NEWPORT ASSOCIATES DEVELOPMENT COMPANY AND NEWPORT ASSOCIATES PHASE I DEVELOPERS LIMITED PARTNERSHIP,

Plaintiffs-Respondents,

V.

CHUBB CUSTOM INSURANCE COMPANY, MT. HAWLEY INSURANCE COMPANY, INDIAN HARBOR INSURANCE COMPANY,

Defendants-Respondents,

AIG SPECIALTY INSURANCE COMPANY F/K/A CHARTIS SPECIALTY INSURANCE COMPANY F/K/A AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendant-Appellant,

ALLIED WORLD ASSURANCE COMPANY (U.S.) INC., ALLIED WORLD NATIONAL ASSURANCE COMPANY, ALTERRA AMERICA INSURANCE COMPANY, ASPEN AMERICAN INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, NATIONAL SURETY CORPORATION, MARKEL AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NAVIGATORS INSURANCE COMPANY, NORTH

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.: A-000295-24 T2

Civil Action

On Appeal From:
SUPERIOR COURT OF NEW JERSEY LAW DIVISION:
HUDSON COUNTY
DOCKET NO.: HUD-L-003482-18
Sat Below:
Hon. Jeffrey R. Jablonski, A.J.S.C.

AMERICAN SPECIALTY INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, PHILADELPHIA INDEMNITY INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC., ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, AND LIBERTY INTERNATIONAL UNDERWRITERS INC.,

Defendants-Respondents.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT AIG SPECIALTY INSURANCE COMPANY

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Dated: December 18, 2024

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PRELIMINARY STATEMENT

This appeal is from the order of the trial court, dated September 13, 2024 (the "Order"), denying Defendant AIG Specialty Insurance Company's ("ASIC") motion to compel arbitration of Plaintiffs' Newport Associates Development Company and Newport Associates Phase I Developers Limited's (collectively "Newport") claim for indemnity ("Newport's Indemnity Claim") arising out of the underlying litigation with Consolidated Edison Company of New York, Inc. ("Con Ed") and Public Service Electric and Gas Company ("PSE&G") (the "Utilities" and the "Utilities Litigation"), and stay the instant litigation (the "DJ Action") pending conclusion of the arbitration. Newport's Indemnity Claim is subject to arbitration pursuant to the arbitration clauses in the only policies remaining at issue in the DJ Action – the Pollution Liability Policy numbered CRE 1576557 (the "ASIC Pollution Policy"), and the Umbrella Liability Policy numbered 8123278 (the "ASIC Umbrella Policy").

The trial court held that the arbitration provision in the ASIC Pollution Policy does not allow for ASIC to demand arbitration without the consent of Newport. T1 76:15-18. The trial court also held that the arbitration clause in the ASIC Umbrella Policy "does not apply here." T1 76:15-18; 76:24-25. The trial court further ruled that ASIC had waived its right to arbitrate Newport's

Indemnity Claim under the factors set forth in *Cole v. Jersey City Medical Center*, 215 N.J. 265 (2013). Da250, T1 68:13-16.

Under the Federal Arbitration Act ("FAA") – which applies to this dispute – as well as New Jersey law, the arbitration clauses at issue provide *either* party with the broad right to invoke arbitration. Once ASIC demanded to arbitrate Newport's Indemnity Claim, Newport was required to arbitrate as its consent was provided when it accepted the insurance policies. Furthermore, the ASIC Umbrella Policy is at issue in the DJ Action and its arbitration clause squarely applies.

Newport has not established by clear and convincing evidence, as it must, that ASIC intentionally relinquished its right to arbitrate Newport's Indemnity Claim. The lower court relied heavily on the passage of time from the filing of the DJ Action to the Motion to Compel Arbitration. But, time alone is not a fair barometer as this case was stayed for many years at Newport's insistence. The key issue is when could ASIC actually demand to arbitrate and achieve a binding result.

This case is analogous to *Chassen v. Fidelity National Financial, Inc.*, 836 F.3d 291 (3d Cir. 2016) where a multi-year delay in demanding arbitration was not deemed a waiver because compelling arbitration at the outset would have been futile. Likewise, in this case, any arbitration demand by ASIC prior

to 2024 would have been futile and accomplished nothing. The only reason why the DJ Action includes Newport's Indemnity Claim was to avoid running afoul of New Jersey's entire controversy doctrine which requires parties to present all claims and defenses related to the underlying controversy in a single proceeding. Until Newport's settlement with the Utilities in late 2023, Newport could not, and did not, pursue its Indemnity Claim against ASIC because it was not ripe.

Arbitration also would have been futile prior to 2024 because any arbitration between Newport and ASIC would have been non-binding on the other insurers who possessed non-arbitrable contribution claims against ASIC and therefore had the right to relitigate the very issues subject to arbitration. Thus, even if Newport's Indemnity Claim were ripe prior to 2024, which it was not, it would have suffered from the same infirmity as the defense cost dispute until Newport settled with the other insurers who had a direct right of contribution.

Thus, it was only after the other insurers settled, the Utilities Litigation was resolved, and the stay was lifted in June of 2024 that Newport's Indemnity Claim was ripe and amenable to binding resolution via arbitration. ASIC promptly moved to compel arbitration at that time. Under these unique facts, the *Cole* factors demonstrate that ASIC did not waive the right to arbitrate.

PROCEDURAL HISTORY

Upon the discovery of a leak of dielectric fluid from the Utilities' cable in the Hudson River, PSE&G brought the Utilities Litigation in November 2016 in the United States District Court for the District of New Jersey against Newport and Con Ed. Da59, Da61, ¶¶ 49, 61-62. Thereafter, Con Ed asserted claims against Newport in the PSE&G Action seeking similar relief in connection with its damages. Newport then filed a third-party suit against Con Ed and a counterclaim against PSE&G. Da61, ¶ 62. The Utilities Litigation involved various property damage claims between the parties arising out of two collapses of the Sixth Street Pier, which is owned by Newport. Da51-52, ¶¶ 2-3. The parties asserted claims related to alleged damage to the Sixth Street Pier, alleged damage to the underground cables owned and operated by the Utilities, alleged damage caused by the debris in the riverbed, and cleanup costs allegedly owed due to the release of dialectic fluid. Da52-53, ¶ 6. Until the Utilities Litigation was resolved, the value (if any) of Newport's Indemnity Claim was unknown as it was subject to various claims and crossclaims between the parties to the Utilities Litigation.

Newport commenced this DJ Action on September 4, 2018 in connection with the underlying Utilities Litigation. Da1-49. The defendants included 27

primary, excess,[1] and umbrella insurers.[2] Newport pled that each primary insurer had a duty to defend and was obligated to pay in full for the expenditures made by Newport to defend the PSE&G Action and respond to certain government orders whereby Newport incurred alleged costs associated with the cleanup. Da94, ¶¶ 237-243. While Newport also sought a declaration and breach of contract damages for the duty to indemnify, i.e. Newport's Indemnity Claim, it did not, at the outset of the DJ Action, actively pursue the indemnity counts in the Second Amended Complaint since those were not ripe and were stayed throughout much of the DJ Action.

As the DJ Action progressed, Newport sought to delay the litigation of Newport's Indemnity Claim and made it clear that it filed suit to obtain a

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[1] Newport has not pursued its claims against the excess insurers, which are not exposed by the totality of Newport's alleged damages, because of where the excess policies attach.

[2] Chubb Custom Insurance Company; Mt. Hawley Insurance Company; Indian Harbor Insurance Company; AIG Specialty Insurance Company; Allied World Assurance Company (U.S.) Inc. ("AWAC"); Allied World National Assurance Company; Alterra America Insurance Company; Aspen American Insurance Company; Aspen Specialty Insurance Company; Endurance American Insurance Company; Endurance American Specialty Insurance Company; Illinois Union Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Navigator's Insurance Company; North American Specialty Insurance Company; Steadfast Insurance Company; Great American Assurance Company; Ohio Casualty Insurance Company; Philadelphia Indemnity Company; St. Paul Fire and Marine Insurance Company; Starr Indemnity & Liability Company; United States Fire Insurance Company; Westchester Fire Insurance Company; XL Insurance American Inc.; Zurich American Insurance Company; American Guarantee & Liability Insurance Company; and Liberty International Underwriters Inc. Da50-51.

defense of the Utilities Litigation and only included Newport's Indemnity Claim to preserve its rights under New Jersey's entire controversy doctrine which required it to bring all claims in a single proceeding.[3] In Newport's own words, when it sought to stay the DJ Action, it argued:

> Newport brought its insurance claims for indemnification at the same time it brought its claims stemming from the duty to defend in order to satisfy the requirements of New Jersey's entire controversy doctrine. The Underlying Action, however, is still in the midst of fact discovery. As such, and although the entire controversy doctrine required that such claims be included in this lawsuit, there can be no determination of the insurers' duty to indemnify Newport until the parties' liabilities and damages have been determined in the Underlying Action. It is for this reason Newport respectfully requests that its claim for indemnity be severed from this action and stayed until such time as those determinations have been made in the Underlying Action.[4]

Da348-49. Accordingly, the DJ Action was focused on Counts I and III of the Second Amended Complaint, which apply to the duty to defend. Counts II and IV of the Second Amended Complaint, which apply to the duty to indemnify Newport, were stayed for the majority of the case and were never actively pursued until mid-2024 when Newport's Indemnity Claim became ripe.

Since the inception of this case, the primary insurers and Newport attempted to resolve various defense-related issues that applied to all parties.

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[3] *See, e.g. Brennan v. Orban*, 145 N.J. 282, 289 (1996).

[4] ASIC includes Newport's June 5, 2019 Brief in Support of its Motion to Sever and Stay to demonstrate the factual point that Newport argued that the indemnity claims now being litigated should be and were stayed. ASIC is not seeking review of that motion.

It was understood that the case could not proceed to the indemnity phase until the defense issues and the underlying Utilities Action were resolved.

Throughout the DJ Action, the trial court granted multiple stays at the insistence of Newport, starting in 2019 and which collectively lasted 38 months (*i.e.,* more than 3 years).[5] There were four separate mediations before Judge John E. Keefe, Sr., which have led to resolutions of the defense issues.[6] During the first two mediations, the parties recognized that there was a need for a ruling on allocation of defense costs among the four primary insurers (including ASIC) before a potential mediated resolution could be reached. Multiple motions regarding the allocation of defense costs were presented to the court in 2021. In March 2021, the court granted Newport's allocation motion and ruled that allocation of defense costs was governed by *Owens-*

[5] Newport requested a stay in late December 2018, which the trial court granted on January 25, 2019, and that stay was in effect until March 1, 2019 (1 month) Da287-88; Newport sought to bifurcate defense and indemnity proceedings and to stay the indemnity claims in June 2019, and the court granted this stay on August 9, 2019 and stayed the action for six months until February 10, 2020 (6 months) Da362-71; in April 2020, the court reinstated its stay and extended it to July 8, 2020 (4 months); on March 21, 2022, the court entered a stay of Newport's indemnity claims, which were stayed for all parties until the stay was lifted on June 24, 2024 (27 months) (although the indemnity claim was stayed on March 21, 2022, the remainder of the DJ Action was stayed on May 9, 2022, and this comprehensive stay remained in place until June 24, 2024). Da334-35; Da338-40; and Da391-93.

[6] Certain of the primary insurers have reserved the right to appeal the allocation percentages set forth in Judge Bariso's allocation decision.

Illinois, assigning various shares to each of the primary insurers and 9.78% to ASIC's claims made Pollution Policy. Da332. Indian Harbor and Mt. Hawley moved for reconsideration, which motion was denied by the trial court on April 30, 2021. Da394-95. Thereafter, Indian Harbor and Mt. Hawley sought interlocutory appeals to this Court, which were denied on July 7, 2021. Da384-86. The parties next entered into a Joint Defense Agreement consistent with the lower court's allocation ruling and proceeded with an arbitration/binding mediation before Judge Keefe in late 2022 to determine reasonable hourly rates applicable to services performed by counsel for Newport. Once Judge Keefe ruled on the reasonable hourly rates, there still needed to be a determination as to what legal services primarily performed by Newport's primary counsel, Paul Weiss Rifkind Wharton & Garrison, were reasonable and necessary. After detailed submissions to Judge Keefe in 2022 and 2023, the parties reached a settlement of the defense cost claim in late 2023.

Following a mediation between Newport and the Utilities in June 2023, Newport agreed to resolve the underlying Utilities Litigation, which settlement was consummated at the end of 2023. Once Newport had agreed to settle with the Utilities, it proceeded to settle all indemnity issues with its primary commercial general liability insurers and the umbrella insurer (AWAC) for the

period 2009 through 2016, i.e. the period after the expiration of the ASIC Umbrella Policy.

Upon being informed by Newport that it had settled all claims with its other insurers, ASIC informed Newport's counsel that it intended to arbitrate the coverage issues regarding the Indemnity Claim. Da388, ¶ 5. Thereafter, during the status conference on January 23, 2024, ASIC informed the court that it sought to refer the remaining dispute to arbitration. *Id*. at ¶ 6. Newport's prior counsel responded that Newport would oppose arbitration on the grounds that ASIC had waived its rights. *Id*. Newport's counsel provided no other basis for opposing arbitration. Now that this is a two-party dispute, the dispute should be arbitrated.

At the January 2024 conference the court directed that the arbitration issue be postponed until all pleadings were finalized. Once the court granted Indian Harbor's motion to amend its answer to assert a cross-claim against ASIC seeking recovery of its defense cost settlement with Newport and ASIC responded to the cross-claim, the court lifted its stay in June 2024. On August 1, 2024, ASIC moved to compel arbitration. Da387-90. Immediately after oral argument on September 13, 2024, the court read into the record its denial of ASIC's motion (the "September 13th Order"). T1 63:22 – 79:18.

STATEMENT OF FACTS

In October 2016, a dielectric fluid discharge was discovered in the Hudson River in the vicinity of the Newport Marina and Sixth Street Pier — which is owned by Newport. Da51-52 at ¶ 2. One month later, the Utilities filed the Utilities Litigation against Newport, alleging that two collapses of the Sixth Street Pier in 2008 and 2009 caused debris to accumulate in the Utilities' easement adjacent to the Pier, thereby causing the Utilities' cable to discharge dielectric fluid. Da59, Da62 at ¶¶ 46-48; 64-65. Two years later, Newport sued ASIC and several other insurers for both defense and indemnity costs. Da1-49.

Newport's two ASIC insurance policies from that time period – the ASIC Pollution Policy and the ASIC Umbrella Policy – both provide for arbitration. The ASIC Pollution Policy contains an arbitration clause (Section F), which states that:

> It is hereby understood and agreed that all disputes or differences that may arise under or in connection with this Policy, whether arising before or after termination of this Policy, including any determination of the amount of Loss, may be submitted to the American Arbitration Association under and in accordance with its then prevailing commercial arbitration rules.
>
> ***
>
> Any party may commence such arbitration proceeding and the arbitration shall be conducted in the Insured's state of domicile.

Da376-77 . This is a broad arbitration clause which applies to "all disputes or differences that may arise under or in connection with" the ASIC Pollution Policy. Further, the ASIC Pollution Policy contains a Service of Suit clause (Section U), which states that Section U is "[s]ubject to Section IV. CONDITIONS, Paragraph F, above"—the arbitration clause. Da383.

The ASIC Umbrella Policy contains an arbitration clause in Endorsement 14, which provides that any disagreement regarding the interpretation of the pollution exclusion contained in Exclusion Q shall be resolved by arbitration:

> In the event of a disagreement as to the interpretation of Exclusion Q. of this policy or a disagreement as to the interpretation any endorsements attached to this policy amending Exclusion Q., the disagreement shall be submitted to binding arbitration before a panel of three (3) arbitrators.

Da383. Here, the crux of Newport's claim under the ASIC Umbrella Policy is whether or not some or all of Newport's Indemnity Claim is excluded by the pollution exclusion.

ISSUES ON APPEAL

1. Whether the trial court erred in holding that a) the arbitration provision in the ASIC Pollution Policy does not require that Newport arbitrate this dispute; and b) the arbitration clause in the ASIC Umbrella Policy does not mandate arbitration of this dispute.

2. Whether the trial court erred in holding that Newport established by clear and convincing evidence that ASIC intentionally waived its right to arbitration based upon its conduct in the case.

ARGUMENT

I. ASIC's Appeal is Subject to De Novo Review (Issue Not Raised Below)

"The existence of a valid and enforceable arbitration agreement poses a question of law, and as such, [this Court's] review of an order denying a motion to compel arbitration is de novo." *Barr v. Bishop Rosen & Co., Inc.*, 442 N.J. Super. 599, 605 (App. Div. 2015). *See also Skuse v. Pfizer, Inc.*, 244 N.J. 30, 46 (2020) ("Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial or appellate courts unless we find it persuasive.") (citing to *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 316 (2019) and *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 445-46 (2014). Further, the issue of whether a party waived its arbitration right is also subject to de novo review. *Cole v. Jersey City Med. Ctr.* , 215 N.J. 265, 275 (2013). Here, the trial court's denial of the Motion to Compel Arbitration on the grounds that

ASIC waived its right to arbitrate and that the arbitration clauses do not apply here should not be given any special deference.

The FAA governs the enforcement of the arbitration clauses in the ASIC policies, and state courts are required to "honor and enforce agreements to arbitrate." *Vaden v. Discover Bank*, 556 U.S. 49, 71 (2009). The FAA applies to any contract "evidencing a transaction involving commerce" that is subject to a written agreement to arbitrate. *See* 9 U.S.C. § 2. The United States Supreme Court has held that the phrase "involving commerce" in the FAA is the "functional equivalent of the more familiar term 'affecting commerce,'" which signals the broadest permissible exercise of Congress' Commerce Clause power. *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix Cos.*, 513 U.S. 265, 273–74 (1995). Here, ASIC is an Illinois corporation headquartered in New York. Newport Associates Development Company is a New Jersey general partnership and Newport Associates Phase I Developers Limited Partnership is a New Jersey limited partnership. Da53-54, ¶¶ 9, 10 and 14. Thus, the issues in this coverage action involve commerce. *Alfano v. BDO Seidman, LLP*, 393 N.J. Super. 560, 574 (App. Div. 2007) ("A nexus to interstate commerce is found when citizens of different states engage in the performance of contractual obligations in one of those states because such a contract necessitates interstate travel of both

personnel and payments.") Thus, it is indisputable that the FAA governs this matter and Newport did not challenge this point in its opposition papers to ASIC's motion to compel arbitration.

Both the FAA and New Jersey policy favor resolution by arbitration. *See Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 440 (2014) ("The Federal Arbitration Act (FAA) 9 U.S.C.A. §§ 1-16 and the nearly identical New Jersey Arbitration Act N.J.S.A. 2A:23-B-1 to -32, enunciate federal and state policies favoring arbitration"). *See also Badiali v. New Jersey Mfrs. Ins. Grp.*, 220 N.J. 544, 556 (2015) ("[T]he public policy of this State favors arbitration as a means of settling disputes that otherwise would be litigated in a court."); *Cole v. Jersey City Med. CT1* , 215 N.J. 265, 276 (2013) ("[A]rbitration . . . is a favored means of dispute resolution.") "Mindful of this public policy," New Jersey courts "resolve possible ambiguity in the contract language in favor of requiring arbitration." *Comando v. Nugiel*, 2014 WL 2117877, at *4 (N.J. Super. Ct. App. Div. May 22, 2014) citing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford, Jr. Univ.*, 489 U.S. 468, 475–76 (1989). Because arbitration is a favored means of dispute resolution, under New Jersey law waiver of the right to arbitrate must be shown by clear and convincing evidence. *Cole*, 215 N.J. at 276. Under this standard, Newport should be ordered to arbitrate Newport's Indemnity Claim.

II. This Dispute Involves Two Mandatory Arbitration Provisions (T1 76:2 - 77:14)

As described in the Statement of Facts, both ASIC policies contain arbitration clauses that require Newport to submit to arbitration.

A. The ASIC Pollution Policy's Arbitration Clause Applies to Newport's Indemnity Claim (T1 76:2-77:3)

The lower court incorrectly ruled that the Pollution Policy's arbitration clause does not compel Newport to arbitrate because the language used in the clause is not mandatory. T1 76:2 - 77:3. To the contrary, the ASIC Pollution Policy gives both parties the right to initiate arbitration and, if either party exercises its right to initiate arbitration, such arbitration is mandatory. This is established by the unambiguous language in the arbitration clause, and is the only logical interpretation that gives meaning to all of the words in the contract. In finding that the arbitration clause is permissive – not mandatory – the lower court improperly isolated the word "may"[7] and did not address the language which renders the arbitration clause mandatory should either party to the contract invoke it:

> **Any party may commence such arbitration proceeding** and the arbitration **shall** be conducted in the Insured's state of domicile.

[7] T1 76:2-11.

Da377 (emphasis added). This language makes it clear that once invoked by "any party," arbitration "shall be conducted" – it thus requires the other party to arbitrate regardless of whether or not they consent.

Newport's argument would render the arbitration clause superfluous as parties are always entitled to arbitrate their disputes on consent – and Newport's position violates the bedrock principle that all language in a contract should be given meaning. *See J.L. Davis & Assocs. v. Heidler*, 263 N.J. Super. 264, 271 (App. Div. 1993) (internal citations omitted) ("Effect, if possible, will be given to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."). Notably, during oral argument, Newport's counsel conceded this point: "[ASIC] should have moved immediately to compel arbitration. We believe they would have been successful." T1 31:14-16. ASIC would have been successful because the arbitration clause required Newport to arbitrate once demanded by ASIC.

The case law that addresses this contract language also holds that it creates a mandatory obligation to arbitrate. In considering similar language, this Court has ruled:

> We distinguished the facts presented in *Medford Township* by expounding on our dicta in *Riverside* and noting the insurance contract there "did not provide '[e]ither party may make a written demand for arbitration.'" *Id.* at 9 (alteration in original) (quoting *Riverside,* 404 N.J.

> at 238). We recognized that "when an arbitration provision specifically permits either party to select arbitration, once invoked, the other party may be bound to arbitrate the dispute."

Del. River Partners LLC v. R.R. ConsT1 , 2022 N.J. Super. Unpub. LEXIS 1134, at *9-10 (App. Div. June 24, 2022)(*internal citations omitted*). The language in the ASIC Pollution Policy falls squarely within this construct which requires that Newport is "bound to arbitrate the dispute." As explained by the United States District Court for the Eastern District of Pennsylvania:

> Courts have repeatedly rejected PPT's argument that the use of the word "may" automatically renders an arbitration clause permissive. *Brown v. City of Phila.,* 2010 U.S. Dist. LEXIS 119163, 2010 WL 4484630 (E.D. Pa. Nov. 9, 2010). Rather, **courts have interpreted arbitration clauses using the word "may" to be mandatory on the grounds that such language merely manifests the parties' intent that arbitration be obligatory if either party so chooses**. *See e.g., Shubert v. Wellspring Media, Inc (In re Winstar Communs., Inc.),* 335 B.R. 556, 563 (Bkrtcy. D. Del. 2005) (citing *Chiarella v. Vetta Sports, Inc*., 1994 U.S. Dist. LEXIS 14395, 1994 WL 557114, at *3 (S.D.N.Y.1994) (". . . **the proper interpretation is that the arbitration provision did not have to be invoked, but once raised by one party, it became mandatory with respect to the other party. A plain reading of the clause supports such an interpretation. If the clause were wholly optional it would serve no purpose**."))

PPT Research, Inc. v. Solvay USA, Inc., 2021 U.S.Dist. LEXIS 127031, at *12 (E.D.Pa. July 7, 2021) (emphasis added). This case law follows the plain meaning of the language – if either party is granted a contractual right and "may" initiate arbitration, once that right is exercised, arbitration is mandatory. Otherwise, the arbitration clause is rendered meaningless. The lower court

wholly ignored this Court's holding in *Delaware River* and rejected the reasoning in *PPT Research* by stating that the "the Third Circuit's advice or recognition is only persuasive before me." T1 76:5-6. Notably, despite the lower court's rejection of case law that squarely addressed the precise issue concerning the context of the word "may," Newport cited to no contrary authority that remotely supported its position.

Rather, Newport merely cited to the Service of Suit clause and claimed that it somehow overrides the arbitration clause. Newport's argument distorted the contract language and effectively ignored the bolded text below:

> U. Service of Suit – **Subject to VI. CONDITIONS, Paragraph F, above**, it is agreed that in the event of failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States…

Da378, Sec. U. (emphasis added). While Newport's Opposition in the lower court quoted the clause, it did not substantively address the first part of the sentence, which states that the Service of Suit clause is "subject to VI. CONDITIONS, Paragraph F" – which is the arbitration clause. This language defeats Newport's argument that the arbitration clause is superseded by the Service of Suit clause as the contract makes it clear that the opposite is true. During oral argument Newport sought to remedy the deficiencies in its briefing by seeking to harmonize the Service of Suit clause and the Arbitration clause

by inserting the word "promptly" into the Service of Suit clause – which is merely another way of asserting its waiver argument which, as discussed below, fails under the facts of this case. T1 24:11-19. Accordingly, the ASIC Pollution Policy requires Newport to arbitrate the Indemnity Claim.

B. The Arbitration Clause in the ASIC Umbrella Policy Requires Arbitration of Newport's Indemnity Claim (T1 76:24-77:2)

The arbitration clause in the ASIC Umbrella Policy states that all disputes concerning Exclusion Q – the pollution exclusion – shall be submitted to binding arbitration. Da383. The pollution exclusion in the ASIC Umbrella Policy is central to Newport's claim here because the dispute involves, among other things, the allocation of pollution and non-pollution damages. Specifically, the Second Amended Complaint seeks damages stemming from the collapses of the Sixth Street Pier and the alleged release of dielectric fluid into the Hudson River. Da59-62, ¶¶ 46-67; Da93, ¶ 233. While Newport alleges certain environmental damages, other alleged damages are non-environmental, such as the removal of concrete debris and repairing the Sixth Street Pier. Da61, ¶ 59. Indeed, this mix of alleged damages, and the issue of what damages are subject to the pollution exclusion, resulted in a settlement between Newport and the primary CGL insurers and one umbrella insurer, all of which had pollution exclusions in their respective policies. Thus, the scope

of the pollution exclusion in the ASIC Umbrella Policy is central to determining ASIC's potential coverage obligations. Accordingly, the lower court's ruling, without explanation, that the ASIC Umbrella Policy's arbitration clause "does not apply here" is patently incorrect as the pollution exclusion will determine the extent of potential coverage for Newport's claims under the ASIC Umbrella Policy. T1 76:24-25. Indeed, the lower court went on to say "[a]nd admittedly if there were an issue with regard to Exclusion Q, arbitration would have been required…" T1 76:25 - 77:2. The best proof of this is that Newport continues to assert a claim against ASIC under the Umbrella Policy and has refused to withdraw that claim. The FAA requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Here, whether there potentially is a valid claim under the ASIC Umbrella Policy is a function of how the pollution exclusion applies and whether the alleged non-pollution damages, if any, are sufficient to trigger the policy. This issue should be determined by an arbitration panel.

III. ASIC Did Not Waive Its Right to Arbitrate Newport's Claims (T1 77:4-8)

In addition to incorrectly holding that arbitration is not required under the ASIC Policies, the trial court erroneously ruled that ASIC waived its right

to arbitrate. (T1 77:4-8). The New Jersey Supreme Court, in *Cole v. Jersey Medical Center*, 215 N.J. 265, 280-281 (2013), set forth seven factors to be analyzed in evaluating whether a party waived its right to arbitrate:

> [i]n deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive ...

Id. While *Cole* provides this list to assist in the waiver analysis, it is non-exhaustive and the waiver analysis must be based upon the totality of the circumstances – which must establish that there is clear and convincing evidence that the party voluntarily and intentionally relinquished the right to arbitration. *Cole*, 215 N.J. at 276-277 and 280-281. In this case, the facts do not establish by clear and convincing evidence that ASIC intentionally relinquished its right to arbitrate the Indemnity Claim. The lower court recognized *Cole*'s holding that no single factor is dispositive and the matter must be considered in its totality. T1 68:2-5. Yet, in reaching its decision, the

lower court failed to conduct a full analysis of the facts and ASIC's unique circumstances, including ASIC's ripeness and futility arguments.

A. The Trial Court Failed to Consider the Totality of the Circumstances When it Determined ASIC Waived its Right to Arbitration (T1 67:12-76:1)

For six of the seven *Cole* factors, the trial court incorrectly applied the facts to the law.

i. ASIC's Motion to Compel Arbitration Was Filed Timely After the Stay was Lifted and the Indemnity Claim was Ripe and Amenable to Binding Resolution Via Arbitration (T1 68:17-20)

Cole requires the consideration of "the delay in making the arbitration request." *Cole* 215 N.J at 280. Here, the lower court solely looked at the time that had elapsed between when suit was filed and when the demand for arbitration was made and disregarded ASIC's arguments – including its arguments on ripeness and futility – regarding why the elapse of time requires context. T1 68:17-20 ("As to the delay, the first factor in making this request, it was only on January 23rd, 2024, which was five years and four months after this litigation began that ASIC ultimately requested this relief."). But, most importantly, the trial court never considered the circumstances of this case that made arbitration futile until the recent developments in this multi-party insurance coverage case.

One unique factor is that for more than three years this case has largely been stayed or in binding mediation/arbitration – at the request and/or consent of Newport. Thus, the passage of time alone cannot be analyzed in a vacuum. Indeed, the current Case Management Order, which is presently stayed, demonstrates that the Indemnity Claim is in its infancy – the schedule addresses written discovery, document production, party and non-party depositions, expert discovery, motion practice and trial. Da391-93.

Newport broke its claims out into four counts in the Second Amended Complaint – two counts related to the duty to defend (Counts I and III) and two counts related to Newport's Indemnity Claim (Counts II and IV). This is consistent with New Jersey law, which treats the duty to defend and the duty to indemnify separately, with the duty to defend being broader than the duty to indemnify and triggered by the allegations in the underlying complaint as opposed to the insured's ultimate liability. *Hartford Ins. Group v. Marson ConsT1 Corp.,* 186 N.J. Super. 253, 257 (App. Div. 1982). For this reason, Newport actively litigated the duty to defend and sought to stay the litigation of Newport's Indemnity Claim. Notably, there is good reason that Newport's Indemnity Claim was largely stayed until June of 2024 – it was not ripe until the Utilities Settlement at the end of 2023, and the stay of the DJ Action was lifted by the lower court after certain procedural pleading issues were

addressed during the first part of the year. Indeed, it would have been impossible to arbitrate Newport's Indemnity Claim before the Utilities Litigation was resolved because Newport had made a demand for reimbursement and its indemnity costs were wholly speculative until the Utilities Litigation was settled. Thus, while the entire controversy doctrine required Newport to raise its Indemnity Claim in this action, it was not ripe until June of 2024 when the claim was liquidated and the stay was lifted. Accordingly, the passage of time, when looked at in context as *Cole* requires, is approximately five weeks – June 24, 2024 through August 1, 2024 – not from 2018 through 2024. As such, there was no delay that could warrant a finding of waiver.

In addition, arbitration could not have resulted in a binding resolution of the claims between ASIC and Newport until Newport settled with the other insurers because any arbitration result could have been undone by the contribution claims held by Newport's other insurers. This action involves a complex insurance coverage dispute involving a progressive loss over the course of nine years that implicates allocation of defense and indemnity under *Owens-Illinois Inc. v. United Insurance Co.,* 138 N.J. 437 (1994). Under *Owens-Illinois*, each insurer has a potential right of contribution from the other insurers, and this right is held by the insurers – not Newport. *See Potomac Ins.*

Co. of Illinois ex. Rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 215 N.J. 409, 425 (2013).[8] Thus, Newport's position that ASIC could have moved to compel arbitration at the outset and sought a stay of the litigation while Newport and ASIC arbitrated the claim is meritless because any resolution of defense or indemnity in arbitration would have been illusory. Any issue resolved in arbitration would have then been subject to litigation with the other insurers who had independent rights of contribution. Any arbitral finding would have merely been a non-binding outcome subject to re-litigation with the other insurers, which would have been a waste of both Newport's and ASIC's resources. For this reason, ASIC resolved the defense cost claim with Newport and the other insurers via litigation and binding mediation.

Thereafter, Newport settled with the other insurers who had potential indemnity obligations in late 2023/early 2024 – at which point it became possible for the first time for Newport and ASIC to reach a binding resolution of Newport's Indemnity Claim via arbitration. Because arbitration between Newport and ASIC would have been futile until the settlement of the Utilities

[8] The facts of *Potomac* show precisely why arbitration at the outset of this litigation would have been futile and simply multiplied proceedings as the plaintiff and one insurer arbitrated and resolved the claim, and the insurer was then subjected to a separate suit for contribution of defense payments despite its settlement with the insured. *Potomac*, 215 N.J. at 415-516.

Litigation and the other insurers' contribution claims were resolved, failing to initiate what would have been, at the time, a wasteful and meaningless arbitration is not grounds for waiver.

The futility issue was addressed by the United States Court of Appeals for the Third Circuit in the case of *Chassen v. Fidelity National Financial, Inc.*, 836 F.3d 291 (3d Cir. 2016) where the defendant engaged in broad discovery and substantive motion practice for over two-and-a-half years before moving to compel arbitration based upon a change in the law. The Third Circuit held that "futility can excuse the delayed invocation of the defense of arbitration. *Id.* at 297. As the court explained, there are many situations, such as ripeness and administrative exhaustion where a waiver analysis is inapplicable because it would not make sense to require a party to undertake a futile gesture to avoid waiver. *Id.* While *Chassen* involved a change in the law concerning the arbitrability of certain claims, the instant case is analogous because arbitration here would have been futile prior to Newport's resolution of the expense claims and Indemnity Claim with the other primary insurers

which extinguished their rights of contribution.[9] Thus, under the futility doctrine, there can be no intentional relinquishment of the right to arbitrate – which is a fundamental requirement for waiver – because ASIC was unable to achieve finality through arbitration until Newport settled with the other insurers. *Cole*, 215 N.J. at 276-277.

The totality of the circumstances must be considered, and when they are, it is clear that ASIC's invocation of arbitration was timely. While the lower court accepted Newport's argument that this case is akin to the 21-month delay in *Cole*[10], T1 69:14 - 70:3, this analogy falls apart with the slightest of scrutiny

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[9] Newport relied below upon the case of *EPIX Holdings Corp. v. Marsh & McClennan Cos., Inc.*, 410 N.J. Super 453 (2009) and argued that *EPIX* establishes that the non-arbitrable claims against other insurers was no impediment to ASIC seeking arbitration earlier in this proceeding. *See,* Newport Argument at T1 31:2-11. *EPIX* did not involve an *Owens-Illinois* allocation or contribution claims. Unlike the present case, where earlier arbitration would have simply resulted in litigation over the exact same topics in the contribution context, there is no indication that the claims between ASIC and EPIX could not have been conclusively resolved in arbitration even though EPIX was still required to litigate its separate claims against other insurers. Similarly, the multi-party nature of *Cole* does not support waiver in this coverage dispute. In *Cole*, the arbitration with the employer would have been binding and resolved that issue regardless of the liability of the hospital. Thus, while there could have been disparate results of the arbitrable and non-arbitrable claims, both would have been final and binding unlike the present case where the other insurers' contribution claims would effectively undo the outcome of arbitration.

[10] The lower court also referenced a "policy argument" that weighed against allowing a "dragging out" of motions to compel arbitration. T1 71:10-20. There is no public policy implicated where a party timely asserts arbitration after an arbitrable claim becomes ripe.

– *Cole* involved a motion to compel arbitration three days before trial, after all substantive summary judgment motions were decided, and after discovery was complete – including a six-day deposition of the plaintiff. *Cole*, 215 N.J. at 271-272.[11] Here, there have been no depositions at all, no rulings on Newport's Indemnity Claim, and a trial date has not been set (although it will be over a year from now under the current CMO which provides for dispositive motions in October of 2025). Da391-93. Indeed, the current CMO contemplates written discovery, document discovery, depositions, expert discovery, and dispositive motions between now and the date of any trial. It is effectively a new case in its infancy and all of the material tasks attendant with litigation have yet to be undertaken. Thus, the passage of time is a result of Newport's strategy in seeking multiple stays and the fact that the duty to defend and the Indemnity Claim are distinct and were to be litigated on separate tracks. The motion to compel arbitration was filed less than six weeks after the most recent stay was lifted and is timely.

ii. Filing of Dispositive Motions (T1 71:21 - 72:3)

[11] It is important to note that the amount of time that a case has been pending before arbitration is demanded is not the test. In *Fasano v. Li*, No. 16 CIV. 8759 (KPF), 2023 WL 6292579, at *10 (S.D.N.Y. Sept. 27, 2023), the Southern District of New York held that based upon litigation of class action and procedural issues, a six-year delay in seeking arbitration did not constitute waiver.

Cole requires the consideration of "the filing of any motions, particularly dispositive motions, and their outcomes." *Cole* at 280-81. In *Cole*, the Court heavily weighed the fact that defendants filed their motion to compel arbitration *after* discovery had concluded, *after* the trial court had ruled on the defendant's motion for summary judgment (granted in favor of the defendant on two of the four counts and denying the other two), *seven days after* the defendant filed its Rule 4:25-7(b) pre-trial information exchange "in which it listed proposed witnesses and exhibits, designated its proposed deposition and interrogatory readings, and listed the motions in limine it would make," and *three days before* the parties were set to go to trial. *See Cole* at 281-82. Here, the lower court failed to address ASIC's arguments that there had been no motions or rulings concerning Newport's Indemnity Claim and that the parties are nowhere near ready for trial. The lower court in a conclusory manner stated that the "matter was heavily litigated before the Superior Court [and] that there was active participation in the discovery that ultimately led to a number of matters to be resolved." T1 71:21 - 72:3. However, the court disregarded the fact that the prior motions solely related to the defense aspect of the case and ignored the fact that Newport's Indemnity Claim, which only became the focus of the litigation recently, has not been the subject of any motion practice. Because there were no proceedings, let alone substantive

rulings, pertaining to Newport's Indemnity Claim, this *Cole* factor supports ASIC.

iii. The Timing of the Motion to Compel Arbitration Does Not Reflect a Litigation Strategy (T1 72:6-8)

Cole also requires the consideration of "whether the delay in seeking arbitration was part of the party's litigation strategy." *Cole* 215 N.J at 281. Newport speculated that ASIC had a "delay strategy," which the lower court embraced in its order without any analysis of the facts. T1 72:6-8. Yet, there are no facts to support a finding that the timing of ASIC's motion to compel arbitration is a "delay strategy."

Until this year the parties devoted their energies to the defense cost dispute – which was successfully resolved via the "binding mediation" (i.e. arbitration) before Judge Keefe. Further, there have been no substantive rulings on indemnity—favorable or unfavorable—and there is no basis for Newport to claim that ASIC is seeking delay as part of its arbitration strategy. To the contrary, the delays prior to ASIC's Motion to Compel Arbitration were the result of Newport's litigation strategy – not ASIC's – and ASIC acted promptly once the stay was lifted.

Due to the nature of Newport's Indemnity Claim — which involves both the application of the pollution exclusion in the ASIC Umbrella Policy and

various complex coverage issues under the ASIC Pollution Policy — now that the other parties have been removed from the case, ASIC has invoked its right to arbitration in order to resolve this dispute fairly and efficiently. It never intended to abandon its contractual right to arbitrate. Da399-400, ¶¶ 4-6. As Newport can obtain complete relief concerning the indemnity claim vis a vis ASIC—and it has settled the Newport Indemnity Claim with its other insurers—arbitration will serve to resolve this dispute in an expeditious fashion that will conserve court and party resources. Thus, the plain evidence shows that ASIC has not engaged in a delay strategy and the third *Cole* factor also weighs in favor of arbitration.

iv. Extent of Discovery Conducted (T1 72:21 - 73:2)

Cole's fourth factor requires an examination of "the extent of discovery conducted." *Cole* 215 N.J at 281. The lower court ruled that this factor supported Newport without addressing the facts demonstrating the contrary. T1 72:21 - 73:2. The *Cole* court examined the fact that discovery had been extensive among the parties in that case, had included interrogatories and depositions of at least twelve persons, and had concluded on a date certain (there, December 30, 2009). *Cole,* 215 N.J at 271. Indeed, the parties were then preparing for trial to be held three months later on March 22, 2010. *Id*. Here, while Newport referred to "extensive" discovery, the fact is that the

litigation to date has focused on the duty to defend, and the majority of the discovery to date relates to this topic and is solely comprised of document and written discovery. No depositions have taken place in the DJ Action, and there is still a significant amount of discovery – both fact and expert - that needs to take place on Newport's Indemnity Claim. For this reason, the governing case management order (which needs to be revised in the event that litigation resumes) has a discovery end date of September 12, 2025. Da391-93.

While Newport complained – and the lower court accepted –that it has produced "voluminous" documents and deposition transcripts[12] from the underlying Utilities Litigation, this is a red herring. First, with or without ASIC's participation in the coverage litigation, Newport would have had to produce these same documents to the other insurers. There is no conceivable scenario where Newport could pursue its claim for defense and indemnity without producing the documents that relate to those topics and Newport did not incur the costs of discovery because of ASIC. The only costs that are specific to ASIC are Newport's serving and responding to written discovery. Because both ASIC and Newport served and responded to such discovery, there is no inequity. Further, because the duty to defend implicates, in part,

[12] The court's reliance on Newport's production of deposition transcripts from the Utilities Litigation is misplaced. T1 72:9 - 73:2. ASIC has not had an opportunity to depose any witness on the coverage issues, which were not at issue in the Utilities Litigation. T1 9:25 - 10:4.

certain of the same facts that relate to the duty to indemnify, certain of the discovery overlapped and relates to both defense and indemnity. This overlapping is immaterial as discovery specific to the indemnity claim has yet to commence.

Here, while limited document and written discovery has been conducted in this case, it has not been completed. **There have been no depositions**. For arbitration disputes involving the FAA, courts have considered the extent of discovery conducted in light of the case's readiness for trial. *See Brownstone Inv. Grp., LLC v. Levey*, 514 F. Supp. 2d 536, 541 (S.D.N.Y. 2007) (granting a motion to compel arbitration where litigation had proceeded for ten months, depositions were taken, and documents were produced from parties and non-parties in the case, and stating: "[W]hatever the extent of pretrial proceedings that have taken place to date, discovery is far from complete and the case is still a long way from being ready for trial.") Further, Newport only recently settled with the Utilities, and there has been no written or deposition discovery concerning Newport's proposed allocation of the Utilities Settlement, or allocation of its own alleged indemnity costs, such as the costs it allegedly incurred to remove debris from the riverbed. As such, because the relevant discovery concerning Newport's Indemnity Claim is in its infancy, compelling arbitration will expedite the completion of discovery and the resolution of the

remaining substantive issues. Thus, as to this factor, the level of discovery favors arbitration.

v. Whether the Party Raised the Arbitration Issue in its Pleadings (T1 73:4 - 74:5)

Cole's fifth factor is "[w]hether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration." *Cole* 215 N.J at 281. The *Cole* court indicated that this factor is less significant than the other factors and is not dispositive. *Id*. at 234. The lower court incorrectly weighed this factor in favor of Newport. T1 73:4 - 74:5. Here, the lower court improperly discounted ASIC's Thirty-Second Affirmative Defense that it raised on May 7, 2019 – that "ASIC has not intentionally relinquished any right to rely on all terms, conditions, definitions, limitations, exclusions, deductibles, self-insured retentions, limits of insurance, and/or any other provisions contained in the ASIC Pollution Policy." Da204; *see also*, Da150 (asserting same as Forty-Fourth Affirmative Defense on behalf of ASIC Umbrella Policy). ASIC also raised as its Fifth Affirmative Defense the point that the court lacks subject matter jurisdiction, which is the case for the arbitrable claims. Da142, Da200. Further, ASIC announced its intent to compel arbitration as soon as

practicable, and raised it at the lower court's first status conference after the other defendants had settled out of the case and the stay had been lifted.

While ASIC's affirmative defenses did not use the word "arbitration," the reference to lack of jurisdiction clearly applies as the court should decline jurisdiction over this arbitrable claim. Da142, Da200. Similarly, ASIC reserved its rights under all of the terms and conditions of the policies, and arbitration is a term in the policies. Da150, Da204. Indeed, courts have ruled that other affirmative defenses encapsulating the right to arbitration – without explicitly using the word "arbitration" – are enough to preserve the right, regardless of the Rule 4:5-1(B)(2) certification. *See Century Indem. v. Viacom Inter., Inc*, 2003 WL 402792, at *6 (S.D.N.Y. 2003) (holding that insurer's failure to include arbitration provision as an affirmative defense and failure to assert arbitration in its certification to the New Jersey state court were not barriers to granting its motion to compel arbitration).

The lower court also incorrectly speculated that ASIC's use of the word "presently" in its Rule 4:5-1(B)(2) certification was "somewhat curious." T1 73:6-7. However, caselaw demonstrates that the addition of "presently" to the Rule 4:5-1(B(2) certification is not uncommon. See *Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593, 601, (App. Div. 2024) ("Biagi's pleadings were accompanied by its own Rule 4:5-1(b)(2)

certification, stating the matter is "not presently the subject of any ... pending arbitration or administrative proceeding.")

ASIC's Rule 4:5-1(B)(2) certification was accurate when filed as it "presently" did not contemplate any other action or arbitration, and this statement was accurate when made in 2019 because the multi-party nature of the case made it impossible to achieve complete resolution of the claims at that time. Da398-400, ¶¶ 3-7. Further, while ASIC (and the other parties) demanded a jury trial, this reflected the status of the case in 2019 when arbitration would have been futile. It was not until the case changed in late 2023 and early 2024, and Newport settled with the Utilities and the primary insurers and other umbrella insurer, that arbitration became a viable dispute resolution mechanism. ASIC submits that this factor should be given little weight as arbitration is justified under the totality of the circumstances.

vi. Proximity to the Date of Trial (T1 74:6-7)

Cole's sixth factor is "[t]he proximity of the date on which the party sought arbitration to the date of trial." *Cole* 215 N.J at 281. In *Cole*, the defendant sought arbitration a mere three days before trial was set to begin. Here, no date for trial has been scheduled in this matter, and the parties agree that trial will not be appropriate until at least late 2025 as the jointly proposed CMO No. 6 provides for the filing of dispositive motions in October of 2025

with a subsequent trial date to be determined. Thus, the trial date is not at issue here, which the lower court agreed. T1 74:6-7 ("Factor number six does not apply here because there is no trial date.").

vii. The Resulting Prejudice Suffered By the Other Party, if Any (T1 74:15-20)

Lastly, regarding the seventh factor, Newport will sustain no prejudice if it arbitrates Newport's indemnity claim. In place of alleging actual prejudice, Newport argued below that 1) it was allegedly prejudiced by providing discovery; 2) arbitration would be contrary to the Service of Suit clause in the ASIC Pollution Policy; and 3) arbitration was allegedly untimely. The court held that there was prejudice and pointed to "[t]he time and expense to produce documents" as "substantial efforts that were taken, all designed to have this matter designed and to be tried before a jury." T1 74:15-20. As demonstrated above, the document production would have taken place without ASIC and would also occur in an arbitration. Thus, the prejudice identified by Newport does not support waiver. And, to declare that Newport's mere contemplation of a jury trial is prejudice misses the point. Newport has not articulated any actual prejudice, and its alleged contemplation of a jury trial must be viewed in the context of the policy it purchased – a policy that requires arbitration at the request of the counter-party. Indeed, ASIC will be prejudiced if this Court does not order arbitration which is the benefit of its

bargain with Newport as expressly provided for in the subject insurance policies. Because Newport will sustain no prejudice by arbitrating the Indemnity Claim, this factor weighs in favor of arbitration.[13]

CONCLUSION

For the foregoing reasons, ASIC respectfully requests that the Court reverse the Order in its entirety, and grant ASIC such other and further relief as the Court deems just and proper.

Respectfully,

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[13] While prejudice is not required for waiver, it is still a relevant *Cole* factor. *See Ocean Fireproofing, LLC v. 23rd St. Urb. Renewal JOF AAI III, LLC*, No. A-0388-23, 2024 WL 2683968, at *7 (App. Div. May 24, 2024).

CONFIDENTIAL INFORMATION CERTIFICATION

1. Confidential Information. I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

X This document or pleading does not contain any confidential information or any confidential personal identifiers, or

This document or pleading previously contained confidential information or confidential personal identifiers, which have been redacted or anonymized, including through the use of fictitious first names or initials. The cover of the redacted version of the document or pleading contains the word "REDACTED." I acknowledge that a non-redacted version must be filed contemporaneously with the redacted version in matters where the confidential information is necessary to the disposition of the matter.

2. Return and Resubmission. I certify that if any confidential information is discovered in this submission and brought to the court's attention, the court will return the document or pleading to me, and I will be responsible to redact or anonymize the confidential information before resubmission. I understand the court may impose sanctions, including suppression of the brief, dismissal in extraordinary cases, and other measures for a failure to accurately make this certification or for the discovery of confidential information in a document that has been filed.

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NEWPORT ASSOCIATES DEVELOPMENT COMPANY and NEWPORT ASSOCIATES PHASE I DEVELOPERS LIMITED PARTNERSHIP,

Plaintiffs-Respondents,

v.

CHUBB CUSTOM INSURANCE COMPANY, MT. HAWLEY INSURANCE COMPANY, INDIAN HARBOR INSURANCE COMPANY,

Defendants-Respondents,

AIG SPECIALTY INSURANCE COMPANY F/K/A CHARTIS SPECIALTY INSURANCE COMPANY F/K/A AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendant-Appellant,

ALLIED WORLD ASSURANCE COMPANY (U.S.) INC., ALLIED WORLD NATIONAL ASSURANCE COMPANY, ALTERRA AMERICA INSURANCE COMPANY, ASPEN AMERICAN INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURNACE

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-000295-24 T2

Civil Action

On Appeal From:
Superior Court of New Jersey
Law Division: Hudson County
Docket No.: HUD-L-003482-18

Sat Below: Hon. Jeffrey R. Jablonski, A.J.S.C.

Date Submitted: January 24, 2024

COMPANY, ILLINOIS UNION INSURANCE COMPANY, NATIONAL SURETY CORPORATION, MARKEL AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NAVIGATORS INSURANCE COMPANY, NORTH AMERICAN SPECIALTY INSURNACE COMPANY, STEADFAST INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, PHILADELPHIA INDEMNITY INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC., ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY AND LIBERTY INTERNATIONAL UNDERWRITERS INC.,

Defendants-Respondents.

BRIEF OF PLAINTIFFS-RESPONDENTS NEWPORT ASSOCIATES DEVELOPMENT COMPANY AND NEWPORT ASSOCIATES PHASE I DEVELOPERS LIMITED PARTNERSHIP

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INTRODUCTION

The Law Division correctly denied the motion by defendant-appellant AIG Specialty Insurance Co. ("ASIC") to compel arbitration on waiver grounds. After almost six years of litigation brought by plaintiffs-respondents Newport Associates Development Company and Newport Associates Phase I Developers Limited Partnership (collectively, "Newport"), ASIC for the first time sought the extraordinary relief of abandoning this case by seeking to compel arbitration. Reversal would create new law; it would be the first time any New Jersey court has compelled arbitration after such a lengthy delay.

ASIC's conduct exhibits the classic hallmarks of intentional waiver. In addition to its delay, ASIC failed to plead arbitration as an affirmative defense or cite any contractual arbitration provision. ASIC went even further by disclaiming any intent to arbitrate and expressly demanding a jury trial. Over the ensuing six years, ASIC actively availed itself of the Law Division's jurisdiction, including its own cross-motion for partial summary judgment on allocation on which it prevailed. ASIC also leveraged expansive discovery not typically available in arbitration to procure over 266,000 pages of documents, interrogatory responses, 39 deposition transcripts, and other discovery from Newport and other parties. ASIC thereby kept its arbitration designs hidden

from Newport and the Law Division for years. If this conduct is not an intentional waiver by the most sophisticated of litigants, nothing is.

ASIC also waived arbitration by sitting on its hands during four prior stays. Instead of reserving its rights or initiating arbitration of its own, ASIC sought a fifth stay only after the fourth stay was lifted, apparently in a calculated strategy to delay this case even further. The inclusion of other parties to this litigation was no reason for ASIC to delay arbitration, as prevailing caselaw confirms that is not a factor with respect to waiver. Nor does the allocation of defense costs among the insurers excuse ASIC's lack of diligence to pursue any arbitration rights as ASIC's defense cost allocation vis-á-vis Newport could have been determined solely through the arbitration. If ASIC desired to seek contribution from other insurers, arbitration with Newport would not have prevented that. ASIC at least had an obligation to alert Newport and the Court below of its intent to arbitrate rather than conceal it behind a jury demand in its responsive pleading. Based on these facts, Judge Jablonski correctly found that "ASIC engaged in litigation conduct that was certainly inconsistent with its right to arbitrate" and concluded that ASIC waived its right to arbitration. Hearing Tr. 68:8-16.

Finally, although not an issue that needs to be reached given ASIC's waiver, the arbitration provision in this policy, located on a pre-printed ASIC

form drafted entirely by ASIC, is permissive, not mandatory. It clearly sets forth that the parties "may" arbitrate their disputes, rather than using the mandatory form "shall." To be sure, ASIC knew to use the word "shall" in the policy if intended – the word appears nine times elsewhere in the arbitration clause itself. But the parties did not. Moreover, arbitration of this type of claim would contractually conflict with the Service of Suit provision, by which ASIC expressly consented to court jurisdiction for claims brought by Newport relating to ASIC's failure to pay claims under the policy. In any event, there can be no reasonable interpretation to infer that Newport ever intended to empower ASIC with the unilateral right to nullify six years of litigation with such a belated arbitration demand.

Resetting this long-standing litigation before a new three-arbitrator panel after ASIC has availed itself of the Court's jurisdiction through motion practice and leveraged expansive litigation discovery procedures not typically available in arbitration would materially prejudice Newport and waste the parties' (and the Law Division's) resources. ASIC's conduct and the totality of circumstances here provide clear and convincing evidence weighing heavily in favor of waiver. Accordingly, the ruling below denying the motion to compel arbitration should be affirmed.

PROCEDURAL HISTORY

Newport commenced this action on September 4, 2018. Da1. Newport filed a Second Amended Complaint on March 12, 2019 ("SAC"). Da50. ASIC's Answer on May 7, 2019, did not include any reference to "arbitration." Da162.

After approximately six years of litigation and extensive discovery among multiple parties, ASIC for the first time filed a motion to compel arbitration on August 1, 2024. Da428-31. Following briefing and oral argument on September 13, 2024, the Honorable Jeffrey R. Jablonski denied ASIC's motion due to ASIC's failure to preserve arbitration in its answer, ASIC's six-year delay to move to compel arbitration, and for other reasons set forth on the record in the hearing transcript. Da248-56; Hearing Tr. 63:22-79:18. On September 30, 2024, ASIC filed notice of this interlocutory appeal.

STATEMENT OF FACTS

Newport owns waterfront property in Jersey City, New Jersey known as the Newport Marina and Sixth Street Pier ("Sixth Street Pier"). Da50 (SAC) ¶ 1. The Sixth Street Pier is a concrete pier that runs parallel to a 30-foot-wide underwater easement ("Easement") granted by Newport to PSE&G to accommodate high-voltage electric cables ("Cables") to transmit power from Jersey City to Brooklyn, New York. *Id.* at ¶¶ 44-45. PSE&G and Con Edison

owned the Cables, which allegedly were installed under several feet of Hudson River riverbed. *Id.* at ¶ 2. The Cables contained dielectric fluid, a refined petroleum product used for insulation purposes. *Id.* at ¶ 43.

On August 30, 2008, a section of the northern seawall of the Sixth Street Pier collapsed into the Hudson River ("2008 Collapse"). *Id.* at ¶ 46. Another section of the northern seawall collapsed on July 28, 2009 ("2009 Collapse"). *Id.* at ¶ 47. The 2008 and 2009 Collapses caused debris from the Sixth Street Pier to fall onto the riverbed.

Approximately eight years ago, on or about October 3, 2016, a dialectic fluid leak was discovered in the Hudson River near the Sixth Street Pier. *Id.* at ¶ 49. Newport worked with the Coast Guard to prepare and implement a plan to remove debris from the riverbed as part of the investigation and remediation of the pollution leak. *Id.* at ¶¶ 58-59.

Newport and ASIC entered into a Commercial Real Estate Pollution Legal Liability Policy dated November 18, 2015 ("Policy"). The Policy contains a permissive arbitration clause, entirely drafted by ASIC and appearing in a pre-printed policy form section of the Policy providing that disputes among the parties "may" be arbitrated, but if exercised, the arbitration "shall" be litigated in the state of Newport's domicile before three arbitrators:

> F. Arbitration – It is hereby understood and agreed that all disputes or differences that may arise under or in connection with

> this Policy, whether arising before or after termination of this Policy, including any determination of the amount of Loss, **may** be submitted to the American Arbitration Association under and in accordance with its then prevailing commercial arbitration rules. The arbitrators **shall** be chosen in the manner and within the time frames provided by such rules. If permitted under such rules, the arbitrators **shall** be three disinterested individuals having knowledge of the legal, corporate, management, or insurance issues relevant to the matters in dispute.
>
> **Any party may commence such arbitration proceeding** and the arbitration **shall** be conducted in the Insured's state of domicile. The arbitrators **shall** give due consideration to the general principles of the law of the Insured's state of domicile in the construction and interpretation of the provisions of this Policy; provided, however, that the terms, conditions, provisions and exclusions of this Policy are to be construed in an evenhanded fashion as between the parties. Where the language of this Policy is alleged to be ambiguous or otherwise unclear, the issue **shall** be resolved in the manner most consistent with the relevant terms, conditions, provisions or exclusions of the Policy (without regard to the authorship of the language, the doctrine of reasonable expectation of the parties and without any presumption or arbitrary interpretation or construction in favor of either party or parties, and in accordance with the intent of the parties).
>
> The written decision of the arbitrators **shall** set forth its reasoning, **shall** be provided simultaneously to both parties and **shall** be binding on them. The arbitrators' award **shall** not include attorney fees or other costs. Judgment on the award may be entered in any court of competent jurisdiction. Each party **shall** bear equally the expenses of the arbitration.

Da417-18 (Policy § F (emphasis added)). The Policy also contains a Service of Suit provision that empowers Newport with the right to sue if ASIC fails to pay any amount due under the Policy and mandates that ASIC "will" submit to a court's jurisdiction:

> U. Service of Suit – Subject to VI. CONDITIONS, Paragraph F, above, it is agreed that in the event of failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, **will submit** to the jurisdiction of a court of competent jurisdiction within the United States. ... and that in any suit instituted against the Company upon this contract, the Company will abide by the final decision of such court or any appellate court in the event of any appeal.

Da419 (Policy § U (emphasis added)).

Newport and ASIC also entered into an umbrella policy for 2008-2009 ("Umbrella Policy"). Da420. The Umbrella Policy provides excess coverage for certain property damage with a high deductible and a pollution exclusion. In stark contrast to the ASIC Policy, the Umbrella Policy contains a mandatory arbitration clause requiring that disputes regarding the scope of the pollution exclusion "shall" be arbitrated. Da424 (Umbrella Policy). The Umbrella Policy arbitration clause, however, is limited to disputes concerning the meaning of the pollution exclusion in Exclusion Q. Da422.

On November 11, 2016, PSE&G filed an action against Newport in the United States District Court for the District of New Jersey, alleging that the collapse of the Sixth Street Pier caused damage to the Cables resulting in the dielectric fluid leak ("Utilities Action"). *Id.* at ¶ 61. Con Edison was subsequently joined as a third-party defendant and also asserted claims against Newport. *Id.* at ¶ 62.

Newport commenced this action on September 4, 2018. Da1. Newport subsequently filed its SAC on March 12, 2019. Da50. ASIC answered the SAC twice on May 7, 2019 – one Answer for the Policy and another for the Umbrella Policy - which collectively included 86 affirmative defenses, none of which refers to "arbitration." Da98, Da162. ASIC's answer included a jury demand and a *Rule* 4:5-1 certification disclaiming any intent to pursue arbitration.

During the past six years of litigation, the parties have engaged in extensive discovery, including production of over 266,000 pages of documents and over 180 gigabytes of data. Pa2 (Cook Cert. at ¶ 5); Hearing Tr. 71:21-73:2. The parties have also served and responded to written document demands and interrogatories. Pa2 (Cook Cert. at ¶¶ 2-4). ASIC actively participated in discovery by propounding at least three sets of interrogatories and at least three sets of document demands to various parties in this litigation. Pa2 (Cook Cert. at ¶ 4). ASIC's written requests included 46 interrogatories and 72 document demands to Newport alone. Pa1, Pa4, Pa30 (Cook Cert., Exhs. A and B, respectively). Newport served 66 pages of written responses and objections to ASIC's interrogatories on November 23, 2020, and Newport served a 46-page written response to ASIC's document demands on November 25, 2020. ASIC also received discovery that was produced in the Utilities

Action, including 39 deposition transcripts, some or all of which may not have been available in arbitration. Pa2 (Cook Cert. at ¶ 6). At no time during that broad exchange of litigation discovery did ASIC indicate it would be seeking to compel arbitration. Da429 (Lewin Cert., ¶ 5 (indicating ASIC did not reveal its desire to arbitrate until sometime "in January 2024")).

In addition to discovery, ASIC further affirmatively and irreversibly availed itself of this Court's jurisdiction in a number of ways, including cross-moving for summary judgment on February 8, 2021, joining a motion to compel Newport to produce documents on May 20, 2021, opposing Newport's motion for reconsideration on April 22, 2021, and responding to Newport's cross-motion for partial summary judgment on February 19, 2021, among other things. Pa107, Pa118 and Pa109).

During the six-year course of this litigation, the Court has stayed the case four times: on January 25, 2019, for approximately one month; on August 9, 2019, for approximately six months; on April 8, 2020, for approximately four months; and on May 9, 2022, for approximately 27 months. Da297, Da338, Da362, Da401. During none of those prior stay requests did ASIC ask this Court to stay the case for arbitration. Da429 (Lewin Cert., ¶ 5). It was not until August 1, 2024, almost six years after Newport commenced this action, that ASIC for the first time filed a motion to compel arbitration - and stay the

case for a fifth time. Following briefing and oral argument, Judge Jablonski denied ASIC's motion on September 13, 2024. Da216.

ARGUMENT

I. The Law Division's Denial Of The Motion Should Be Affirmed Because ASIC Waived Arbitration

Judge Jablonski correctly denied ASIC's motion to compel arbitration because ASIC waived its right to arbitrate by delaying its motion and affirmatively participating in this litigation for the past six years and by failing to even mention arbitration in its pleadings while demanding a jury trial. Rather than moving to compel arbitration at the outset, ASIC did the opposite by certifying that it had no intention to arbitrate, actively participating in the litigation, and moving for - and prevailing on - its motion for partial summary judgment on the allocation issue. ASIC's conduct is a textbook case of waiver of a right of arbitrate. The Law Division correctly decided the motion and, respectfully, it should be affirmed.

A. ASIC Waived Arbitration Under The Prevailing *Cole* Factors

As both parties and the Law Division recognized, the New Jersey Supreme Court articulated a seven-factor test that governs the analysis of waiver of a right to arbitrate, consisting of "(1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was

part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any." *Cole v. Jersey City Med. Ctr.*, 215 N.J. 265, 280-281 (2013); Hearing Tr. 67:5-68:16. While no one factor is determinative, the length of the delay here, ASIC's filing and prevailing upon a dispositive motion, its active engagement in discovery, and its failure to preserve any purported rights to arbitration in these circumstances all weigh heavily against the motion.

1. ASIC Waived Arbitration By Delaying Six Years

The first *Cole* factor is the delay in making the arbitration request. *Cole*, 215 N.J. at 280. Newport commenced this litigation on September 4, 2018. Da1. ASIC did not file this motion to compel arbitration until August 1, 2024 – five years and eleven months later. Db9. While ASIC contends that it raised arbitration prior to filing its motion, by its own admission it did not do so until a discussion with Newport's prior counsel on January 23, 2024 – almost five years and four months after Newport commenced this lawsuit. Hearing Tr. 68:19.

Significantly, ASIC does not cite to any case where a New Jersey court compelled arbitration after this many years of litigation, nor has our research revealed any reported or unreported New Jersey state case. The lone case cited by ASIC in defense of a six-year delay, *Fasano v. Li*, No. 16 CIV. 8759 (KPF), 2023 WL 6292579, at *10 (S.D.N.Y. Sept. 27, 2023), is not a New Jersey case. It is an unreported federal decision from New York that did not analyze the seven *Cole* factors and has no precedential value here. Db28n.10; Da302. Moreover, the *Fasano* case was still at the pleading stage despite approximately six years of litigation because motions to dismiss had been appealed to the Second Circuit twice and remanded twice. Da302 at *4. Therefore, the motion to compel arbitration in *Fasano* was timely filed contemporaneously with a motion to dismiss an amended complaint, something that ASIC failed to do here. Also, unlike here where ASIC asserted and prevailed upon a partial summary judgment motion, there had "been almost no litigation on the merits" in *Fasano* and the "parties ha[d] engaged in virtually no discovery." *Id.* at *10. The *Fasano* case, therefore, is irrelevant despite any superficial similarity in duration.

The longest delay considered by any New Jersey state court that our research found in a reported case was in *Cole* (which is also cited by ASIC), where the New Jersey Supreme Court ultimately held that defendant waived its

right by delaying twenty-one months into the litigation to file its motion to compel arbitration. *Cole*, 215 N.J. at 281 ("A twenty-one month delay is substantial, particularly in light of the fact that [defendant] otherwise failed to provide notice of its intent to seek arbitration.").[1] Like the defendant in *Cole*, ASIC failed to provide notice of its intent to seek arbitration. However, ASIC's waiver here is far more egregious because ASIC's delay is over *three times longer* than the delay in *Cole*. As Judge Jablonski reasoned below, ASIC's delay here "pales in comparison to what the Court approved was ... an unreasonable length of time in *Cole* of 21 months." Hearing Tr. 69:14-215. Granting ASIC's request would set a groundbreaking new precedent and would encourage insurers to hide their intent to arbitrate from other parties and drag coverage litigations through our state courts for years before moving to compel arbitration. *See* Hearing Tr. 71:10-12 ("There's also a policy argument that if it did not establish, this factor would permit dragging coverage before moving to compel arbitration.") That cannot be the law of our State. Accordingly, as Judge Jablonksi correctly held, this factor weighs in Newport's favor against compelling belated arbitration. Hearing Tr. 71:12-20.

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[1] Just last year, this Court found a far shorter delay of 16 months to be "extensive" and long enough to support waiver even though "seven of those months consisted of a period when the case had been referred to a mediator." *See, e.g., Herrera v. Paramount Freight Sys., Inc.*, No. A-0424-23, 2024 N.J. Super Unpub. LEXIS 951, *13 (App. Div. May 24, 2024) Pa73 (Cook Cert., Exh. F).

a. Futility Does Not Excuse ASIC's Six-Year Delay

Although not one of the *Cole* factors, ASIC argues that its extended delay should be excused given the "totality of circumstances" because arbitration against Newport was futile until after Newport reached settlements with other insurers on different policies. Db2-3, 22, 25-26. ASIC argues that an arbitration solely with Newport at the outset would have been futile because its contribution claims against those other insurers would still need to be litigated. *See* Db3. However, the mere fact that there are different claims in the litigation does not mean each claim must be considered separately in serial fashion. If ASIC wanted to arbitrate indemnity against Newport later, it had to arbitrate its defense share against Newport first. The arbitration award would have determined the defense allocation issue between Newport and ASIC under the Policy, and ASIC would remain free separately to litigate defense cost shares against the other insurers if it wished to do so without Newport being involved.

ASIC's argument to the contrary is flawed in several respects. First, whether or not an arbitration was futile at that time, such purported futility would not excuse ASIC from preserving its arbitration rights in its Answer, nor would it grant ASIC free license to belatedly arbitrate by surprise almost six years later without at least placing Newport and the other parties on timely

notice at the outset of ASIC's intent to arbitrate – particularly after affirmatively certifying to the contrary. There is no law to support such a position. Even in *Chassen*, which is cited by ASIC, the defendant filed its motion to compel arbitration just one month after a change in the law allowing it to do so. *Chassen v. Fid. Nat'l Fin., Inc.,* 836 F.3d 291, 303 (3d Cir. 2016).

Second, arbitration of the indemnity claim was, in fact, not futile. ASIC could have promptly exercised its right to arbitrate at the outset of the case regardless of whether the award would later be enforceable vis-à-vis other insurers. There are essentially three possible outcomes if ASIC arbitrates separately: (1) the arbitration panel and court could agree that ASIC owes the same percentage, in which case there is no need for a second lawsuit; (2) a court could determine that ASIC owes more than the arbitration panel determined and the other insurers thereby owe less to Newport, resulting in Newport assuming the risk of the deficiency and not being made whole; or (3) a court could determine that ASIC owes less than the arbitration panel determined, thereby shifting more of the loss to the other insurers, in which case the other insurers could pursue ASIC for the difference. This is part of the strategic choice of exercising an arbitration right in a multi-party litigation, with which ASIC should be well familiar. Although the arbitration outcome would be binding on both Newport and ASIC, both arbitrating parties bear the

risk that they may not be made whole by a contribution claim in subsequent litigation.

This is not unlike the risk of settlement by one defendant when others go to trial. The settling parties bear the risk that their settled share of recovery/liability may differ from the amount later determined at trial and they may end up better – or worse – off as a result of that choice. Here, ASIC chose not to preserve its right to arbitrate separately against ASIC at the outset in a multi-party litigation. Whether ASIC will be better or worse off as a result of that tactical decision remains to be seen.

Third, the fact that other parties are not subject to arbitration does not make arbitration futile, even if it perhaps is not the most efficient path to resolution. Newport's arbitration rights, if any, stem from the arbitration clause it drafted and inserted in the Policy, not on the settlement status of other insurers. Indeed, *Cole* makes this clear by explaining that the waiver analysis is "not affected" by non-arbitrable claims against other parties. *Cole*, 215 at 283.

Fourth, ASIC is a sophisticated insurer that should have known at the time it entered into the Policy that there would or could likely be other insurers involved in a subsequent claim by Newport who would not be subject to the bilateral arbitration clause in Newport's Policy with ASIC. *See generally*,

Hearing Tr. 68:20-69:4 (noting the insurance sophistication of ASIC and its attorneys). So entering into a Policy with an arbitration clause that carries the risk of waiver if not exercised in the company of a multi-party insurance litigation should not come as a surprise to ASIC.

Fifth, ASIC's efficiency argument is not compelling here. ASIC complains that the arbitration would still require litigation afterward with respect to contribution. However, ASIC would have six years of litigation, interrupted by an arbitration, with additional litigation among the insurers without Newport thereafter. Two proceedings are likely necessary either way (unless an arbitrator and court reached the exact same percentages). Accordingly, ASIC's quixotic efficiency through delay is illusory.

ASIC cites to the *Chassen* case to support its argument, even though it is a federal case that is not controlling authority here. However, the *Chassen* case actually supports Newport's position. As mentioned above, defendants in *Chassen* timely raised the arbitration within three months of a change in the law that permitted those claims to be arbitrated. There has been no change in the law here, so there is a significant factual distinction. *Chassen*, 836 F.3d at 303.

In addition, there is a legal distinction because the *Chassen* court defines "futility" very differently than ASIC. Futility does not mean "ripeness", as

ASIC argues. *See, e.g.,* Db22. Instead, the Third Circuit explained that futility means that a motion for arbitration "was almost certain to fail". *Chassen*, 836 F.3d at 297, 299. In that case, the Third Circuit found that the law at the time the complaint was filed in 2009 precluded arbitration of those types of claims, so a motion to arbitrate was certain to fail. However, a change in the law pursuant to a 2011 Supreme Court decision subsequently allowed arbitration of such claims. Accordingly, the Third Circuit held that arbitration could proceed two-and-a-half years later because of a subsequent change of law. *See id.* at 293-294. By contrast here, ASIC does not argue that a motion to arbitrate was almost certain to fail because the law was different six years ago, as in *Chassen*. Instead, ASIC's argument is that there were other defendant insurers who made it less efficient for them to do so. *See, e.g.,* Db25.

This is not the legal definition of "futility." Indeed, there is no case cited by ASIC that the involvement of other parties makes an arbitration motion futile or "almost certain to fail." The *Cole* case makes that clear. *Cole*, 215 N.J. at 283 ("Our analysis is not affected by the fact that non-arbitrable claims initially were present in the lawsuit as [plaintiff] asserted claims against [another defendant], who was not a party to the arbitration agreement.") Given that there has been no intervening change in the law six

years into this litigation, *Chassen* does not apply to ASIC's "totality of circumstances" here.

ASIC also cites to *Potomac Ins. Co. of Illinois ex. Rel OneBeacon Ins. Co. v. Penn. Mfrs. Ass'n Ins. Co.,* 215 N.J. 409 (2013) for this proposition. Db24-25. However, *Potomac* demonstrates that ASIC could have done what OneBeacon did in that case by litigating its own contribution claim against the other insurers either in the presently pending case or in a separate litigation. *Potomac* does not hold such a process to be futile. To the contrary, *Potomac* shows that it is a commonly employed practice in multiple-insurer disputes.

For example, in *EPIX Holdings Corp. v. Marsh & McLennan Cos., Inc.,* 410 N.J. Super 453 (App. Div. 2009), American International Group, Inc. ("AIG"), as affiliate of ASIC, moved to compel mandatory arbitration of its claims even though plaintiff's other claims against other defendants were not subject to arbitration and still had to be litigated. *Id.* at 480. In any event, nothing made it futile for ASIC to at least preserve any arbitration rights it may have had by giving timely notice in an affirmative defense at the outset, nor did anything require ASIC to misleadingly sign an affirmation that it did not contemplate arbitration. *See* Da199-205, 207. Such actions by ASIC all support the Law Division's finding of waiver – not futility.

2. ASIC Actively Participated in Litigation and Dispositive Motion Practice

The second *Cole* factor is the filing of any motions, particularly dispositive motions, and their outcomes. *Cole*, 215 N.J. at 280-281. ASIC's involvement in the case was not as a mere spectator and could hardly be described as passive. As Judge Jablonski noted from his own experience with this case, "this matter was heavily litigated before the Superior Court ... before me and also before my predecessor, Judge Bariso". Hearing Tr. 71:23-72:3. Even ASIC itself concedes that it participated in numerous motions during the past six years of litigation, including various summary judgment briefs. *See, e.g.,* Db30. For example, ASIC affirmatively availed itself of this Court's jurisdiction by cross moving for partial summary judgment on February 8, 2021. Pa107. ASIC prevailed on that motion. Pa114.

ASIC claims that it has not obtained any substantive rulings adverse to Newport's interests. (*See, e.g.,* Db29-30.) But that was not for lack of ASIC trying, but rather just for lack of ASIC succeeding. Indeed, ASIC, far from being a passive observer to this litigation, actively opposed Newport's interests in this litigation several times, including a letter brief responding to Newport's cross-motion for partial summary judgment on February 19, 2021, an opposition to Newport's cross-motion for partial summary judgment relating to the Umbrella Policy on October 2, 2020, an opposition to Newport's cross-

motion for partial summary judgment on February 23, 2022, and a letter joining in a motion to compel document production from Newport on May 20, 2021. Pa109, Pa92, Pa123, Pa118. ASIC's affirmative participation opposing Newport's litigation positions is precisely the type of action by a litigant that waives its ability to later arbitrate. *See Cole*, 215 N.J. at 280-81.

ASIC also filed oppositions to various other motions in the case, including an opposition to Indian Harbor Ins. Co. and Mt. Hawley Ins. Co.'s motion for reconsideration on April 22, 2021, an opposition to Chubb Custom Insurance Co.'s motion for partial summary judgment on January 14, 2020, and an opposition to Chubb's motion for partial summary judgment on February 11, 2022. Pa116, Pa91, Pa121.

The Law Division further reiterated that during all this active litigation, "at no point in time was it indicated [by ASIC] that arbitration was in any way to be contemplated." Hearing Tr. 72:4-5. Given ASIC's active involvement in litigation over the past six years, including its voluntary and affirmative invocation of this Court's jurisdiction to advance its own legal rights, this second factor weighs heavily against arbitration.

3. ASIC's Apparent Delay Strategy

The third *Cole* factor considers whether the delay in seeking arbitration was part of the moving party's litigation strategy. *Cole*, 215 N.J. at 281.

ASIC argues that "there are no facts to support a finding" of strategic delay. The record, however, demonstrates otherwise. ASIC's failing to mention "arbitration" in any of its 39 affirmative defenses, certifying pursuant to *Rule* 4:5-1 that no arbitration is contemplated, making a jury demand, serving broad discovery, actively litigating motions, and delaying six-years its motion to compel arbitration all support the Law Division's finding that this factor weighs heavily against arbitration. Hearing Tr. 72:6-8.

While it cannot be known for sure what ASIC's litigation strategy is, ASIC's actions to date appear to incorporate delay as part of its strategy. This incidentally would not be an unexpected or uncommon tactic for an insurer being sued to pay millions of dollars in long-overdue reimbursements owed under an insurance policy given that delaying payment of a claim generally increases an insurance company's investment income and thereby increases its profit.[2]

ASIC's specific actions here indicate a consistent strategy to delay. *See generally, Chavis v. