (Final Judgment, JA1864 ¶ 2), the Joint Excess Policies have been triggered.

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[8] The Superior Court's statement that "[t]he parties agree, as to exhaustion the policies are unambiguous" is partly correct. JA1736. Viking argued below that the language of the Joint Excess Policies unambiguously supports vertical exhaustion. *See* JA1537-40. If the Excess Insurers now seek to present a contrary interpretation, that fact alone would establish ambiguity.

Ignoring the language of their own policies, the Excess Insurers make an end-run for horizontal exhaustion, arguing that their policies cannot be accessed because, contrary to the Superior Court's holding, all of the Liberty umbrella polices are not exhausted. EI Ans. Br. at 20. But the Excess Insurers did not appeal the finding below that all the umbrella policies between 1972 and 1985 are exhausted (JA1864 ¶ 2), and they have waived any claim to the contrary. *See* Supr. Ct. R. 14(b)(3); *see also Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 8 (Del. 2013) ("Under Delaware Supreme Court Rule 14, an appellant must raise and argue claims of error in both the Summary of Argument and the Argument portions of his Opening Brief. This Court will not entertain arguments presented only in the Reply Brief.").

Even if not waived, the Excess Insurers' argument has no merit. It is premised on the notion that the umbrella policies cannot be accessed because the Liberty primary policies are not exhausted—a claim that simply rehashes their disagreement with the jury's and Superior Court's findings concerning application of the deductibles in the 1980-1985 Liberty primary policies. Viking's Answering Brief demonstrated that the Excess Insurers' argument concerning the deductible endorsement in the 1980-85 primary policies has no merit. *See* Viking Ans. Br. at 32-49.

Finally, and in any event, for the reasons discussed below, the Excess Insurers' assertion concerning Liberty's umbrella policies is wrong. Liberty's obligations, like the Excess Insurers', were dictated by the language of their policies. And as the undisputed record shows, Liberty exhausted its *umbrella* policies despite the fact that Viking still has some *primary* insurance available in other policy years. JA1904 ¶¶ 62, 63; JA1905 ¶ 66; JA1906 ¶ 70. The Excess Insurers point to nothing in Liberty's umbrella policies mandating exhaustion of primary policies in other years before the umbrella policies are obligated to pay. Rather, the Excess Insurers' assertions concerning Liberty's umbrella policies rely on the same specious legal argument that they assert with respect to their own policies.[9]

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[9] The Excess Insurers' reliance on the *State Farm* and *Seneca* decisions for the proposition that "umbrella policies cannot be exhausted until all underlying policies are exhausted" (EI Ans. Br. at 21) is misplaced. Both cases addressed losses within a single policy period, and the decisions were based on application of the policies "Other Insurance" provisions. *See State Farm Fire & Cas. Co. v. LiMauro*, 482 N.E.2d 13, 19 (N.Y. 1985) (addressing coverage for auto accident and deciding dispute based on policies' "Other Insurance" provisions); *Seneca Ins. Co. v. Ill. Nat'l Ins. Co.*, 2009 WL 2001565, at *4-5 (S.D.N.Y. July 9, 2009) (Trans. ID 56301646) (analyzing policy's "Other Insurance" provision in deciding contribution dispute between carriers that issued coverage in the same policy year). These cases do not address whether lower-level coverage in *other years* must be exhausted first. And as explained in Section I.B., below, the New York Court of Appeals has held that "Other Insurance" provisions apply only where two insurers issue coverage during the same policy period, and do not apply in the successive-policy context. *See Consol. Edison*, 774 N.E.2d at 694.

B. The Excess Insurers Continue To Cite Case Law Addressing A Different Issue In A Different Context To Argue That New York Law Overrides The Plain Language Of Their Policies.

No law supports the Superior Court's decision to set aside the Joint Excess Policies' plain language, which it conceded supports vertical exhaustion. JA1743. New York has not adopted a horizontal exhaustion rule as a matter of law. The Excess Insurers conceded below—and do not dispute here—that the choice between a vertical and horizontal exhaustion methodology arises only in the context of losses triggering multiple policy years. *See* JA1654; *see also* Viking Op. Br. at 36-37 (*citing, e.g.,* 2 BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 13.14 (16th ed. 2013) (Trans. ID 56301646) (issue of horizontal versus vertical exhaustion arises "[w]hen coverage for more than one policy period is triggered . . .")).

