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	REDACTED PUBLIC VERSION

APPELLEE VIKING PUMP, INC.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns Viking Pump, Inc.'s ("Viking's") and Warren Pumps LLC's ("Warren's") rights to excess-layer insurance coverage for asbestos-related personal injury lawsuits in light of the exhaustion of the primary and umbrella insurance policies they share for the fourteen-year period in which the companies had a common parent, Houdaille Industries, Inc. ("Houdaille"). Over the course of this case's nearly ten-year life, the Court of Chancery and Superior Court made several critical rulings in Viking's and Warren's favor, and a three-week jury trial on certain factual issues culminated in what the Superior Court called "[s]ubstantially" a "Plaintiffs' verdict." JA1727.

Viking files this Answering Brief in response to the Excess Insurers' and Travelers' appeals of (1) the Court of Chancery's ruling that Viking has the rights of an insured under the Excess Policies and (2) the jury's and Superior Court's findings that Liberty's primary-layer policies for the years 1980-85 are exhausted. Viking Pump also joins and hereby incorporates Sections I, III and IV of Warren Pump's Answering Brief concerning the Court of Chancery's "all sums" allocation ruling, the Superior Court's ruling concerning the Excess Insurers' defense obligations, and exhaustion of the Liberty primary policies.

SUMMARY OF ARGUMENT

Travelers' Br., I.[1] Denied. The Court of Chancery correctly found that Viking has the rights of an insured under the Excess Policies. JA0993.

The plain language of the insurance contracts and other relevant contracts, and the parties' course of conduct confirm Viking's rights. From 1968 to 1984, Viking was a named insured under the Excess Policies as a division of Houdaille. In 1985, the division became a subsidiary, Viking retained rights to prior policies under an express agreement, and the subsidiary is an insured under subsequent policies. In 1988, Houdaille sold Viking's stock to IDEX Corp. ("IDEX") via an agreement to which Viking was not a party and which did not divest Viking's insurance rights.

In light of these contractual underpinnings, all parties involved—including the parties to the 1985 and 1988 agreements and Liberty, issuer of the policies with the "anti-assignment" language upon which most of the Excess Insurers rely—have always acted in accordance with Viking having liability, and the Houdaille policies providing coverage, for asbestos claims arising from pre-1988 occurrences involving Viking products. The Court of Chancery recognized that this twenty-year course of conduct made sense: the entity responsible for the asbestos claims

[1] Travelers' Opening Brief is abbreviated herein as "Tr. Br." and the Excess Insurers' Opening Brief is abbreviated as "EI Br."

has the insurance rights. JA0938. And, well-settled New York law confirms that where events upon which liability is based occur before transfer, anti-assignment provisions have no application. *Arrowood Indem. Co. v. Atlantic Mut. Ins. Co.*, 948 N.Y.S.2d 581, 582 (N.Y. App. Div. 2012). As a consequence, the Court of Chancery concluded "it is frankly difficult to understand why the Excess Insurers are litigating this issue." JA0946.

Excess Insurers' Br., II. Denied. The jury and Superior Court correctly found that Liberty's 1980-85 primary policies are exhausted. The Excess Insurers do not contest that Liberty paid the policies' full aggregate limits; instead, they claim that Liberty failed to collect the appropriate deductibles. This argument fails for three reasons.

First, the Excess Policies are triggered by their plain terms when the directly underlying insurers pay their full policy limits. The Excess Insurers did not condition their liahility to Viking and Warren on agreement with the way in which Liberty exhausted its limits. While an excess insurer is free to contest coverage under its own policy, it cannot avoid or reduce its liability by challenging the propriety of an underlying insurer's decision to pay. JA1606-08.

Second, the Superior Court correctly held that whether the 1980-85 Liberty primary policies had $100,000 per-occurrence deductibles, as the Excess Insurers claim, is irrelevant to exhaustion. As even the Excess Insurers' cases show, a

deductible is part of a policy's limits. EI Br. at 30. All payments of loss, whether within or above the amount of the deductible, erode policy limits. Because it is undisputed that Liberty's indemnity payments under the 1980-85 primary policies matched the policies' total limits (JA1907-08 ¶¶ 76-79; XA317), it does not matter who paid the loss as between Viking and Warren or Liberty—under either scenario, the payments exhausted the policies. JA1606-08.

Finally, the policies' plain language shows that Liberty properly calculated and collected deductibles as part of an adjusted premium. These policies contain a "Policy Premium Adjustment Endorsement" (the "Premium Endorsement"), which provides for an adjusted premium that expressly includes a "Deductible Expense" component. At trial, Liberty's Carl Brigada confirmed that the deductible and premium adjustment provisions "work together" and that the deductibles were calculated and paid as part of the adjusted premium. The Excess Insurers' contrary reading must be rejected in favor of the insureds' interpretation, which the Superior Court found was supported by substantial evidence. JA1608-11.

STATEMENT OF FACTS

I. VIKING'S POLICY RIGHTS

Viking Pump Company was an independent company until it was merged into Houdaille in 1968, becoming a Houdaille division for 17 years. JA1895 ¶ 15. The 1968-1984 Houdaille Liberty policies to which the Excess Policies follow form identify "Viking Pump Division" as a named insured.[2]

Houdaille transferred all of the assets and liabilities of its Viking Pump Division to its newly formed subsidiary Viking Pump-Houdaille, Inc., pursuant to a 1985 Assignment and Assumption Agreement (the "1985 Viking AAA"). JA1896 ¶ 16, TA1036. The subsidiary received "all of the right, title and interest of the Assignor in and to all of the properties and assets of the Assignor . . . required for the conduct of the business of the Viking Pump Division, Houdaille Industries, Inc." TA1036. Beginning in 1985, "Viking Pump-Houdaille, Inc." is a named insured under Houdaille's policies.[3]

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[2] *See generally* 1968-1984 Liberty primary and umbrella policies, declaration pages. The Liberty's primary policies specifically identify Viking Pump Division as an Insured. *See, e.g.*, JA2297. Liberty's umbrella policies, in the definition of Persons Insured, provide as follows: "Each of the following is an insured under this policy to the extent set forth below: . . . (3) any additional insured (not a named insured under this policy) included in an underlying policy . . ." *See, e.g.*, JA2367.

[3] *See, e.g.*, 1985-1986 Liberty primary and umbrella policies, at JA4344, JA4400, VB19, VB28; *see also* 1985 Excess Policies follow-form provisions at JA4421, JA4429, JA4454, JA4471, JA4484.

In January 1988, IDEX purchased from Houdaille all of the stock of Viking Pump-Houdaille, Inc., and several otber Houdaille subsidiaries via a Stock Purchase Agreement (the "1988 SPA"). JA1896 ¶ 17; TA1043-1071. Viking was not a party to this contract. Viking Pump, Inc., as the entity is now known (VB53-54), remains a wholly-owned subsidiary of IDEX. JA1896 ¶ 18. In 1981, Houdaille purchased John Crane, Inc., which was expressly excluded from coverage under the Excess Policies and purchased its own separate coverage. *See, e.g.,* JA4377, JA4408. In 1989, Houdaille dissolved and transferred certain administrative responsibilities for tbe Excess Policies to John Crane, but John Crane is not insured under these policies and has never contended otherwise. TA720-23. There is no evidence that any asbestos claims relating to Viking's operations have ever been asserted against Houdaille or any party other than Viking.

In 2007, the Court of Chancery confirmed Viking's rights to the 1968-1986 Liberty policies, which contain the anti-assignment language on which most of the Excess Insurers rely. VB1-3.

II. THE COURT OF CHANCERY'S OCTOBER 2009 RULING

The Court of Chancery ruled that Viking has the rights of an insured under the Excess Policies. JA0932-33, 0935-39. In 1985, apart from the change in corporate form from division to subsidiary, nothing changed. Based on the 1985

Viking AAA's broad language, which assigned to Viking "all of the properties and assets of [Houdaille] (whether tangible or intangible, real or personal) required for the conduct of the business of the Viking Pump Division, Houdaille Industries, Inc.," (JA0933; TA1036) the court concluded that "the only reasonable interpretation of the Viking AAA is that it assigned the right to recover under the Houdaille Policies for liabilities relating to the Viking Pump business and predating the Viking AAA to New Viking." JA0939.

