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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	**PUBLIC VERSION**
	) CASES BELOW:	
	) SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, Consolidated C.A. No. N10C-06-141 FSS [CCLD] -and- COURT OF CHANCERY OF THE STATE OF DELAWARE, Civil Action No. 1465-VCS	

APPELLEE WARREN PUMPS LLC'S ANSWERING BRIEF

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Warren[1] submits this Answering Brief in opposition to the Excess Insurers' appeal from the Court of Chancery and Superior Court rulings below.

NATURE OF THE PROCEEDINGS

Plaintiffs seek insurance coverage for the Asbestos Claims under Excess Policies issued to Houdaille, the former owner of Plaintiffs' businesses. The action was commenced in the Court of Chancery in 2005, and the Excess Insurers were added as defendants in 2007. In October 2009, Chief Justice (then Vice-Chancellor) Strine entered summary judgment holding that (1) Plaintiffs are entitled to exercise the rights of insureds under the Excess Policies; and (2) the losses relating to the Asbestos Claims should be allocated among the triggered Excess Policies using an "all sums" methodology. After transfer to the Superior Court and a jury trial, the court ruled that (1) the jury's conclusion that the policies underlying the Excess Policies were properly exhausted was supported by the evidence; and (2) all but one of the Excess Policies follow form to the umbrella policies' defense payment obligations. All parties have appealed from portions of the June 9, 2014 final judgment incorporating those and other rulings.

[1] Warren incorporates the Table of Abbreviations contained in the Excess Insurers' Opening Brief ("EI Br."), except that, as used herein, "Excess Insurers" includes appellant Travelers Casualty and Surety Company ("Travelers") and "Excess Policies" includes all excess policies that are the subject of the appeals before this Court. Capitalized terms not included in that Table have the meaning ascribed to them in Warren's opening appellate brief. Travelers's opening brief is referenced herein as "Trav. Br."

[redacted]

SUMMARY OF ARGUMENTS

The linchpin of the Excess Insurers' appeal is their assertion that the Court of Chancery and Superior Court decisions "cast aside" New York[2] precedents with respect to the rulings challenged by the Excess Insurers. Trav. Br. at 43. In fact, the rulings from which the Excess Insurers appeal are not only consistent with, but compelled by, well-established New York precedents.

1. **EI Brief Point I And Trav. Brief Point II Are Denied.** Contrary to the Excess Insurers' contention, the New York Court of Appeals's decision in *Consolidated Edison Co. of N.Y., Inc. v. Allstate Insurance Co.*, 774 N.E.2d 687 (N.Y. 2002) (*"Con Ed"*), did not mandate the application of pro rata allocation to all policies promising to pay "all sums" in connection with liabilities related to injury "during the policy period." To the contrary, the Court in *Con Ed* expressly *refused* to apply any one allocation method as a matter of New York law or public policy. Indeed, *Con Ed* expressly stated that pro rata allocation was *not* "explicitly mandated by the policies" before it, applying that method solely on the basis that it was "consistent" with the policy language. *Id.* at 695. Post-*Con Ed* decisions refusing to apply pro rata allocation when doing so would be inconsistent with the

[2] No party has appealed from the Court's determination that the Excess Policies are governed by New York law.

[redacted]

policy language underscore the fact that *Con Ed* did not set a bright line requirement for pro rata allocation in all cases.

Notably, *Con Ed* distinguished this Court's application of an all sums allocation in *Hercules, Inc. v. AIU Insurance Co.*, 784 A.2d 481 (Del. 2001), based on the "different policy language" at issue in *Hercules*. The "difference" referred to was the presence in the *Hercules* policies of a Prior Insurance Provision, one of the two types of Non-Cumulation Provisions that appear in or are incorporated into each Excess Policy in this case.[3] This Court held that such a provision "extends coverage beyond the policy period in the case of continuing damage [and therefore] cannot be reconciled with pro rata allocation." 784 A.2d at 493-94. Indeed, all but one of the Excess Insurers here *conceded* below that Non-Cumulation Provisions cannot be applied in the context of pro rata allocation.

Applying *precisely* the standard mandated by *Con Ed* – that the allocation method be determined by the policy language – the Court of Chancery's thorough, well-reasoned decision held that the language of the Excess Policies requires an all sums allocation, because the Non-Cumulation Provisions cannot be "sensibly applied" outside such an allocation. *See Viking II*, 2 A.3d at 119-27. That holding did not ignore the standard required by *Con Ed*; to the contrary, it enforced it.

[3] The term "Non-Cumulation Provisions" refers collectively to the Liberty Provisions, as defined below, and the Prior Insurance Provisions.

[redacted]

2. **Trav. Br. Point I Is Denied.** As a matter of law, the anti-assignment provisions in the Excess Policies do not bar the assignment of rights under those Policies to Warren for liability based on pre-assignment occurrences, as that assignment did not alter the risks insured by the Excess Insurers. Moreover, the plain language of the agreement by which Warren purchased the Warren Pumps business from Houdaille unamhiguously grants Warren the right to access all pre-transfer Houdaille insurance for losses stemming from pre-transfer activities, and may not be altered hy the parol evidence on which the Excess Insurers, non-parties to the agreement, rely.

3. **EI Br. Point II Is Denied.** The Liberty policy "deductibles" erode the aggregate policy limits; thus, whether Liberty or Plaintiffs paid these deductihles did not alter in the least whether the full underlying policy limits necessary to trigger the Excess Policies were exhausted. Moreover, there was more than ample evidence in both the policy language and the extrinsic evidence introduced at trial to support the jury's conclusion that Plaintiffs fully satisfied all amounts due under the Liberty primary policies.

4. **EI Br. Point III Is Denied**. There is no merit to the Excess Insurers' argument that defense costs continued to he "covered" under the primary policies even after exhaustion, [redacted] A claim is "covered" under a

[redacted]

policy, within the meaning of the umbrella policy language, only if policy limits remain to satisfy the claim; once the primary policy limits were exhausted, the Liberty umbrella policies were obligated to pay Plaintiffs' defense costs.

Nor does any language in the Excess Policies clearly and unequivocally repudiate their obligation to follow form to the umbrella policy defense payment obligation. Express policy endorsements supersede much of the language that the Excess Insurers contend vitiates their "follow form" defense payment obligations, and, as a matter of well-settled New York law, those obligations cannot be overcome by the "assume charge," "consent" or "ultimate net loss" provisions on which the Excess Insurers rely.

[redacted]

STATEMENT OF FACTS

A. The Relevant Corporate History

From 1972 to 1985, Houdaille owned and operated the "Warren Pumps" business, which had been in operation since 1897, either as a business unit or through subsidiaries, such as Warren Pumps-Houdaille, Inc. ("WPH"). Houdaille purchased all of the Excess Policies as part of an integrated insurance program to cover Houdaille and its subsidiaries and business units. *See, e.g.*, JA1969.

In 1985, W.P., Inc ("WP"), Warren's corporate predecessor, purchased the Warren Pumps business by means of an Asset Sale Agreement ("ASA") among WP, WPH and Houdaille. *Viking I*, 2007 WL 1207107, at *1-8. Under the original ASA, WP agreed to assume all liabilities for the pre-sale activities of the Warren Pumps business. WP was not granted rights to Houdaille's or WPH's insurance, but agreed to maintain at least $25 million in claims-made coverage for post-closing claims based upon pre-closing "occurrences." TA792-95.

Prior to the closing, however, WP was unable to obtain the coverage required under the original terms of the ASA. Given the parties' mutual interest in ensuring that Warren had insurance to respond to future claims arising out of pre-sale activities, they agreed to amend the ASA to assign to WP the right to access

the existing Houdaille coverage for such claims. WB[4]113:10-115:3; WB204 (26:16-18); WB212(60:5-61:12); TA967-71; *Viking I*, 2007 WL 1207107, at *5. Specifically, the Amendment required WP to secure and maintain a $1,000,000 claims-made liability policy applicable to pre-closing "occurrences," and specified that WP could then access Houdaille's and WPH's pre-closing insurance for losses that (i) exceeded that $1,000,000 limit and (ii) arose from otherwise covered "occurrences prior to the date of the Closing":

> [WPH] and Houdaille have permitted [WP] to utilize the insurance coverage in excess of the primary casualty limits identified above, which [WPH] and Houdaille have in effect, *for claims made pertaining to occurrences prior to the date of the Closing, but only to the extent that such insurance coverage is in fact available.*[5]

B. The Relevant Policy Provisions

The 1972-1985 Houdaille insurance program consisted of (1) primary and umbrella layers of coverage each sold by Liberty; and (2) the Excess Policies.[6] In

[4] "WB" refers to Warren's Answering Appendix, submitted herewith.

[5] TA969-70 (emphasis added).

