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Supreme Court of California
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No. S275179

In the Supreme Court
of the
State of California

TRUCK INSURANCE EXCHANGE,
Plaintiff and Appellant,

v.

KAISER CEMENT AND GYPSUM CORP., *et al.*,
Defendants, Cross-complainants and Appellants.

EXCESS INSURERS' ANSWER BRIEF ON THE MERITS

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

DUANE MORRIS LLP
Brian A. Kelly (SBN 124738)
*Paul J. Killion (SBN 124550)
Kathryn T.K. Schultz (SBN 221322)
Spear Tower One Market Plaza
Suite 2200
San Francisco, CA 94105-1127
Telephone: 415.957.3000
Facsimile: 415.957.3001
E-mail: bakelly@duanemorris.com
pjkillion@duanemorris.com
kkschultz@duanemorris.com

Attorneys for Defendants and Respondents
London Market Insurers

KENDALL BRILL & KELLY LLP
Alan Jay Weil (SBN 63153)
10100 Santa Monica Blvd., Suite 1725
Los Angeles, CA 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705
E-mail: ajweil@kbkfirm.com

RUGGERI PARKS WEINBERG LLP
James P. Ruggeri (*pro hac vice forthcoming*)
Edward B. Parks, II (*pro hac vice forthcoming*)
1875 K Street, NW, Suite 600
Washington, DC 20006
Telephone: 202.984-1400
Facsimile: 202.984-1401
E-mail: jruggeri@ruggerilaw.com
eparks@ruggerilaw.com

Attorneys for Defendant and Respondent
First State Insurance Company

AIWASIAN & ASSOCIATES
Deborah A. Aiwasian (SBN 125490)
725 S. Figueroa Street, Suite 1050
Los Angeles, CA 90017
Telephone: (213) 233-9650
Facsimile: (213) 233-9651
E-mail:
Deborah.Aiwasian@mclolaw.com

Attorneys for Defendant and Respondent
Westchester Fire Insurance Company (With Respect To International Insurance Company Policy No. 5233172273)

OTHER EXCESS INSURERS JOINING THIS ANSWER BRIEF ARE LISTED ON NEXT PAGE

SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
Wendy E. Schultz (SBN 150720)
515 S. Figueroa Street, Suite 1470
Los Angeles, CA 90071
Telephone: +1 213.996.4200
E-mail: wschultz@spcclaw.com

Attorneys for Defendant and Respondent The Insurance Company of the State of Pennsylvania; Defendant and Respondent Granite State Insurance Company

SELMAN BREITMAN LLP
Elizabeth M. Brockman (SBN 155901)
Calvin S. Whang (SBN 215945)
11766 Wilshire Blvd., 6th Floor
Los Angeles, CA 90025
Telephone: +1 310.689.7043
E-mail: ebrockman@selmanlaw.com
cwhang@selmanlaw.com

Attorneys for Defendants and Respondents National Casualty Company and Sentry Insurance a Mutual Company, as assumptive reinsurer of Great Southwest Fire

CROWELL & MORING LLP
Mark D. Plevin (SBN 146278)
Three Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: +1 415.986.2800
E-mail: mplevin@crowell.com

Attorneys for Defendants and Respondents Fireman's Fund Insurance Company and Allianz Underwriters Insurance Company f/k/a Allianz Underwriters

SQUIRE PATTON BOGGS (US) LLP
G. David Godwin (SBN 148272)
475 Sansome Street, Suite 1600
San Francisco, CA 94111
Telephone: +1 415.954.0200
E-mail: david.godwin@squirepb.com

Attorneys for Cross-Defendant and Respondent The Continental Insurance Company (for itself and its successor to certain policies issued by London Guarantee & Accident Company of New York)

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP
Robert Dennison (SBN 127498)
626 Wilshire Boulevard, Suite 800
Los Angeles, CA 90017
Telephone: +1 213 624.4500
Facsimile: +1 213 624.0820
E-mail: rdennison@tlsslaw.com

Attorneys for Defendant and Respondent Evanston Insurance Company as successor by merger with Associated International Insurance Company ("Associated") and TIG Insurance Company (formerly known as Transamerica Insurance Company and as successor by merger to International Insurance Company)

DAVIS WRIGHT TREMAINE LLP
Everett W. Jack, Jr. (SBN 313870)
Lawrence B. Burke (SBN 147523)
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5630
Telephone: +1 503 241.2300
Facsimile: +1 503 778.5299
E-mail: everettjack@dwt.com
larryburke@dwt.com

Attorneys for Defendant and Respondent Transport Insurance Company (as successor-in-interest to Transport Indemnity Company)

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ISSUE ON REVIEW

May a primary insurer seek equitable contribution from an excess carrier after the primary policy underlying the excess policy has been exhausted (vertical exhaustion), or is equitable contribution from an excess insurance carrier available only after all primary policies have been exhausted (horizontal exhaustion)?

INTRODUCTION AND SUMMARY OF ARGUMENT

As a primary insurer of Kaiser Cement and Gypsum Corporation (Kaiser), Truck Insurance Exchange (Truck) has no right to equitable contribution from Kaiser's excess insurers (Excess Insurers).[1] (*Signal v. Harbor* (1980) 27 Cal.3d 359, 369 (*Signal*); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1293-1294, fn.4 (*Fireman's Fund*).) Truck's primary insurer obligations are materially different from Excess Insurers' obligations and, regardless of whether a *policyholder* may vertically access its excess layers of insurance, there is no equitable contribution between a primary and excess insurer. Accordingly, the answer to the limited question on review is that Truck, as a primary insurer with unexhausted and applicable primary insurance coverage, has no right to equitable contribution from Excess Insurers as a matter of settled California law, and law of the case here. The Court of Appeal decision should be affirmed.

Truck provided 19 years of primary insurance to Kaiser; Excess Insurers provided multiple layers of excess insurance

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[1] Excess Insurers are those identified on the caption pages.

above Truck's primary policies and Kaiser's other primary policies. Truck and Excess Insurers have no contractual relationship with each other. Rather, Truck's equitable contribution claim against Excess Insurers stands or falls based on principles of equity designed to accomplish ultimate justice and "does not arise out of contract, for their agreements are not with each other…." (*Signal, supra,* 27 Cal.3d at p. 369.)

The current dispute centers on Truck's 1974 primary policy, which has no aggregate limit on liability. Kaiser selected Truck's 1974 primary policy, and the overlying 1974 excess policy issued by the Insurance Company of the State of Pennsylvania (ICSOP), to respond to its asbestos claims. Throughout this litigation, Truck has taken multiple conflicting positions, all designed to escape its contractual obligation to Kaiser to provide an uncapped per occurrence limit for each asbestos claim triggering its 1974 primary policy.[2]

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[2] See *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 672 (*LMI*) [rejecting Truck's position that all the asbestos claims arise from one occurrence, which Truck argued allowed it to escape liability upon a single payment of its stacked $8.3 million in cumulative primary limits]; *Kaiser Cement and Gypsum Corp. v. Insurance Co. of the State of Pennsylvania* (2013) 155 Cal.Rptr.3d 283, 304-05 (*ICSOP*) [adopting Truck's position that anti-stacking provisions in its policies limited Truck's liability under *all* its policies to only a single $500,000 occurrence limit under the 1974 policy, but also requiring that all primary insurance horizontally exhaust]. The *ICSOP* decision was ordered depublished but, like *LMI*, is citable as law of the case. (Cal. Rules of Court, rule 8.1115(b)(1).)

Truck's equitable contribution claim against the Excess Insurers was resolved in the Phase III-A bench trial below, with the trial court rejecting Truck's claim. The Court of Appeal affirmed the judgment. (*Truck Insurance Exchange v. Kaiser Cement* (Cal.Ct.App. Jan. 7, 2022) 2022 WL 71771 (*Truck*).) The lower courts were correct: Truck has no valid claim for contribution for several reasons.

First, as noted, under settled California law, a primary insurer like Truck cannot seek equitable contribution from an excess insurer. Equitable contribution is a loss sharing doctrine, not a loss shifting one. It applies only when two or more insurers have insured the same risk at the same level of insurance, and one of them is paying more than its fair share. A primary insurer and an excess insurer are fundamentally different and, by definition, do not insure the same risk: The primary insures all the risk up to its policy limits; the excess policies insure only the exposure rising above those primary limits. Primary insurers respond first to each claim and provide a defense to the insured. Excess insurance generally contains no duty to defend and is priced to respond only to large and infrequent claims. Here, Truck issued primary level insurance and is not paying more than its fair share.

Second, Truck's theory that it is entitled to equitable contribution because Excess Insurers "drop down" and "share" in its primary layer obligations is contrary to equity, California law, and the policy wording as a whole. In addition, Truck's claim is contrary to the *ICSOP* decision, which resolved the excess

attachment *in this action* and is law of the case. Applying *ICSOP*, Excess Insurers executed a comprehensive agreement with Kaiser to contribute to claims in excess of Truck's unaggregated per occurrence limit.

Third, Truck's proposed contribution scheme is not equitable. It seeks to force Excess Insurers to pay for the *same* claim on *both* the primary and excess layers. (*Truck*, *20-21, 27; 3-JAA-1253-54, 1299-1300.)[3] It is inequitable to Kaiser because it seeks to use excess policy limits to reduce Truck's own primary policy obligations, depleting Kaiser's excess insurance and ultimately reducing the amount of insurance available to compensate asbestos claimants. Truck's scheme is the antithesis of equity.

Fourth, Truck cannot reconcile the numerous California decisions, including decisions of this Court, which are at odds with its position. Instead, it focuses almost exclusively on an incorrect reading of *Montrose Chemical Corporation v. Superior Court* (2020) 9 Cal.5th 215 (*Montrose III*), which Truck argues allows it to obtain equitable contribution from Excess Insurers. But *Montrose III* has nothing to do with equitable contribution between insurers; nor does *SantaFe Braun, Inc. v. Ins. Co. of N. Am*. (2020) 52 Cal.App.5th 19 (*SantaFe Braun*), the only other case on which Truck places significant reliance. Instead, both cases concern an *insured's* contractual claim for coverage against its insurers.

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[3] JAA=Joint Appellants' Appendix; JRA=Joint Respondents' Appendix.

While conceding that *Montrose III* and *SantaFe Braun* did not address equitable contribution, Truck argues there is no meaningful distinction between an insured's contractual claim for coverage and an insurer's equitable contribution claim, and therefore *Montrose III* and *SantaFe Braun* mandate vertical exhaustion in the contribution context as well. But this Court has repeatedly declared that the rules governing coverage and the rules governing equitable contribution have little or nothing to do with each other. *Montrose III* leaves the latter rules intact, and under those rules Truck's claim fails.

In short, contrary to Truck's argument, *Montrose III* does not dismantle, *sub silentio*, all prior California law on equitable contribution, but instead confirms that equitable contribution is materially different from a contract claim. (*Montrose III, supra,* 9 Cal.5th at p. 237.) As a primary insurer, Truck cannot obtain equitable contribution from Excess Insurers.

STATEMENT OF FACTS

Since the 1970s, Kaiser has been named in thousands of product liability suits alleging bodily injury from exposure to Kaiser's asbestos-containing products. (*LMI, supra,* 146 Cal.App.4th at p. 652; *Truck,* *4-5.) [4]

[4] In 2016, Kaiser commenced Chapter 11 bankruptcy proceedings. (See *In re Kaiser Gypsum Company, Inc.*, U.S. Bankr. Court, W.D. N.C., No. 16-31602.) The bankruptcy court lifted the automatic stay on October 30, 2017 so that appellate proceedings in this case could continue. Kaiser's bankruptcy plan has been confirmed, and only Truck has appealed; the appeal remains pending in the Fourth Circuit. (4th Cir. No. 21-1858.)