The Court of Chancery recognized that "it would make little sense" to read the Viking AAA as having assigned liabilities but not the insurance for those liabilities because doing so would have been tantamount to Houdaille waiving valuable insurance rights. JA0938. The court also held that the 1988 SPA did not divest Viking's insurance rights; Viking was not a party to the agreement, and the purpose of the insurance provision was "to make sure that Houdaille and IDEX were not accidentally forfeiting insurance coverage." JA0942-43.

III. LIBERTY PAID THE LIMITS OF ITS 1980-85 PRIMARY POLICIES TO SATISFY VIKING'S AND WARREN'S ASBESTOS LIABILITY

The Excess Insurers' appeal of the Superior Court's exhaustion/deductible ruling questions Liberty's application of policy deductibles and therefore focuses on a subset of primary-layer policies. EI Br. at 28-41. Liberty's primary-layer policies from 1972 to 1979 had no deductibles. VB66-67. Thus, this appeal

involves only Liberty's primary-layer policies from 1980 to 1985. VB77-78; VB99-100; JA1689.

Each of the 1980-85 Liberty primary policies had a $2 million aggregate products liability limit, for a total of $12 million in coverage. XA317. The total aggregate products liability limits of all 1972-85 Liberty primary and umbrella policies was $59,500,000. *Id.* On January 3, 2008, Liberty advised Warren that its indemnity payments had completely exhausted all its 1972-85 primary-layer Houdaille policies. JA1904 ¶ 61; VB81-82. Two and a half years later, on August 25, 2010, Liberty advised Warren and Viking that its 1972-85 umbrella-layer policies were also completely exhausted. JA1905 ¶¶ 66-67; VB82. Liberty has paid a total of REDACTED under the 1972-1985 Houdaille policies. VB82-84, VB86-95; XA317; JA1907-08 ¶¶ 75-77; VB105-214. It fully exhausted the $59,500,000 in aggregate products liability limits and paid an additional REDACTED for defense costs that did not erode policy limits. VB84; JA1906 ¶ 72; XA317. The Excess Insurers did contest these payments or their amounts at trial.

IV. DEDUCTIBLES WERE PAID UNDER THE POLICIES' PREMIUM ADJUSTMENT ENDORSEMENTS

The 1980-85 Liberty primary policies each contained a deductible billing plan. VB75. The premiums charged under that plan had three components: an "advanced premium," which was designed to cover Liberty's administrative costs

of producing the policy; a "deductible premium," which was charged on an "as-you-go" basis and based on the insureds' specific loss history; and an "excess premium," which allowed Liberty to collect additional premium based on losses above the deductible. VB67-71; JA1706.

Two provisions in the 1980-85 Liberty primary policies address deductible premiums: the Deductible Liability Insurance Endorsement (the "Deductible Endorsement"), and the Premium Endorsement. *See, e.g.*, JA3685, JA3689-90. The two provisions "worked together" and "interact with each other." VB79-80. The Deductible Endorsement "explains what makes up the deductible" and the Premium Endorsement "talks about the application." *Id.* The Premium Endorsement creates an "adjusted premium" based on the insured's loss history. *See, e.g.*, JA3689-90; VB67-71. The adjusted premium includes a "Deductible Expense" component. *See, e.g.*, JA3689. The Deductible Expense, in turn, is based upon the "deductible amounts incurred . . . under the Deductible Liability Insurance Endorsement" and expressly includes "payments made directly by the named insured for all losses and 'allocated loss adjustment expense' falling within the deductible." *See, e.g., id.*

Carl Brigada, who has worked for Liberty for more than thirty-five years and managed the Warren and Viking accounts, explained that the deductibles were part of a "cash flow plan," which is used wben an insurer lacks sufficient information

about an insured "that would enable them to just come up with a flat rate price for the policy." VB67-71; VA176-77. This deferred premium will "reflect the insured's loss experience, how many claims get made against the insured during the course of that . . . policy or those policies . . . ." *Id.* In short, deductibles are paid through premium adjustments.

Liberty sent Warren and Viking premium billing invoices for the 1980-85 primary policies that included deductible premiums. VB98-99; VB215-33; VB56-59; VB72-73; VB234-52. Based on their loss history, Viking paid REDACTED (VB99-100; VB215-33; VB56; VA290, VA295) and Warren paid REDACTED. VB63-64. Liberty confirmed that Warren and Viking fully paid all amounts owed under the Deductible and Premium endorsements. VB77-78; VB99-100; JA1706.

The Excess Insurers did not dispute at trial that Liberty properly calculated the various premium components of its 1980-85 primary policies, including the deductible component. VB102.

V. THE JURY AND SUPERIOR COURT BOTH CONCLUDED THAT THE LIBERTY PRIMARY POLICIES ARE EXHAUSTED

The jury was asked to construe the 1980-1985 Liberty primary policies as they relate to the deductibles and choose between the parties' competing constructions. Specifically, the jury was asked: "Should deductibles under the 1980-1985 Liberty primary policies be: (A) applied on a $100,000 per occurrence

basis; or (B) paid through the premium adjustment endorsement?" JA1480 ¶ 1. The jury sided with Viking and Warren, concluding that the 1980-1985 deductibles were properly paid through the Premium Endorsements. *Id.*

The Superior Court held that the jury's verdict "was supported by substantial evidence" and that there was "no basis for overturning the jury's finding as to Liberty's exhaustion." JA1740-41. The Superior Court also held that "whether or not the deductible was appropriately applied on an actual per-occurrence basis is beside the point." JA1740. This is so because—as Mr. Brigada testified—losses within a policy's deductible erode policy limits, regardless of whether the deductible is paid, and it is undisputed that Liberty's indemnity payments under the 1980-85 primary policies exhausted those policies' aggregate limits. JA1738-39.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT VIKING HAS RIGHTS TO THE EXCESS POLICIES.

A. Question Presented.

Did the Court of Chancery commit reversible error when it found that Viking Pump, Inc., has the rights of an insured under the Excess Policies, in light of the fact that the Viking Pump Division of Houdaille and the Viking Pump-Houdaille, Inc., subsidiary were named insureds; Viking Pump, Inc., received all assets and liabilities of the Viking business; and rights to the policies were assigned to Viking after the injuries for which Viking seeks coverage has occurred?

B. Scope Of Review.

Grants of summary judgment are reviewed *de novo* as to both facts and law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits Of The Argument.

1. Viking Pump, Inc. Has Rights To The Excess Policies.

a. The 1985 Viking AAA Validly Assigned Insurance Rights to Viking Pump-Houdaille, Inc.

As an operating division of the first named insured, JA1896 ¶ 16, Viking was insured under the 1968-1984 Excess Policies.[4] The "Viking Pump Division" is expressly identified in the Schedules to the Declarations of each Liberty policy to which the Excess Policies follow form. *See* n.2 *supra*. After December 1984, when the division became a wholly owned subsidiary, this subsidiary was a named insured. *See* n.3 *supra*.

REDACTED

In these circumstances, the anti-assignment clause simply does not apply, because Viking today is the very same entity named as an insured under the policies at issue. *See In re Reif*, 174 N.E.2d 492, 495 (N.Y. 1961) (Where a change in the corporate form is the only change for a company as a result of incorporation, the corporation is liable for its predecessor's contractual obligations).

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[4] *See Bewers v. Am. Home Prods. Corp.*, 472 N.Y.S.2d 637, 638 (N.Y. App. Div. 1984), *aff'd*, 474 N.E.2d 247 (N.Y. 1984) (Division is not a discrete legal entity but is part of the corporation).

The notion that Viking forfeited insurance rights when it became a subsidiary cannot be squared with the 1985 Viking AAA's assignment of "all assets" required to conduct the Viking business.[5] The Court of Chancery properly found this grant to be "broad," for several reasons. *First,* it includes "all of the right, title and interest," whether "tangible or intangible." JA0936; TA1036. *Second,* Houdaille also assigned "all other arrangements or understandings of whatsoever nature, whether oral or written." *Id.*[6] Nothing restricts such rights or interests to a specific list. To the contrary, the parties manifested a broad intent for Viking to have *all* relevant rights and interests.[7] *Id.* Rights to insurance for assumed liabilities cannot reasonably be excluded from this comprehensive agreement. *See* JA0936-37.

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[5] Absent fraud (none is charged here), a sale of controlling stock is not an assignment. *See Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *5 (Del. Ch. Mar. 11, 1999); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 528 (Del. Ch. 1970).

