Supreme Court of California
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March 18, 2024

Hon. Chief Justice
Hon. Associate Justice
Hon. Associate Justice
Hon. Associate Justice
Hon. Associate Justice,
Hon. Associate Justice
Hon. Associate Justice
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102-4797

Re: *Truck Insurance Exchange v. Kaiser Cement*, No. S273179
Oral Argument: April 3, 2024, 9:00 a.m.

Dear Honorable Justices:

This Court has set oral argument for this matter on Wednesday, April 3, 2024 at 9 a.m. In anticipation of oral argument, appellant/petitioner Truck Insurance Exchange respectfully requests leave to file this letter providing citations to relevant recent cases. These recent cases support points made in Truck's briefing as indicated. Truck anticipates that these additional citations may be discussed at oral argument and writes to provide the Court and counsel notice of these cases.

1. *Allied Premier Ins. v. United Fin. Cas. Co.* (2023) 15 Cal. 5th 20, 28–29. Although ultimately decided on other grounds, this Court reaffirmed that an insurer has a right to equitable contribution from other insurers on the risk independent of what the insured might wish:

"In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and

one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, *each insurer has independent standing* to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk." (First italics added, second and third italics in original, quotation marks and citation omitted; accord *Selective Way Ins. Co. v. Fireman's Fund Ins. Co.* (2023) 257 Md. App. 1, 42–44, 289 A.3d 719, 743–744 ["An insurer's 'right of equitable contribution belongs to each insurer individually' and "exists *independently* of the rights of the insured," citation omitted, original italics].)

See O.B. 57–60, Reply Br. 33–41, Answer to Amici 6–7.

2. In mid-December 2022, after Truck Insurance Exchange had filed its reply brief, the North Carolina Supreme Court decided *Radiator Speciality Co. v. Arrowood Indem. Co.* (2022) 2022-NCSC-134, ¶ 76, 383 N.C. 387, 418, 881 S.E.2d 597, 618. The North Carolina Supreme Court agreed with an insured's claim that an "excess" carrier had to step in to defend it even though there was an applicable primary policy from another policy period. Like here, the "excess" policy agreed to defend if scheduled underlying insurance was exhausted. (The policy language in *Radiator Speciality*, unlike here, mentioned exhaustion of unscheduled underlying insurance as well.) As this Court held in *Montrose III*, the North Carolina Supreme Court, following the majority rule amongst the states, held that "other insurance" policy language only applies to the same policy period. It rejected multi-policy-period horizontal exhaustion and held that single-policy-period vertical exhaustion applied so long as there was no available underlying policy in the "excess" carrier's policy period. (Unlike California, the North Carolina Supreme Court applied an "exposure" coverage trigger rather than a "continuous" trigger and did not adopt an "all sums" approach. But those distinctions make no difference as to the point decided.) (See *Through Transp. Mut. Ins. Ass'n Ltd. v. StarStone Nat'l Ins. Co.* (D. Kan., 2022) 628 F. Supp. 3d 1087, 1096–1097, appeal dismissed, No. 22-3202, 2023 WL 2966336 (10th Cir. Feb. 21, 2023) ["Some jurisdictions that apply horizontal exhaustion apply an exception if the policy language warrants it: 'If an excess policy states that it is excess

over a specifically described policy and will cover a claim when that specific primary policy is exhausted, such language is sufficiently clear to overcome the usual presumption that all primary coverage must be exhausted.' In this situation, the 'specific excess policy must pay as soon as the limits of the specified underlying insurance are exhausted,'" citation and fn. omitted. Held: predicting Kansas Supreme Court would find "excess" carrier owed a duty to defend as soon as specified underlying policies exhausted].)

See O.B. 34–37, Reply Br. 28–33, Answer to Amici 16–17.

Thank you for the opportunity to bring these recent cases to the Court's attention.

Respectfully submitted,

Robert A. Olson

cc: Attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, my email address is gwest@gmsr.com.

On March 18, 2024, I served the foregoing document(s) described as: **LETTER TO THE CALIFORONIA SUPREME COURT** on the interested party(ies) in this action, addressed as follows:

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Executed this March 18, 2024 at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Gwendolyn West
Gwendolyn West

Truck Insurance Exchange v. Kaiser Cement and Gypsum Corp.
Supreme Court Case No. S273179

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/18/2024 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TRUCK INSURANCE EXCHANGE v. KAISER CEMENT AND GYPSUM CORP. (LONDON MARKET INSURERS)**
Case Number: **S273179**
Lower Court Case Number: **B278091**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/18/2024

Date

/s/Gwendolyn West

Signature

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Last Name, First Name (PNum)

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