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Supreme Court of California
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Civil No. S273179

In the Supreme Court
of the
State of California

TRUCK INSURANCE EXCHANGE,
Petitioner, Appellant and Respondent,

v.

KAISER CEMENT AND GYPSUM CORP., *et al.*,
Defendants, Appellants and Respondents.

ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal of the State of California
Second Appellate District
Case No. B278091

Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. BC249550
The Honorable Kenneth Freeman, Judge

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Respondent Excess Insurers[1] submit this Answer to the Petition for Review filed by Plaintiff-Appellant Truck Insurance Exchange.

I. Introduction.

The Court of Appeal's January 7, 2022 decision in this two-decades-old case affirms two equitable trial phases rejecting primary insurer Truck's efforts to obtain contribution from itself (Phase II) and from Excess Insurers (Phase III-A). Truck spins the unpublished decision as creating a "direct conflict in published precedent," and leaving insurance "coverage for long-tail claims in disarray." Nothing could be further from the truth.

Truck does not cite a single equitable contribution case that conflicts with the Court of Appeal's decision regarding Phase III-A. In fact, California courts uniformly have held that a primary

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[1] Excess Insurers are: Certain Underwriters at Lloyd's, London and various insurance companies doing business in London, designated herein as London Market Insurers; First State Insurance Company; The Insurance Company of the State of Pennsylvania; Granite State Insurance Company; The Continental Insurance Company (for itself and as successor to certain policies issued to London Guarantee & Accident Company of New York); Fireman's Fund Insurance Company; Allianz Underwriters Insurance Company f/k/a Allianz Underwriters; National Casualty Company; Sentry Insurance, a Mutual Company, as assumptive reinsurer of Great Southwest Fire; Transport Insurance Company (as successor-in-interest to Transport Indemnity Company); Evanston Insurance Company as successor by merger with Associated International Insurance Company and TIG Insurance Company (formerly known as Transamerica Insurance Company and as successor by merger to International Insurance Company); and Westchester Fire Insurance Company.

insurer cannot obtain equitable contribution from an excess insurer. As to Phase II, Truck's effort to claim contribution from its other primary policies was lost in an earlier appellate decision in this case, which held—based on Truck's *own* arguments and its anti-stacking wording—that Truck's 1974 policy was the *only* primary policy available to respond to Kaiser's asbestos claims. Truck *won* on this issue previously and now seeks to abandon its prior position and argue for the opposite result, claiming all its policies must respond. As the Court of Appeal held, in addition to other reasons, law of the case alone "doom[ed]" Truck's argument regarding Phase II. The decision is replete with other factual and legal issues unique to the case, further undermining Truck's claim that the issues it raises are of broad interest. Review is unwarranted by this Court.

First, as to Phase III-A, the Court of Appeal's decision is based on well-settled law: "Absent specific agreement to the contrary, there is no contribution between primary and excess insurers." (Opn. at 68, citing *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1080; see also *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1293, 1300.) In addition, Truck never made a showing of an equitable entitlement to contribution based on the facts of the case. Truck cannot show it has paid more than its fair share, because it already has obtained contribution from all of the other primary insurers. Truck's claim that Excess Insurers are not paying their fair share is without record support because Kaiser's excess insurers have been paying the excess portions of

claims above Truck's 1974 primary policy—millions of dollars—for well over a decade under two successive agreements with Kaiser. And Truck's contention that Kaiser would not be harmed by its contribution scheme was rejected by both the trial court and Court of Appeal as without support. (Opn. at 10, 45, 48-49.) In fact, Truck's contribution scheme would harm both the insured and the underlying asbestos claimants by depleting or exhausting the available excess coverage in other years that have aggregate limits. Ultimately, Truck's argument seeks to unwind over 12 years of the excess carriers paying their fair share under agreements with the insured, adding yet another complicated round of litigation to a case that already has burdened the California courts for 21 years.

Second, contrary to Truck's exaggerated contention, the Court of Appeal's decision creates no uncertainty regarding this Court's decision in *Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215 (*Montrose III*), not only because the decision here is unpublished, but also because it involves equitable contribution claims, which this Court recognized in *Montrose III* involves a "meaningfully different scenario" from the contract action addressed in *Montrose III*. (9 Cal.5th at 237.) In *Montrose III*, this Court left intact *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329, the "usual rules of equitable contribution between insurers," and the case law recognizing the fundamental differences between primary and excess insurance. (9 Cal.5th at 236.) Similarly, the Court of Appeal's decision in *SantaFe Braun,*

Inc. v. Insurance Co. of North America (2020) 52 Cal.App.5th 19 (*SantaFe Braun*), like *Montrose III*, does not involve, let alone address, equitable contribution. Nor did *SantaFe Braun* address excess policy language, like that here, which expressly disclaims the duty to defend.