[6] *See, e.g., Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 631-32 (Del. Ch. 1989) (the terms "any," "understanding," and "arrangement" indicate "an intent . . . 'to extend beyond agreements and contracts in the classical contractual "offer" and "acceptance" sense'") (quotation omitted); *cf Mizell v. Comm'r of Internal Revenue*, 1995 WL 700547, at *3 (T.C. Nov. 29, 1995) ("While the concept of an agreement certainly includes a contractual agreement, it is a broader concept that would also include other forms of agreements not necessarily arising from strict contractual relationships.").

[7] *See Bekhor v. Bear, Stearns & Co.*, 2004 WL 2389751, at *5 (S.D.N.Y. Oct. 25, 2004) ("The phrases 'including' and 'without limitation' are redundant in that each asserts a breadth of coverage beyond the item or items that those phrases immediately precede . . . . Those phrases each mean that the lists following them are not exhaustive and do not in any way restrict the scope of the provision.") (citation omitted).

The parties' intent for Viking to retain insurance rights is confirmed by the fact that Viking also assumed all pre-1985 liabilities related to the business of the Viking Pump Division, TA1037, including obligations and liabilities "of whatsoever nature . . ." (TA1037-38) and "of the type covered by . . . general liability (including, without limitation, product liability) insurance . . . of the Viking Pump Division . . ." TA1039. The Court of Chancery properly found that the assumption of all liabilities made the insurance rights "'required for the conduct of the business'" under any reasonable understanding of that phrase: "A business is defined not only by its product line, but also by the contractual commitments it must meet in order to function." JA0936-37. The only way Viking could meet this obligation "without selling off its own assets and decreasing the value of Houdaille's holdings would have been to use Houdaille's pre-existing coverage." JA0937. "[R]eading an agreement as transferring only the Houdaille-Era Claims but not the Houdaille-Era Insurance Rights would be 'absurd.'" *Id.*

As the Court of Chancery also explained (and the Excess Insurers do not contest), the parties quite sensibly matched the insurance rights with the entity that tort claimants would sue—the Viking subsidiary:

> By assigning the Houdaille-Era Insurance Rights to New Viking, Houdaille was matching its liabilities with the entity tort plaintiffs were most likely to sue—*so long as New Viking had the assets*

> *required to respond to those plaintiffs*. One reason to place business lines in subsidiaries is to cabin liabilities, including for claims arising from pre-spin-off occurrences. It defeats that purpose if the target that one wishes plaintiffs to aim at—the spun-off subsidiary—does not get the insurance rights to address the pre-spin-off claims.

JA0938-39 (emphasis in original).

b. The Parties' Intent Is Clear.

The Court of Chancery properly rejected the Excess Insurers' assertion that the broad assignment of rights was not sufficiently specific as to insurance, finding that the broad transfer of assets readily included insurance rights. The court ruled (and the Excess Insurers agree) that Florida law governs the 1985 Viking AAA. TA1040; JA0936 n.64; Tr. Br. at 34 n.15. "Under Florida law, '[n]o particular words or form of instrument is necessary to effect an equitable assignment and any language, however informal, which shows an intention on one side to assign a right . . . and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment." JA0936 n.64, citing *Giles v. Sun Bank, N.A.*, 450 So. 2d 258, 260 (Fla. Dist. Ct. App. 1984); *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. Dist. Ct. App. 2007). Under Florida law, all assets "required for the conduct of the business" necessarily included the insurance rights. JA0936 n.64. The Court of Chancery pointedly noted the absurdity of the Excess Insurers' position that insurance rights were not singled out: "Indeed, the Viking AAA also did not specifically identify the plants,

equipment, and real property that New Viking was to acquire. Were they not transferred under the Agreement?" *Id.*[8]

2. The 1988 SPA Did Not Divest Viking's Insurance Rights.

The 1988 transaction was a stock sale. Whatever liabilities and assets Viking had before the sale, it had after the sale. *See, e.g., In re KB Toys Inc.*, 340 B.R. 726, 728 (D. Del. 2006) (assets and liabilities are transferred in a stock sale). This transaction did not divest Viking of rights or liabilities that it already had. The Excess Insurers assert that under the 1988 SPA, "Houdaille was to *retain* all pre-closing liabilities." Tr. Br. at 14, 35 (emphasis in original). This ignores that Viking Pump-Houdaille—which was not a party to the 1988 SPA—had *already* assumed liabilities for pre-1985 occurrences and corresponding insurance rights. As to those claims, there was nothing for Houdaille to retain. The Court of Chancery thus properly found that the 1988 SPA did not divest liabilities or rights from Viking, or alter Viking's legal liability to asbestos claimants. JA0942-43.

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[8] While New York law does not apply to the 1985 Viking AAA, the New York case cited by the Excess Insurers for a supposed lack of manifestation of intent to assign does not support their position. JA0941 n.75. In *Property Asset Management, Inc. v. Chicago Title Ins. Co.*, 173 F.3d 84, 87 (2d Cir. 1999), the supposed assignee attempted to establish the loan assignment through a backdated document and affidavits from corporate officers. Because the affidavits "express only the uncommunicated subjective understandings of the officers," there was no "'act or words' that manifest an intent to assign." *Id.*, quoted at Tr. Br. at 34. Here, Viking does not rely on after-the-fact testimony to establish intent to assign. Objective, contemporaneous evidence—the 1985 Viking AAA's language and the parties' unbroken course of conduct—demonstrate the parties' intentions.

The Excess Insurers also rely on a paragraph of the 1988 SPA which on its face addresses the allocation of liabilities between the contracting parties—Houdaille and IDEX—not between Houdaille and Viking:

> 5.12. Allocation of Certain Liabilities. Upon the Closing, Buyer [IDEX Corporation] will as a result of such transaction assume only those liabilities that pertain to the NonCrane Subsidiaries, including, but not limited to, those liabilities set out on Schedule B hereto, and Buyer shall release, indemnify and hold Houdaille harmless from all such liabilities; provided, however, that Houdaille shall remain liable to the extent of insurance coverage available (in the event of claims arising from occurrences prior to the Closing Date, only to the extent such coverage is available on an occurrence basis) under existing or previously existing casualty insurance policies . . .

TA1065-66 (emphasis original). This passage does not allocate any Viking liabilities, or any Viking assets (including insurance rights) to any entity. Nor does it transfer *back* to Houdaille any liabilities or rights possessed by Viking, or in any way address the 1985 assignment to Viking. Nor could it, since the entity possessing those liabilities and rights, Viking, was not a party to the 1988 SPA. In specifying that Houdaille retained liabilities "to the extent" its pre-closing insurance was available, the parties simply ensured that those policies would apply to pre-sale occurrences.

3. Extrinsic Evidence Confirms Viking's Insurance Rights.

As the Court of Chancery observed, "'any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the

agreement.'" JA0943, quoting *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008); *see also Cheek v. McGowan Elec. Supply Co.*, 483 So. 2d 1373, 1381 (Fla. Dist. Ct. App. 1985) (course of conduct relevant to contract interpretation). Here, the parties' unbroken course of conduct confirms their intent. Viking has always defended the asbestos claims;[9] Houdaille has always acknowledged Viking's coverage rights; and Liberty has always treated Viking as an insured.

This undisputed course of conduct has at its source one incontrovertible fact: nothing in the 1985 or 1988 agreements could affect asbestos plaintiffs' rights to sue the responsible party. REDACTED

The 1985 Viking AAA affords the insurance for suits asserting Viking liability.

The Excess Insurers attempt to rewrite the parties' mutual intent by referencing an October 1987 internal Houdaille memorandum that states "claims for occurrences prior to the date of closing (but yet to be reported) will be the responsibility of Houdaille and would be covered under the previously purchased

[9] "[F]or a generation New Viking has acted as if it was responsible for the Houdaille-Era Claims. The Excess Insurers have not explained why New Viking would voluntarily do that or why IDEX, as New Viking's parent, would have allowed its subsidiary to respond to liabilities for which it was not responsible." JA0944.

Houdaille insurance policies." TA1074 (underlining in original). There is no evidence that this document was ever shared with IDEX or demonstrates the parties' mutual intent three months later when executing the January 1988 SPA. And, the 1988 SPA is "the entire agreement and understanding of the parties hereto in respect of the transactions contemplated by this Agreement . . ." TA1061. In any event, the October 1987 internal memo simply says that Houdaille's pre-closing policies would respond for pre-closing occurrences and IDEX's post-closing policies would cover post-1987 occurrences:

> [A]ll claims related to occurrences subsequent to the date of the closing (directly associated with the six non-Crane businesses and/or products sold by these businesses) will be covered by the [IDEX] insurance. Existing claims and claims for occurrences prior to the date of closing (but yet to be reported) will be the responsibility of Houdaille and *would be covered under the previously purchased Houdaille insurance policies*.