[6] The Excess Insurers rely heavily on an "Addendum" of "Selected Policy Provisions" submitted for the first time on this appeal, despite the fact that complete copies of the Excess Policies are included in the Joint Appendix, and that as a matter of New York law each Policy must be read and applied as a whole. While Warren respectfully submits that the Addendum should be rejected on that basis alone, Warren's review also indicates that in several instances, the Addendum (1) quotes policy language that has been superseded by policy endorsements while omitting any reference to the endorsements; (2) quotes both pre-printed form language and inconsistent language set forth in policy endorsements without revealing the different sources of the language and, by extension, that the language in the endorsements controls; and (3) selectively quotes language from a given provision without quoting other language in the same provision that is relevant to the same subject matter. For the Court's convenience in the event it

order to provide seamless coverage among the layers of coverage, each Excess Policy follows form to the underlying Liberty umbrella policy unless the Excess Policy expressly provides otherwise. *See, e.g.*, JA1751-53.

Each of the 1980-1985 Liberty primary policies contains a "Deductible Liability Insurance Endorsement" ("Deductible Endorsement") providing for the payment of a "deductible" that erodes *both* the "per occurrence" *and* aggregate policy limits. *See, e.g.*, JA4076. Thus, whether paid as a "deductible" or as a "coverage" obligation, once amounts equal to a given primary policy limit have been paid toward covered judgments or settlements, the primary policy is exhausted. The Liberty primary policies further provide that Liberty may, at its option, pay any amount falling within the deductible and that its policy obligations continue "irrespective" of the deductible amount. *See, e.g., id.*

In addition, those same policies contain a "Policy Premium Adjustment Endorsement" ("Premium Endorsement") that makes clear that the policy "deductibles" were to be calculated only as a part of the policy premium. Under that endorsement, an additional premium was charged to the policyholder based, in part, on a fixed percentage of deductible amounts incurred under the Deductible Endorsement. *See, e.g.*, JA4079-80. Carl Brigada, the Liberty executive

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determines to refer to the Addendum, Warren submits herewith a "Compendium" that identifies the key inaccuracies relevant to the proceedings before this Court.

[redacted]

responsible since 2003 for ensuring that all amounts due under the Liberty policies were paid, testified at trial that, under that language, the deductible is "nothing more than a device that's used to calculate the amount of premium." WB603:8-604:21; 614:14-615:8; 623:6-12; 625:17-19.

Upon exhaustion of the applicable underlying Liberty primary policy, each Liberty umbrella policy provides coverage for judgments and settlements of "personal injury" claims, subject to a $3,000,000 limit for liabilities arising from any one "occurrence" and an aggregate limit for all "products" claims, such as the Asbestos Claims. *See, e.g.*, JA3553, 3570. The Liberty umbrella policies define "occurrence" as the event – such as an inhalation of asbestos fibers – that causes a claimant's bodily injuries during the policy period, which injuries trigger Liberty's coverage obligations. *See, e.g.*, JA3572.

Once triggered, the Liberty umbrella policies expressly anticipate that they will respond to injury both within and outside the policy period. The Liberty umbrella policies contain "Non-Cumulation of Liability – Same Occurrence" provisions ("Liberty Provisions") that define how the policy will respond to claims for injuries or damage that trigger multiple successive Liberty policies:

> If the same occurrence gives rise to personal injury, property damage or advertising injury or damage ***which occurs partly before and partly within any annual period of this policy,*** the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment

> made by the company with respect to such occurrence, either under a previous policy or policies of which this is a replacement, ***or under this policy with respect to previous annual periods thereof.***

See, e.g., JA3571 (emphasis added).

Twenty-six of the thirty-four Excess Policies at issue in this appeal incorporate the Liberty Provision into their coverage. XA25-26. The other eight contain a "Prior Insurance and Non-Cumulation of Liability" provision ("Prior Insurance Provision"), which similarly contemplates that the policy applies to injuries that take place outside, as well as within, the policy period:

> It is agreed that if any ***loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Assured prior to the inception date hereof*** the limit of liability hereon as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.
>
> Subject to the foregoing paragraph and to all the other terms and conditions of this Policy ***in the event that Personal injury or Property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy the Company will continue to protect the Assured*** for liability in respect to such Personal injury or Property damage without payment of additional premium.

See, e.g., JA3582 (emphasis added).

Each Liberty umbrella policy imposes on the insurer a duty to defend and pay the costs of defending against claims "covered under this policy (or which would be covered but for the insured's retention . . .), but not covered under any

[redacted]

underlying policy or any other insurance." *See, e.g.*, JA3570. As discussed more fully below (*see infra* Argument Point IV), with the sole exception of the Excess Policy sold by International Surplus Lines Insurance Company ("ISLIC"), each of the Excess Policies followed form to that duty.

C. Liberty's Handling And Payment Of The Asbestos Claims

Liberty handled and paid Asbestos Claims for Warren from 1987 until the exhaustion of the last remaining Liberty umbrella policy limits in 2010. WB651:23-654:10. For nearly all of that time, Liberty paid 100% of Warren's asbestos-related costs, either by itself or in conjunction with other insurers, even though virtually all of the asbestos plaintiffs alleged bodily injuries that took place partially outside, as well as within, the Liberty policy periods. XA27-29; WA204-58; WB049-52; WB663:14-666:19; *Viking II*, 2 A.3d at 127-29. In 2008, Liberty collected nearly $10 million from Plaintiffs representing the amounts due under the primary policy Deductible and Premium Endorsements. WB613:19-614:5; 619:10-620:10; 626:16-627:9; 633:18-646:11; 738-56; 712:23-716:14; 582-600.

[redacted]

At trial, Mr. Brigada testified that the umbrella policies required Liberty to pay those defense costs, and that Liberty had never taken a contrary position. WB657:7-662:16.

[redacted]

D. The Parties Move For Summary Judgment Before Vice Chancellor Strine

In 2009, all parties moved for summary judgment on (1) whether Viking and Warren were entitled to exercise the rights of insureds under the Excess Policies; and (2) the proper allocation method to be applied to the Excess Policies. WB001-47; XA1-54. After reviewing the parties' initial submissions on the allocation issue, the court ordered the parties to provide supplemental submissions explaining how the Excess Policies would respond to a hypothetical Asbestos Claim under the all sums and pro rata allocation methods, and what role, if any, the Non-Cumulation Provisions would play in each scenario. *See* JA0791-94, 0796-802; WB542-81. In response, ***all but one of the Excess Insurers agreed that non-cumulation provisions cannot be applied in a pro rata allocation scenario.*** With the sole exception of appellant Travelers,[7] each Excess Insurer urged that the "solution" to that problem was for the court simply to ignore the Non-Cumulation Provisions, in order to apply a pro rata allocation. WB558, 574.

For its part, Travelers alone argued that the Liberty Provision could be applied after the hypothetical judgment was prorated among all triggered policies. WB562-64. Under this scenario, an insurer's obligation would first be reduced by "spreading" the loss among all triggered policy periods, and then would be even

[7] The two Hartford Group insurers that joined Travelers's submission subsequently settled their coverage disputes with Plaintiffs and are not parties to the various appeals before this Court.

[redacted]

further reduced by applying the Liberty Provision. *See id.* In other words, rather than preventing a "double" recovery, as the Excess Insurers now claim, the Liberty Provisions would restrict the policyholder to only a fraction of the "occurrence" limit that would otherwise be available for a fully-covered loss. *See* WB568-70; *Viking II*, 2 A.3d at 124. Moreover, Travelers *agreed* with Plaintiffs that the Prior Insurance Provision "does not apply . . . in a pro rata jurisdiction . . . because once you allocate the entire loss across the relevant period" there is no coverage for a given loss under a prior or subsequent policy period. WB578.[8] Thus, like the other Excess Insurers, Travelers suggested that the "solution" to the incompatibility of Prior Insurance Provisions and pro rata allocation was simply to apply an allocation method that rendered the Provisions superfluous.

E. The Court Of Chancery's Ruling On Summary Judgment

In an October 14, 2009 opinion, the court held that "liability under the Excess Policies is to be allocated on an all sums basis." *Viking II*, 2 A.3d at 130. The court reached that conclusion only after examining well-settled New York precedents (*id.* at 114-19) and concluding that, while "various courts have expressed a preference, on policy grounds, for one [allocation] method over the other," that is not the rule in New York. Rather, the court held that New York's

[8] This statement was all the more notable because three policies sold by First State Insurance Company – one of the Hartford insurers that joined Travelers's submission – contained Prior Insurance Provisions. *See* JA3912, 4278, 4454.

[redacted]

Court of Appeals and other state courts "make clear that, in a case governed by New York law, the question of which of the hasic methods applied depends on which is the most faithful to the bargain struck by the parties to the insurance contracts at issue." *Id.* at 113-14 (footnotes and citations omitted). The court further found that *Con Ed* exemplified "New York courts' contract–focused approach to the allocation question" (*id.* at 117) in that, rather than "establish[ing] a bright-line ruling that the pro rata method of allocation would govern all insurance contracts based on New York law," the Court of Appeals had decided the issue based on the language of the policies before it. *Id.* at 119.

Applying that standard, the Court of Chancery held that the Non-Cumulation Provisions in the Excess Policies "cannot be reconciled with the pro rata method of allocation." *Id.* at 122-27. The court explained that:

> After proration, ***the very premise upon which the Non-Cumulation . . . Provisions are based is absent***, because there is no common injury. . . . This makes the Non-Cumulation Provision nonsensical because the clause, by its terms, cannot be applied to separate injuries.