A. Truck Is Kaiser's Only Remaining Primary Insurer.

Truck issued multiple primary policies to Kaiser from 1964 to 1983, across 19 policy periods, with limits and deductibles as described by the court below. (3-JAA-1244; 2-JAA-726-27[¶A]; *Truck*, *5-6.) Under its policies, Truck pays "all sums" that Kaiser is legally obligated to pay for personal injury, "including all loss resulting therefrom." (8-JAA-3327; 3-JAA-1251.) Truck also agreed to "[i]nvestigate and defend any claim or suit against the insured alleging such injury, sickness, disease…even if such claim or suit is groundless, false or fraudulent," and to provide the defense "in addition to the applicable limit of liability" in the policy. (8-JAA-3327-28.) Truck pays defense and indemnity for the underlying asbestos claims under its 1974-75 policy year, which Kaiser selected because it has no aggregate limit, does not require Kaiser to pay an allocated share of defense (like Truck's other primary policies), and it has the lowest deductible per occurrence ($5,000). (8-JAA-3325, 3399,3420-3421.)

B. Kaiser's Other Primary Insurers Are Exhausted, Having Previously Equitably Contributed to Truck.

Truck sought and obtained equitable contribution for decades worth of defense and indemnity from Kaiser's other primary insurers. (2-JAA-535-37[¶¶ 3-5, 9-10]; 3-JAA-1277-79; 3-JRA-760-61[¶¶G,I]; 3-JRA-918[¶¶1-5]; *Truck*, *5-6.) Although Truck now seeks to characterize Excess Insurers as primary insurers, Truck has repeatedly stipulated otherwise and represented to the Court of Appeal that there are *no* other valid

and collectible "non-Truck primary policies." (See *ICSOP*, 155 Cal.Rptr.3d at p. 306.)

C. Kaiser's Excess Insurance

Kaiser purchased multiple layers of excess insurance over its primary policies. (2-JAA-508; *Truck*, *23.) Unlike Truck's primary policies, the excess policies do not attach at dollar one, but instead provide coverage to Kaiser in excess of all "other valid and collectible insurance" for the "ultimate net loss" after exhaustion of underlying limits or "retained limits." (See §III.B., below.) Importantly, the excess policies disclaim a duty to defend, though a few provide umbrella coverage containing a conditional duty to defend for occurrences not covered by (i.e. outside the scope of) the underlying insurance—a circumstance not applicable here.[5] (3-JAA-1074-85, 1283-1292; 7-JAA-2473-74, 2667, 2669-71, 2686-87, 2689, 2767, 2770, 2798-99, 2801, 2817, 2819, 2823; 8-JAA-3012, 3027-28, 3079-82.)

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[5] Truck does not dispute that under California law the umbrella provisions of the excess policies are not implicated by Kaiser's asbestos claims. (See *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 398, quoting *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 812 [umbrella coverage is "alternative primary coverage as to losses 'not covered by' the primary policy"]; *Wells Fargo Bank, N.A. v. Calif. Ins. Guarantee Assoc.* (1995) 38 Cal.App.4th 936, 947-49 [explaining umbrella insurance and scope of coverage concept].)

STATEMENT OF THE CASE

A. All Contract-Based Issues Have Been Adjudicated or Resolved; Only Truck's Phase III-A Equitable Contribution Claim Is Subject to Review.

After over 21 years of litigation and multiple trips to the Court of Appeal, the limited issue on review is Truck's Phase III-A equitable contribution claim against Excess Insurers, which was rejected following a trial and affirmed on appeal. Most of this long history is summarized in the prior appellate decisions in this case. (*Truck*, *7; *LMI, supra,* 146 Cal.App.4th at pp. 652-654.) In its first decision, the Court of Appeal rejected Truck's financially-motivated argument that all of Kaiser's asbestos claims constituted one combined single occurrence. (*LMI,* at pp. 660-61.) Instead, each asbestos claim is a separate occurrence under the policies. (3-JAA-1246; 2-JAA-728[¶O]; *Truck*, *7.)

1. The *ICSOP* Opinion Held that Horizontal Exhaustion of All Primary Insurance Was Required Before Kaiser's Excess Policies Attach, but Limited Truck's 19-Years of Primary Insurance to One $500,000 Limit Per Occurrence.

The next appellate decision in this matter, *ICSOP*, resolved two broad issues. First, and directly relevant here, the court held that ICSOP, the excess insurer over Kaiser's selected 1974 Truck policy, had no obligation to pay any asbestos claim before the horizontal exhaustion of *all* "valid and collectible" primary insurance triggered by each claim. (*ICSOP*, *supra*, 155 Cal.Rptr.3d at pp. 297-98, citing, inter alia, *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.* (1996) 50

Cal.App.4th 329, 340 (*Community Redevelopment*).) Next, the court held that once Truck has paid its occurrence limit under the selected 1974 policy for a given claim, there is no other available and collectible primary insurance from Truck for that occurrence because Truck's primary policies contained "anti-stacking" language limiting the available coverage under all 19 years of Truck policies to one per occurrence limit in the 1974 year.[6] (*ICSOP*, at pp. 304-05.) This Court denied review in *ICSOP*.

Because Truck and all parties stipulated there was no other valid and collectible primary insurance, ICSOP was contractually obligated to pay each asbestos claim in excess of $500,000 that triggered its excess policy. (3-JRA-918, ¶1.) As Truck acknowledges, *ICSOP* is law of the case. (*Truck*, *20; Truck's Opening Brief on the Merits ("TOBM") at 26.)

2. *ICSOP* Resolved Excess Attachment and Accordingly Certain Excess Insurers Are Paying Their Respective Excess Share of Claims Exceeding Truck's Single $500,000 Primary Limit Under an Excess Coverage-In-Place Agreement.

Following *ICSOP*, the attachment point for Kaiser's excess coverage was established. In reliance, certain Excess Insurers and Kaiser entered into an Excess Coverage-In-Place Settlement

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[6] Despite Truck's previous contention in *LMI* that it provided $8.3 million in total annual per occurrence limits, Truck argued in *ICSOP* it was obligated to pay only a single $500,000 per occurrence limit under self-described "anti-stacking" language in its 1974 policy. The Court of Appeal ultimately accepted Truck's revised position in *ICSOP*. (155 Cal.Rptr.3d at pp. 305-06.)

Agreement ("Excess CIP"), under which the excess portion of each claim is fully funded after Truck pays its full primary policy limit. (3-JRA-758-59[¶¶4-5], 762-63[¶¶U,W].)[7] Thus, consistent with their respective contractual obligations to Kaiser, Truck must defend and pay its primary limit for each occurrence up to $500,000, and Excess Insurers pay the excess portion of each occurrence above $500,000. Because the Excess CIP pays excess claims, Kaiser dismissed its lawsuit against all Excess Insurers in 2014. (3-JRA-1370-77.)

Contrary to Truck's contention that Excess Insurers "contribute nothing" to the asbestos claims (TOBM, 60), Excess Insurers in fact have paid tens of millions of dollars in indemnity for claims resolved above Truck's primary obligation. (See pp. 33-34, below.)

B. Truck's and Kaiser's Remaining Issues Were Tried to the Court in Three Phases.

The remaining issues in the case were resolved through three phased bench trials. Only Phase III-A is at issue before this Court, as Truck acknowledges. (TOBM, 29, fn.7.)

Phase III addressed Truck's equitable contribution claim against Excess Insurers and was divided into two potential sub-phases.[8] The Phase III-A trial involved extensive briefing and

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[7] The importance of the Excess CIP is underscored by the fact it was assumed by Kaiser as an integral part of its bankruptcy plan. (https://ecf.ncwb.uscourts.gov/doc1/134112783952)

[8] Because Truck lost in Phase III-A, the Phase III-B trial—which would have determined further equitable issues relating to the

deposition proffers, stipulated facts, and over 90 trial exhibits and declarations. (3-JAA-1262-69; 2-JRA-652-681; *Truck*, *22.) On August 8, 2016, the trial court issued its final decision denying Truck's equitable contribution claim against Excess Insurers. (3-JAA-1309; 3-JAA-1167-68 *Truck*, *23.)[9] Truck did not file objections to the court's Phase III-A statement of decision, and the trial court entered final judgment consistent with its rulings in the three phases. (11-JAA-4865-67; 3-JAA-1167-68.)

C. The Court of Appeal's Decision

In affirming the Phase III-A statement of decision, the Court of Appeal rejected Truck's equitable contribution claim against Excess Insurers, including Truck's isolated and out of context reading of the excess policy wording. (*Truck*, *24-28.) The court also rejected Truck's contention that *Montrose III* and *SantaFe Braun* required Excess Insurers to "drop down" and contribute with Truck as primary, because both decisions involved a policyholder pursuing *contract-based* claims. Relying on *Montrose III's* analysis, which distinguished *Community Redevelopment* because it involved an equitable contribution dispute rather than a coverage dispute as was at issue in *Montrose III*, the Court of Appeal found *Community Redevelopment was* applicable to Truck's equitable contribution claim for that same reason. (*Truck,* *26-27.) The court concluded

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amount of Truck's claim, its allocation, and other issues— was unnecessary. (3-JRA-1070-1113 at 1073.)

[9] Phase III-A also resolved a question about Truck's deductible, which is not an issue on review.

that "[a]bsent a specific agreement to the contrary, there is no contribution between primary and excess insurers." (*Id.* at *27, citing *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1080 (*Reliance*).) There is, of course, no "agreement to the contrary" between Truck and Excess Insurers here.

ARGUMENT

I. Truck Misconstrues the Equitable Contribution Issue on Review, Arguing as If Truck Were the Policyholder.

Although the issue on review is limited to a primary insurer's claim to "equitable contribution from an excess carrier," Truck does not respond to the issue framed. Instead, Truck focuses on policy wording, erroneously arguing "[t]he issue solely concerns the interpretation of written policy language," as if Truck were the policyholder in a contract dispute with its insurers. (TOBM, 32.) Truck also incorrectly asserts that equitable rights of contribution between insurers are "rights based on insurance policies" and "should be founded on particular policies' specific language." (*Id.* at 10.) But the issue on review is not one of contract, but of equity. Truck's claim to equitable contribution from Excess Insurers fails for several fundamental reasons.

A. Equitable Contribution Is About Accomplishing Ultimate Justice in the Bearing of a Specific Burden and Is Not Controlled by the Language of the Insurance Contracts.

This Court explained over forty years ago in *Signal* that equitable contribution is not an exercise in contract

interpretation because "'[t]he reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other." (*Signal, supra,* 27 Cal.3d at p. 369, citation omitted.) Instead, insurers' "respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders.'" (*Ibid*, quoting *National American Ins. Co. v. Insurance Co. of North America* (1977) 74 Cal.App.3d 565, 577; see also *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 72 ["Equitable contribution applies *only* between insurers [citations] and *only* in the absence of contract."].)

Unlike a dispute between an insured and an insurer, where the court must effectuate the contracting parties' intent at the time of contracting (Civ. Code §1636; *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868), a dispute between insurers for equitable contribution is about accomplishing "ultimate justice," a matter not controlled by policy language. (*Signal, supra,* 27 Cal.3d at p. 369.) Instead, contract language is but one factor to be considered. (See *Ibid.*; *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204 Cal.App.4th 1214, 1231-32 (*Axis*).)