TA1074 (underlining in original; bracketed material and italics added). Thus, if it has any relevance here, the memo confirms that the Viking asbestos claims were to be covered by Houdaille's insurance.

4. The Court of Chancery Correctly Applied Well-Settled New York And Florida Law In Ruling That The Consent To Assignment Provisions Do Not Defeat Viking's Rights.

The Court of Chancery correctly ruled that Liberty's "consent to assignment" provisions do not defeat Viking's insurance rights. New York "follows the majority rule that such a [no-transfer] provision is valid with respect

to transfers that were made prior to, but not after, the insured-against loss has occurred." *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 170 (2d Cir. 2006);[10] *see also* 17 WILLISTON ON CONTRACTS § 49:126 (4th ed. 2014) ("As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred."). Here, coverage rights were transferred after the Excess Policies' periods and any loss triggering coverage had already taken place.

a. Particularly In Asbestos Cases, Anti-Assignment Provisions Do Not Bar Post-Loss Assignments.

The rationale for the rule that post-loss assignments are permitted is that "[w]hen the loss occurs *before* the transfer, however, the characteristics of the [assignee] are of little importance: regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy." *Globecon Grp., LLC v. Hartford Fire Ins. Co.*, 434 F.3d 105, 171 (2d Cir. 2006) (emphasis added,

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[10] *See also Travelers Indem. Co. v. Israel,* 354 F.2d 488, 490 (2d Cir. 1965); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC,* 375 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2005); *Mellen v. Hamilton Fire Ins. Co.*, 17 N.Y. 609, 615 (N.Y. 1858) (rejecting as "quite . . . untenable" an insurer's assertion that an anti-assignment provision barred coverage for fire losses that occurred before the assignment); *Ardon Constr. Corp. v. Firemen's Ins. Co. of Newark, N.J.*, 185 N.Y.S.2d 723, 729 (N.Y. Sup. Ct. 1959) ("It has long been the doctrine of this State that rights under a policy of insurance may be assigned after loss notwithstanding a clause in the policy forbidding assignments.") (citing cases); *Beck-Brown Realty Co. v. Liberty Bell Ins. Co.*, 241 N.Y.S. 727, 728 (N.Y. Sup. Ct. 1930) (holding that assignment of fire insurance policy subsequent to a loss is valid, regardless of policy's consent-to-assignment condition).

brackets original); *see also* 3 COUCH ON INSURANCE § 35:8 (3d ed. 2014) (no-assignment clauses "protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.") (citations omitted). Any other rule would confer a windfall on insurers by allowing them to escape responsibility for risks that they collected premium dollars to bear.

Under the laws of New York and Florida (and the overwhelming majority of other jurisdictions, including Delaware)[11]—the "loss" occurs when the event giving rise to the liability takes place, *e.g.* when the bodily injury occurs, irrespective of when claims arising from the injury are asserted. Every loss for which Viking seeks coverage occurred between 1968 and 1985 when Viking was a Houdaille division or subsidiary. No choice of law analysis is necessary on this issue, because the laws of New York (which govern the Excess Policies) and Florida (which govern the 1985 Viking AAA) are in accord. *See Globecon*, 434

[11] *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co.*, 1991 WL 138431, at *7 n.14 (Del. Super. Ct. July 15, 1991) (noting that "anti-assignability" clauses should not preclude assignment of coverage rights for environmental liabilities; such clauses generally "limit the assignability of insurance contracts before the insured-against loss has occurred"); *Egger v. Gulf Ins. Co.*, 864 A.2d 1234, 1242 (Pa. Super. Ct. 2004) (upholding insurance assignment for claims for pre-assignment bodily injury;), *aff'd*, 903 A.2d 1219 (Pa. 2006); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763-64 (Minn. Ct. App. 1999) (upholding insurance assignment for post-assignment claims which arose from pre-assignment environmental damage; "when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity").

F.3d at 170; *Arrowood Indem. Co.*, 948 N.Y.S.2d at 582 (New York law; insurer's no-assignment provision does not apply to post-loss transfer of rights); *Texaco A/S, S.A. v. Commercial Ins. Co. of Newark, N.J.*, 1995 WL 628997, at *6 (S.D.N.Y. Oct. 26, 1995), *vacated on other grounds*, 160 F.3d 124 (2d Cir. 1998) (New York law; no-assignment clause did not bar post-loss insurance rights transfer pursuant to merger); *Better Constr., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 651 So. 2d 141, 142 (Fla. Dist. Ct. App. 1995) (Florida law; anti-assignment clause does not bar insured's assignment of after-loss claim).

The jury's trigger finding—uncontested by the Excess Insurers—was that bodily injury first occurs upon cellular and molecular damage caused by asbestos inhalation. JA1868 ¶ 9. The claims for which Viking seeks coverage involve alleged exposure to asbestos in products manufactured by Viking prior to 1985. All events leading to injury covered by the Excess Policies therefore took place before the transfer of insurance rights to Viking.

A recent New York opinion belies the Excess Insurers' assertion that New York's highest court would find that only "fixed" and "identifiable" coverage benefits may be assigned. Tr. Br. at 25. In *Arrowood v. Atlantic Mutual*, a New York intermediate appellate court held that an asset sale agreement transferred insurance rights for pre-transfer claims. 948 N.Y.S.2d 581. Tort plaintiffs sued the acquiror, Kerry, Inc., for exposures to chemical products manufactured by the

former owner of the acquired business, St. Louis Flavors Corp., and Kerry sought coverage under St. Louis' pre-assignment policies. *Id.* at 582. Citing New York's rule that an insurance policy no-transfer provision is "'valid with respect to transfers that were made prior to, but not after, the insured-against loss,'" the court held that coverage transferred to Kerry because "the underlying plaintiffs' product sale and exposure allegations show that the potential liabilities in question arose before the transfer." *Id.* at 582-83, quoting *Globecon*, 434 F.3d at 170, and citing *Kittner v. Eastern Mut. Ins. Co.*, 915 N.Y.S.2d 666, 669 n.3 (N.Y. App. Div. 2011).

The *Arrowood* court rejected with little difficulty the argument also made by the Excess Insurers here that the different nature of the companies somehow translated into increased risk for the insurers. The court reasoned that "in the final analysis, Kerry is only seeking a defense from Travelers to the extent of the risk that Travelers contracted to undertake—those claims that potentially implicate St. Louis's products." *Arrowood,* 948 N.Y.S.2d at 583. Expressly following the Court of Chancery's decision here, the court explained that "'once the insured against loss has occurred, there is no issue of an insurer having to insure against additional risk;'" "'the only question is who the insurer will pay for the loss.'" *Id.* at 582-83, quoting *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 103 (Del. Ch. 2009).

The Excess Insurers' claim that a "growing number" of courts have held coverage rights of the sort acquired by Viking violate anti-assignment provisions is unsupported. To the contrary, many recent opinions, including from courts applying New York and Florida law, have reached the same result as *Globecon* and *Arrowood*. *See, e.g., Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 490-91 (N.D. Ohio 2006) (applying New York law and collecting cases from multiple jurisdictions; assignability restrictions did not bar coverage for post-assignment asbestos claims arising from pre-assignment occurrences); *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377-78 n.7 (Fla. 2008) (assignment restrictions do not apply to post-loss assignment); 3 COUCH ON INSURANCE § 35:8 (3d ed. 2014) ("Although there is some authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss. . . .") (citations omitted); *see also infra* n.12.

Elliott is instructive. Based on an assignment of insurance rights for pre-1986 Liberty occurrence-based policies, plaintiff claimed coverage for thousands of asbestos suits alleging pre-assignment injury. 434 F. Supp. 2d at 486-90. Like Viking here, the assignee owned a business whose "fundamental character" had "remained the same" despite several changes in "ownership and corporate

structure." *Id.* at 486. The court held that the insurer's anti-assignment clause did not bar coverage for asbestos claims arising from pre-assignment injury; the insurer is not harmed since "the assigned risk is the same risk [the insurer] initially agreed to insure." *Id.* at 490-91 (citations omitted) [12]

Faced with this consistent enunciation of New York law, the Excess Insurers rely on opinions decided under Indiana and California law, *Travelers Casualty & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008), and *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003), and declare that New York law "is consistent with and points towards" the holdings of these cases. Tr.