Id. at 123 (emphasis added).

The court also held that Plaintiffs are entitled to exercise the rights of insureds under the Excess Policies. In addition to ruling that the anti-assignment provisions in the Excess Policies did not bar the assignment of insurance rights to

[redacted]

Plaintiffs, the court held that the only "reasonable reading" of the Amendment to the ASA was that it was intended to confer such rights. *Viking II*, 2 A.3d at 94.

F. The Superior Court's Defense Cost Rulings

Following transfer to the Superior Court, the matter proceeded to trial on remaining disputes, including the Excess Insurers' claims that: (1) Liberty primary policies were not properly exhausted; (2) Liberty umbrella policies did not have a defense payment obligation; and (3) even if they did, the Excess Policies did not follow that obligation. The jury found for Plaintiffs on all issues. JA1480-82.

In post-trial motions, the Superior Court ruled that the defense issues should have been decided by the court based on the unambiguous policy language. JA1687, 1700-01. The court then held that the Liberty umbrella policy language obligates Liberty to pay for the defense of the Ashestos Claims once the underlying primary policy limit is exhausted (JA1747-50), and that, even if the policy language were ambiguous on this point, both the jury's verdict and New York law would require the same result. JA1750. The Superior Court rejected the Excess Insurers' arguments that various provisions in the Excess Policies – including provisions stating that the Excess Insurers had no duty to "assume charge" of the defense, requiring the Excess Insurers' consent to incur defense costs, or excluding "costs" from the definition of "ultimate net loss" – negated their agreement to follow form to Liberty's defense obligations. JA1753-61.

[redacted]

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY APPLIED NEW YORK LAW IN HOLDING THAT THE EXCESS POLICIES PROVIDE COVERAGE ON AN "ALL SUMS" BASIS

A. Questions Presented

1. Was the Court of Chancery correct in holding that New York law does not automatically apply pro rata allocation to all multi-year losses?

2. Was the court correct in holding that the Non-Cumulation Provisions mandate an all sums allocation under New York law?

B. Standard And Scope Of Review

Issues of insurance policy interpretation are reviewed *de novo*. *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997).

C. Merits Of The Argument

1. Under New York Law, The Policy Language Controls The Choice Of Allocation Method

The Excess Insurers barely address the actual reasoning of the allocation ruling, choosing instead to accuse the court below (both directly and through their proxies)[9] of "ignor[ing]," "distort[ing]," "cast[ing] aside" and "launch[ing] an

[9] It is not surprising that attorneys who represent insurance companies in coverage litigation are the source of the insurance treatise sections and the "practitioner commentary" that the Excess Insurers have submitted as "evidence" of the Court's allegedly defective legal analysis. *See* Exhibits 1, 3, 7 and 10 in Excess Insurers' Compendium of Authorities. To provide the illusion of "balance," the Excess Insurers also have submitted one article from a policyholder attorney, who (equally unsurprisingly) applauds the Court's "singular focus on fundamental New York contract interpretation principles." *Id.*, Ex. 4 at 3.

[redacted]

attack on" New York precedents. EI Br. at 3, 25-26 n.6. In short, the Excess Insurers argue that New York law mandates the application of pro rata allocation whenever policies are triggered by injury or damage during the policy period. That argument fundamentally misstates the rulings of New York's highest court.

Contrary to the Excess Insurers' arguments, *Con Ed* did ***not*** hold that every policy covering injury "during the policy period" provides coverage only for that portion of the loss that takes place within the policy period. Nor did *Con Ed* identify any public policy interest in the consistent application of pro rata allocation, much less one that would justify imposing a pro rata allocation in the face of contrary policy language. Rather, and as the Court of Chancery correctly noted, *Con Ed* based its pro rata ruling on the speeific policy language before it, and held that different policy language eould lead to the application of a different allocation method. *See* 2 A.3d at 117-18.

The *Con Ed* Court began its determination by noting that, "[i]n dctermining a dispute over insurance coverage, we first look to the language of the policy." 774 N.E.2d at 693. The Court then coneluded that language holding that the poliey coverage was triggered by injury "during the policy period" trumped the promise to pay "all sums" relating to the liability.[10] *See generally* 774 N.E.2d at 693-95.

[10] The *Con Ed* Court also rejected the policyholder's reliance on "other insurance" provisions, noting that "[s]uch clauses apply when two or more policies provide coverage during the same

[redacted]

However, the Court expressly held that a pro rata allocation was "*not* explicitly mandated by . . . the language of the policies" (*id.* at 695 (emphasis added)) and that different policy language could support a different result.[11]

The other cases the Excess Insurers erroneously cite as "mandating" the application of pro rata allocation actually highlight New York's policy-focused standard. For example, in *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 991 N.E.2d 666, 676 (N.Y. 2013) (cited in EI Br. at 18, Trav. Br. at 39-41), New York's Court of Appeals held that "[a] pro rata allocation is consistent with the language of the policies at issue here," and that "[t]here is no indication that the parties intended that the [policyholder]'s total liability" could be assigned in the first instance to a single policy period. Similarly, *Olin Corp. v. American Home Assurance Co.*, 704 F.3d 89 (2d Cir. 2012) ("*Olin II*") (cited in EI Br. at 22, Trav. Br. at 43-45), states that "courts should use the pro rata approach" only *"in the absence of contractual language to*

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period" and were therefore irrelevant to allocating liability among "policies that were in force during successive years." 774 N.E.2d at 694.

[11] The Excess Insurers' reliance on the Court's statement that "[p]roration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period" (EI Br. at 21; Trav. Br. at 39-40, quoting 774 N.E.2d at 695), ignores that the Court tied those observations to the specific language of the policies in issue. In the very same paragraphs, the opinion states that "joint and several allocation *is not consistent with the language of the policies"* and that pro rata allocation *"is consistent with the language of the policies." Id.* (emphasis added). Those statements would be superfluous if the Court were imposing a *per se* rule against insurance coverage for injury outside the policy period.

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the contrary" and that *"New York law does not preclude parties from contracting to indemnify the insured for damage allocated to years after the termination of the policy."* 704 F.3d at 96, 102 (emphasis added).

Most notably, the court in *Mt. McKinley Insurance Co. v. Corning Inc.*, 2012 N.Y. Misc. LEXIS 6531 (N.Y. Sup. Ct. Sept. 7, 2012) ("*Corning*"), confirmed that *Viking II* correctly held that New York has not adopted any one method of allocation – in direct contrast to the Excess Insurers' arguments here:

> In [*Viking Pump II*], the Delaware court *correctly noted* that the New York Court of Appeals has not adopted a definite position upon whether pro rata or [all sums] allocation applies to multiple insurance policies covering the same loss. The eourt noted, *again correctly*, if somewhat derisively[[12]] that the Court of Appeals has found that the issue is to be governed by the language of the policies at issue.

Id. at *11-12 (emphasis added).

The Court of Chaneery's applieation of all sums allocation to the Excess Insurers' defense obligations was particularly apt. Even after *Con Ed*, New York

[12] As do the Excess Insurers here (*see* Trav. Br. at 3, 41-42), the *Corning* trial court misread the court's decision as criticizing *Con Ed* for failing to "engage in an extended public policy analysis" and "mocking the Second Circuit's inclusion of a public policy element" in its decision in *Olin Corp. v. Insurance Co. of North America*, 221 F.3d 307 (2d. Cir. 2000) ("*Olin I*"). 2012 N.Y. Misc. LEXIS 6531, at *12-13. The court did no such thing. Rather, it noted that the brevity of the *Con Ed* allocation analysis belied any intent to mandate pro rata allocation in all cases as a matter of New York public policy, and that the supposed "public policy" and "equity" concerns that drove the adoption of pro rata allocation in *Olin I* are absent from the state court decisions. *See* 2 A.3d at 116-119. As for the assertion that the court "ignor[ed] established New York precedent" (2012 N.Y. Misc. LEXIS 6531, at *14), the *Corning* court identified no "precedent" that it believed supported a different outcome in *Viking Pump*, and, as set forth herein, there is none.

[redacted]

courts hold that a single insurer may be held responsible for paying all defense costs in full. *See, e.g.*, *Travelers Cas. & Sur. Co. v. Alfa Laval, Inc.*, 2011 WL 9557466, at *3, 5 (N.Y. Sup. Ct. Nov. 18, 2011) (holding that insured could obtain full amount of defense against asbestos claims from one insurer, subject to its right to seek contribution from other insurers), *aff'd as modified*, 954 N.Y.S.2d 23 (App. Div. 2012).[13]

In short, the Court of Chancery correctly recognized that its decision to apply New York law to the allocation issue did not itself resolve that issue. Rather, it mandated that the court determine whether the full policy language called for application of an all sums or pro rata allocation.