The purpose of equitable contribution "is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the

expense of others." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1293.) In resolving an equitable contribution claim, "[t]he court may consider numerous factors… including the nature of the underlying claim, the relationship of the insured to the various insurers, the particulars of each policy, and any other equitable considerations." (*Axis, supra,* 204 Cal.App.4th at pp. 1231-32.) In *Signal*, this Court "expressly decline[d] to formulate a definitive rule applicable in every case in light of varying equitable considerations which may arise, and which affect the insured and the primary and excess carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers." (*Signal*, *supra*, 27 Cal.3d at p. 369.) These principles have governed California insurance law for decades.

Truck's singular focus on policy language ignores the fundamental foundation for equitable contribution. Its argument that the same policy words should be treated the same regardless of context or the party making the claim misses the mark. Whether and when a *policyholder* may access its excess layers of coverage based on its *contracts* with those insurers is fundamentally different from whether a primary insurer can demand that excess insurers become de facto primary insurers based on "equity."

Truck does not "stand in the shoes" of its insured, as if this were a claim for equitable subrogation. Truck cannot rely on the same contractual promises as if it were the policyholder. Truck's operative Third Amended Complaint only includes a cause of

action for equitable contribution against Excess Insurers and *not* equitable subrogation, which it had previously asserted but dropped. (3-JAA-1261-62; 2-JAA-419, 516; 1-JAA-365.) And rightly so because equitable subrogation "aims to place the burden for a loss *entirely* on the party *responsible* for it and by whom it should have been paid, and thus to relieve *entirely* an insurer who paid the loss and who *in equity was not primarily liable*." (3 Croskey, et al., Cal. Ins. Lit., 8:65.1 (Rutter 2021) [explaining that equitable contribution is a "loss sharing procedure," not a loss shifting procedure] (Croskey); *Fireman's Fund, supra,* 65 Cal.App.4th at pp. 1291-92.) Here, Truck is the insurer that is "primarily liable," with its own contractual and legal obligations to Kaiser as its primary insurer.

B. Equitable Contribution Is Available Only Between Insurers Sharing the Same Obligation on the Same Level of Insurance and Is Not Available to a Primary Insurer Against Excess Insurers.

Equitable contribution "applies to apportion costs among insurers that share *the same level of liability* on the same risk as to the same insured." (*Maryland Cas. Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1089 (*Maryland Cas.*), emphasis added.) Because primary insurers and excess insurers do not share the same level of liability, "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." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1300, citing *Signal, supra,* 27 Cal.3d at pp. 367-368; see also *Reliance, supra,* 72 Cal.App.4th 1063, 1078 ["As a general rule, there is no

contribution between a primary and an excess carrier."]; *RLI Ins. Co. v. CNA Cas. of California* (2006) 141 Cal.App.4th 75, 84 [same]; *Transcontinental Ins. Co. v. Ins. Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1303-04 (*Transcontinental*) [same].) Put another way, "[o]ne insurer has no right of contribution from another insurer with respect to its payment on an obligation for which it was *primarily* responsible, and as to which the liability of the second insurer was only *secondary*." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1298.)

As Kaiser's only remaining primary insurer (*Truck*, *6), Truck is primarily liable for the first $500,000 of each claim, and the defense costs. Truck is not entitled to equitable contribution from Excess Insurers because they do not share the same level of coverage as Truck or the same burden.

In fact, Truck's theory that it is entitled to equitable contribution against the excess insurers because they "drop down" on exhaustion and "share" the primary layer was squarely rejected in *Transcontinental*. There, the court held a primary insurer in a construction defect coverage dispute was not entitled to reimbursement from the excess under equitable contribution. (148 Cal.App.4th at p. 1304.) The court rejected the same contention Truck makes here: "In this case, equitable contribution cannot apply because [the primary] and [the excess insurer] did not share the same level of liability and were not obligated to defend the same loss or claim." (*Ibid*.)

The primary insurer then argued—again like Truck does now—that the excess insurer "shared the same level of

obligation" once the underlying primary policy exhausted, so equitable contribution was viable. The court rejected this contention as well: "We reject [the primary insurer's] assertion equitable contribution applies because it and [the excess insurer] shared the same level of obligation on the same risk as soon as the [underlying primary] policy was exhausted. Applying basic rules of contract law, an insurer's obligation and the scope of coverage is defined by the terms of the insurance contract. [citation] Although [the excess insurer's] insurance was triggered when the underlying policy was exhausted, this event did not change the fact the policy was written to cover different risks and parties than [the primary] policy." (*Id*. at p. 1304, fn.3.)

The court further held that the costs incurred for the defense of the common insured (the developer) could not be foisted upon the excess carrier because there is no right to contribution between a primary and an excess carrier. (*Id.* at p. 1304.) The excess policy did not transform into a primary policy upon exhaustion of the underlying policy. (*Id*. at p. 1304, fn.3.) [10] Like the primary insurer in *Transcontinental,* Truck's equitable contribution claim also is not viable.[11]

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[10] Based upon unique facts in *Transcontinental* relating to an additional insured endorsement, the court held that equitable subrogation was the primary's only viable claim against the excess insurer. (*Id*. at pp. pp. 1304-05.) But here, equitable subrogation is neither available to Truck nor even pled. (See §I.A., above.)

[11] Truck is not the first primary insurer in California to attempt to force an excess insurer to prematurely drop down and share

The long-standing rule preventing primary insurers from seeking contribution from excess insurers makes sense. Among other things, it affords the parties a clear demarcation of responsibility based on the respective obligations of each level of insurance, thereby avoiding a multiplicity of overlapping obligations. The separate question of whether a *policyholder* can access its excess insurance vertically before all triggered primary has exhausted is not the issue presented here, as much as Truck tries to convince otherwise.

Instead, the issue is whether Truck is entitled, under the circumstances of this case, to force excess insurers to share its primary obligation. In the equitable contribution context,

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the obligations of an otherwise solvent and available primary insurer; California courts have consistently rejected such efforts. (See, e.g., *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 599-601 (*Olympic*) [rejecting primary's arguments that loss should be prorated along with excess insurer because all had "excess other insurance" clauses]; *Chubb/Pacific Indem. Group v. Insurance Co. of North America* (1987) 188 Cal.App.3d 691, 698-99 (*Chubb/Pacific)* [rejecting effort by primary to cede policy limits and transfer defense to excess insurer]; *North River Ins. Co. v. American Home Assurance Co.* (1989) 210 Cal.App.3d 108, 113 (*North River)*[rejecting primary's argument that "excess other insurance" clause in its policy made the primary policy excess to the excess insurer's policy]; *Reliance, supra*, 72 Cal.App.4th at pp. 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."]; *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1708-09 (*Ticor)*[rejecting contention that excess insurer must drop down and defend where primary insurer refused to participate in defense].)

California law, the law of the case, and judicial estoppel each confirm the principle that primary insurer Truck is not entitled to contribution from excess insurers.

Here, as explained, under the Excess CIP settlement with Kaiser, ICSOP pays excess amounts above Truck's $500,000 per occurrence limit for each occurrence, and the other triggered excess insurers on the same excess layer as ICSOP equitably contribute to ICSOP their allocated share of each excess claim. (3-JAA-1247; 3-JRA-762-63[¶¶U, W].) Far from paying "nothing," as Truck asserts, Excess Insurers are sharing their common excess level burden, and in a manner satisfactory to Kaiser, who also signed the Excess CIP. (*Ibid*.) This settlement was made possible because there was certainty after *ICSOP* regarding the amount Truck was obligated to pay, as primary, with its dollar-one obligation, and the obligations of Excess Insurers, with their shared excess obligation.

C. Primary and Excess Insurance Are Qualitatively Different.

The Court of Appeal correctly rejected Truck's equitable contribution claim on the basis that primary and excess insurance are "qualitatively different" (*Truck*, *27), a point recognized multiple times by this Court. (See, e.g., *Signal*, *supra*, 27 Cal.3d at pp. 367-70; *Montrose III*, *supra*, 9 Cal.5th at pp. 222-23.)

It cannot seriously be disputed that Truck and Excess Insurers provided different levels of coverage. Truck's own complaint makes clear that it issued primary, dollar-one coverage, and the "excess insurance" was placed at a different

level. (2-JAA-508, ¶ 23 ["Defendant Excess Insurers issued policies of excess comprehensive general liability coverage to Kaiser…"].) Despite the contractual obligations it willingly assumed and for which it received a much higher premium, Truck seeks to impose those obligations on the excess insurers, whose contractual obligations are more limited. As the trial court correctly found, Truck's arguments "would undermine the very concept of excess insurance." (3-JAA-1300.) Truck's scheme cannot stand in light of the fundamental differences between primary and excess insurance.

First, there is the difference in attachment points. As this Court explained in *Montrose III*, primary insurance "attaches immediately upon the happening of the occurrence," while excess liability "attaches upon the exhaustion of underlying insurance coverage." (*Montrose III*, *supra*, 9 Cal.5th at p. 222; see also *North River, supra,* 210 Cal.App.3d 108, 112; *Community Redevelopment*, 50 Cal.App.4th at pp. 337-338.) Here, Truck's 1974 primary policy agrees to pay "all loss" (8-JAA-3327), while Excess Insurers' policies indemnify Kaiser for excess claims as part of an "ultimate *net* loss," which is defined to mean the loss net of other valid and collectible insurance. (3-JAA-1074-85; 7-JAA-2473, 2529-30, 2686-90, 2764-72, 2817-25; 8-JAA-3012, 3027, 3077-80.)

Second, there is the difference in defense obligations, which are sometimes more valuable to an insured than indemnity. The primary insurer typically has a duty to defend, pays the defense in addition to limits, and has the right to control the defense.

(See *Ticor, supra,* 40 Cal.App.4th 1699, 1707; see also *Signal*, 27 Cal.3d 359, 365-368; *Olympic, supra,* 126 Cal.App.3d 593, 597; *FMC v. Plaisted & Cos*. (1998) 61 Cal.App.4th 1132, 1198-1201, disapproved on other grounds in *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 201.) Here, Truck's 1974 primary policy promised to "[i]nvestigate and defend any claim or suit against the insured… even if such claim or suit is groundless, false or fraudulent," and to pay defense in addition to limits. (8-JAA-3327-28.) Because Truck has the duty to defend, it cannot, for example, simply tender its policy limits to Kaiser and force the excess insurers to assume the defense. (*Continental Cas. Co. v. Royal Ins. Co.* (1990) 219 Cal.App.3d 111, 121-125; *Chubb/Pacific, supra,* 188 Cal.App.3d 691, 698-99.)

In contrast, excess policies typically contain no duty to defend or, in the case of umbrella insurance, limit defense only to claims falling outside the scope of the underlying primary insurance. (*Powerine, supra*, 37 Cal.4th at p. 398, fn. 9; *Ticor*, *supra*, 40 Cal.App.4th at p. 1707["[a]s a general rule, under California law the primary insurer alone owes a duty to defend"].) Here, the excess policies do not have a duty to defend, and expressly disclaim it. Truck acknowledges the pre-1958 excess policies do not have a duty to defend. (TOBM, 57.) And the post-1958 excess policies expressly state they "shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured but… shall have the right and shall be given the opportunity to associate [in the defense] where the claim or suit involves, or

appears reasonably likely to involve" the insurer. (7-JAA-2689, 2770, 2823; 3-JAA-1077-78, 1083, 1085.) In *Gribaldo, Jacobs, Jones & Assoc. v. Agrippina Versicherunges* (1970) 3 Cal.3d 434, this Court examined similar wording and concluded it is "apparent that defendants had no affirmative duty to defend plaintiffs....." (*Id.* at pp. 440-41, 448 [policy gave the insurer the option, not the obligation, to take over and control the defense].)