This is critical, because no New York court has applied a horizontal exhaustion rule to losses triggering multiple policy periods—the precise issue before this Court. Despite arguing below that "New York ***embraces*** the horizontal exhaustion rule" (JA1651 (emphasis in original)), the Excess Insurers finally agree that New York courts have not expressly adopted a horizontal exhaustion rule. EI Ans. Br. at 21 ("New York courts have not expressly addressed horizontal exhaustion"). The Superior Court also agreed: "while Illinois and California have expressly applied horizontal exhaustion to continuous injury cases, such as

asbestos, New York has not." JA1790. These concessions themselves justify reversal of the Superior Court's horizontal exhaustion ruling—the Superior Court correctly found that the Joint Excess Policies' language supports vertical exhaustion, and there is no dispute that New York courts have not adopted a horizontal exhaustion rule of law, regardless of policy language.

Undeterred, the Excess Insurers argue that horizontal exhaustion is compelled by a line of New York cases that, as Viking pointed out in its Opening Brief, address a different issue in a different context. The Excess Insurers' Answering Brief reads as if Viking never filed an opening brief. Indeed, the Excess Insurers fail to address any of the points on which Viking distinguished these cases or even attempt to explain why, in light of these clear differences, the cases they cite have any bearing on the issue before this Court.

The Excess Insurers do not dispute that the New York cases they cite concern losses within single policy period. *See Home Ins. Co. v. Liberty Mut. Ins. Co.*, 678 F. Supp. 1066 (S.D.N.Y. 1988) (addressing umbrella insurer's contribution claim against primary insurer during same policy year); *Liberty Mut. Ins. Co. v. Ins. Co. of State of Pa.*, 841 N.Y.S.2d 288 (N.Y. App. Div. 2007) (addressing excess insurer's contribution claim against primary carrier in same

policy year).[10] These cases did not address the issue of horizontal versus vertical exhaustion because, as stated above, that issue is only implicated "[w]hen coverage for more than one policy period is triggered." *See* 2 OSTRAGER, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 13.14 (Trans. ID 56301646); *see also* JA1654. Despite the fact that Viking explained this distinction in its Opening Brief (Viking Op. Br. at 36-37), the Excess Insurers do not even attempt to explain how these cases nonetheless compel application of horizontal exhaustion.

Second, Viking pointed out in its Opening Brief that rather than creating or applying a blanket rule of law, as the Excess Insurers contend, the New York contribution cases that the Superior Court relied upon were decided as matters of interpretation of the specific policy language at issue. Viking Op. Br. at 42-43. Importantly, those contribution cases turned on application of the policies' "Other Insurance" provisions (*see id.*), which New York's highest court has held only apply "when two or more policies provide coverage *during the same period*," as opposed to multiple successive periods. *Consol. Edison*, 774 N.E.2d at 694

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[10] The *Continental Casualty* case cited by the Excess Insurers is distinguishable for a different reason. There, the coverage dispute was between two primary-layer insurers, one of which was defending the insured under a coverage section of its policy that it did not believe applied "[t]o avoid default judgments." *Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, 923 N.Y.S.2d 538, 540-41 (N.Y. App. Div. 2011). The case did not address horizontal versus vertical exhaustion or even priority among insurers that issued coverage at different layers in the same policy year. *See id.* The case ultimately was decided based on a late notice defense that has no bearing on this dispute. *Id.* at 542-43.

(emphasis added). Again, the Excess Insurers do not dispute or even address this point in their Answering Brief.[11]

Lastly, the Excess Insurers' cases do not "provide that all primary coverage must be exhausted before *the policyholder* may access higher-level policies," as they contend. EI Ans. Br. at 21 (emphasis added). In fact, each of the New York cases that the Excess Insurers cite involved disputes *between insurers* after the policyholder had already been indemnified for its losses. In each case the policyholder had obtained full coverage and the issue was simply how to divide the loss among the insurers. *Home Insurance*, for example, involved an umbrella insurer's lawsuit against the primary insurer of a co-defendant in the underlying personal injury suit. *See Home Insurance,* 678 F. Supp. at 1066. Unlike the Excess Insurers here, the umbrella insurer in *Home Insurance* had contributed to its insured's settlement of the underlying litigation before turning to the primary carrier for contribution. *Id.* at 1068. The same is true of the *Liberty Mutual* case,