2. The Court Properly Held That The Non-Cumulation Provisions Are Inconsistent With Pro Rata Allocation

a. The Court's Holding Is Consistent With Precedents Addressing Non-Cumulation Provisions

Because their argument centers on the inaccurate assertion that "New York is a pro rata jurisdiction" (Trav. Br. at 38), the Excess Insurers barely acknowledge the Court of Chancery's policy language analysis. In particular, their briefs omit any discussion of the language or purpose of the Non-Cumulation Provisions, the

[13] That result gives effect to longstanding New York precedents holding that an insurer must provide a full defense to any action stating a single potentially covered claim. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 690 N.E.2d 866, 868-69 (N.Y. 1997).

[redacted]

decisional law that has developed around those Provisions, or Liberty's application of the Provisions – each of which was central to the court's ruling.

In particular, the Excess Insurers neglect to mention that *Con Ed* expressly relied on the *absence* of non-cumulation clauses in applying a pro rata allocation in that case, distinguishing this Court's application of an all sums allocation in *Hercules* on the ground that ***the insurance policy language in Hercules was "different."*** *See* 774 N.E.2d at 694. The "difference" in language addressed in the passage of *Hercules* cited by the *Con Ed* Court was the presence in the *Hercules* policies of Prior Insurance Provisions materially identical to those contained in the Excess Policies here. 784 A.2d at 493-94. The lower court in *Hercules* held that those Provisions were inconsistent with its decision to apply pro rata allocation, and thus refused to enforce them. This Court reversed: "Rather than giving way to pro rata allocation, [the Prior Insurance Provision] undercuts the rationale for pro rata allocation because it provides continuing insurance for post-[policy period] damage arising out of a continuing occurrence." *Id.* at 494.

In fact, later decisions of New York's highest court which actually involve policies containing non-cumulation provisions similarly *enforce those provisions as written without requiring any proration of the policyholder's multi-year loss*. In *Hiraldo ex rel. Hiraldo v. Allstate Insurance Co.*, 840 N.E.2d 563 (N.Y. 2005), *aff'g* 778 N.Y.S.2d 50 (App. Div. 2004), the policyholder suffered a $700,000 loss

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involving injury spanning three policy periods, each covered by a policy that "applie[d] only to losses which occur during the policy period," but which also contained a non-cumulation provision. *Id.* at 564. A pro rata allocation would have assigned $233,333.33 to each policy period. Nonetheless, the New York Court of Appeals affirmed the lower court's ruling that those provisions "limited the plaintiffs to the recovery of the limit of *one* policy period, *i.e.*, *$300,000*" for the full judgment. 778 N.Y.S.2d at 51 (emphasis added).

Other New York courts have similarly applied non-cumulation provisions without reference to pro rata allocation, *even where, as in Hiraldo, the policies contained the "during the policy period" language.* Those New York decisions recognize – as did the Court of Chancery here – that non-cumulation clauses provide the policyholder with the right to recover one *full* "per occurrence" limit – for each "occurrence" triggering a given coverage layer.[14] They thus are wholly consistent with, and fully support, the court's all sums allocation here.

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[14] *See, e.g.*, *Mark IV Indus., Inc. v. Lumbermens Mut. Cas. Co*, 2006 WL 1458245, at *4-5 (N.Y. Sup. Ct. Apr. 28, 2006) (holding that Liberty Provision restricted insured's recovery to the full "per occurrence" limit available under one of four consecutive Liberty policies and rejecting argument that the Provision was unenforceable); *Bahar v. Allstate Ins. Co.*, 159 Fed. App'x 311, 312 (2d Cir. 2005), *aff'g* 2004 WL 1782552 (S.D.N.Y. Aug. 9, 2004) (following *Hiraldo* in holding that non-cumulation provision applied to restrict insured's recovery to the limit of a single policy and rejecting policyholder's argument that "during the policy period" language rendered the provision ambiguous); *Greenridge v. Allstate Ins. Co.*, 312 F. Supp. 2d 430, 440 (S.D.N.Y. 2004), *aff'd*, 446 F.3d 356 (2d Cir. 2006); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 179-85 (N.D.N.Y. 1996) (applying Liberty Provision to restrict the

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The Court of Chancery's application of all sums allocation is also in full accord with decisions of courts across the country holding that non-cumulation provisions are inconsistent with a pro rata allocation scheme.[15]

The supposed New York "non-cumulation" cases on which the Excess Insurers rely are not to the contrary. In particular, the only "non-cumulation" clause cited by the court in *Corning* was a standard "other insurance" provision in an insurance policy sold by Lumbermens Casualty that did not reference the

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insured's recovery to the highest limit available under one of five triggered policies for property damage that continued across multiple policy periods).

[15] *See, e.g., Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626 (Wis. 2009) (citing Liberty Provision as a basis for "all sums" ruling; "the policy obligates Liberty Mutual to pay for injury that occurs 'partly before and within the policy period'"); *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 797 N.E.2d 434, 440-41 (Mass. App. Ct. 2003) (Prior Insurance Provision contradicted insurer's claim that the policy coverage was "confine[d] . . . to the policy period in which the property damage occurred"); *FMC Corp. v. Plaisted & Cos.*, 72 Cal. Rptr. 2d 467, 499 (Cal. Ct. App. 1998) (citing Prior Insurance Provision as support for the court's conclusion that "[o]nce coverage has attached – i.e., once it has been triggered – it will extend to all of the insured's liability for damages attributable to the same occurrence in and after the policy period"); *Dow Corning Corp. v. Cont'l Cas. Co.*, 1999 Mich. App. LEXIS 2920, at *20 (Mich. Ct. App. Oct. 12, 1999) (citing Prior Insurance Provision as a basis for the court's holding that "the policy provides for indemnification for injuries occurring outside the policy period"); *M-B Co. v. Parker Hannifin Corp.*, 1989 WL 111968, at *2 (Wis. Ct. App. July 12, 1989) (affirming trial court ruling that Prior Insurance Provision "extended [the insurer's] liability" to property damage that took place following the policy period); *Liberty Mut. Ins. Co. v. Those Certain Underwriters at Lloyd's*, 650 F. Supp. 1553, 1559 (W.D. Pa 1987) (basing allocation decision on Prior Insurance Provision; "[t]here can be no clearer indication that these policies were intended to provide coverage for *all* damages regardless of when they occurred") (emphasis in original); *see also Spaulding*, 819 A.2d at 422 (refusing to enforce Liberty Provision because doing so would conflict with New Jersey's application of pro rata allocation based on public policy grounds); Plaintiffs' Opening Brief and cases cited therein (XA31-41).

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potential applicability of the policy to injury outside of the policy period.[16] Indeed, the *Corning* court *distinguished Viking II on that very ground:* "In contrast, the clauses . . . in *Viking Pump expressly considered an injury occurring outside of the time limitations of each policy* . . . . Upon the policy language at bar, *Viking Pump* is distinct from the Lumbermens' policy language." *Id.* at *20 (emphasis added).

Long Island Lighting Co. v. Allianz Underwriters Insurance Co, Index No. 604715197 (N.Y. Sup. Ct. Dec. 20, 2003) (*"LILCO"*) (cited in EI Br. at 22) – the Excess Insurers' only other supposed "non-cumulation" case[17] – is similarly inapt. As even the *LILCO* court recognized, the policies before it did not contain non-cumulation provisions,[18] and its holding is therefore irrelevant to the Court of Chancery's analysis of the effect of the Non-Cumulation Provisions here. In any event, to the extent that *LILCO* suggests that a court may decline to enforce a true

[16] *See* 2012 N.Y. Misc. LEXIS 6531, at *17 (quoting the "non-cumulation" provision as applying "[i]f the insured has other valid and collectible insurance, other than insurance specifically in excess hereof, with any other insurance covering a loss also covered by this policy"). *See also id.* n.11 (criticizing parties for failing to direct the court to the specific policy provisions on which they relied).

[17] The Excess Insurers' other cases either include no discussion of the policy language at all or merely address the standard insuring clause language that was construed in *Con Ed. See generally* EI Br. at 18-19; Trav. Br. at 39-40. Tellingly, only one of those cases even *mentions* a non-cumulation provision, albeit not in the context of New York law or a pro rata allocation. *See Air & Liquid Sys. Corp. v. Allianz Underwriters Ins. Co.*, 2014 WL 4060309, at *13-16 (W.D. Pa. Aug. 15, 2014).

[18] *See* slip op. at 7 (stating that policyholder relied for its "all sums" argument on "other insurance and *misdenominated* non-cumulation provisions") (emphasis added). In fact, the *LILCO* provision was materially identical to the provision that the *Corning* court held related solely to allocation among policies covering the same policy period. *Compare LILCO* provision (quoted in EI Br. at 22 n.5) *with Corning* provision (2012 N.Y. Misc. LEXIS 6531, at *17).

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non-cumulation provision in order to apply pro rata allocation, it is contrary to New York law. *See, e.g.*, *Bahar*, 159 Fed. App'x at 312 ("during the policy period" language cannot justify refusal to enforce non-cumulation provisions).

b. The Insurers Agreed That The Non-Cumulation Provisions Are Inconsistent With Pro Rata Allocation

The court's conclusion that the Non-Cumulation Provisions are inconsistent with pro rata allocation also is in full accord with the understanding of both Liberty *and the Excess Insurers themselves prior to this appeal.* For more than twenty years, Liberty, the author of the Liberty Provision, paid the Asbestos Claims on an all sums basis, even though a pro rata allocation would have shifted losses to years not covered by its policies. *See Viking II*, 2 A.3d at 127-29.