Third, there is the difference in relative premium charged. Primary insurers receive far greater premium per dollar of coverage than excess insurers, to account for the greater "first dollar" primary exposure—indemnifying more frequent but smaller losses—and to compensate the cost of defending and handling the claims. (See *Signal*, *supra*, 27 Cal.3d at p. 365; *Chubb/Pacific, supra,* 188 Cal.App.3d at pp. 698-99.) Conversely, excess insurers receive a much smaller premium per dollar of coverage because excess insurance is designed to indemnify only the infrequently-occurring large losses, and typically does not provide a duty to defend.

Here, for example, the premium received by the 1958 London first layer excess policy, with the same or greater indemnity limits than the scheduled primary insurance, was set at a mere 5% of the primary insurance premium. (7-JAA-2474.) And for the 1974 annual period, Truck received at least $134,000 in advance and quarterly premium payments, plus an adjustment based upon Kaiser's reported employee remuneration, for its $500,000 per occurrence primary policy; while ICSOP received a premium of $25,000 for its $5,000,000 excess policy covering the

same annual period. (6-JAA-2425, 2435; 8-JAA-3345.)[12] Thus, Truck received in premium $1.34 (and more after annual "premium adjustment") for each $5.00 of primary coverage, while ICSOP received only 2.5 cents for each $5.00 of excess coverage. (*Ibid*.) In other words, Truck received *fifty times* more premium per dollar of coverage than ICSOP.

Truck downplays all these differences between primary and excess insurance, arguing "they cannot trump a policy's plain language." (TOBM, 53.) But the issue here is not an exercise in policy wording; it is about principles of equity that are designed to achieve ultimate justice in the bearing of a specific burden. (*Signal*, *supra*, 27 Cal.3d at p. 369; *Axis Surplus, supra,* 204 Cal.App.4th at pp. 1231-32.) Truck ignores the significant premium difference, arguing that *SantaFe Braun* also downplayed the difference in premiums. (TOMB, 42, citing *SantaFe Braun,* 52 Cal.App.5th at pp. 29-30.) But *SantaFe Braun* did not involve an equitable contribution claim between primary and excess insurers.

In fact, California courts have repeatedly relied on the same differences outlined above to reject "equitable" claims by primary insurers seeking to force excess insurers to contribute to

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[12] Truck suggests it received only $118,000 for its 1974 primary policy, but accounts only for the quarterly deposits required and does not include the advance deposit or any remuneration adjustments. (TOBM, 53). It also ignores the hundreds of thousands of dollars it received for its other 18 policy periods, none of which have had to pay defense or indemnity for any Kaiser claims. (JAA-66, 100, 110-112, 119, 123, 127-133, 137-138, 158, 178, 181-82, 187, 190, 193, 196, 207-09, 233-35.)

the primary's own obligations. (See, e.g., *Chubb/Pacific, supra*, 188 Cal.App.3d at p. 699 ["We see no equitable basis for relieving [the primary] from the contractual obligations it freely assumed and imposing them on [the excess insurer] which contractually avoided them."]; *Reliance*, *supra*, 72 Cal.App.4th at pp. 1082-83 [rejecting contention that primary insurer "be allowed to shift the loss to an excess carrier which charged a lower premium;" "we cannot conclude that the equities permit recovery in this case."].)

D. Equitable Contribution Arises Only Where One Insurer Has Paid More than Its Fair Share.

Under California law, "[a]n insurer can recover equitable contribution only when that insurer has *paid more than its fair share*; if it has not paid more than its fair share, it cannot recover, *even against an insurer who has paid nothing*." (*Scottsdale Ins. Co. v. Century Surety Co.* (2010) 182 Cal.App.4th 1023, 1035-36 (*Scottsdale*), emphasis added; see also *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1067 (*Crowley*) ["equitable contribution is the right to recover from a co-obligor that shares liability with the party seeking contribution, as when multiple insurers insure the same loss and one insurer *has paid more than its share* to the insured."]; *Fireman's Fund, supra*, 65 Cal.App.4th at p. 1293 [same].).

Here, Truck is paying only one out of its 19 primary policy limits. (*Truck*, *17; *ICSOP, supra,* 155 Cal.Rptr.3d at pp. 305-306.) Truck achieved that result in *ICSOP*, arguing that it owed only one $500,000 policy limit per asbestos bodily injury claim (and not $8.3 million in total per occurrence limits, as Truck had

argued in *LMI*). (*Truck,**17, citing *ICSOP,* 155 Cal.Rptr.3d at pp. 305-06; *LMI*, *supra*, 146 Cal.App.4th at p. 653.) Truck cannot now argue that its fair share is less than what it argued for in the Court of Appeal.

Furthermore, as discussed, Excess Insurers are fulfilling their obligations by paying the excess portion of each claim over Truck's $500,000 per occurrence limit. (3-JAA-1246-47; 3-JRA-762-63 [¶¶ U,W].) A recent large mesothelioma verdict against Kaiser in Washington illustrates the inequity of what Truck seeks. In *Budd v. Kaiser Gypsum Company, Inc.* (Wash.Ct.App. 2022) 505 P.3d 120, the jury awarded $13,426,000 in damages. (*Id.* at p. 126.) Under *ICSOP* and the Excess CIP, Truck pays the first $500,000 of this $13.4 million claim, less the $5,000 deductible paid by the Kaiser Asbestos Trust (or less than 4% of the judgment), while the triggered excess insurers pay $12,926,000 (or over 96% of the judgment). There is no unfairness to Truck in paying the share its contract requires. Yet Truck is now trying to *reduce* its share well below its net $495,000 primary obligation by shifting onto Excess Insurers the vast majority of its 4% share, through the guise of "equitable" contribution.

Truck argues for the first time in the case that requiring it to pay one of its 19 limits per occurrence is somehow unfair because its 1971-1980 uncapped policies were issued "at a time when this Court had yet to adopt" the continuous trigger. (TOBM, 13-14, 32-33, citing *Montrose Chemical Corp. v. Admiral*

Ins. Co. (1995) 10 Cal.4th 645 (*Montrose I*).) Truck's argument is both puzzling and incorrect.

First, Truck contractually *agreed* to provide primary insurance without an aggregate limit. (8-JAA-3299, 3325, 3331.) It has no basis to complain that the policy it wrote is now, in retrospect, "unfair." It was not an underwriting mistake.

Second, Truck's contention that the continuous trigger was unknown to insurers in 1971 was rejected by this Court in the very case Truck cites. (See *Montrose I, supra,* 10 Cal.4th at pp. 671-73, 687-88 [examining drafting history to explain that the insurance industry contemplated coverage for continuous exposure to injurious conditions at least as early as 1966 when the ISO revised its liability policy form to expand from accident-based wording to occurrence-based wording, broadening coverage to include "*continuous* and repeated exposure to conditions."].) In fact, Truck's policy defines "occurrence," like the 1966 ISO form, to mean "an event, or *continuous* or repeated exposure to conditions." (8-JAA-3336-37.)

Moreover, Truck's claim that it did not contemplate continuous injury claims is belied by the fact that in *ICSOP*, Truck successfully argued its policy contains an anti-stacking provision, designed to avoid stacking of multiple policy limits triggered by a continuous occurrence. (3-JAA-3331; *ICSOP*, 155 Cal.Rptr.3d at pp. 302-303.) If Truck did not contemplate multiple policies for a continuous loss, why did it have an anti-stacking provision in its policy, as it argued in *ICSOP*?

Last, Truck claims "unfairness" because it "has paid upwards of $450 million" toward Kaiser's claims. (TOBM at 53-54 and 14-15, fn.2.). But Truck's $450 million figure lacks support in the record. Truck bases this figure upon the $77.45 million that *Kaiser incurred* during the 2004-2007 period when Truck *failed* to fully defend and indemnify Kaiser. (TOBM, 14-15, fn.2; 6-JAA-2374[¶ 27].) Applying simple division to this 38-month period, Truck concludes it paid $24 million per year and then multiplies this amount for each year after 2007 to reach its $450 million figure. (TOBM, 14-15, fn.2.)

But Truck never reimbursed Kaiser for the full $77.45 million. Instead, the underlying evidence establishes that Truck unilaterally reduced Kaiser's $77.45 million reimbursement claim by more than $27 million for a net reimbursement to Kaiser of about $50 million.[13] Ironically, rather than supporting Truck's claim that the Excess Insurers are paying nothing, the evidence confirms that pursuant to the Excess CIP the Excess Insurers paid over $12.6 million for the claims above $500,000, which is about 25% of the $50 million reimbursed by Truck. (6-JAA-2313-2354 at 2317; 3-JRA-762-63 [¶¶ U,W].)

In sum, the record does not support Truck's contention that it is paying more than its fair share. Furthermore, simply

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[13] Truck's offsets included: (1) $12,647,500 for amounts paid in asbestos settlements above Truck's $500,000 limit (i.e., amounts funded by Excess Insurers), (2) more than $9,521,158 for a per claim deductible (addressed in reversed Phase I decision), and (3) $5,052,497 that Kaiser recovered from various insolvent insurers. (6-JAA-2313-2354 at 2317.)

because an insurer has paid large sums does not mean the amount paid is unfair. Because Truck is not paying more than its fair share, Truck is not entitled to equitable contribution under California law. (See *Scottsdale, supra,* 182 Cal.App.4th at pp. 1035-36; *Crowley, supra,* 158 Cal.App.4th at p. 1067; *Maryland Cas., supra,* 81 Cal.App.4th at p. 1089.)

Of course, Truck is not really arguing it is paying more than its *fair* share; it is arguing its share, determined according to its policy language and governing law, is more than it *wants* to pay. But as this Court stated in *Montrose III*: "What we have said in prior cases applies here as well: There is no evident unfairness to insurers when their insureds incur liabilities triggering indemnity coverage under the negotiated policy contract." (*Montrose III*, *supra*, 9 Cal.5th at p. 236.)

E. Truck Seeks to Force Excess Insurers to Simultaneously Contribute to Claims at Both the Primary Level (Under $500,000) and the Excess Level (Above $500,000); Doing So Is Not Equitable and Will Harm Kaiser.

Truck's claim will lead to inequitable and absurd results. Under Truck's scheme, Excess Insurers would pay *both* at the primary level (contributing to claims covered by Truck's primary insurance up to $500,000 per occurrence) and then again at the excess level (paying claims excess of the $500,000 Truck primary limit).

Specifically, for claims *below* $500,000 per occurrence, Truck contends it can seek contribution from Excess Insurers—the same excess insurers that are already paying for claims resolved *above* $500,000 per occurrence. In other words, Truck

seeks to force Excess Insurers to *simultaneously contribute on both the primary and excess levels.* For example, in the *Budd* claim discussed earlier, it would have Excess Insurers paying $12,926,000 for the excess amount of the $13.4 million claim, plus a portion of Truck's $495,000 primary obligation. That is both unprecedented and unjust, and it is precisely why California courts have restricted equitable contribution to insurers sharing the same level of coverage. Truck's scheme is unworkable—which is why no court has ever endorsed it.