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[11] The *Liberty Mutual* decision cited by the Excess Insurers is particularly inapposite and was also decided based on the specific policy language at issue in that case. The court in *Liberty Mutual* actually denied an excess insurer's motion for summary judgment on its contribution claim against a primary-layer insurer. *Liberty Mutual*, 841 N.Y.S.2d at 290. While the opinion states that the excess insurer might be entitled to contribution, depending on the outcome of the underlying case, the court's conclusion was based on the fact that the excess policy provided that it was triggered upon exhaustion of "the underlying policies listed in the Schedule of Underlying Insurance *and the applicable limits of any other insurance providing coverage"* and the primary policy at issue was actually listed in the excess insurer's schedule of underlying insurance. *Id.* (citation omitted; emphasis added). The Joint Excess Policies do not contain any comparable language.

in which an insured's excess general liability insurer brought suit against the insured's primary-layer employer's liability insurer *after* the excess insurer had paid $1.5 million to settle the underlying action. *Liberty Mut.*, 841 N.Y.S.2d at 289-90; *accord Cont'l Cas. Co.*, 923 N.Y.S.2d at 540-41 (after defending and indemnifying insured in underlying asbestos litigation, excess products liability insurer sued primary-layer "wrap-up" insurer for contribution). Thus, contrary to the Excess Insurers' claim, none of the decisions held that a policyholder could not access excess insurance before all potentially applicable lower-level coverage is exhausted. And none of them deny a policyholder its right to access its excess insurance, as the Excess Insurers' proposed horizontal exhaustion rule would here.

C. The Court Of Chancery Correctly Recognized That The Policy Language Here Contemplates Vertical Exhaustion.

The Excess Insurers fail to address the Court of Chancery's observation that Viking could proceed by exhausting policies vertically under the court's all sums ruling, by submitting, for example, losses under Granite State's 1979 excess policy once "the Primary and Umbrella Policies *for 1979* have been exhausted." JA0960 (emphasis added). Instead, the Excess Insurers argue that horizontal exhaustion, in the abstract, "is compatible with 'all sums' allocation." EI Ans. Br. at 23. However, to harmonize all sums allocation and horizontal exhaustion, the Excess Insurers must imply an all sums allocation method that applies *by layer—i.e.*, a

policyholder is given the right to select a policy from the triggered policy years, but coverage does not proceed up the tower once that policy is exhausted; instead, the insured must proceed horizontally to other triggered policies at the same coverage layer. *See id.* ("'All sums' governs the relationship among multiple triggered policies *in the same coverage layer* . . .") (emphasis in original). But this is not what the Court of Chancery found when it adopted all sums allocation. *See* JA0960-61. And it is not how this Court described all sums allocation in *Stonewall*:

> Under the all sums approach, [the insured] may choose a single *tower* of coverage, applicable to a single year, from which to seek indemnity and defense costs. After selecting a tower, *coverage then proceeds up the tower from the first layer of coverage* until full indemnity or complete exhaustion of the policy limits occurs. In turn, the selected insurers may then seek contribution against other carriers from other towers whose policies were also triggered by the product liability claims.

Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co., 996 A.2d 1254, 1259-60 (Del. 2010) (emphasis added).[12] The Excess Insurers' contorted definition of all sums allocation includes the insured's right to "choose a single tower of coverage,"

[12] Referring to the *Stonewall* decision, the Excess Insurers state incorrectly that Viking "urges this Court to apply *Delaware* law to the policy language." EI Ans. Br. at 20 (emphasis in original). As Viking explained in its Opening Brief, Delaware law and New York law are not in conflict on the issue of horizontal versus vertical exhaustion, because no New York court has even addressed horizontal exhaustion in the successive policy context, and because policy language controls under both New York and Delaware law. Viking Op. Br. at 28.

but it strips out the related concept that "coverage then proceeds up the tower from the first layer of coverage." *Id.* The conclusion that insureds may choose a "tower" of coverage under all sums allocation and that "coverage then proceeds up the tower" reflects a vertical exhaustion principle; it is the antithesis of horizontal exhaustion.