For their part, the Excess Insurers *conceded* in the court below that the Non-Cumulation Provisions were inconsistent with the application of pro rata allocation, and argued that the court should resolve that conflict by holding that the Provisions are "not applicable" in a pro rata regime. WB558, 574, 578. As this Court held in *Hercules*, under any law that gives primacy to the policy language – as does New York – just the opposite is true. Policy language does not give way to the choice of an allocation method; rather, the choice of an allocation method is dictated by the requirements of the policy language. 784 A.2d at 494.

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Belatedly recognizing that fact, on this appeal, the Excess Insurers have reversed course, and suggest that the Provisions are not only "consistent" with pro rata allocation, hut necessary to prevent a "double recovery."[19] El Br. at 22-23; *see also* Trav. Br. at 43-45. Nowhcrc in their briefs, however, do the Excess Insurers explain how there could he a "double recovery" in a pro rata allocation, which divides loss among policy periods. Nor do thcy address the Court of Chancery's analysis and determination that the Non-Cumulation Provisions would artificially and unfairly reduce the coverage otherwise applicable under the Policies if applied in the context of a pro rata allocation. *See* 2 A.3d at 123-27.

Moreover, *Olin II*, the only case that the Excess Insurers cite for their new-found belief that proration and non-cumulation are "consistent," does not support that premise. The policyholder in *Olin II* sought coverage under two consecutive excess policies for an occurrence that caused environmental property damage from 1957 to 1987. The insurer argued that its obligations had not attached, because the policies only applied to losses in excess of $30.3 million, and a pro rata allocation

[19] The Excess Insurers also suggest that pro rata allocation is necessary to prevent solvent insurers in one policy year from having to bear losses which would otherwise be applicable to insolvent insurers in another year. El Br. at 23-24. That is a back-door argument for horizontal exhaustion of the Excess Policies' limits – an argument expressly and correctly rejected by the Superior Court in its post-trial rulings. *See* JA1774-1801; *see also* Appellant Viking Pump Inc.'s Opening Brief On Appeal (Nov. 6, 2014) ("Viking Opening Br."), Argument Point I. No Excess Insurer is "harmed" by the fact that a portion of Plaintiffs' losses will not be assigned to an insolvent insurer in another policy year, because no Excess Insurer has a right to insist on the payment of another year's underlying limits as a prerequisite to its own obligations.

of the loss would assign only $3.3 million to each annual period. However, the court held that the policies' Prior Insurance Provisions "require[d] the insurer to indemnify the insured for personal injury or property damage continuing after the termination of the policy." 704 F.3d at 100. As a result, the court held that "$72.6 million in damage" potentially fell "within the coverage of the 1966-69 policy." 704 F.3d at 105. That holding, which depended on losses being aggregated into a single policy year, does not bear even a family resemblance to a pro rata allocation.

Moreover, Travelers's citation to *dictum* in *Olin II* stating that the Prior Insurance Provision "alone" cannot trigger an all sums allocation ignores the full statement by the *Olin II* court: "That [Prior Insurance Provision] is not enough to impose joint and several liability and reject pro rata allocation, given that the continuing coverage provision of [the Provision] applies only to damages continuing *after* the termination of the policy **and is silent regarding damages occurring *before* the policy period**." 704 F.3d at 103 (italics in original, boldface added).[20] *Olin II* thus acknowledges that a provision, like the Non-Cumulation Provisions, which involves coverage for injuries before, during and after the policy period is inconsistent with pro rata allocation. Accordingly, even if the Second

[20] In fact, the *first* paragraph of the Provision *does* address coverage for damage or injury that takes place in prior policy periods – a point that the court may have overlooked in light of the fact that there was no applicable prior coverage in *Olin II*.

[redacted]

Circuit's *dictum* in *Olin II* were binding on this Court, which it is not, that *dictum* would provide no basis for reversing the Court of Chancery's allocation decision.

3. The Court Below Correctly Applied Bedrock New York Rules Of Policy Interpretation

The Court of Chancery's decision correctly applied not only New York decisional law with respect to allocation and the enforceability of non-cumulation clauses, but also basic New York rules of insurance policy interpretation. In particular, the court's decision "harmonizes all of the terms of the contract" so as to "giv[e] effect and meaning to every term of the policy." *Oot v. Home Ins. Co. of Indiana*, 676 N.Y.S.2d 715, 717-18 (App. Div. 1998); *see also Westview Assocs. v. Guar. Nat'l Ins. Co.*, 740 N.E.2d 220, 222 (N.Y. 2000). Under the court's ruling, "the words 'during the policy period' simply require that the insured's liability for the claim in question be attributable to . . . an injury in fact during the policy period." *Viking II*, 2 A.3d at 123. The *allocation*, however, is controlled by the Non-Cumulation Provisions, which require payment of a full policy limit for injury or damage occurring both within and outside the policy period. In contrast, other than vague references to the need to prevent a "double recovery" – which cannot occur in a pro rata allocation in any event – the Excess Insurers identify no purpose

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that can be served by the Non-Cumulation Provisions in the context of a pro rata allocation.[21]

The Court of Chancery's decision also is consistent with black-letter New York law holding that specific policy provisions control over more general provisions. *Aguirre v. City of New York*, 625 N.Y.S.2d 597, 598 (App. Div. 1995); *Rocon Mfg., Inc. v. Ferraro*, 605 N.Y.S.2d 591, 593 (App. Div. 1993). The Non-Cumulation Provisions specifically address the extent and nature of the insurers' payment obligations with respect to a continuing injury that triggers more than one policy period. They therefore control over the general statement that the policy is obligated to pay for an occurrence resulting in injury or damage during the policy period, which does not appear in a section of the Policies addressing apportionment of losses. *See Viking II*, 2 A.3d at 119.

Finally, the court's holding was compelled by New York law requiring that ambiguous policy language be construed in favor of coverage. *Viking II*, 2 A.3d at 129 n.188 (citing *State v. Home Indem. Co.*, 486 N.E.2d 827, 829 (N.Y. 1985)). The court correctly held that, even "if the extrinsic evidence that has been

[21] Indeed, a pro rata allocation negates the one function generally ascribed to a Non-Cumulation Provision – preventing the policyholder from "stacking" limits in multiple years to apply to the same injury or damage. *See* Excess Insurers' Sur-Reply Brief on Allocation Issue (WB521, 523). A pro rata allocation already accomplishes the same objective, by making each policy year liable only for injury "during the policy period." *See State v. Cont'l Ins. Co.*, 88 Cal. Rptr. 3d 288, 302 (Cal. Ct. App. 2009), *aff'd*, 281 P.3d 1000 (Cal. 2012).

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presented did not render the contract's meaning free from rational dispute, [the court] would in any event have to rule against the Excess Insurers who, had they wished to, could have included in their policies a provision expressly and unambiguously requiring that liability be allocated on a pro rata basis." 2 A.3d at 129.

4. Certification Is Not Warranted

In a final effort to avoid the court's well-reasoned application of established New York law below, the Excess Insurers request that this Court certify the allocation issue to the New York Court of Appeals. There is no basis for that request. The Court of Chancery did not address questions of first impression: *Con Ed* set the standard for selection of an allocation method; *Hiraldo* and its progeny established the enforceability and primacy of Non-Cumulation Provisions; and established New York rules of construction informed the Court's decision. Accordingly, certification is not warranted. *See Intel Corp. v. Am. Guar. & Liab. Ins. Co.*, 51 A.3d 442, 451-52 (Del. 2012) (refusing to certify questions to the California Supreme Court where issue addressed was not one of first impression in the California courts).

II. THE COURT OF CHANCERY BELOW CORRECTLY RULED THAT WARREN HAS THE RIGHTS OF AN INSURED UNDER THE EXCESS POLICIES

A. Question Presented

1. Did the Excess Policies' anti-assignment provisions bar Plaintiffs from exercising the rights of insureds under the Excess Policies?

2. Did the Amended ASA convey to Warren the rights of an insured under the Excess Policies?

B. Standard And 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. The Anti-Assignment Provisions Are Inapplicable Here

As set forth in Point I.C.4 of the Viking Br.,[22] in which Warren joins, under well-established New York law, anti-assignment provisions cannot bar the assignment of insurance rights for pre-assignment occurrences, as such assignments do not increase the risks faced by the insurer. *See* Viking Br. at 20-30. Most recently, in *Arrowood Indemnity Co. v. Atlantic Mutual Insurance Co.*, 948 N.Y.S.2d 581 (App. Div. 2012), the New York appellate court both cited with approval the Court of Chancery's holding that an insurer cannot avoid coverage

[22] "Viking Br." refers to Appellee Viking Pump, Inc.'s Answering Brief dated Dec. 10, 2014.