Third, Truck's narrow and unsupported reliance on the so-called "continue in force" language contained in some excess policies does not necessitate review. Without the support of a single California case, and ignoring context and the policy wording as a whole, Truck claims these three words transform excess policies into primary policies, and not to the benefit of Kaiser, but for the benefit of only Truck. Neither *Montrose III* nor *SantaFe Braun* nor any other published California case endorses Truck's interpretation or even mentions the "continue in force" language, and the few unpublished or out-of-state cases that have addressed the wording reject Truck's interpretation because it ignores the remainder of the contract wording.

Finally, as to Phase II, the Court of Appeal correctly rejected Truck's attempt to seek "equitable contribution" from itself because the court had previously held that Truck's 1974 policy was the only Truck primary policy obligated to respond to Kaiser's claims—based on Truck's peculiar anti-stacking wording and Truck's *own* arguments insisting it be enforced. (See *Kaiser Cement and Gypsum Corp. v. Insurance Co. of the State of Pennsylvania* (Apr. 8, 2013) B22310, 155 Cal.Rptr.3d 283, opn. ordered nonpub. Jul. 17, 2013 (*ICSOP*).) As the Court of Appeal made clear, *ICSOP* is law of the case and it defeats Truck's Phase

II argument from the start. (Opn. at 50.) Moreover, based in part on the *ICSOP* ruling, Kaiser and the Excess Insurers were able to settle their long-running litigation in 2013 through a coverage-in-place settlement that continues to provide Kaiser with needed certainty as to its excess coverage.

The Court of Appeal's decision provides long-sought closure to a long-pending case. The decision is not of widespread importance to other coverage disputes, as evidenced by the fact that not a single insurer or insured asked the court to publish the decision. And the decision, which is entirely consistent with well-established rules, creates no uncertainty in California law.

Truck's Petition should be denied. Review is not "necessary to secure uniformity of decision or to settle an important question of law." (Rules of Court, rule 8.500 (b).)

II. Truck's Two Issues for Review Present No Important or Unsettled Questions of California Insurance Law.

Truck presents two lengthy and meandering questions for review, neither of which are genuinely at issue in this case and both of which ignore the long history of this dispute.

Truck's first question is confusing, misleading and ambiguous, purporting to address the Phase III-A trial judgment on equitable contribution. Truck appears to ask whether *Montrose III* should be interpreted to permit a primary insurer to obtain equitable contribution from excess insurers. But *Montrose III* already addressed this question and explicitly held that "[t]he exhaustion rule does not alter the usual rules of equitable contribution between insurers." (*Montrose III*, 9 Cal.5th at 226.)

One of the "usual rules of equitable contribution" is that "in the absence of an express agreement to the contrary, there is *never* any right to contribution between primary and excess carriers of the same insured." (See *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1293, 1300; see also Opn. at 68.)

Truck also tries to wedge policy language into its first issue, ignoring that this Court explained many years ago that equitable contribution does not turn on contract wording, since the insurance contracts are not between the insurers. (*Signal Cos., Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369.) Truck also makes no effort to address the full contract language, instead plucking out one phrase ("continue in force") and simplistically arguing it operates to completely change the excess contracts, without consideration of all the other terms and conditions contained in the excess policies.

Truck's second question for review relates to the affirmance of the Phase II trial and asks whether "a carrier [may] horizontally allocate to its own policies in other policy periods covering the insured for the same loss…?" This issue presents no unsettled issue of California law because the Court of Appeal resolved the question consistent with California law and as required by law of the case. As the Court of Appeal explained, its prior *ICSOP* decision in this case "concluded that based on the policies' anti-stacking provisions, [Truck's] 1974 policy was the only policy available to pay claims triggering the policy. [ICSOP at p.30 (155 Cal.Rptr.3d at 302-03)] This holding alone dooms

Truck's argument for cross-policy allocation as it is law of the case." (Opn. at 50.)