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[12] Other courts, including Delaware courts, have also applied this principle to asbestos claims. *See CNH Am., LLC v. American Cas. Co. of Reading, Pa.*, 2014 WL 626030, at *5 (Del. Super. Ct. Jan. 6, 2014), *rearg. denied*, 2014 WL 1724844 (Del. Super. Ct. Apr. 29, 2014) (asset sale agreement that transferred "all . . . [a]ssets other than Retained Assets" transferred insurance rights for asbestos claims; insurer consent not required because asbestos exposure occurred before transfer); *York Int'l Corp. v. Liberty Mut. Ins. Co.*, 2011 WL 2111989, at *5 (M.D. Pa. May 26, 2011) (declining to enforce no-assignment clause; insurer's risk as to asbestos claims was not increased "because the alleged injuries took place during the applicable coverage period which was before the contracts were assigned"); *In re Federal-Mogul Global Inc.*, 385 B.R. 560, 567 (Bankr. D. Del. 2008) ("[T]o the extent that the events giving rise to liability have already occurred, there will be no additional risk to the insurance companies by virtue of the assignments"), *aff'd*, 402 B.R. 625, 645 (D. Del. 2009) (insurers "have no economic incentive to prevent this assignment, particularly whereas here, the events creating exposure to asbestos liability have already occurred"); *In re Ambassador Ins. Co.*, 965 A.2d 486, 491 (Vt. 2008) (claims arose under occurrence policies when parties were injured by asbestos-containing products; later assignment of insurance rights did not violate consent-to-assignment clauses); *In re ACandS, Inc.*, 311 B.R. 36, 41 (Bankr. D. Del. 2004) (rights under policies could be assigned to asbestos trust of Chapter 11 estate; "because an insured's right to proceeds vests at the time of the loss giving rise to the insured's liability, restrictions on an insured's right to assign its proceeds are generally void"); *Mass. Elec. Co. v. Commercial Union Ins.*, 2005 WL 3489658, at *2 (Mass. Super. Ct. Oct. 18, 2005) (rejecting insurers' argument that assignment restrictions invalidated transfer of rights to pre-assignment policies).

Br. at 24-28. These opinions hold that assignment restrictions bar transfers of insurance rights unless the claim has "been reduced to a sum of money due or to become due under the policy." *Henkel*, 62 P.3d at 75; *U.S. Filter*, 895 N.E.2d at 1180. This is *not* the law of New York or the "vast majority" of jurisdictions. *See* JA0950-51 (discussing conflict between *Henkel* and New York precedents regarding assignment of coverage for pre-assignment injury); *Elliott*, 434 F. Supp. 2d at 491 (*Henkel* conflicts with New York and other states' precedent allowing post-loss assignments and "should not be followed"). The Excess Insurers' other cases are factually inapposite.[13]

b. Assignment Has Not Increased The Insurers' Risk

Travelers speculates that John Crane and a "revived" Houdaille may "claim rights to the Houdaille insurance" in the future. Tr. Br. at 29. This conjecture has

[13] *See e.g., Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 539-40 (W.D. Mich. 2003) (confirming that "an anti-assignment clause will not be enforced where loss occurs before the assignment" and that the "majority rule" was that "an insurer's responsibility under a liability policy accrues at the time the complainant suffers damage . . ." (citations omitted). On the specific facts of the *Century* case, the court concluded that there was no right to insurance proceeds because the liabilities at issue were imposed by statutes which did not exist at the time of the sale and because of a fact issue as to whether the injury took place before the assignment—facts not present here. *Id.* The Excess Insurers' other cases hinge on specific state law peculiarities not relevant here—as opposed to the supposedly "inchoate" or "speculative" nature of the claims. *See Keller Founds., Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 874-75 (5th Cir. 2010) (Texas courts "diverge from this majority and enforce non-assignment clauses even for assignments made post-loss"); *In re Katrina Canal Breaches Litig.*, 63 So. 3d 955, 960 (La. 2011) (Under Louisiana statute, anti-assignment clause may bar an insured's post-loss assignment where clause unambiguously states that it applies to post-assignment losses); *Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734 (Haw. 2007) (Hawaii statute permits enforcement of no-assignment clauses).

no legal significance under New York law, which focuses on whether the assignment extends the insurer's obligations to *uninsured* risks. In any case, the asbestos claims at issue arise from the same risks that the Excess Insurers contracted to insure, and the changes in the corporate forms of the "Viking Pump" and "Warren Pumps" businesses have done nothing to alter the Excess Insurers' obligations. Indeed, and if anything, the assignments to Viking and Warren preserve the status quo by holding the Excess Insurers to the same duties for the same insured risks that they indisputably owed for the "Viking Pump" and "Warren Pumps" businesses during the policy periods.

Moreover, Travelers' "prejudice" claim ignores that ***John Crane has no insurance rights under the Excess Policies whatsoever.*** The 1989 Assignment and Assumption Agreement gave John Crane only certain administrative rights and responsibilities for these Houdaille policies. TA720-23. Without exception, the relevant Liberty umbrella policies (and "follow form" Excess Policies) exclude coverage for John Crane and its business operations. *See, e.g.*, JA4377, JA4408.

And Travelers provides no basis for asserting that Houdaille—which ceased corporate existence over 25 years ago—will be "resurrected." Regardless, any revived Houdaille could pursue coverage, if at all, only for claims that are separate and distinct from the asbestos claims at issue here. Houdaille no longer has any insurance rights (nor any legal responsibility) for claims involving the "Viking

Pump" or "Warren Pumps" businesses. It is axiomatic that an assignment "divests the assignor of all control over the right assigned." GLEN BANKS, 28 NEW YORK PRACTICE SERIES, *NEW YORK CONTRACT LAW* § 15:3 (2014) ("Validity of assignment") (citing cases); *see also In re Stralem*, 758 N.Y.S.2d 345, 347 (App. Div. 2003); *Zwiebel v. Guttman*, 809 N.Y.S.2d 214, 215-16 (App. Div. 2006). Furthermore, there is nothing unusual about both a corporate policyholder and a former subsidiary seeking coverage under the same policies for different claims arising from different insured risks. *See Elliott,* 434 F. Supp. 2d at 498-500.

The Excess Insurers' passing attempt to argue that their risk has in fact increased is also contrary to the undisputed facts at trial: Viking and Liberty have defended the asbestos claims REDACTED . JA0949 n.87.[14] The Excess Insurers cite no record evidence to the contrary, only speculation that separate defenses for Viking and Warren have increased costs, and, as noted, that Houdaille could someday be "revived." Tr. Br. at 29-30. The Excess Insurers present no evidence that the change in corporate form or the sale to IDEX altered Viking's business in any way or imposed any new obligations on insurers. They simply owe Viking Pump, Inc. the same duties for the same insured risks as they

[14] *See* Viking Op. Br. at 9 ("Through October 2012, Viking had resolved REDACTED claims without payment and only REDACTED with payment, for a total of REDACTED in settlement payments.") (citations omitted) "Viking's settlement payments averaged REDACTED per claim. REDACTED ; there have been no judgments against Viking." *Id.*

owed the pre-1985 division. Nor could the transactions possibly have led to increased risk: every claim for which Viking seeks coverage involves alleged injuries from exposure to asbestos before the change in corporate form. *See Texaco,* 1995 WL 628997, at *6 ("When the loss occurs before the transfer, any increase in risk due to the successor's characteristics is irrelevant.") (citations omitted).

Finally, as the Court of Chancery concluded, even if Viking had not received insurance rights, "the Excess Insurers would still be responsible for the Houdaille-Era Claims because Houdaille, if not New Viking, would hold the Insurance Rights." JA0946. In this context, the Court of Chancery concluded "it is frankly difficult to understand why the Excess Insurers are litigating this issue." *Id.*

c. Certification To New York's Highest Court Is Not Needed.