From Kaiser's perspective, it is also grossly unfair because the "contribution" payments Truck seeks will impair or exhaust the aggregate limits in the excess policies, accelerating the reduction of Kaiser's insurance—to the detriment of the policyholder and future claimants. As the Court of Appeal concluded, Truck "seeks to shift responsibility for payment of future claims from itself to excess carriers or its insured." (*Truck*, *20.)

In addition, Truck's scheme harms Kaiser because it may leave Kaiser without coverage for claims *over* $500,000. Under the *ICSOP* decision, ICSOP's excess insurance is only triggered when Truck pays its full per occurrence limit for each claim (*ICSOP*, *supra*, 155 Cal.Rptr.3d at pp. 304-05.) But if Truck's scheme succeeds, Truck will avoid paying its full $500,000 per occurrence limit, because "contribution" from Excess Insurers reduces the amount Truck pays. And if Truck is allowed to pay less than its full per occurrence limit, excess coverage is not owed under the negotiated Excess CIP. Such an inequitable result

would leave Kaiser without coverage for claims over $500,000—or force Kaiser to make up the difference—because the Excess CIP, based on the attachment rules decided by the Court of Appeal in *ICSOP*, requires Excess Insurers to pay only after Truck has paid a full $500,000. (*Ibid*.; 3-JRA-762-63[¶¶U,W].) Further, Kaiser is left with no recourse against Excess Insurers, as it dismissed its claims with prejudice following the Excess CIP, in reliance on *ICSOP*. (3-JRA-1375-79.)

F. A Judgment on Equitable Contribution Is Reviewed for Abuse of Discretion.

Truck insists the issue presented is a question of law subject to de novo review. (TOBM, 32.) But as explained, the issue is not one of contract interpretation, it is one of equity—and ultimately one reviewed for abuse of discretion. (See *Axis, supra,* 204 Cal.App.4th at pp. 1231-32 [in evaluating equitable contribution among multiple insurers, "the trial court exercises its discretion and weighs the equities seeking to attain distributive justice and equity among the mutually liable insurers."], citing *Fireman's Fund, supra,* 65 Cal.App.4th 1279, 1293; see also *Truck*, *19.)[14] Deference is owed as the trial court exercised its discretion in resolving an equitable claim.

Truck's proposed de novo review standard also overlooks that the judgment here arises from a *trial* and is based on factual

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[14] See also *Hartford Cas. Ins. Co. v. Travelers Indem. Co.* (2003) 110 Cal.App.4th 710, 724 [equitable contribution ruling reviewed for abuse of discretion]; *Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 111 [same].)

findings as well as contract interpretation.[15] Deference to the trial court's Phase III-A statement of decision is appropriate also because Truck failed to submit written objections to the decision. (See Code Civ. Proc. §634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132-33; 11-JAA-4865-67)

II. *Montrose III* Did Not Involve Equitable Contribution and It Does Not Control Here.

While ignoring long-standing California law on equitable contribution, Truck claims *Montrose III* compels equitable contribution here. But *Montrose III* concerns an *insured's* right to all-sums coverage. (*Montrose III*, *supra*, 9 Cal.5th 215.) This Court has repeatedly recognized—most recently in *Montrose III* itself—that the contractual considerations underlying an insured's coverage claims are very different from those underlying an insurer's equitable contribution claims. (*Id*. at p. 237.)

A. This Court has Consistently Ruled that an Insured's Right of Recovery Is Not Governed by the Same Principles as an Insurer's Equitable Contribution Claim.

Truck urges extension of *Montrose III*, insisting that there are no material differences between an insured's right to coverage and an insurer's equitable contribution claim. (TOBM, 61.) But Truck makes no real argument for equating an insured's

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[15] That the trial court's factual findings were based on stipulated facts and other written evidence "does not lessen the deference due those findings." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn.3; see also *Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501, 508.)

contractual right to coverage with an insurer's contribution claim. In fact, Truck is unable to do so because this Court has squarely rejected that equation on three separate occasions.

The *first* time, over 25 years ago, the Court stressed the importance in distinguishing between disputes between an insured and insurer and actions between carriers, for which "different contractual and policy considerations may come into play in the effort to apportion such costs among the insurers. . . ." (*Montrose I*, *supra*, 10 Cal.4th at p. 665.) The Court cautioned that "cases whose analyses fail to take these distinctions into account…may shed more darkness than light on the matter." (*Ibid*.)

When this Court rejected the argument for the *second* time, it was even more emphatic, stating that "[w]hen multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the 'other insurance' clauses of the policies or under the equitable doctrine of contribution. That apportionment, however, has no bearing upon the insurers' obligations to the policyholder." (*Dart Indus., Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080, citations omitted (*Dart*).) More than simply distinguishing an insured's right to coverage from an insurer's right to contribution, the Court in *Dart* declared that the one has "no bearing" on the other. In other words, the issues are *entirely* different.

This Court rejected Truck's argument for the *third* time in *Montrose III*. There, the insurers argued that the insured could not recover from them in its preferred order because of decisions

denying equitable contribution to a primary insurer, principally *Community Redevelopment*. But this Court rejected the argument that contribution claims are analogous to coverage claims, explaining that *Community Redevelopment* "addresses a meaningfully different scenario and thus offers no real lessons for resolving the question now before us." (*Montrose III*, *supra*, 9 Cal.5th at p. 237.) This Court found that since *Community Redevelopment* addresses a primary insurer seeking contribution from an excess insurer, the insured vs. insurer dispute before it "differs from *Community Redevelopment* in fundamental respects." (*Ibid.*)

In *SantaFe Braun*, the Court of Appeal also recognized that coverage and contribution are very different issues. (52 Cal.App.5th at p. 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."].)[16]

In short, this Court has repeatedly and expressly confirmed there is no *analogy* between equitable contribution and contractual coverage. And yet Truck rests its entire argument on that analogy.

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[16] The Appellate Court of Connecticut, in applying California law, refused to follow *SantaFe Braun*, instead following "the long line of California cases that adhere to the well settled rule under California law that an excess policy does not cover a loss until all primary insurance has been exhausted." (*Continental Cas. Co. v. Rohr, Inc.* (Conn.Ct.App. 2020) 244 A.3d 564, 600-605 (*Rohr*) [providing compelling analysis of California law on the issue].)

B. Truck's Arguments Based on the Policy Language Fail.

To the extent that Truck relies on arguments other than the alleged analogy between coverage issues and contribution issues, those arguments also fail.

1. Contribution Is Equitable, Not Contractual.

Truck declares, "[w]hat matters is policy language, not artificial rules." (TOBM, 34.) Policy language of course controls a dispute between an insured and an insurer, who stand in a contractual relationship governed by that language. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-65 (*Bank of the West*).) But there is no contract between Truck and Excess Insurers and therefore no question of enforcing any contract language. As shown above, Truck's claim is equitable in nature, and Truck cannot make any effective appeal to equity.

2. "Other Insurance" Provisions Do Not Operate as Truck Contends.

Even if Truck were pursuing a contract-based claim here, which it is not, its argument would suffer from a deep, fundamental flaw. Truck's contractual argument relies primarily on the alleged significance of "other insurance" provisions. But *Montrose III* rejected the insurers' argument for horizontal exhaustion not because "other insurance" provisions imply vertical exhaustion in coverage claims, but because the Court doubted that "other insurance" provisions have *anything at all* to do with exhaustion in the coverage context involving a

policyholder's contract claims. (*Montrose III*, *supra*, 9 Cal.5th at p. 231.)

Where "other insurance" provisions *do* control is in contribution cases. In *Dart*, this Court concisely expressed the California rule: "'Other insurance' clauses become relevant only where several insurers insure the same risk at the *same level* of coverage. An 'other insurance' dispute cannot arise between excess and primary insurers." (*Dart*, *supra*, 28 Cal.4th at p. 1079 fn.6; see also *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 513 (*Carmel*); *JPI Westcoast Constr., L.P. v. RJS & Assocs., Inc.* (2007) 156 Cal.App.4th 1448, 1465 fn.2; *North River, supra,* 210 Cal.App.3d 108, 114].) These cases are expressing, in different terms, the same principle expounded above: an insurer is entitled to contribution only from another insurer on the same level of coverage. Here, Truck, a primary insurer, is not on the same level as Excess Insurers, and therefore its claim for contribution never gets out of the starting gate.

Truck ignores these issues by noting that *Montrose III* followed the Restatement of the Law of Liability Insurance ("Restatement") and "five sister-state Supreme Court decisions" that found that "'other insurance' clauses are not aimed at governing the proper allocation of liability among successive insurers in cases of long-tail injury" (TOBM, 44-45, citing *Montrose III*, *supra*, 9 Cal.5th at pp. 232-233) and arguing that *Community Redevelopment* was decided before these decisions (TOBM, 49). Like *Montrose III*, however, none of the five out-of-

state decisions support a primary insurer obtaining equitable contribution from excess insurers, which this Court stated was a "meaningfully different scenario" from a contract dispute. (*Montrose III*, 9 Cal.5th at p. 237.)

Three of the five out-of-state cases addressed *policyholders* seeking coverage from their insurers. (See *In re Viking Pump, Inc.* (N.Y. 2016) 52 N.E.3d 1144, 1156, 1157; *Boston Gas Co. v. Century Indem. Co.* (Mass. 2009) 910 N.E.2d 290, 299; *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.* (N.J. 2004) 843 A.2d 1094, 1096.) Only two of the five cases addressed contribution between insurers, and both involved a dispute among *primary* insurers and not, as is the situation here, a primary insurer seeking contribution from excess insurers. (See *Steadfast Ins. Co. v. Greenwich Ins.* Co. (Wis. 2019) 922 N.W.2d 71, 79 [contribution claim between two primary insurers]; *Ohio Cas. Ins. Co. v. Unigard Ins. Co.* (Utah 2012) 268 P.3d 180, 184 [same].) The cases do not support Truck's claim for equitable contribution from Excess Insurers. [17]

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[17] Truck's reliance on the Restatement also is misplaced. First, the Restatement §40 cited in *Montrose III,* and on which Truck now relies, addresses the use of "other insurance" clauses in coverage suits between the insured and insurers involving concurrent coverage situations. (Rest. Liab. Ins., §40 (2019).) In fact, §40 relies on the *North River* case cited above. (*Id.* at §40, Rptr. Note c.) Second, Section 39 of the Restatement, which addresses "Excess Insurance: Exhaustion and Drop Down," makes clear, contrary to Truck's arguments, that "exhaustion is the default rule," and that "most, if not all" excess policies contain exhaustion clauses which "typically provide that coverage under the excess policy is available only after the aggregate amount of

3. Truck May Not Avail Itself of the Reasonable Expectations Doctrine.

According to Truck: "Insurance policy language, like the language in other contracts, should be read consistently. The same policy/contract language should mean the same thing in all contexts." (TOBM, 10.) That statement demands significant qualification. The same language should mean the same thing in an *analogous* context. But Truck's argument that language must mean the same thing in *all contexts* necessarily must also mean that context is irrelevant and may be disregarded. That is not the law and never has been. Instead, courts "must interpret the language in context, with regard to its intended function in the policy." (*Bank of the West, supra,* 2 Cal.4th at p. 1265; see also *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 374 [same]; *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288 [same].)

California law distinguishes between an insurer and an insured in countless ways. The most obvious, important, and relevant way is that ambiguous policy language is interpreted to protect the objectively reasonable expectations of the insured. (*Montrose I*, *supra*, 10 Cal.4th at p. 667.) Here, Truck claims for itself the protections the law reserves for insureds. This Court, however, has rejected this same argument, holding that the reasonable expectations doctrine is inapplicable where the dispute "concerns only the respective rights of two insurers."