In sum, neither of the issues Truck posits from Phases II and III-A presents an important or unsettled issue of California insurance law. Instead, Phases II and III-A turned on long-settled California law on equitable contribution, and on a specific policy interpretation issue decided in a prior appeal in the matter, which is now law of the case.

III. Factual and Procedural Background.

This matter arises from a judgment following three phased bench trials, which included witnesses, stipulated facts and extensive documentary and deposition testimony evidence that resolved the final issues in this 21-year-old asbestos-related insurance coverage case. Truck's petition seeks review of the portions of the decision affirming Phases II and III-A. The record, the unique facts and circumstances of this case, California law, and law of the case fully support the Court of Appeal's decision.

Since Truck first filed this action in 2001 (Opn. at 3), it has taken multiple conflicting positions, all designed to escape its contractual obligation to Kaiser and place its own financial interests ahead of its insured.[2] With this petition, Truck seeks to

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[2] See *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 672 ("*LMI*") review den. (S150310) [rejecting Truck's position that all the asbestos claims arise from one occurrence, which would have permitted Truck to escape liability upon payment of its stacked $8.3 million in cumulative primary limits]; *ICSOP, supra,* 155 Cal.Rptr.3d at 304-05, review den. and nonpub. ordered (S210870) [adopting Truck's position that anti-

foist its obligations as a primary insurer onto excess insurers. In effect, Truck seeks to rewrite its primary insurance policy, which expressly provides two promises: (1) to "investigate any claim or suit" even if "groundless, false or fraudulent;" and (2) to pay, in addition to its defense, up to $500,000 for each and every occurrence, with "no limit to the number of occurrences for which claims may be made hereunder." (8-JAA-3327-28, 3331.)[3]

In *ICSOP*, Excess Insurers argued that Truck had multiple primary limits available, having issued four separate policies spanning 19 years. However, Truck successfully argued that it pays only the $500,000 per-occurrence limit of the 1974 primary policy selected by Kaiser, and that its other 18 years of primary insurance were not valid and collectible insurance for that same claim. Thus, after Truck pays its 1974 primary limit for a given claim there is no other primary insurance for that claim and the 1974 excess insurer, ICSOP, must pay amounts in excess of Truck's $500,000 per-occurrence limit. (Opn. at 43, citing *ICSOP* at 35 [155 Cal.Rptr.3d at 305-06].)

Following the *ICSOP* decision, the Excess Insurers finalized an interim agreement resolving their disputes with Kaiser, whereby ICSOP agreed to pay the excess claim and receive contribution from other triggered excess insurers for each

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stacking provisions in its policies limited Truck's liability under all its policies to only a single $500,000 per-occurrence limit under the 1974 policy].)

[3] Notably missing from Truck's Attachment C to its Petition is the wording from Truck's *own* primary policies.

excess claim. Kaiser dismissed its claims against the excess insurers over eight years ago. (3-JAA-1247; 3-JRA-1370-79.)

This appeal follows three phases of trial, described at pages 5-9 of the Opinion. Phase I involved deductible billing issues between Truck and Kaiser and is not raised in Truck's Petition.

In Phase II, the trial court concluded that Truck cannot allocate to its own policies (*i.e.,* obtain equitable contribution from itself) because it would circumvent the "all sums" requirement, potentially reduce coverage in years in which Truck policies contain aggregate limits, and contravene the *ICSOP* ruling, which "makes clear that the only available policy insurance for a continuing injury [asbestos claim] is the 1974 Truck policy." (Opn. at 45.) The Court of Appeal affirmed, holding that Truck's purported claim against itself was "not a theory of equitable contribution" and that the *ICSOP* ruling alone "dooms Truck's argument for cross-policy allocation as it is law of the case." (Opn. at 48, 50.)

In Phase III-A, the trial court rejected Truck's argument that the first layer *excess* policies have a duty to drop down and equitably contribute on the *primary* layer along with primary insurer Truck. (Opn. at 55.) The Court of Appeal affirmed, rejecting Truck's arguments that *Montrose III, SantaFe Braun,* and an isolated reading of the "continue in force" wording entitled Truck to equitable contribution from the Excess Insurers. (Opn. at 67-68.)