The Excess Insurers' request that the Court certify "this issue"—defined broadly and vaguely as "the enforceability of consent-to-assignment provisions"—to the New York Court of Appeals should be denied since it is based on a mistaken argument that New York law is unsettled. *See* Argument section I.C.4. *supra*; *see also Ardon*, 185 N.Y.S.2d at 729 ("[i]t has long been the doctrine of this State that rights under a policy of insurance may be assigned after loss notwithstanding a clause in the policy forbidding assignments."); *Cf. Quadrant Structured Prods. Co.*

v. Vertin, 2013 WL 5962813, at *1 (Del. Nov. 7, 2013) (certifying question to New York Court of Appeals where "resolution of the appeal before us depends on dispositive and unsettled questions of New York law"). Certification to New York's highest court is also inappropriate because Florida law governs the 1985 Viking AAA and its allocation of assets and liabilities.

II. THIS COURT SHOULD AFFIRM THE SUPERIOR COURT'S AND JURY'S RULINGS THAT THE LIBERTY PRIMARY AND UMBRELLA POLICIES FOR 1980 TO 1985 ARE EXHAUSTED

A. Question Presented.

Whether the Superior Court's ruling that the 1980-85 Liberty policies are exhausted can be set aside where it is undisputed that Liberty paid its full policy limits under each of those policies.

B. Scope Of Review.

This Court reviews the Superior Court's conclusions of law *de novo* and applies the highly deferential "clearly erroneous" standard to findings of fact. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 108 (Del. 2013).

C. Merits Of Argument.

1. The Joint Excess Policies Are Triggered Onee Liberty Pays The Full Limits Of The Direetly Underlying Policies, Which Indisputably Has Oceurred, And The Exeess Insurers Cannot Seeond Guess The Propriety Of Those Payments

The excess policies sitting above the 1972-85 Liberty-Houdaille policies (the "Joint Excess Policies") attach under their plain terms once the directly underlying carriers have paid the full amount of their respective policy limits. International's first-layer excess policy for 1981, for example, states that "[l]iability of the company [International] with respect to any one occurrence shall not attach unless and until the insured, or the insured's underlying insurer, has paid the amount of

underlying insurance stated in Declaration 5," which is described as "$3,000,000.00 each occurrence and in the aggregate (where applicable) umbrella liability as provided by Liberty Mutual Policy Number to Be Advised excess of underlying insurance or self-insured retention." JA3998-4000. Each of the other policies contains materially identical provisions.[15]

This plain language is dispositive of the Excess Insurers' attempt to overturn the Superior Court's exhaustion ruling concerning the 1980-85 Liberty policies.[16] It is ***undisputed*** in this case that Liberty paid the full aggregate policy limits of each of those policies on account of asbestos claims against Viking and Warren. JA1907-08 ¶¶ 76, 77; JA1707. This fact establishes the Joint Excess Insurers' duty to pay and justifies affirming the Superior Court's exhaustion ruling. The Excess Insurers should not be allowed to condition their coverage obligations now on anything other than full payment of the underlying limits.

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[15] *See* JA2068-69, 2090-91, 2170-71, 2227-28, 2395, 2412, 2582, 2595, 2867, 2906-07, 2930, 3071, 3372-74, 3330, 3389, 3433, 3580, 3591, 3614-16, 3622, 3748, 3751, 3876, 3885, 3911, 4000, 4006, 4025, 4117, 4137, 4158, 4165, 4169, 4171, 4277, 4297, 4302, 4425, 4433, 4464, 4484.

[16] Liberty issued primary- and umbrella-layer insurance coverage to Houdaille from 1972 to 1985, but only the primary policies for 1980 through 1985 had deductibles. VB104. The Excess Insurers' appeal of the Superior Court's ruling on Viking's and Warren's payment of deductibles through the Policy Premium Adjustment Endorsement relates only to Liberty's primary policies for 1980 through 1985. *See* EI Br. at 28-41.

While the Excess Insurers do not dispute that Liberty paid out the full limits of its 1980-85 primary policies toward settlements of Viking's and Warren's asbestos claims (JA1907-08 ¶¶ 76, 77), they assert a right to challenge the ***propriety*** of these payments, claiming that Liberty did not properly apply its own deductible provisions. EI Br. at 28-41. The law does not permit such second-guessing. The Excess Insurers cite no New York authority suggesting that an excess insurer may challenge a primary carrier's good-faith payment decisions. Courts in New York have consistently recognized that a contract should be interpreted according to its plain terms and the meaning that the parties have ascribed to it, not the interpretation of a stranger to the agreement. *See MBL Contracting Corp. v. King World Prods., Inc.*, 98 F. Supp. 2d 492, 497 (S.D.N.Y. 2000) (New York law; refusing to consider non-party's interpretation of contract in absence of evidence that either of contracting parties ever adopted such interpretation); *In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 522 (Bankr. E.D.N.Y. 1994) (New York law; refusing to permit stranger to consignment contract to challenge contract's validity, which was unquestioned by both contracting parties).

Consistent with this general principle, decisions outside New York show that the Excess Insurers' attempts to second guess Liberty's payments are improper. The U.S. District Court for the Western District of Texas's decision in *ARM*

Properties Management Group v. RSUI Indemnity Co. is instructive, as it involved an excess insurer's attempt to challenge exhaustion of underlying limits on the ground that the primary insurer failed to collect appropriate deductible amounts. 2008 WL 5973220 (W.D. Tex. Aug. 25, 2008). After the insured's primary and first-layer excess insurers acknowledged coverage and paid out the entirety of their $30 million limits, the insured's second-layer excess insurer, RSUI, denied coverage for the insured's remaining losses on the ground that the underlying policies were not properly exhausted because the primary carrier had not collected the appropriate deductible: "RSUI argues the underlying insurers' payment of the policy limits may not have triggered liability under the RSUI excess coverage policy because . . . ***the underlying insurers failed to apply a deductible*** for the amount of coverage each property was eligible to receive under the National Flood Insurance Program." *Id.* at *5 (emphasis added).

The district court rejected RSUI's attempts to second guess the underlying carriers' payments, citing the plain language of the excess policy's attachment provision, which—like the provisions at issue here—stated that the excess insurer's "liability attaches to the Company only after the primary and underlying excess insurer(s) have paid or have admitted liability for the full amount of their respective ultimate net loss liability, [$30,000,000 per Occurrence] . . ." *Id.* (bracket text supplied by court). Noting that "[i]t is undisputed the underlying

insurers have paid $30,000,000," the court found that "whether or not the underlying insurers failed to take advantage of exceptions in their coverage or otherwise overpaid, as RSUI claims, is not relevant to the issue of whether RSUI's liability has attached." *Id.* at *7. Rather, "[t]he simple fact that both underlying insurers have paid their policy limits as defined in Item 6 of the excess insurance contract is sufficient to trigger RSUI's duties under this clause." *Id.*

ARM Properties is part of a consistent line of cases precluding an excess insurer from contesting exhaustion of underlying insurance by challenging an underlying insurer's payments. *See, e.g., Edward E. Gillen Co. v. Ins. Co. of Pa.*, 2011 WL 1694431, at *4 (E.D. Wis. May 3, 2011) (excess insurer "is free, as it has already done, to contest coverage under its own policy. But an excess liability insurer cannot avoid or reduce liability under its own policy by challenging a separate insurer's decision to settle or pay out claims at a prior layer of insurance."); *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403, 416 (R.I. 2001) ("absent fraud between the insured and the primary carrier, 'the insured does not carry the burden of proving the soundness of the primary carrier's decision to pay.'"); *UNR Indus., Inc. v. Cont'l Ins. Co.*, 1988 WL 121574, at *16 (N.D. Ill. Nov. 9, 1988) ("Home has cited no law which supports its theory that an excess insurer can proceed against its insured because of the primary insurer's alleged 'improper exhaustion' of primary coverage . . ."); *LSG Techs., Inc. v. U.S. Fire Ins.*

Co., 2010 WL 5646054, at *13 (E.D. Tex. Sept. 2, 2010) (excess insurer "fail[ed] to cite language from its policies giving it the right to examine the propriety of the primary insurer's claims handling and payments or the strength of the underlying plaintiffs' claims.").

The cases on which the Excess Insurers rely fall into two categories, neither of which applies here. The first are cases recognizing that an excess insurer, in determining coverage under its own policy, does not have to follow the primary insurer's decisions with respect to coverage under its policy. *See, e.g., In re Liquidation of Midland Ins. Co.*, 861 N.Y.S.2d 922, 937 (N.Y. Sup. Ct. 2008). This is consistent with the law cited above: an excess insurer is free to interpret its own policy differently than an underlying carrier, but it cannot avoid liability by questioning an underlying insurer's decision to pay. *See Gillen*, 2011 WL 1694431, at *4.