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based on anti-assignment clauses "once the insured against loss has occurred" (*id.* at 582-83), and rejected Travelers's argument – which Travelers makes again here – that "loss" does not take place until the underlying plaintiff brings suit. *Id.* at 583. As the Excess Insurers effectively conceded below, they faced no additional indemnity risk as a result of the assignments here. WB274. Whether a claimant sued Houdaille as the owner of the Warren Pumps and Viking Pumps businesses or Warren and Viking as the successor owners, the only effect on the Excess Insurers' indemnity obligations was to change the name of the payee.

Neither do the Excess Insurers' speculative claims of an increased "defense cost" exposure support reversal, as they ignore the reality of the underlying defense. [redacted] As the Court of Chancery correctly recognized, that undisputed fact belies Travelers's unsupported speculation that the costs of defending a "unified Houdaille" (Trav. Br. at 30) would he less than those of defending claims based upon Warren and Viking's separate product lines. *Viking II*, 2 A.3d at 104 n.87.

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[redacted] Liberty – [redacted] – had every reason to minimize its defense cost exposure since defense cost payments did not erode its policy limits. *See Viking II*, 2 A.3d at 104 n.87. [redacted] Although it bears the burden of proof on this issue, Travelers has submitted only conjecture to support its contrary position.[23]

[23] Moreover, Travelers's baseless claim notwithstanding (Trav. Br. at 31), the jury's "unequal treatment" finding does not support the Excess Insurers' anti-assignment defense. The Excess

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2. The Amended ASA Gives Warren The Status Of An Insured Under The Excess Policies

Travelers's "fallback" argument that the Amendment to the ASA was not intended to provide Warren with rights under the Excess Policies fails for several reasons. As the Court of Chancery correctly ruled, Travelers's argument is contrary to the only "reasonable reading" of the Amendment. *Viking II*, 2 A.3d at 94-95 ("[n]othing in the ASA Amendment distinguishes" between the Liberty coverage and the Excess Insurers' coverage layers). In fact, both the Houdaille and Warren deponents confirmed that the Amended ASA was intended to provide Warren with access to all Houdaille coverage applicable to pre-closing occurrences involving the Warren Pumps business. WB127:13-128:20; WB138:1-8; WB174:12-175:4; WB350(251:2-253:6).

Moreover, Travelers, which, as a non-party to the ASA, has no standing to contradict the parties' application of its terms in any event (*see MBL Contracting Corp. v. King World Prods, Inc.*, 98 F. Supp. 2d 492, 497 (S.D.N.Y. 2000)), bases its contrary position solely on matters *outside the Amendment*. *See* Trav. Br. at 36-37. Its arguments are thus in direct contravention of New York law barring the use of parol evidence to alter unambiguous contractual language. *See Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990).

Insurers could have avoided that outcome by honoring their coverage obligations to Viking.

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In any event, that parol evidence does not support reversal. Travelers's assertion that Houdaille sought consent to assignments of other contracts (Trav. Br. at 36) ignores that those efforts were made in connection with a different provision of the ASA, which dealt with Warren's assumption of governmental and other ongoing services contracts, whose assignment required formal consent. WB095:4-101:10; WB329(168:3-13); WB336(194:5-195:9). Even at the time of the ASA, the assignment of insurance rights for pre-assignment losses did not require such consent.[24] *See, e.g., Ocean Accident & Guar. Corp. v. Sw. Bell Tel. Co.*, 100 F.2d 441, 446-47 (8th Cir. 1939). Nor does Travelers's speculation that the parties "likely" intended to provide Warren with access to only $27 million in coverage warrant reversal. Trav. Br. at 37. The Amendment contains no such limitation, and no witness recalled limiting Warren's access to specific layers of the Houdaille insurance program. *See, e.g.*, WB174:12-175:4. Such speculation could not raise a material issue of disputed fact sufficient to defeat Warren's motion, and the grant of summary judgment should therefore be affirmed in all respects.

[24] Contrary to Travelers's assertion, the August 27, 1985 Marsh & McLennan letter (TA974) does not show that Houdaille ever "considered making a request for the excess carriers' consent to a transfer of insurance rights to WP, Inc." Trav. Br. at 16. Nor does that letter even arguably advise Houdaille on whether any Excess Insurer's consent to the assignment was required. Indeed, the author specifically noted his absence of a legal background. *See* TA974 ("[A]s respects the comments as to our legal system, you must recognize that we are not lawyers."). As one would expect, Houdaille relied on its outside counsel to advise it on anti-assignment provisions. WB339 (206:1-6).

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III. THE JURY'S CONCLUSION THAT THE LIBERTY POLICIES WERE PROPERLY EXHAUSTED WAS FULLY SUPPORTED BY THE EVIDENCE

A. Question Presented

1. Was the jury's determination that the Liberty Policy limits were properly exhausted, and the Excess Policies triggered, supported by the evidence?

B. Standard And Scope Of Review

Where supported by the evidence, the verdict of a jury is conclusive. *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979). The decision of the trial court as to whether the verdict was supported by the evidence will be upheld unless it constitutes an abuse of the court's discretion. *Id.*

C. Merits Of The Argument

As Viking correctly argues, what the Excess Insurers characterize as "deductibles" were, in fact, part of a comprehensive premium structure created by Liberty. *See* Viking Br. at 41-48. But even were that not the case, the jury's determination that all amounts necessary to exhaust the Liberty primary policies were fully paid was supported by the evidence, and must stand.

The Excess Insurers' attack on the jury's determination of exhaustion is dependent on their assertion that the $100,000 "deductibles" in the 1980-1985 Liberty primary policies "do not erode Liberty's aggregate limits." EI Br. at 31. In fact, that assertion is false. The Liberty primary policies expressly provide that

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"The company shall be liahle 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." JA4076 (emphasis added).[25] As the Excess Insurers themselves note, that unambiguous provision must be "applied hased on how the policies were written." EI Br. at 28-29. Thus, whether an amount paid in settlement of an Asbestos Claim fell within the "deductible" or not, its payment counted toward the satisfaction of the aggregate policy limit.

Moreover, as Viking correctly notes, the Excess Insurers cannot avoid that conclusion by demanding that Plaintiffs, rather than Liberty, pay the deductible amounts, hoth because the Excess Insurers lack any legal right to determine how Liberty satisfies its policy ohligations (Viking Br. at 31-38) and because the policy language specifically provides that Liberty may pay the deductihles itself if it so chooses. JA4076. Thus, presented with evidence that the amounts paid toward Asbestos Claim settlements exceeded the Liherty primary policy limits (WB668:16-672:20; 686:17-697:7), the jury was entitled to conclude, as it did, that those limits were exhausted even if the amounts were fully paid by Liberty.

[25] As Viking correctly argues, that result is also compelled by the nature of "deductibles," which even the Excess Insurers' own authorities recognize serve to erode the policy limits. *See* Viking Br. at 38-41.

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Further, the jury was fully entitled to credit the testimony of Carl Brigada that the approximately $10 million Liberty charged to Plaintiffs in 2008 satisfied any outstanding obligation owed to Liberty, whether as a "deductible" or an additional "premium." WB613:7-626:15; WB712:3-716:14; WB717:15-727:17; WB729:10-733:8; WB734:16-737:2. That is particularly true given the fact that the only rebuttal the Excess Insurers offered to Mr. Brigada's testimony was the contrary calculation of an ACE claims handler, who (1) never saw a Liberty policy before this case (WB765:22-766:1); (2) had "no idea what Liberty intended when it drafted its own policy language" (WB766:12-14); (3) did not know that Liberty had charged Warren and Viking nearly $10 million in deductible-based premiums under the 1980-1985 Liberty primary policies (WB770:5-12; 771:4-21); and (4) could not say definitively that Liberty had erred in applying the premium and deductible endorsements, testifying only that "it doesn't appear that they did it properly," but adding "I don't know that." WB772:14-22. Accordingly, the Superior Court's determination that the jury's verdict was supported by the evidence was correct, and must be affirmed.

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IV. THE SUPERIOR COURT CORRECTLY RULED THAT ALL 33 EXCESS POLICIES IN ISSUE PROVIDE COVERAGE FOR PLAINTIFFS' COSTS OF DEFENDING THE ASBESTOS CLAIMS

A. Questions Presented

1. Are the Liberty umbrella policies obligated to pay for the costs of defending the Asbestos Claims upon exhaustion of the applicable underlying Liberty primary policies?

2. Does any of the Excess Policy language cited by the Excess Insurers negate their agreement to follow form to Liberty's defense payment obligation?

B. Standard And Scope Of Review

Issues of insuranee policy interpretation are reviewed *de novo*. *Phillips*, 700 A.2d at 129.

C. Merits Of The Argument

1. The Liberty Umbrella Policies Cover The Costs Of Defending The Asbestos Claims

The Excess Insurers contend that Liberty, one of the world's largest and most sophisticated insurance companies, so misunderstood its own policy language [redacted], even though the umbrella policies did not cover those costs. EI Br. at 43. The Superior Court correctly rejected that argument and ruled – consistent with Liberty's own application of the umbrella policies for more than two decades – that the umbrella policies were obligated to pay for the defense of the Asbestos Claims as soon as

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the relevant primary policies were exhausted. *Viking III*, JA1749-50. That conclusion is correct as a matter of fact and law, and should be affirmed.