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all limits of underlying insurance has been exhausted…" (Rest. Liab. Ins. §39, Comment c, emphasis added.)

(*Argonaut Ins. Co. v. Transport Indem. Co.* (1972) 6 Cal.3d 496, 506; see also *Hartford Acc. & Indem. Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1300 [same]; *Atlantic Mut. Ins. Co. v. Travelers Ins. Co.* (1983) 147 Cal.App.3d 1054, 1057 [same].)

In *Montrose III*, on which Truck erroneously and so heavily relies, the reasonable expectations doctrine played a significant role only because an insured was involved. While considering the excess insurers' argument for horizontal exhaustion, the Court ultimately found the language at issue ambiguous. (*Montrose III*, *supra*, 9 Cal.5th at p. 230 ["Although the insurers' interpretation is not an unreasonable one, it is not the only possible interpretation of the policy language."].) In order to resolve the ambiguity, the Court applied the reasonable expectations doctrine, explaining that "[t]o the extent any of the language of these policies remains ambiguous, we resolve these ambiguities to protect the objectively reasonable expectations of the *insured*." (*Id.* at p. 234, emphasis added, citation and internal quotation marks omitted.) Indeed, the Court's ultimate conclusion in the coverage context was based on the reasonable expectations of the insured: "Consideration of the parties' reasonable expectations favors a rule of vertical exhaustion rather than horizontal exhaustion." (*Ibid.*)

But Truck is not the insured seeking to enforce its insurance contract; it is a primary insurer making a claim to "equity" against Excess Insurers—a claim not allowed under California law. Truck has no right to avail itself of a doctrine designed specifically to protect insureds, and it has no reasonable

expectation of anything other than the results mandated by its own policy language. Indeed, here Truck is attempting to use the *Montrose III* holding *against* its own insured, seeking a result that will diminish Kaiser's insurance. (*Truck*, *20-21; 3-JAA-1253.)

III. Truck's Drop Down Theory Fails.

A. *Community Redevelopment* Remains Valid in the Equitable Contribution Context.

In *Community Redevelopment*, the court faced a similar equitable contribution action between a primary and excess insurer and held that "a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose [I]*." (*Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 340.) "Absent a provision in the excess policy *specifically describing* and *limiting* the underlying insurance," the horizontal exhaustion rule governs. (*Ibid.*)

Community Redevelopment built on California caselaw requiring the exhaustion of *all* primary insurance before an excess obligation is triggered. (See, e.g., *Olympic*, *supra*, 126 Cal.App.3d at p. 600 [all primary insurance must be exhausted before an excess policy attaches "even where there is more underlying primary insurance than contemplated by the terms of the secondary policy."]; *North River, supra*, 210 Cal.App.3d at p. 112 ["Liability under an excess policy attaches only after all primary coverage has been exhausted."].) Consistent with *Community Redevelopment*, horizontal exhaustion has been

widely applied in California.[18] As the court summed up in *Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984 (*Padilla*), "the tail-end, lone defending primary insurer cannot 'share the misery' with the first-period excess insurer" because the excess insurer has no duty to drop down and provide defense so long as other primary insurance is available. (*Id.* at p. 989.) Any other rule "is perfect legal logic leading to absurdity—that is, it would be contrary to the reasonable expectations of all parties by obliterating the distinction between excess and primary insurance." (*Ibid.*)

The reasoning and result reached in *Community Redevelopment* remain valid in light of *Montrose III*. First, as discussed, there is an important distinction between primary and excess insurer obligations and this alone compels a result like that reached in *Community Redevelopment* where all valid and collectible primary insurance is required to exhaust before excess must respond. Second, the excess policy wording must be read in

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[18] Numerous decisions have applied horizontal exhaustion for both single date-of-loss claims (see, e.g., *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184, 194; *Carmel, supra,* 126 Cal.App.4th at 514; *American Casualty Co. v. General Star Indemnity Co.* (2005) 125 Cal.App.4th 1510, 1520-21; *Reliance, supra,* 72 Cal.App.4th 1063, 1076-77) and claims spanning multiple periods (see, e.g., *Padilla*, *supra*, 150 Cal.App.4th at p. 986;; *Pacific Coast Building Products, Inc. v. AIU Ins. Co.* (9th Cir. 2008) 300 Fed.Appx. 546, 548; *Lafarge Corp. v. Travelers Indem. Co.* (9th Cir. 2002) 32 Fed.Appx. 851, 852; *Stonewall Insurance Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-53; *Rohr, supra,* 244 A.3d 564, 583, 605-09; but see *SantaFe Braun*, *supra*, 52 Cal.App.5th 19, 30).

this context and without regard to the reasonable expectations of the insured. And when read in this context, the excess policies make clear that they are secondary to primary insurance.

Here, the Court of Appeal, like the trial court, analyzed all the excess policy language and determined that "[s]uch policies all have language tracking the horizontal exhaustion language examined in *Community Redevelopment* and in *ICSOP*." (*Truck*, *27.) The court concluded that the excess policies require horizontal exhaustion of primary insurance and that *Montrose III* and *SantaFe Braun* do not address, let alone require, vertical exhaustion in this equitable contribution context.

B. The Excess Policies Provide Coverage Excess of All "Valid and Collectible Insurance," Including Truck's 1974 Primary Policy, and "*Shall Not Contribute* with Such Other Insurance."

Kaiser's excess contracts were issued by different insurers over thirty years. In context, the excess contracts all confirm that Excess Insurers do not pay or contribute at the primary level. Although there are differences, the excess policy wording generally can be grouped into the following periods: (1) 1953-58 (London "TP-7" form) (7-JAA-2449-2630); (2) 1958-64 (London "Price Forbes Umbrella" or "LRD-60 Umbrella") (7-JAA-2633-2863); and (3) 1983-85 (First State [1983-84] and Westchester [1984-85]). (8-JAA-3007-58, 3059-88.)[19] There also are multiple

[19] The 1964-83 excess policies are not at issue due to the affirmed Phase II decision, which is not part of the limited review by this Court. These policies are not subject to Truck's "drop down" or equitable contribution claim in Phase III-A.

layers of excess insurance in the 1983-85 years which "follow form" to the First State or Westchester wording. (3-JAA-1291-92; e.g., 7-JAA-2930; 3-JAA-1074-85.)

While all the terms must be considered in context and each policy considered as a whole (see *Bank of the West, supra,* 2 Cal.4th at p. 1265; *LMI*, *supra*, 146 Cal.App.4th at p. 656, citing Civ. Code § 1641; *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245), several consistent features demonstrate that the excess policies are not meant to contribute to Truck's primary obligation.

First, each of the excess policies pay only the "ultimate net loss" excess of other applicable insurance, which includes Truck's 1974 primary policy. (3-JAA-1074-85; 7-JAA-2473, 2529, 2569, 2686-87, 2764-67, 2817-19; 8-JAA-3012, 3027, 3077-80.) The concept is so fundamental to the excess policies, it is embedded in the contract's coverage grant. (*Ibid.*)

Second, none of the excess policies have a duty to defend Kaiser's asbestos claims. (3-JAA-1074-85; 7-JAA-2473, 2529, 2569, 2689, 2770, 2823, 2952; 8-JAA-3012, 3082.)

Third, each of the excess policies also expressly requires that "if other valid and collectible" insurance is available, the excess insurance "shall be in excess of and *shall not contribute with*" the other insurance. (3-JAA-1074-85; 7-JAA-2689, 2770, 2823, 2931; 8-JAA-3028, 3082.) This provision both confirms that the policies provide excess coverage and that the policies "shall not contribute with" the "other valid and collectible" insurance. This latter provision alone defeats Truck's contribution claim.

In addition, the policies contain other provisions, such as Attachment of Liability, Loss Payable and Retained Limits provisions, which further operate to require horizontal exhaustion and go to the equities at issue here. (3-JAA-1075, 1078, 1080, 1082, 1084-85.)

1. The 1953-58 Excess Policies.

Ultimate Net Loss. The 1953-58 excess policies only cover "accidents" for an "ultimate net loss" that expressly deducts "*all recoveries, salvages and other insurances*" and "excludes all expenses and 'Costs'." (3-JAA-1074-75 [emphasis added]; 7-JAA-2473, 2529, 2569.) Thus, "ultimate net loss" is the amount paid after deducting "*all* recoveries, salvages *and other insurances*" and excludes defense costs ("all expenses and 'Costs'").

Truck's primary obligation to pay up to the first $500,000 per occurrence for a claim are "recoveries" and "other insurances" that is deducted from the loss before the excess policy attaches. Thus, regardless of whether the *scheduled* primary insurance has paid an aggregated limit as a result of a settlement, the "ultimate net loss" definition deducts "other insurances" issued by Truck. (See, e.g., *Carmel, supra,* 126 Cal.App.4th at pp. 510-511 [ultimate net loss wording operated to make excess policy excess over all other available coverage].)[20]

[20] The reference to "any other insurance" in the UNL clauses in Excess Insurers' policies is effectively the same as the reference to "scheduled" and "unscheduled" insurance in the RLI policy in *Carmel, supra*, 126 Cal.App.4th at p. 510.

Attachment of Liability. The "Attachment of Liability" provision in the 1953-58 wording provides that liability shall not attach in any event under the policy,

> unless and until [Fireman's Fund] shall have *admitted liability* for the Primary Limit *or* Limits, or unless and until the Assured has *by final judgment been adjudged to pay* a sum which exceeds the Primary Limit or Limits.

(3-JAA-1075 [emphasis added]; 7-JAA-2473, 2529, 2570.)

Truck never established either condition of the clause here. First, Fireman's Fund, the primary insurer whose exhaustion Truck contends vertically triggers the 1953-58 excess coverage, has denied liability. (See 9-JAA-3593-3615 at 3604; 3-JRA-1039-40) Second, Truck never presented any evidence of a final judgment paid in excess of the available primary limits for an underlying asbestos bodily injury claim triggering the 1953-58 period.

Thus, because neither condition of the Attachment of Liability clause has been met, there is no attachment of liability under the 1953-58 policies even under Truck's incorrect "vertical exhaustion" theory. (See *Aerojet-General Corp. v. Commercial Union Ins. Co.* (2007) 155 Cal.App.4th 132, 137, 147 [finding conditions of clause not met under virtually identical facts and language]; see also *McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646 [relying on similar "Attachment of Liability" clause and concluding liability under "the excess insurance does not attach until all primary insurance has been exhausted"], disapproved on other grounds in *Reserve, supra*, 30 Cal.3d at p. 814.)

2. The 1958-64 Excess Policies.

Ultimate Net Loss. The 1958-64 excess policies all indemnify Kaiser only for "ultimate net loss," which is defined to mean the loss net of "other valid and collectible insurance." (3-JAA-1076-77; 7-JAA-2686-87, 2764-65, 2767, 2817-19.) Specifically, the definition of "Ultimate Net Loss" includes the types of expenses for which indemnity is potentially available and provides that the excess insurers "shall not be liable for expenses as aforesaid when such expenses are included in *other valid and collectible insurance*." (*Ibid.,* emphasis added.) Because the 1974 Truck primary policy constitutes "other valid and collectible insurance" (see *ICSOP*, 155 Cal.Rptr.3d at pp. 295-96), there is no coverage obligation under the 1958-64 excess wording for claims within Truck's $500,000 per occurrence limit because "other valid and collectible insurance" is available to pay ultimate net loss.