The second group of cases involved policyholders that settled coverage disputes with their primary insurer for ***less than the primary policy's limits***. *See Forest Labs., Inc. v. Arch Ins. Co.*, 953 N.Y.S.2d 460, 462 (Sup. Ct. 2012) (the insured "negotiated settlements in which each [underlying] insurer paid a part of its $10 million obligation, and [the insured] 'filled in the gaps' to reach the $10 million mark for each policy."); *J.P. Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 947 N.Y.S.2d 17, 21 (N.Y. App. Div. 2012); *Qualcomm, Inc. v. Certain*

Underwriters at Lloyd's, London, 73 Cal. Rptr. 3d 770, 773 (Cal. Ct. App. 2008); *Great Am. Ins. Co. v. Bally Total Fitness Holding Corp.*, 2010 WL 2542191, at *2 (N.D. Ill. June 22, 2010); *Comerica Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp. 2d 1019, 1034 (E.D. Mich. 2007). That did not happen here. JA1907-08 ¶¶ 76, 77.

Liberty not only paid its full indemnity limits ($59.5 million), it also paid REDACTED pursuant to its defense obligation, which did not reduce limits. Disputes over ***whether*** primary policy limits have been paid in full present a very different issue than disputes like this one, where an excess insurer questions ***how*** a primary policy was exhausted. The former cases raise a legitimate issue as to whether the insured has proven its *prima facie* case.[17] In the latter cases, however, the excess insurer is attempting to assert a right that is not contained in its policy. *See LSG Techs., Inc.*, 2010 WL 5646054, at *13 (excess insurer "fail[ed] to cite language from its policies giving it the right to examine the propriety of the primary insurer's claims handling and payments or the strength of the underlying plaintiffs' claims."); *see also* ALLAN D. WINDT, INSURANCE CLAIMS

[17] The Excess Insurers state that the "New York Court of Appeals has held that a policyholder is not entitled to excess coverage unless the policyholder proves that the underlying insurance is exhausted." EI Br. at 37. This is true insofar as it goes, but it does not address what, specifically, an insured must show to prove exhaustion. The Excess Insurers' cases do not answer this question, as neither involved a dispute over exhaustion of underlying insurance. *See Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690 (N.Y. 2002); *Am. Home Assurance Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 18 (N.Y. 1997) As shown above, proving exhaustion required Viking and Warren to show payment of the full underlying limits identified in the Excess Policies, which they have done.

& DISPUTES: REPRESENTATIONS OF INSURANCE COMPANIES AND INSUREDS § 6:45A (6th ed. 2004) ("typical excess policies do not say that the excess insurers will pay only after the primary policy has been exhausted by the unavoidable payment of $1 million, or the reasonable payment of $1 million.").

In sum, Viking and Warren satisfied their burden to show that Liberty paid the full aggregate limits of its 1980-85 primary policies on account of Viking's and Warren's asbestos claims. JA1907-08 ¶¶ 76, 77. The Excess Insurers cannot second-guess the propriety of those payments.

2. The 1980-85 Liberty Policies Are Exhausted Whether Or Not Warren And Viking Paid Deductibles Under The Premium Endorsement

The 1980-85 Liberty primary policies are exhausted even if they include $100,000 per-occurrence deductibles of the sort the Excess Insurers envision. The Excess Insurers' own cases show that a policy's deductible is part of—and when paid is subtracted from—the policy's limits. *See Tokio Marine & Fire Ins. Co. v. Ins. Co. of N. Am., Inc.*, 693 N.Y.S.2d 520 (App. Div. 1999) (primary carrier with $1 million limit must pay $750,000 because $250,000 deductible was "properly subtracted from the policy limits"); *N.Y. State Thruway Auth. v. KTA-Tator Eng'g Servs., P.C.*, 913 N.Y.S.2d 438, 440 (App. Div. 2010) ("a deductible is an amount that an insurer subtracts from a policy amount . . ."). This means that all covered

loss payments, whether in the form of deductible payments or policy payments by the insurer, will erode the policy's limits.

This is borne out by the Liberty Deductible Endorsements, which state that Liberty is only liable for the difference between the policy limit and the deductible:

> The company shall be liable only for an amount equal to the "Personal Injury" and "Property Damage", "Each Occurrence" limit stated in the policy minus the applicable amount of deductible damages (excluding allocated loss adjustment expense) under the above Paragraph 1. And, subject to the foregoing, only for the difference between the "Personal Injury" or "Property Damage" aggregate limits stated in the policy and the sum of deductible damages (excluding allocated loss adjustment expenses) applicable.

See, e.g., JA3685 ¶ 2. As the Superior Court correctly held, this language means that "whether or not the deductible was appropriately applied on an actual per-occurrence basis is beside the point." JA1740. This is because Liberty's payments toward judgments and settlements under the 1980-85 primary policies ***matched the $12 million aggregate limits of those policies***. JA1907-08 ¶¶ 76-79; XA317. This is on top of the REDACTED in defense costs that Liberty paid under these primary policies. It does not matter whether these amounts were paid by Viking or Warren (as a deductible) or by Liberty. In either case, the payments eroded the policy limits, exhausted the policies, and triggered excess coverage.

The Excess Insurers appear to concede that this is true for per-occurrence limits but dispute that payments within the deductible erode the Liberty policies'

aggregate limits. EI Br. at 35 ("Liberty had no responsibility for claims under $100,000, which did not erode Liberty's $2 million annual aggregate policy limit as a matter of law.") Despite declaring that this is true "as a matter of law," the Excess Insurers do not cite any authority in support of this fiat. And for good reason: contract language controls the rights and obligations of the parties, and the policies' Deductible Endorsements state that the policies' aggregate limits (and not just per-occurrence limits) are reduced by payments within the deductible:

> ***The company shall be liable only for*** an amount equal to . . . ***the difference between the*** "Personal Injury" or "Property Damage" ***aggregate limits*** stated in the policy ***and the sum of deductible damages*** (excluding allocated loss adjustment expenses) applicable.

See, e.g., JA3685 (emphasis added). Of course, Liberty could have drafted its deductible provision differently (*see, e.g., Aetna Cas. & Sur. Co. v. Mantakounis*, 1996 WL 190046, at *6 (Del. Super. Ct. Mar. 5, 1996) (deductible provision provided that "'Aggregate' limits for such coverage shall not be reduced by the application of such deducible amount"), but the language that Liberty used states that the sum of payments within the deductible are subtracted from the policy's aggregate limits. In fact, if anything, Liberty overpaid limits in certain instances because it had committed to settlements that were beyond the limits. *See* VB88.

The Excess Insurers' real complaint appears to be that Viking and Warren did not pay the deductibles themselves. EI Br. at 36 ("Viking and Warren did not

pay the Liberty policies' $100,000 per-occurrence deductible."). As an initial matter, this is factually inaccurate. It is undisputed that Liberty collected REDACTED from Warren and REDACTED from Viking as "adjusted premiums" that included deductibles under the 1980-85 Liberty primary policies. VB65-67, VB74; VB96-100; *see also* JA1740 (Superior Court: "the deductible endorsement clearly permits Liberty to accept the deductible later, which is what the REDACTED settlement between Liberty and Plaintiffs represented."). And the primary policies make clear that exhaustion does not depend on who pays the deductible: Liberty "may pay any part [or] all of the deductible amount to effect settlement of any claim or suit." *See, e.g.*, JA3685 ¶ 5. The Superior Court properly concluded this feature "allow[ed] the parties to continue the underlying litigation without the complicated per-occurrence deductible payments urged by the [Excess Insurers]" and found that "Liberty's method of collecting the deductible after-the-fact . . . was legal. Nothing in the policy prevents it." JA1740.

3. The Plain Terms Of The 1980-85 Liberty Primary Policies Support The Superior Court's Conclusion That The Policies Are Exhausted

New York law, like Delaware's, mandates that insurance policies he read as a whole. *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 920 N.E.2d 359, 363 (N.Y. 2009) ("'[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of

the parties as manifested thereby.'") (citation omitted); JA0923-0924 ("In determining meaning, a contract is to be read as a whole, with a court giving effect to every term therein."). The Excess Insurers, however, ask this Court to construe Liberty's "Deductible Endorsement" standing in isolation, while ignoring the related Premium Endorsement, which all parties to the contract agreed dictates the calculation and collection of deductibles under the 1980-85 primary policies. VB80.