The California cases that the Excess Insurers cite for this supposed harmony between all sums allocation and horizontal exhaustion are readily distinguishable because they involved materially different policy language. Rather than applying a per se rule requiring horizontal exhaustion, as the Excess Insurers suggest, in California, as in New York, the "articulated basis in the cases upholding this [horizontal exhaustion] rule is one of contract interpretation." *See Kaiser Alum. & Chem. Corp. v. Certain Underwriters at Lloyd's, London*, 2003 Extra LEXIS 174, at *6-7 (Cal. Super. Ct. June 13, 2003) (Trans. ID 56301646).

The excess policy language addressed in those cases expressly required exhaustion of a specific list of directly underlying policies but, unlike the Joint Excess Policies, they also specified that the insured must exhaust "any other underlying insurance collectible by" the insureds. *See Kaiser Cement & Gypsum Corp. v. Ins. Co. of State of Pa.*, 126 Cal. Rptr. 3d 602, 614 (Cal. Ct. App. 2011) (excess policy triggered upon exhaustion of directly underlying policies "'*plus the applicable limit(s) of any other underlying insurance collectible by the Insured.*'");

Community Redevelopment Agency of Los Angeles v. Aetna Cas. & Sur. Co., 57 Cal. Rptr. 2d 755, 760 (Cal. Ct. App. 1996) ("express provisions of the [excess] policy further provide that Scottsdale's liability was also excess to 'the applicable limits of *any other underlying insurance* collectible by the [insured parties].'"). There is no similar catch-all language in the Joint Excess Policies that even arguably requires the exhaustion of lower-level policies in other years.

At bottom, the Excess Insurers' claim of harmony among horizontal exhaustion and all sums allocation is, in any event, irrelevant. Viking does not dispute that all sums allocation and horizontal exhaustion *can* be applied simultaneously. A few cases have done so, albeit when interpreting very different policy language and by applying all sums allocation on a layer-by-layer basis. The issue is whether doing so here is faithful to the policy language and the Court of Chancery's all sums allocation ruling, which plainly contemplated Viking's right to access excess coverage without requiring exhaustion of underlying insurance in other policy years. *See* JA0960-61. The Court of Chancery's description of all sums allocation comports with this Court's description of the allocation method, and it is compelled by the policies' language.

D. The Court Should Not Certify Any Issues Concerning Horizontal Exhaustion To The New York Court Of Appeals.

The Excess Insurers' request for the Court to certify an undefined "horizontal exhaustion question" to the New York Court of Appeals (EI Ans. Br. at 3, 25) should be denied, because it is based on the same misguided notion that the issue of horizontal versus vertical exhaustion is a question of law divorced from policy language. As shown above, that is wrong. The issue of exhaustion methodology starts and ends with the policies' language, which this Court is more than capable of construing. New York law has consistently recognized the primacy of contract language in resolving insurance coverage disputes like this one, so it cannot be said that New York has no controlling precedent on this question. *See* JA0954; *Raymond Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 833 N.E.2d 232, 234 (N.Y. 2005) (quoting *Consol. Edison*, 774 N.E.2d at 693 ("'In determining a dispute over insurance coverage, we first look to the language of the policy.'")).

II. JOINDER IN WARREN'S REPLY BRIEF ON THE ISSUE OF THE EXCESS INSURERS' DEFENSE OBLIGATIONS

While recognizing that Viking joined the portion of Warren's appeal addressing the Superior Court's rulings on the Excess Insurers' defense obligations (EI Ans. Br. at 40), the Excess Insurers repeatedly describe those arguments in terms that imply the appeal is pursued only by Warren. To clarify, Viking joined the portion of Warren's appeal concerning the Excess Insurers' defense obligation (Viking Op. Br. at 4 n.5; *see also* "Notice of Joinder," Trans. ID 56306095) and hereby incorporates the portion of Warren's reply brief addressing that issue.

CONCLUSION

For these reasons, and the reasons set out in Viking's Opening Brief, the Superior Court's ruling adopting a horizontal exhaustion rule for primary- and umbrella-layer insurance should be reversed, and this Court should find that the Joint Excess Policies are triggered once the directly underlying policies, in the same policy year, are exhausted.

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