Assistance and Co-Operation. The 1958-64 excess policies all expressly disclaim the duty to defend in the Assistance and Co-Operation provision, which states that the excess insurers "shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured…" (3-JAA-1077, 7-JAA-2689, 2770, 2823.)

Other Insurance. The 1958-64 excess policies also contain an Other Insurance clause providing that "if other valid and collectible insurance with any other insurer" is available, the

excess insurance "shall be in excess of and shall not contribute with" the other insurance. (3-JAA-1078; 7-JAA-2689, 2770, 2823.) The *ICSOP* opinion, which Truck agrees is law of the case, held that a virtually identical "other insurance" provision in the ICSOP excess policy required the exhaustion of all "valid and collectible" primary insurance before the excess policy attached. (*ICSOP*, 155 Cal.Rptr.3d at p. 298; 6-JAA-2431.) The Court of Appeal reaffirmed that ruling again in this appeal. (*Truck*, *27.)[21]

Loss Payable. The "Loss Payable" provision in the 1958-64 excess wording further requires horizontal exhaustion of all primary coverage. That provision provides that "[l]iability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence." (3-JAA-1078; 7-JAA-2689, 2770, 2823.) As held in *ICSOP*:

> "Underlying insurance" simply means *primary* insurance. In other words, we believe that the reference to "underlying insurance" clarifies the excess nature of the *ICSOP* policy – i.e., that the policy does not attach immediately upon a loss, but only after all available primary insurance has been exhausted.

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[21] California courts have repeatedly relied upon "other insurance" provisions in concluding horizontal exhaustion is required in equitable contribution claims. (See, e.g., *Community Redevelopment*, *supra*, 50 Cal.App.4th at pp. 335, 338; *Reliance, supra*, 72 Cal.App.4th at p. 1075; *Carmel, supra*, 126 Cal.App.4th at p. 511.)

(*ICSOP*, *supra*, 155 Cal.Rptr.3d at p. 295.) Under the applicable law of the case, Truck is the only available primary insurer and Truck's $500,000 limit of liability is the primary limit that must be paid per occurrence before liability under an excess policy will attach. (*Id*. at pp. 305-06.) Again, Truck's drop-down argument fails as to the 1958-64 wording and law of the case.

3. The 1983-85 Excess Policies.

The excess policies in the 1983-85 period, including the First State and Westchester policies, contain the same "retained limits" and "other insurance" provisions that *Community Redevelopment* and *ICSOP* held required all "valid and collectible" underlying insurance to be exhausted before an excess obligation is triggered. (3-JAA-1080-85; 8-JAA-3012, 3028, 3077, 3082; *ICSOP*, *supra*, 155 Cal.Rptr.3d at p. 298.) For example, the Retained Limit – Limit of Liability provision of the Westchester Policy states that "the company's liability shall be only for the ultimate net loss in excess of the Insured's retained limit, defined as the greater of: (a) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the Insured; or (b) an amount as stated in Item 4(C) of the declarations as the result of any one occurrence not covered by the said policies or insurance;…" (8-JAA-3077.) The First State policy has substantially the same provision. (8-JAA-3012.) This language is virtually identical to the policy language interpreted in *ICSOP* and *Community Redevelopment* as requiring horizontal

exhaustion. (*ICSOP*, at pp. 294-96, 298; *Community Redevelopment*, *supra*, 50 Cal.App.4th at p. 335.)

The First State and Westchester policies also disclaim the duty to defend (8-JAA-3012, 3082) and contain provisions that explicitly state the policies are excess to other "valid and collectible" insurance and "shall…not contribute with such other insurance." (8-JAA-3028, 3082.) Many of the higher layer "short forms" also include their own Other Insurance and Loss Payable clauses, which further reinforce horizontal exhaustion for the reasons previously stated. (See, e.g., 7-JAA-2931, 2973.)

C. The "Continue in Force" Language Does Not Transform Kaiser's Excess Policies into Primary Insurance from Which Truck Can Seek Equitable Contribution.

Rather than address the entirety of the excess contract wording or its context, Truck plucks three words from the Limit of Liability provision contained in some but not all of the excess policies. That provision, which is subject to all other terms and conditions of the policy, states that in the event of exhaustion of the aggregate limits of the underlying insurance by payment of losses, the excess policies shall "*continue in force* as underlying insurance." (3-JAA-1077, 1080, 1082; 7-JAA-2686, 2765, 2817-18; 8-JAA-3012, 3081.)[22] Truck argues the "continue in force" phrase transforms excess policies into something like primary policies

[22] The 1953-58 LMI excess policies do not contain "continue in force" wording. (3-JAA-1074.)

that are required to drop down and participate with other primary policies.

Although this phrase has appeared in excess policies generally since at least the 1950s (e.g. 3-JAA-1076-77), no California court has ever adopted the interpretation Truck now peddles, and for good reason—Truck's interpretation is flawed and requires the Court to ignore the remainder of the excess wording. For several reasons, Truck's interpretation fails.

As the Court of Appeal noted, Truck selectively focuses on one phrase out of context and in isolation from the rest of the policy. (*Truck*, *27.) The court explained that "[t]he 'continue in force' language is modified not only by the specified underlying policies, but also by the 'other insurance' that also must be exhausted." (*Ibid*.) "Indeed, the key language is the 'other insurance' language of the policies, which requires horizontal exhaustion." (*Ibid*.)

Additionally, all the excess policies make clear that Excess Insurers' obligations are subject to all of the limitations, terms and conditions of their contracts. 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 it in the Other Insurance clause requirement that "nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance." (3-JAA-1078, 1085.) Further, policies containing a Maintenance of Underlying Insurance clause that acts as a follow form condition exclude the primary

insurer's obligation to defend, either expressly or by making the excess form, with its defense disclaimer in the Assistance and Cooperation clause, controlling. (3-JAA-1075, 1085.)[23] Only by ignoring the complete wording, that its claim is based in equity and the important contextual differences between excess and primary insurance, is Truck able to cobble its argument together.

In the face of the complete excess wording and in proper context, Truck's contention that the simple phrase "continue in force as underlying insurance" works to undo all the other provisions in the excess policies, including writing in a defense obligation where none exists, is unsupported and unreasonable.

Instead, the function of the "continue in force" phrase is much more basic—it operates to fill a potential gap that might open between the excess policy and the underlying policies as the underlying policies pay claims and erode or exhaust their aggregate limits. The "continue in force" wording closes that gap, protecting the policyholder, not Truck. But when the excess policy "continues in force," it does so subject to all its terms, including the disclaimer of a duty to defend and the exhaustion requirement of all collectible insurance. Nothing in the clause suggests otherwise.[24]

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[23] The Maintenance of Underlying provision in the 1953-58 excess policies expressly states they do not follow form to the primary insurers' *"obligation to investigate and defend …"* (3-JAA-1075 [emphasis added].)

[24] Truck cites one Arizona case as "support" for its assertion that excess policies with "continue in force" language promise to "step into the shoes" of primary policies upon exhaustion. (TOBM, 51,

Moreover, the drop down feature never comes into play where Truck's 1974 policy is implicated because that policy has no aggregate limit, and will *always* pay the first $500,000 of each occurrence; and ICSOP (which sits above the 1974 Truck policy), and the other triggered Excess Insurers (pursuant to the Excess CIP) will pay the excess amount up to the available excess limit. In other words, there is no "gap" so the "continue in force" feature is not relevant—a result due in large part to Truck's success in *ICSOP*, which is the law of this case.

The handful of courts that have considered the issue have squarely rejected the "transformation" argument Truck makes. In *Newmont USA Ltd. v. American Home Assur. Co.* (E.D.Wash. 2009) 676 F.Supp.2d 1146, for example, the court explained, "the 'continue in force' language of the policy does not render the remaining terms of the excess policy a nullity or suggest that its conditions are replaced by the provisions of the underlying insurance. There is no authority for such a proposition and it just simply runs counter to the express and unambiguous language of the policy itself." (*Id.* at p. 1156; see also *Flintkote*

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citing *AMHS Ins. Co. v. Mut. Ins. Co. of Arizona* (9th Cir. 2001) 258 F.3d 1090, 1096.) But *AMHS* does not involve "continue in force" wording and never states excess "stand in the shoes" of primary insurers. Instead, *AMHS* turned on the specific wording at issue and a somewhat unusual situation where a single insurer wrote multiple layers of both straight excess and umbrella policies. (258 F.3d at pp. 1094-1100.) The case also applied Arizona law and was distinguished in *Carmel, supra,* 126 Cal.App.4th at pp. 513-14, because it "does not appear to be consistent with California's approach to equitable contribution."

Co. v. Gen. Acc. Assur. Co. of Canada (N.D. Cal. Aug. 6, 2008) 2008 WL 3270922 at p. *26 [rejecting contention that excess policy was transformed into a *primary* policy when it dropped down: "Specific excess policies that provide for coverage for liability *only* do not automatically 'drop down' to become a substitute primary policy upon unavailability of the covered primary policies. The excess policy nevertheless remains excess."].)[25]

No California case has ever adopted Truck's reading of the "continue in force" clause. For example, the excess policy at issue in *Community Redevelopment* also contained "continue in force" language and the court nonetheless held that the excess policy read as a whole required horizontal exhaustion. (*Community Redevelopment,* 50 Cal.App.4th at pp. 335, 338-340.) Truck claims two out-of-state cases found the "continue in force as underlying insurance" language includes defense costs, but neither supports Truck. (TOBM, 56, citing *Sinclair Oil Corp. v. Allianz Underwriters Ins. Co.* (Ill. Ct. App. 2015) 39 N.E.3d 570 and *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.* (Minn. 1988) 433 N.W.2d 82.) *Sinclair Oil* addressed different policy language, which stated it is "subject to the terms and conditions of the underlying insurance." (39 N.E.3d at p. 580.) The policies here do not have that language. *Interstate Fire* did not base its decision on "continue in force" language, but instead applied a broad approach "of allocating respective policy coverages in light

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[25] The trial court and Court of Appeal found *Flintkote* did not support Truck. (3-JAA-1303-04; *Truck*, *21-22.)

of the total policy insuring intent, as determined by the primary policy risks and the primary function of each policy." (433 N.W.2d at p. 86 & fn.2.) No California case has followed that approach.

In sum, the "continue in force" phrase does not exist in a vacuum. It must be read in context and in conjunction with all the provisions of the excess contracts, including disavowal of a duty to defend, and the "ultimate net loss," "other insurance," and other policy language requiring application of horizontal exhaustion of all primary insurance. The phrase does not transform an excess policy into a primary policy when the excess policy's other terms and conditions indicate otherwise.

Nor can Truck transform the excess policies into primary policies by inventing a new term for them—"hybrid." Whatever moniker Truck devises, the excess policies are certainly *not* primary policies, and the Truck policy certainly *is* a primary policy. The excess policies and the Truck policy therefore do not insure the same risk at the same level, and, accordingly, Truck is not entitled to contribution under the basic principles outlined above.

D. The Court of Appeal Previously Adjudicated Horizontal Exhaustion in *ICSOP*, Which Is Law of the Case. Truck's Arguments Are Also Foreclosed Under Judicial Estoppel.

Truck's entire drop down argument also is barred by the law of the case and judicial estoppel doctrines which arise from the prior *ICSOP* decision.