In its attempt to explain how *Montrose III* requires review of the Court of Appeal's decision as to Phase II and Phase III-A,

Truck ignores several key distinguishing circumstances of this appeal:

- Truck is the sole remaining primary insurer, with an unlimited duty to defend and an adjudicated contractual obligation to pay the first $500,000 of indemnity for every claim under the selected 1974 primary policy, which has no aggregate limit. (Opn. at 14, 43.)
- Truck has already received equitable contribution from all non-Truck primary carriers and has stipulated that all non-Truck primary policies have been exhausted. (Opn. at 14; Pet. at 41; Excess Insurers' Joint Respondents Brief ("EJRB") at 28.)
- As recognized by California courts, the excess policies at issue are materially different from primary policies like Truck's, and do not afford the same unlimited defense obligation as do Truck's policies. (EJRB at 64-65.)
- Kaiser and its lower-level excess insurers reached a final settlement agreement in 2013 based on the *ICSOP* ruling, and Kaiser dismissed its lawsuit against all excess insurers. (3-JAA-1282, 1247; 3-JRA-1370-79.) The settled excess insurers are and have been paying their respective excess shares for each asbestos claim over Truck's $500,000 primary limit, first under an Interim Funding Agreement entered in 2009, and then pursuant to the final

settlement entered in 2013. (3-JAA-1282, 1246-47; 3-JRA-762-63[¶¶ U, W].) [4]

IV. Reasons Why Review Should Be Denied.

A. Truck's First Issue Does Not Warrant Review.

1. The Decision Correctly Rejected Truck's Phase III-A Equitable Contribution Claims, Based on Settled Law and the Particular Facts and Circumstances of this Two-Decade Old Case.

As Truck recognizes, its contribution claim against the excess insurers is "ultimately…an equitable matter among insurers." (Truck's Opening Brief below, p. 40.) Although Truck argues about "promises" made by Excess Insurers (Pet at 14, 15, 19, 43), those promises were made to the insured, Kaiser, not to Truck. Whatever "reciprocal rights and duties" exist between Truck and the Excess Insurers "do not arise out of contract, for their agreements are not with each other." (*Signal, supra,* 27 Cal.3d at 369.) Instead, they "flow from equitable principles designed to accomplish ultimate justice," the application of which are "not controlled by the language of their contracts with the respective policyholders." (*Ibid*.) As both the trial court and the

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[4] The fact that Kaiser and the excess insurers already resolved their disputes, and Kaiser has dismissed all claims against the excess insurers, directly refutes Truck's assertion that the decision will somehow "make coverage disputes harder to resolve informally, resulting in more litigation." (Pet. at 9.) The *ICSOP* decision paved the way for a resolution between Kaiser and its excess insurers. Only Truck stands defiant after three Court of Appeal decisions.

Court of Appeal found, there are multiple reasons Truck is not entitled to equitable contribution here.

First, as noted, equitable contribution is about accomplishing ultimate justice and is not controlled by policy language. (See *Signal, supra,* 27 Cal.3d at 369.) Contract language is but one factor to be considered in adjudicating an equitable contribution claim. (See *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204 Cal.App.4th 1214, 1231-32.) Furthermore, Truck's Phase III-A argument is contrary to California law because "in the absence of an express agreement to the contrary, there is *never* any right to contribution between primary and excess carriers of the same insured." (See *Fireman's Fund, supra,* 65 Cal.App.4th at 1293, 1300 ; see also Opn. at 68.) Truck makes no real effort to rebut this settled law, citing the *Fireman's Fund* case just once towards the end of its Petition, although the case was cited by this Court as authority for equitable contribution principles in *Montrose III*. (9 Cal.5th at 228, fn.5.)

Second, equitable contribution is only available between insurers sharing the same level where one has paid more than its fair share. The Excess Insurers did not issue primary insurance to Kaiser. Moreover, Truck is not paying more than its fair share, which is a prerequisite to an equitable contribution claim. (See *Montrose III*, 9 Cal.5th at 228, fn.5; *Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1036 ["[a]n insurer can recover equitable contribution only when that insurer has paid more than its fair share"]; see also Opn. at 50.) Instead,

Truck is paying exactly what is required under its 1974 contract. (Opn. at 50; *ICSOP*, 155 Cal.Rptr.3d at 305-06.) As explained by the Court of Appeal, "*ICSOP* concluded that based on the policies' anti-stacking provisions, the 1974 policy was the only policy available to pay claims triggering that policy." (Opn. at 50, citing *ICSOP* at 30 [155 Cal.Rptr.3d at 302-03].) Although Truck issued 19 years of primary coverage, it is only paying one occurrence limit per claim under only its 1974 primary policy, as a result of Truck's *own* interpretation of the anti-stacking language in its policies, which was adopted by the Court of Appeal in *ICSOP*. (*ICSOP*, 155 Cal.Rptr.3d at 298.) In other words, Truck is definitely not paying more than its fair share after its prior *victory* on this issue. For this reason *alone*, Truck has no basis to recover equitable contribution.