The Liberty umbrella policies promise to pay defense costs incurred in connection with injuries "covered under this policy (**or which would be covered but for the Insured's retention** as stated in the declarations), but **not covered under any underlying policy**." JA3570 (emphasis added). The Excess Insurers contend that the Asbestos Claims were "covered" by the "underlying" Liberty primary policies even after those policies were exhausted, because, although no longer payable under the primary policies, the claims still fell within the "scope" of the primary policies' insuring terms.

That strained interpretation is simply irreconcilable with the policy language. "Covered under" must mean "actually payable under," because, if it does not, no claim could *ever* be "covered *but for* the Insured's retention." The only time that a claim would not be "covered" *because of the insured's retention* is when that claim is *payable* within the retention layer rather than the policy layer. As a matter of law, a policy term must have the same meaning both times that it appears in the same sentence. *See, e.g., Hartol Prods. Corp .v. Prudential Ins. Co. of Am.*, 47 N.E.2d 687, 689 (N.Y. 1943). Thus, just as a loss is not *yet* "covered" under the primary policy when it is payable under the retention, so, too, it is no

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longer "covered" under the primary policy when that policy's limits have been exhausted.

Even if the policy language were ambiguous, the judgment still must stand. The parties originally submitted the question of the Liberty defense obligation to the jury on the assumption that the policy language was ambiguous. After considering both the language and the extrinsic evidence – including Liberty's own decades-long application of that language – the jury concluded that the Liberty umbrella policies were obligated to pay the costs of defending the Asbestos Claims. JA1481. That conclusion was fully supported by the record at trial, and provides an alternate basis for affirming the final judgment on this issue.[26]

2. None Of The Language On Which The Excess Insurers Rely Negates Their Follow Form Defense Payment Obligation

As a matter of well-established New York law, an excess insurer whose policy follows form to a policy with a defense payment obligation adopts that obligation unless the excess policy expressly and unequivocally provides to the

[26] The cases on which the Excess Insurers rely do not support a different result. The policy in *American Safety Indemnity Co. v. 612 Realty LLC*, 2009 WL 2407822 (N.Y. Sup. Ct. Aug. 4, 2009) (EI Br. at 43), did not include the "would be covered but for the Insured's retention" language; more importantly, the court held that the policy language was, at best, ambiguous and therefore had to "be construed against the insurer as the drafter of the agreement." *Id.* at *5. Similarly, the court in *Liberty Mutual Insurance Co. v. Pacific Indemnity Co.*, 579 F. Supp. 140, 144-45 (W.D. Pa. 1984) (El Br. at 44), held only that the umbrella policy had no defense payment obligation where the policyholder was *receiving payments from two primary insurers.* The court did not endorse the theory that the Excess Insurers advance here – that Liberty has no obligation under its umbrella policies even *after* all applicable primary policies have exhausted.

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contrary. *See, e.g., Chunn v. N.Y.C. Housing Auth.*, 866 N.Y.S.2d 145, 147 (App. Div. 2008) ("*Chunn*"); *Axis Reins. Co. v. Bennett*, 2008 U.S. Dist. LEXIS 53921, at *11-13 (S.D.N.Y. June 26, 2008).[27] Applying these standards, both the jury, as a matter of fact, and the Superior Court, as a matter of law, correctly concluded that 33 of the 34 Excess Policies incorporated the Liberty umbrella defense payment obligation. Those conclusions are fully supported by the unambiguous policy language and should be affirmed in all respects.

a. The Supposed "Express Disclaimers" Of Defense

The Excess Insurers' assertion that "[s]ix Excess Policies expressly disclaim any duty to provide defense costs" (EI Br. at 44-46) does not survive scrutiny. For one INA and three International Policies, the Excess Insurers cite to preprinted "insuring agreement" forms (*see* EI Br. at 45) – but ignore that each one of those Policies contains an endorsement that either adopts the Liberty defense obligation or sets forth an express promise to pay defense costs.[28] Those endorsements

[27] Indeed, the very purpose of "follow form" coverage is to ensure uniformity of coverage in complex insurance programs without the need for a "minute policy-by-policy analysis" to determine the nature and extent of coverage. *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 922 N.Y.S.2d 220, 222 (N.Y. 2011).

[28] *See* Endorsements to International Policy nos. 5220113076 and 5220282357 (JA4005, 4120) ("**Notwithstanding anything contained herein to the contrary**, it is understood and agreed that this Insurance covers the same Named Assured and is subject to the same terms, definitions, exclusions and conditions (except as regards the premium and the amount and limits of liability) as are contained in . . . the first layer Umbrella of the Liberty Mutual Insurance Company") (emphasis added); Endorsement to International Policy no. 5220489339 (JA4433) (amending definition of "loss" to "include[] loss expenses and *legal expenses* incurred by the Insured with

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control over inconsistent policy language. *See, e.g., N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 124 (2d Cir. 2001); JA1751 n.255.[29]

The remaining Policies in this group[30] state that "the insurance afforded by this [c]ertificate shall not apply to any expenses [i.e., defense costs] for which insurance is provided in the primary insurance." JA3622, 4421. This language merely clarifies that the excess insurer is "not obligated to pay defense costs so long as the underlying policy [is] obligated to do so." *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46, 64 (Minn. Ct. App. 2002), *aff'd in relevant part, rev'd in part on other grounds*, 667 N.W.2d 405 (Minn. 2003); *see also Hartford Accident & Indem. Co. v. Pac. Emp'rs Ins. Co.*, 862 F. Supp. 160, 164-65 (S.D. Tex. 1994) (holding that this language "merely states that [the excess insurer] does not have to pay the expenses for which [the underlying insurer] is obligated while its initial limits have not been met").[31]

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the consent of the company *in the investigation or defense of claims*, including court costs and interest") (emphasis added); Endorsement to INA Policy no. XCP145194 (JA4171) ("[T]he coverage afforded by this policy shall be no less broad than underlying.").

[29] The International policy endorsements also dispose of the Excess Insurers' contention that any defense payments under the three International policies should erode policy limits. EI Br. at 46 n.11. The endorsements in Policy nos. 5220113076 and 5220282357 incorporate into those policies the umbrella policy language stating that defense costs are payable "in addition" to limits, while the endorsement in Policy no. 5220489339 states that "[e]xpenses . . . paid by the company shall be paid in addition to the limit of liability . . . ." JA4433.

[30] California Union Policy no. ZCX003889 and INA Policy no. XCP156562; *see also* INA Policy no. XCP145194 at JA4165.

[31] In any event, even if the language of these three Excess Policies were ambiguous, which it is

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b. The "Assume Charge" Language

Language providing that the Excess Insurers shall not be called upon to "assume charge" of the policyholder's defense does not negate the obligation to pay the costs of that defense. The duty to *conduct* the defense is separate and apart from the duty to *fund* that defense.[32] Recognizing this distinction, the court in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1218 (2d Cir. 1995), *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996), held that, under New York law, endorsements stating that the insurer "may, at the sole option of the [insurer], assume charge of the . . . defense" and that "the [insurer] shall *not* be obligated to assume" the insured's defense did "not in any way limit the Insurers' obligation to reimburse defense costs incurred."[33] That conclusion has been echoed by courts throughout the country.[34]

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not, the Final Judgment should be affirmed based on the jury's verdict that the Policies impose such an obligation as a matter of fact. JA1481-82.

[32] *See In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 n.11 (S.D.N.Y. 2005); *In re Silicone*, 652 N.W.2d at 65 ("A policy might exclude a duty to defend, however, while including a duty to pay defense costs.").

[33] Certain Excess Insurers have in the past sought to distinguish *Stonewall* on the ground that the policy there included a defense provision. That is a distinction without a difference, because the Excess Policies incorporate the express defense provisions of the Liberty umbrella policies.

[34] *See, e.g.*, *Cone Mills Corp. v. Allstate Ins. Co.*, 443 S.E.2d 357, 361-62 (N.C. Ct. App. 1994); *FDIC v. Booth*, 824 F. Supp. 76, 80 (M.D. La. 1993); *North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1210 (3d Cir. 1995); *Hartford Accident*, 862 F. Supp. at 164-65. The Excess Insurers' cases do not support a contrary result. In *M.H. Lipiner & Son, Inc. v. Hanover Insurance Co.*, 869 F.2d 685 (2d Cir. 1989), the court held that the underlying claims were not even potentially covered under the policies, and the decision does not indicate that the policy contained or incorporated any obligation to pay defense costs. *Id.* at 688. Similarly, in *In re*

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Moreover, the "assume charge" clauses provide that the insurer shall not be required to assume charge of the *settlement* of claims. If disclaiming a duty to "assume charge" of the defense eliminates the obligation to pay defense costs, then disclaiming the duty to "assume charge" of settlements would eliminate the duty to pay *settlements*, impermissibly rendering the coverage illusory. While the Excess Insurers do not argue for such a result, neither do they offer any justification for avoiding it under their interpretation of the "assume charge" provisions.[35]

c. The "Consent" Language

Nor is the Excess Insurers' follow form obligation negated by provisions requiring insurer consent before incurring defense costs. To the contrary, the requirement of insurer consent to costs ***presumes that the obligation to pay costs exists in the first place***, as there would be no need to seek an insurer's consent to amounts that it could not be called upon to pay. *See North River*, 52 F.3d at 1202.