As the Court of Appeal found, Truck's current arguments are subject to the law of the case doctrine, which "precludes a party from obtaining appellate review of the same issue more than once in a single action." (*Truck*, *20, quoting *Katz v. Los Gatos-Saratoga Joint Union High School Dist*. (2004) 117 Cal.App.4th 47, 62.) The doctrine "applies to this court even though the previous appeal was before the Court of Appeal, and it applies even though this court may conclude the previous Court of Appeal opinion was erroneous." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) Truck acknowledges that the *ICSOP* decision is "highly persuasive" but wrongly argues it is "not binding." (TOBM at 28) Truck is bound and cannot reargue this issue under the law of the case. *(Morohoshi*, at p. 491.*)*

Here, *ICSOP* held that horizontal exhaustion of primary insurance was required before the ICSOP excess policy attached. (*ICSOP, supra,* 155 Cal.Rptr.3d at pp. 297-298.) Thus, "all of the primary policies in force during the period of continuous loss will be deemed primary policies to each of the excess policies covering that same period." (*Id*. at p. 297.) Having argued and lost the horizontal exhaustion issue in *ICSOP*, Truck cannot now resurrect the same arguments and take another crack at obtaining a different result, particularly where the other parties acted in reliance on the law of the case regarding the attachment of excess insurance. (*Truck*, *20.)

In addition, judicial estoppel forecloses Truck's twin arguments that there is other non-Truck "primary" insurance (i.e., the Excess Insurance) and that Truck's fair share is less

than $500,000. As this Court explained in *Aguilar v. Lerner* (2004) 32 Cal.4th 974, the judicial estoppel doctrine prevents "a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (*Id.* at p. 986, internal citation omitted.) "The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies." (*Ibid.*)

Judicial estoppel applies here to bar Truck from taking positions inconsistent with what it argued in *ICSOP*. Specifically, Truck took the position in *ICSOP* that once it paid its $500,000 limit for an occurrence, there was no other valid and collectible primary insurance for that occurrence. (*ICSOP, supra,* 155 Cal.Rptr.3d at pp. 293, 302; 3-JRA-958-86 at 974.) [26] In the trial court, Truck *stipulated* that the "only non-Truck *primary* insurance available to respond to [asbestos bodily injury claims]" is exhausted. (2-JAA-744-761, [¶1], emphasis added.) Having

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[26] In summarizing Truck's position, the *ICSOP* court found that Truck "concurs that ICSOP's excess indemnity obligation is conditioned on exhaustion of all 'available' underlying primary insurance," but "urges that the dispositive issue before us is whether a *single* primary occurrence limit per asbestos bodily injury claim constitutes the only 'available' primary insurance, such that when one such limit is exhausted, the excess insurer must indemnify Kaiser for any additional loss." (*ICSOP,* 155 Cal.Rptr.3d at p. 293.) The court explained that "[a]s to that issue, Truck contends that under the plain language of its policies, Kaiser may collect up to the policy limits of only *one policy* for each occurrence. Thus, Truck urges that the trial court correctly found that Kaiser may collect only once for each 'occurrence'—not once per occurrence *per year*, or once per occurrence *per policy*." (*Ibid.*)

admitted that all non-Truck primary coverage available for an asbestos occurrence has exhausted, Truck is judicially estopped from asserting now that Excess Insurers provide additional, unexhausted non-Truck primary insurance, which is exactly what Truck is arguing with its equitable contribution claim.

In addition, Truck argued in *ICSOP* that rather than pay $8.3 million in stacked occurrence limits for its 19 years of primary policies, it owed only one $500,000 per occurrence limit based on an "anti-stacking" provision in its 1974 policy. (*ICSOP*, 155 Cal.Rptr.3d at p. 298) The *ICSOP* court accepted Truck's argument and held that although ICSOP's 1974 excess policy "is excess to all collectible primary insurance, not merely to the primary insurance purchased for the 1974 policy year," Truck's 1974 primary policy limited Truck's liability to Kaiser to $500,000 per asbestos bodily injury claim. (*Id.* at pp. 298, 305-306.) In light of the positions it took in *ICSOP*, Truck cannot now contend it is being unfairly treated and paying too much or that its obligation must be shared by Kaiser's Excess Insurers.

IV. Conclusion

The answer to the issue presented on review is that, absent a specific agreement to the contrary, there can never be equitable contribution between primary and excess insurers; and, in any

event, on the particular facts of this case, Truck is not entitled to equitable contribution from Kaiser's Excess Insurers.

Dated: September 29, 2022

Respectfully submitted,

DUANE MORRIS LLP

By: */s/Paul J. Killion*
Brian A. Kelly
*Paul J. Killion
Kathryn T.K. Schultz

Attorneys for Defendants and Respondents
London Market Insurers

Dated: September 29, 2022

KENDALL BRILL & KELLY LLP

By: */s/Alan Jay Weil*
Alan Jay Weil

Attorneys for Defendant and Respondent
First State Insurance Company

Dated: September 29, 2022

RUGGERI PARKS WEINBERG LLP

By: */s/James P. Ruggeri*
James P. Ruggeri
Edward B. Parks, II

Attorneys for Defendant and Respondent
First State Insurance Company

Dated: September 29, 2022

AIWASIAN & ASSOCIATES

By: */s/Deborah A. Aiwasian*
Deborah A. Aiwasian

Attorneys for Defendant and Respondent
Westchester Fire Insurance Company (With Respect To International Insurance Company Policy No. 5233172273)

AND OTHER INSURERS JOINING EXCESS INSURERS' ANSWER BRIEF ON THE MERITS LISTED ON PAGE 2

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/s/ Paul J. Killion
Paul J. Killion

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Lawrence Burke	larryburke@DWT.COM	e-Serve	09-29-2022 1:16:39 PM
Davis Wright Tremaine LLP		6601c3fb-587f-4406-a249-a7dbfe16c7ff	
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Duane Morris		f68eb399-63c1-4f23-9742-921d6ac2bdc9	
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Brian Wright	bwright@cooklawfirm.la	e-Serve	09-29-2022 1:16:39 PM
The Cook Law Firm, P.C.		a3ccb1f0-5392-4def-91d4-a982efee2bce	
G. David Godwin	david.godwin@squirepb.com	e-Serve	09-29-2022 1:16:39 PM
Squire Patton Boggs (US) LLP		ad21250e-780a-426b-9117-660fbc8b0dec	
Rosemary Clough	rosemary.clough@mclolaw.com	e-Serve	09-29-2022 1:16:39 PM
Aiwasian & Associates		c509d7fe-9834-4739-9506-da7c6557ca11	
Elizabeth Brockman	ebrockman@selmanlaw.com	e-Serve	09-29-2022 1:16:39 PM
Selman Breitman LLP		7ae0a8b5-4c21-4bea-a9d2-60c5ebfb7061	
Philip Cook	pcook@cooklawfirm.la	e-Serve	09-29-2022 1:16:39 PM
The Cook Law Firm, P.C.		9e24b3dc-074c-4765-aa9d-e3ebbf79a9c2	
Victoria Domantay	VCDomantay@duanemorris.com	e-Serve	09-29-2022 1:16:39 PM
Duane Morris		4e6c4e70-9ea1-49de-b0aa-16dc6abc6f25	
Deborah Aiwasian	Deborah.Aiwasian@mclolaw.com	e-Serve	09-29-2022 1:16:39 PM
Aiwasian & Associates		ac0c45fd-5d3a-4b0a-b315-9ae77093e65e	
Robert Olson	rolson@gmsr.com	e-Serve	09-29-2022 1:16:39 PM

Greines, Martin, Stein & Richland LLP		7cec22ec-bb6b-4e5f-ab1d-c579443bc3c7	
Paul Killion	PJKillion@duanemorris.com	e-Serve	09-29-2022 1:16:39 PM
Duane Morris		0daf411f-c811-473b-8092-cf96c5f01e7e	
Marsha Conte	marsha.conte@mclolaw.com	e-Serve	09-29-2022 1:16:39 PM
Aiwasian & Associates		5af5630b-3517-4a2c-9844-1266e89a6abb	
Mark Plevin	mplevin@crowell.com	e-Serve	09-29-2022 1:16:39 PM
Crowell & Moring, LLP		d3dbd724-f2da-43c1-b0f6-1f25c9a4e867	
Edward L. Xanders	exanders@gmsr.com	e-Serve	09-29-2022 1:16:39 PM
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Alan Weil	ajweil@kbkfirm.com	e-Serve	09-29-2022 1:16:39 PM
Kendall, Brill & Kelly LLP		dfa0c6da-0b20-4707-af41-00637f0d3c14	
Scott Hoyt	shoyt@pamhlaw.com	e-Serve	09-29-2022 1:16:39 PM
Pia Anderson Moss Hoyt		8770e904-e82f-4a32-ba1d-6f98d499c566	
James Ruggeri	jruggeri@ruggerilaw.com	e-Serve	09-29-2022 1:16:39 PM
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/s/Paul Killion
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Killion, Paul (124550)
Last Name, First Name (Attorney Number)

Duane Morris
Firm Name

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Kathryn Schultz Duane Morris 221322	KKSchultz@duanemorris.com	e-Serve	9/29/2022 1:20:31 PM
Brian Kelly Duane Morris 124738	bakelly@duanemorris.com	e-Serve	9/29/2022 1:20:31 PM
Wendy E. Schultz Sinnott, Puebla, Campagne & Curet	wschultz@spcclaw.com	e-Serve	9/29/2022 1:20:31 PM
Brian Wright The Cook Law Firm, P.C. 166753	bwright@cooklawfirm.la	e-Serve	9/29/2022 1:20:31 PM
G. David Godwin Squire Patton Boggs (US) LLP 148272	david.godwin@squirepb.com	e-Serve	9/29/2022 1:20:31 PM
Rosemary Clough Aiwasian & Associates	rosemary.clough@mclolaw.com	e-Serve	9/29/2022 1:20:31 PM
Elizabeth Brockman Selman Breitman LLP 155901	ebrockman@selmanlaw.com	e-Serve	9/29/2022 1:20:31 PM
Philip Cook The Cook Law Firm, P.C. 149067	pcook@cooklawfirm.la	e-Serve	9/29/2022 1:20:31 PM

Victoria Domantay Duane Morris	VCDomantay@duanemorris.com	e-Serve	9/29/2022 1:20:31 PM
Deborah Aiwasian Aiwasian & Associates 125490	Deborah.Aiwasian@mclolaw.com	e-Serve	9/29/2022 1:20:31 PM
Robert Olson Greines, Martin, Stein & Richland LLP 109374	rolson@gmsr.com	e-Serve	9/29/2022 1:20:31 PM
Paul Killion Duane Morris 124550	PJKillion@duanemorris.com	e-Serve	9/29/2022 1:20:31 PM
Marsha Conte Aiwasian & Associates	marsha.conte@mclolaw.com	e-Serve	9/29/2022 1:20:31 PM
Mark Plevin Crowell & Moring, LLP 146278	mplevin@crowell.com	e-Serve	9/29/2022 1:20:31 PM
Edward L. Xanders Greines, Martin, Stein & Richland, LLP 145779	exanders@gmsr.com	e-Serve	9/29/2022 1:20:31 PM
Alan Weil Kendall, Brill & Kelly LLP	ajweil@kbkfirm.com	e-Serve	9/29/2022 1:20:31 PM
Scott Hoyt Pia Anderson Moss Hoyt 92723	shoyt@pamhlaw.com	e-Serve	9/29/2022 1:20:31 PM
James Ruggeri	jruggeri@ruggerilaw.com	e-Serve	9/29/2022 1:20:31 PM
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/s/Paul Killion

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Killion, Paul (124550)

Last Name, First Name (PNum)

Duane Morris

Law Firm