Third, although Truck deceptively portrays itself as having paid "hundreds of millions of dollars without one penny in contribution" (Pet. at 9), in fact it has already obtained all the contribution to which it is entitled from Kaiser's other primary insurers sharing the primary layer, each of whom have paid their full limits in contribution after years of defending and indemnifying asbestos claims against Kaiser. (Pet. at 41; Opn. at 12-13 & fn. 6, 14.)

Fourth, the Excess Insurers are already contributing on the excess level to Kaiser's claims through their separate coverage-in-place agreements with Kaiser. (3-JAA-1282.) They are paying their fair share, and have been for over 12 years, first under an interim funding agreement entered in 2009, and then under a

formal coverage-in-place agreement entered in December 2013. (*Id*.) In fact, Truck's contribution claim would force the excess insurers to pay *more* than their fair share by "becom[ing] de facto primary insurers on the risk," even though Kaiser selected Truck's 1974 unaggregated primary policy to respond to the claims. (3-JAA-1299; Opn. at 58, 41.) Forcing the Excess Insurers to contribute to Truck's primary obligations "would undermine the very concept of excess insurance in a continuing loss situation" (3-JAA-1299-1300), placing the Excess Insurers in the untenable position of paying contribution at *both* the primary *and* excess layers for the same occurrence, the antithesis of ultimate justice. That is not equity.

Finally, Truck has no right to demand an equitable recovery from Kaiser's excess insurers because it has not acted equitably itself. (See, e.g., *Wilson v. S.L Rey, Inc.* (1993) 17 Cal.App.4th 234, 244 [plaintiff's conduct is a basis to deny equitable relief]; Civ. Code §3517.) Although the trial court noted that it "has not considered Truck's allegedly 'inequitable conduct'" (3-JAA-1306), it nonetheless made all the necessary factual findings to demonstrate Truck's penchant, over the last two decades, to repeatedly place its own financial interest ahead of its insured, forcing Kaiser, for example, to incur between 2004 and 2007 "$77.45 million in defense and indemnity costs that were Truck's responsibility." (Pet. at 14, fn. 2, citing Opn. at 17.) The Court of Appeal also recognized that Truck continues to place its own interest above the insured, observing that Truck—by its own admission—makes its current arguments to gain

access to reinsurance under other Truck primary policies, despite arguing (successfully) in *ICSOP* that only one of its policies need respond to Kaiser's claims. (Opn. at 48-49.) As the Court of Appeal concluded, "Truck seeks to shift responsibility for payment of future claims from itself to excess carriers or its insured." (Opn. at 48-49.) Truck's conduct alone undermines its equitable claim.

2. The Decision Does Not Conflict With *Montrose III* or *SantaFe Braun*, Neither of Which Involved Equitable Contribution Between Insurers.

Unlike Truck's rejected equitable contribution claims in Phases II and III-A, *Montrose III* and *SantaFe Braun* both involved an *insured* seeking coverage under its contracts with its insurers. In *Montrose III*, this Court found that context particularly important. (9 Cal.5th at 237.)

With a stipulation that all primary insurance was exhausted, *Montrose III* addressed a previously undecided issue: whether an insured must horizontally exhaust its *excess* insurance by layers. For many reasons, including the difficulty in allocating among excess policies with differing attachment points and limits, *Montrose III* held that an insured was not required to horizontally exhaust each excess layer. (9 Cal.5th at 238.)