That conclusion is further compelled by the fact that *primary* policies generally, including the Liberty primary policies, typically bar insureds from

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September 11th Liability Insurance Coverage Cases, 458 F. Supp. 2d 104 (S.D.N.Y. 2006), certain excess policies incorporated by reference standard forms absolving them of the obligation to provide a defense, and *none of the underlying primary or umbrella policies to which they followed form had a defense obligation. Id.* at 116, 121.

[35] Significantly, most of the London policies containing "assistance and cooperation clauses" *also* include "costs" provisions (*see, e.g.*, JA3085-86), which London represented to the Court "unambiguously" require London to pay the costs of defense. *See* WB528.

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"incur[ring] any expense" without the insurer's consent. *See, e.g.*, JA3834.[36] Under longstanding New York law, those clauses do not permit the insurer to withhold consent to incur defense costs unreasonably.[37] Indeed, Warren is unaware of any insurer that has ever argued, let alone any court that has held, that this standard provision converts a primary insurer's defense payment obligation into an "option" to pay defense costs in the insurer's sole discretion. Thus the inclusion of a consent clause in an Excess Policy that has agreed to follow form to policies that already contain such a clause *cannot meet the standard of "expressly and unequivocally" excluding from the promise to follow form the promise to pay defense costs as required by New York law. Chunn*, 866 N.Y.S.2d at 147.[38]

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[36] The Liberty umbrella policies similarly provide for Liberty to "pay defense expenses incurred with its written consent" where the policyholder is responsible for "the investigation, defense or settlement" of third-party claims to which the umbrella policies apply. *See, e.g.*, JA4109.

[37] *See, e.g.*, *Smart Style Indus., Inc. v. Pa. Gen. Ins. Co.*, 930 F. Supp. 159, 163-64 (S.D.N.Y. 1996) (consent clause "cannot literally be read as prohibiting an insured from incurring any expense without the explicit prior approval of the insurer"); *Hugo Boss Fashions, Inc. v. Federal Ins. Co.*, 1999 U.S. Dist. LEXIS 17016, at *14-15 (S.D.N.Y. Nov. 1, 1999) (same); *Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 2003 N.Y. Misc. LEXIS 1989, at *18 (Sup. Ct. Mar. 31, 2003).

[38] *Stonewall* – the sole authority that the Excess Insurers cite for their "consent" argument (EI Br. at 47) – does not support their attempt to evade their follow-form defense payment obligations. The case pre-dates the cases cited above rejecting insurers' arguments that such clauses make the payment of defense costs "voluntary." In addition, in the four sentences devoted to the topic, the *Stonewall* court did not address the significance of a follow-form carriers' duty to "expressly and conspicuously" negate its obligation to pay for defense costs where the policy to which it follows form *also* contains a "consent" clause.

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Finally, an insurer cannot insist upon cooperation or invoke a right to prior consent after it has repudiated liability for the claim. *Am. Ref-Fuel Co. v. Res. Recycling, Inc.*, 722 N.Y.S.2d 570, 574 (App. Div. 2001); *Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co.*, 291 N.E.2d 380, 382-83 (N.Y. 1972). For seven years, the Excess Insurers have asserted every defense imaginable to Warren's insurance claims, and deny coverage for the Asbestos Claims to this day. They are thus precluded from avoiding their follow-form obligation to pay the costs of defending the Asbestos Claims based on any failure by Plaintiffs to seek their "consent" to those costs.

d. The Exclusion Of "Costs" From The Definition Of "Loss" Or "Ultimate Net Loss"

As both the jury and the Superior Court correctly held, the Excess Policies that exclude costs or expenses from the definition of "ultimate net loss" or "loss" also do not negate the Excess Insurers' promise to follow form to the Liberty defense payment obligation. As an initial matter, the five Excess Policies that exclude "expenses" from "ultimate net loss" also contain provisions that (i) require the insurer's "consent" to defense costs and (ii) describe how defense costs will be apportioned between the Excess Insurer and underlying insurers.[39] Such provisions specifically impose an obligation to pay defense costs even absent the

[39] *See* London Policy Nos. K25878 (JA2633), 881/UHL0395 (JA3085), 881/UKL0340 (JA3331), 881/UKL0341 (JA3409), 881/UKL0342 (JA3445).

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follow-form promise, because an insurer that has no obligation for defense costs would have no need for a provision specifying "which" costs of defense are or are not payable under the policy. *See, e.g.*, *North River*, 52 F.3d at 1197 (similar provisions obligated an excess insurer "to pay defense costs, in excess of policy limits, to its insured"). Indeed, the Excess Insurers themselves ***affirmatively represented to the court below that these separate provisions require the payment of defense costs.*** WB528.

The insurance policies at issue in *Stonewall* and *Home Insurance Co. v. American Home Products Corp.*, 902 F.2d 1111 (2d Cir. 1990) (cited in EI Br. at 48), contained no independent language evidencing an intention to pay defense costs in addition to "ultimate net loss." Indeed, the *Home* court noted that the excess policy there not only excluded "expenses" from "ultimate net loss" but contained no language to indicate that the insurer otherwise owed a defense payment obligation. *See id.* at 1114; *see also Stonewall*, 73 F.3d at 1218.

In contrast, the exclusion of "costs" or "expenses" from the definition of ultimate net loss does not negate separate policy language promising to follow form to an underlying obligation to pay defense costs.[40] Rather, it requires that

[40] *See Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 800-01 (Ohio Ct. Com. Pl. 1995); *A.W. Chesterton Co. v. Northbrook Excess & Surplus Ins. Co.*, 1999 Mass. Super. LEXIS 581, at *19-21, *44-45 (Mass. Super. Sept. 29, 1999); *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 70-71 (1st Cir. 2009); *In re Silicone*, 652 N.W.2d at 66.

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such costs be paid in addition to the limits of the policy. *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1335 (S.D.N.Y. 1995).

Finally, the Excess Insurers' claim that pre-printed provisions in three Lexington Policies[41] "exclude all expenses and costs" (EI Br. at 48) impermissibly ignores other relevant provisions in those Excess Policies. Two of those policies contain typewritten endorsements that conform their language to that of other Excess Policies which the Superior Court correctly held provide coverage for defense costs. *See* JA1755-57, 1759-61, 1763.[42] The third contains an incomplete "insuring agreement" upon which the Excess Insurers rely (*see* JA3110) but also a complete version of an entirely different insuring agreement that extends coverage to "*expenses*" as well as "*damage[s].*" *See* JA3124. At the very least, the presence of these two inconsistent insuring forms creates an ambiguity that must be resolved – and which the jury did resolve – in Warren's favor. *See, e.g., Mazzuoccolo v. Cinelli*, 666 N.Y.S.2d 621, 623-24 (App. Div. 1997).

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[41] Lexington Policy nos. CE5504779, CE5503312 and 5510143. *See* JA2906, 3110, 3371.

[42] The Lexington endorsements in question agree to follow form to policies issued by "Lloyd's" (JA2911, 3375), and each of the two Lexington policies shares a coverage layer with Lloyd's/London underwriters. Lexington Policy no. CE5504779 and Lloyd's/London Policy no. 881/UGL0160, for example, cover the same time period at the same attachment point and participate in a "quota-sharing" arrangement pursuant to which those policies contribute stated percentages to the same covered losses. *See* JA2879, 2881, 2905, 2907. That is equally true of Lexington Policy no. 5510143 and Lloyd's/London Policy no. 881/UKL0340. *See, e.g.*, JA3330, 3337; 3373, 3374; *see also* JA1969.

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CONCLUSION

For the reasons set forth above, Warren respectfully requests that the Court affirm the Final Judgment to the extent that it reflects (i) the Court of Chancery's rulings that the Excess Policies provide coverage in accordance with an "all sums" allocation methodology and that Plaintiffs are entitled to exercise the rights of insureds under the Excess Policies; (ii) the Superior Court's rulings that all Excess Policies other than the ISLIC policy provide coverage for Plaintiffs' asbestos-related defense costs; and (iii) the jury's verdict that the Liberty primary policies with deductibles were properly exhausted.[43]

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[43] Warren notes that the Excess Insurers' briefs do not seek reversal of or certification with respect to the Superior Court's determination that the Excess Policies are subject to vertical, not horizontal, exhaustion. Warren agrees with Viking that requiring horizontal exhaustion of *any* layer of coverage is contrary to New York Law. *See* Viking Opening Br. at 35-43. However, at the very least, there is no basis for disturbing the Superior Court's correct determination that the Excess Policy layers of coverage are not subject to horizontal exhaustion, particularly in the absence of any challenge to that ruling in the Excess Insurers' briefs.

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CERTIFICATE OF ELECTRONIC SERVICE

Jennifer C. Wasson hereby certifies that, on the 23rd day of December, 2014, she caused to be filed, via File and Serve*Xpress*, an electronic version of the within document, and to be served, via File and Serve*Xpress*, upon the Delaware counsel of record identified below:

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