The Premium Endorsement creates an "adjusted premium" based on the insureds' actual loss history. The "adjusted premium" expressly includes a premium component called the "Deductible Expense," which is calculated based upon "deductible amounts incurred." *See, e.g.*, JA3689. The Liberty primary policies provide for a "computation of the adjusted premium based upon the audited premiums and exposures and 'deductible amounts incurred' as of six months after termination of the policy." *See, e.g.*, JA3690. The policy continues, "[a]fter each computation, if the adjusted premium computed exceeds the premium previously paid for such Deductible Expenses, Excess Premiums and Fixed Expenses the 'named insured' shall pay the difference to the company; if less, the company shall return the difference to the 'named insured'." *Id.*

The Premium Endorsement thus makes clear that the policy's deductible is part of the "adjusted premium" charged back to the Viking and Warren based on

their specific loss experience. The undisputed evidence at trial showed that Viking's payment of REDACTED and Warren's payment of REDACTED as "adjusted premiums" based on their respective loss histories satisfied any obligation to pay deductibles. VB65-67, VB74; VB96-100. Century's and International's claims handler, Theresa Carpenter, the only witness for the Excess Insurers on the issue of Liberty's deductibles, conceded she could not dispute that Viking's REDACTED payment to Liberty was sufficient under the Premium Endorsement to satisfy the deductibles for Viking's asbestos claims. VB102. The Excess Insurers similarly did not dispute the sufficiency of Warren's REDACTED payment to Liberty, assuming that the deductible was properly paid as part of an adjusted premium, just as the jury concluded.

The cases that the Excess Insurers cite in support of their claim that the Liberty deductibles were not properly paid are distinguishable because they involved materially different policy language. *See Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 776 (E.D. Pa. 1989) (involving a "corridor deductible plan" that is not found in the Liberty primary policies); *Arch Ins. Co. v. R.A. Bright Constr., Inc.*, 2009 WL 1507574, at *4-5 (N.D. Ill. May 28, 2009) (involving an "Allocated Loss Adjustment Expense" that, unlike Liberty's "adjusted premium," did not expressly include a deductible component). The Excess Insurers make no effort to reconcile the policy language in those cases with

the language at issue here. Instead, they simply imply that all policies with "'loss sensitive' features" must be the same, regardless of the specific terms of those policies. EI Br. at 32-33. That argument falls of its own weight, as there is no dispute that policy language controls. *See* JA0923, 0954.

The Excess Insurers' claim that the Superior Court's ruling ignores some "well understood meaning" of the term "deductible" also misses the mark. At the threshold, the insurers did not introduce at trial any evidence concerning this supposed trade usage. In any event, the Liberty policies themselves, and not some industry glossary or dictionary, define the deductibles and how they are calculated and paid. The Court need not and should not resort to extra-record, extrinsic evidence of trade usage to determine the meaning of the term "deductible" as used in the Liberty Policies. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997) ("trade usage" is extrinsic evidence appropriately considered only if the contract language is ambiguous); *Omni Berkshire Corp. v. Wells Fargo Bank, N.A.*, 307 F. Supp. 2d 534, 540 (S.D.N.Y. 2004).

In any event, the "Deductible Expense" portion of the Premium Endorsement is consistent with the claimed "well understood" meaning: The REDACTED that Viking and Warren collectively paid to Liberty was plainly "a portion of covered loss that [was] not paid by the insurer" and "an amount that the insurer

subtracts from the policy amount, reducing the amount of insurance." EI Br. at 30 (citations omitted).

The Excess Insurers' reading of the Premium Endorsement as simply "compensat[ing] Liberty for the cost of handling claims that fall in the per-occurrence deductibles" is not supported by the plain terms of the policies or any evidence at trial. EI Br. at 32. Their construction ignores the fact that the "Deductible Expense" premium is expressly calculated using the "deductible amounts incurred," which includes "***payments made directly by the named insured*** for all losses and 'allocated loss adjustment expense' falling within the deductible." *See, e.g.*, JA3689 (emphasis added). The Premium Endorsement thus explicitly included in its formula additional premiums that would be owed to—and were in fact collected by—Liberty on account of the very deductibles that the Excess Insurers claim must be paid. That was the genesis of the REDACTED that Viking and Warren paid Liberty under the Premium Endorsement. If the endorsement simply dealt with calculating a premium for ***Liberty's*** handling of losses within the deductible, as the Excess Insurers' claim, it would make no sense to include in the endorsement a premium related to the ***insureds'*** payments within the deductible.

But even if this Court agreed that the Excess Insurers have presented a ***possible*** construction of the policies, affirming the Superior Court's ruling would

still be required. "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.'" JA0967 (quoting *Cantanucci v. Reliance Ins. Co.*, 349 N.Y.S.2d 187, 191 (N.Y. App. Div. 1973)).[18] The Court of Chancery recognized that this rule has "special vigor" when applied to policies denominated as "comprehensive general liability policies," which the Liberty primary policies are. JA967. Thus, even if the Excess Insurers have presented a plausible construction of the Liberty primary policies, it must be rejected in favor of the insureds' construction.

Carl Brigada, who has worked for Liberty for more than thirty-five years, testified that the deductibles in Liberty's 1980-85 primary policies were ***part of*** the policies' adjusted premiums. VB61-62, VB71. He explained that the Deductible Endorsements and Premium Endorsements work together and must be read together. "This [Deductible] endorsement talks about definitions, it explains what makes up the deductible, and the other [Premium] endorsement talks about the

[18] The Superior Court stated in its *Viking Pump III* decision that the "parties agree, as to exhaustion the policies are unambiguous and, therefore, there is no need for extrinsic evidence." JA1736. This is partly correct. Viking and Warren argued in post-trial briefing that the language of the policies unambiguously supported the jury's verdict that the deductibles were paid as part of the Premium Endorsement and that the Liberty primary policies are exhausted. However, if this Court believes that the Excess Insurers have presented a second, plausible reading of the policy language, then that ruling alone demonstrates ambiguity.

application." VB80. The adjusted premium is a "cash flow plan" that is utilized where an insurer lacks sufficient information about an insured to calculate a flat rate price for the policy:

> With large corporations like Houdaille, they have many, many different manufacturing operations. They—the insurance companies just don't have that kind of statistical background that would enable them to just come up with a flat rate price for the policy. So they come up with what's called a cash flow plan. And a cash flow plan is nothing more than a deferring of premium that's going to take place over a period of time.

VB68. Mr. Brigada testified that the $100,000 deductible found in the Deductible Endorsement was the basis for calculating the "Deductible Premium" addressed in the Premium Endorsement. VB69-70. "To that number," Mr. Brigada testified, "would be applied multipliers" and "rating factors," and then the premium "gets charged on an as-you-go basis." *Id.* Mr. Brigada's testimony was the only extrinsic (non-opinion)[19] evidence on the issue of Liberty's deductibles, and it is consistent with the policy language. Consistent with Mr. Brigada's testimony, the jury concluded that the deductibles under the 1980-85 Liberty primary policies were properly "paid through the premium adjustment endorsement." JA1480. The Superior Court later ruled that the jury's verdict was supported by "substantial

[19] Excess Insurer witness Theresa Carpenter testified concerning Liberty's deductibles but offered only a simple calculation based on an assumption of per-occurrence deductibles and "opined that Liberty is still obligated to an outstanding REDACTED in indemnity limits." JA1709.

evidence." JA1740-41. That finding is entitled to the highly deferential "clearly erroneous" standard, which the Excess Insurers have fallen well short of satisfying. *See DV Realty*, 75 A.3d at 108-09.

4. Certification To New York's Highest Court Is Not Needed.

The Court need not certify any issues related to the Superior Court's exhaustion ruling to the New York Court of Appeals. EI. Br. at 41. Controlling precedent exists on the issue, *see MBL Contracting*, 98 F. Supp. 2d at 497; *Tokio Marine*, 693 N.Y.S.2d at 520, and the Excess Insurers do not argue otherwise.

CONCLUSION

The Court of Chancery's rulings regarding Viking's rights as an insured and the Superior Court's ruling concerning exhaustion of Liberty's 1980-85 primary policies were well-founded based on the relevant contracts and law. Those rulings should not be reversed.

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Dated: December 10, 2014

CERTIFICATE OF SERVICE

I, Travis S. Hunter, hereby certify that on December 10, 2014, I caused a copy of the foregoing document to be served via File & Serve Xpress upon all counsel of record.

/s/ Travis S. Hunter
Travis S. Hunter (#5350)