Montrose III distinguished the facts before it from *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50 Cal.App.4th 329, the leading California case requiring horizontal exhaustion of *primary* insurance in an equitable claim between primary and excess insurers. (*Montrose III*, 9 Cal.5th at

237.)[5] As *Montrose III* explained, *Community Redevelopment* "addresses a meaningfully different scenario and thus offers no real lessons for resolving the question now before us." (*Ibid.*) The Court went on, "[t]his case differs from *Community Redevelopment* in fundamental respects. This case, unlike *Community Redevelopment*, is not a contribution action between primary and excess insurers; it is, rather, a coverage dispute between excess insurers and their insured." (*Ibid.*)

In addition to confirming that the "usual rules of equitable contribution between insurers" apply (*id.* at 226), *Montrose III* left undisturbed the long-standing case law recognizing the fundamental differences between primary insurance and excess insurance, observing that liability under primary insurance "attaches immediately upon the happening of the occurrence," while excess liability "attaches upon the exhaustion of underlying insurance coverage." (*Montrose III*, 9 Cal.5th at p. 222.)

Since *Montrose III* involved an *insured* seeking coverage, *Montrose III*'s vertical exhaustion ruling also relied on the

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[5] As an example of Truck's attempt to manufacture conflict in the law, Truck states that *Community Redevelopment* relied on authorities that predated the continuous loss rule in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 (*Montrose I*). (Pet. at 26.) This misleading statement completely ignores that *Community Redevelopment* discussed *Montrose I* extensively *in the decision*, explaining that the "horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose*." (*Community Redevelopment*, 50 Cal.App.4th at 340-342.) In fact, the *Community Redevelopment* case involved a continuous loss. (*Ibid.*)

doctrine of "the reasonable expectations of the insured," which provides special protection for *insureds* as a matter of public policy. (*Montrose III*, 9 Cal.5th at 230.) However, the reasonable expectations doctrine has no application in a dispute between insurers. (See *Argonaut Ins. Co. v. Transport Indem. Co.* (1972) 6 Cal.3d 496, 506 [reasonable expectations doctrine inapplicable where dispute "concerns only the respective rights of two insurers."]; *Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 300 [same]; *Atlantic Mut. Ins. Co. v. Travelers Ins. Co.* (1983) 147 Cal.App.3d 1054, 1057 [same].)

Like *Montrose III*, the decision in *SantaFe Braun* did not address equitable contribution between insurers, and instead dealt only with a contract action between the policyholder and its insurers. (52 Cal.App.5th at 29 ["Whatever the rights of the excess carriers may be to contribution from primary insurers whose policies do not directly underlie the excess policy is a different question that is not now before us, and on which we express no opinion."].) *SantaFe Braun* also distinguished the decision in *Community Redevelopment* because that case involved contribution. (*Id.* at 30.)

Truck argues that *SantaFe Braun* did not find compelling the differences between excess and primary insurance, quoting the Court of Appeal's observation that "[f]rom the perspective of the insured, *one would reasonably expect the excess insurer to contribute to the defense once the scheduled policies have been exhausted* and the attachment points reached." (Pet. at 33, quoting *SantaFe Braun*, 52 Cal.App.5th at 29 [Truck's

emphasis].) But here, not only are reasonable expectations not relevant, many of Kaiser's excess insurance policies expressly disclaim the duty to defend in their "assistance and cooperation" clauses. (3-JAA-1075, 1085; see also Pet. Ex.C.) In *Gribaldo, Jacobs, Jones & Assoc. v. Agrippina Verscherunges* (1970) 3 Cal.3d 434, this Court interpreted similar wording and held that no duty to defend arises in a policy that explicitly disclaims the duty, finding that under the policy provision it is "apparent that defendants had no affirmative duty to defend plaintiffs. . . ." (*Id.* at 448 [policy gave the insurer the option, not the obligation, to take over and control the defense]; see also *Id.* at 440-441.)

In sum, neither *Montrose III* nor *SantaFe Braun* involve an insurer vs. insurer equitable contribution dispute. Neither case considered excess policy wording that expressly disclaims a duty to defend. Neither case addressed the "continue in force" language upon which Truck so heavily relies. In short, neither *Montrose III* nor *SantaFe Braun* are in conflict with nor necessitate review of the unpublished decision here.

3. Truck's "Continue in Force" Argument Is Without Support in the Law and Turns on a Flawed Interpretation that Reads Contract Terms Out of Context and in Isolation.

As part of its effort to manufacture legal issues for review where none exists, Truck focuses solely and without context on the isolated "continue in force" phrase contained in some of the excess policies. (See Opn. at 67.) Truck labels the Excess Insurers "continue-in-force insurers," as if that phrase were an accepted industry description for a special type of excess

insurance policy. It is not. Even though the phrase has been used in the Limit of Liability section of various excess policies since at least the 1950s,[6] no California case has ever viewed the phrase to function in the manner Truck attempts to misuse it. The three horizontal exhaustion decisions Truck cites in its Petition—*Montrose III*, *SantaFe Braun,* and *Community Redevelopment*—do not even address the "continue-in-force" clause.

Under Truck's simplistic view, the one phrase "continue in force" commands that the excess insurance contracts drop down and become transformed into primary insurance. This is an argument of Truck's creation that finds no support in any reported California decisions. Kaiser does not join it.

Truck's interpretation ignores both context and the fundamental difference between primary and excess insurance, failing to interpret the policy as a whole. The few courts that have considered continue-in-force wording have rejected Truck 's approach because it ignores the remainder of the contract wording. (See, e.g., *Newmont USA Ltd. v. American Home Assur. Co.* (E.D.Wash. 2009) 676 F.Supp.2d 1146, 1156 [rejecting argument that continue-in-force wording required excess to drop down and assume primary defense obligation]; *Flintkote Co. v. Gen. Acc. Assur. Co. of Canada* (N.D. Cal. Aug. 6, 2008) 2008 WL 3270922, *26 [same].)

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[6] Here, for example, the "continue in force" language appears in the excess policies dating back to 1958. (Truck Pet. at 13 and at Attachment C.)

It is a well-settled rule of California policy interpretation that policy terms cannot be read in isolation, but must be read in their entirety and in context. (See *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 656, citing Civ. Code § 1641 and *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) Here, the excess policies make clear that the Excess Insurers' obligations are subject to all the contracts' limitations, terms and conditions, including disclaimers of the duty to defend. Some state this condition at the beginning of the insuring agreement (3-JAA-1074, 1076), others add it directly in the paragraph containing the "continue in force" wording (3-JAA-1080, 1082), and some also state in the Other Insurance clause that "nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance." (3-JAA-1078, 1085.) That the excess policies do not have the same obligations as the primary Truck policy is further demonstrated by the substantially smaller premium charged for the excess coverage. (See EJRB at 63-67.) The trial court correctly found (and the Court of Appeal agreed) that "based on the language of all the excess policies…there is no obligation on the Excess Insurers to drop down." (3-JAA-1293; see EJRB at 76-84; Opn. at 66-67.)

Truck ignores any wording at odds with its overly-simplistic approach, arguing that because *Montrose III* collectively referred to multiple excess contract provisions as "other insurance" wording, distinctions in wording can be disregarded. (Pet. at 27-30.) Not only does Truck's argument

ignore the context of the *Montrose III* dispute (a contract action between the insured and its excess insurers), Truck also overlooks that *Montrose III* cited a case where an "other insurance" clause operated to exhaust all available *primary* insurance. (9 Cal.5th at 230, fn.6, citing *Peerless Cas. Co. v. Continental Cas. Co.* (1956) 144 Cal.App.2d 617, 626 [excess insurer not required to contribute when insurance settlement was prorated across two primary insurers and at least one primary policy remained unexhausted].)

Furthermore, as a general rule, California courts "honor the language of excess 'other insurance' clauses *when no prejudice to the interests of the insured will ensue*." (*Travelers Cas. & Sur. Co. v. American Equity Ins. Co.* (2001) 93 Cal.App.4th 1142, 1149 [emphasis added].) Here, there is no prejudice to the insured, who in fact agrees with the Excess Insurers that Truck is *not* entitled to equitable contribution either from itself (Phase II) or from the Excess Insurers (Phase III-A). (See Kaiser's Supp, Brief and Joinder to Phase III-A Trial Brief, filed May 2, 2016, p.5.)

In sum, Truck's contention that the simple phrase "continue in force as underlying insurance" works to undo all the other contract provisions in the excess policies, including writing in a defense obligation where none exists, is simplistic, unsupported and unreasonable. No California case has ever adopted Truck's reading of the clause. Certainly there is no conflict warranting review. Instead, Truck is simply one more primary insurer attempting to force excess insurers to drop down

and share the primary insurer's own obligations, which California courts have repeatedly and consistently rejected.[7]

B. Truck's Second Issue Regarding Phase II Does Not Warrant Review Because It Is Defeated by Law of the Case.

As to Truck's second issue addressing Phase II, the Court of Appeal aptly observed, "Truck does not seek contribution from another insurer on the same loss, but rather seeks to shift responsibility for payment of future claims from itself to excess carriers or its insured." (*Id*. at 48). As noted above, the Court of

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[7] California courts have consistently rejected attempts to force an excess insurer to drop down and share the obligations of an otherwise solvent and available primary insurer. (See, e.g., *Transcontinental Ins. Co. v. Ins. Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1304, fn.3 [rejecting primary's contention that it can obtain equitable contribution from excess insurer because the excess drops down to the "primary level" upon underlying exhaustion]; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1708-09 [rejecting contention that excess insurer must drop down and defend where primary insurer refused to participate in defense]; *Reliance Nat. Indem. Co. v. General Star Indem. Co.* (1999) 72 Cal.App.4th 1063, 1078, 1080-81 [rejecting primary's attempt to obtain contribution from excess; "as a general rule, there is no contribution between a primary and an excess carrier."]; *North River Ins. Co. v. American Home Assurance Co.* (1989) 210 Cal.App.3d 108, 113 [rejecting primary's argument that "excess other insurance" clause in its policy made the primary policy excess to the excess insurer's policy]; *Chubb/Pacific Indem. Group v. Insurance Co. of North America* (1987) 188 Cal.App.3d 691, 698-99 [rejecting effort by primary to cede policy limits and transfer defense to excess insurer]; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 599-601 [rejecting primary's arguments that loss should be prorated along with excess insurer because all had "excess other insurance" clauses].)

Appeal rejected Truck's Phase II contentions because they could not be squared with *ICSOP*, which "concluded that based on the policies' anti-stacking provisions, [Truck's] 1974 policy was the only policy available to pay claims triggering the policy." (Opn. at 50.)

Furthermore, based upon the trial record, the Court of Appeal found that "Truck's proposal could expose Kaiser to detrimental exhaustion of Truck's policies having an aggregate limit, resulting in Kaiser losing coverage for what could have been covered claims. Similarly, it could deplete or exhaust layers of excess insurance above the other Truck policies." (*Id*. at 48.) Thus, "it could reduce the amount of insurance available to Kaiser *and the asbestos claimants* by exhausting policies with aggregate limits." (Opn. at 52 [emphasis added].)

In addition, allowing Truck to spread its payment to other policies and other insurers would completely thwart the *ICSOP* ruling that the 1974 ICSOP excess policy pays after Truck's 1974 primary policy pays its $500,000 occurrence limit. If Truck were to allocate the $500,000 paid under the Truck 1974 policy to Truck's other primary policies, Truck's 1974 policy would not have paid its full limit for the claim, and thus the overlying 1974 ICSOP policy would not have been obligated to pay any excess loss. (See Kaiser's Respondent's Brief at 59-60; EJRB at 57.) In effect, Truck's Petition seeks to unravel the final settlement Kaiser and the excess insurers reached in 2013 in direct reliance on both *ICSOP* and the interpretation that Truck itself successfully advanced for its *own* policies in that appeal.

(*ICSOP*, 155 Cal.Rptr.3d at 298.) The Court should decline Truck's invitation to further prolong this case so Truck can take another run at issues long resolved.

In sum, no important, unsettled issue is presented by Truck's Phase II issue. Instead, it is just another attempt by Truck to have it both ways—reducing its exposure in the *ICSOP* case by arguing its anti-stacking clause funneled all claims into its 1974 policy, despite issuing 18 other years of primary policies, then turning around in Phase II and arguing it can now reallocate those claims back to its other policies, in order to exhaust their limits and thwart Kaiser's all sums selection.

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V. Conclusion.

Truck's Petition raises nothing novel or worthy of review. Rather, it is yet another attempt by Truck to shirk its primary insurer obligations under California law and to shift those obligations to excess insurers who did not insure Kaiser on the primary level nor agree to defend as a primary. This Court declined, more than 40 years ago, to make an excess insurer a coinsurer with the primary insurer, recognizing that the policyholder pays for two kinds of liability coverage, each at a different rate. (*Signal, supra,* 27 Cal.3d at 365.) The Court of Appeal's unpublished opinion is entirely consistent with this settled law. Excess Insurers respectfully request that Truck's Petition for Review be denied so that this two-decade-old case can finally come to a close.

Dated: March 7, 2022

Respectfully submitted,

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/s/ Paul J. Killion
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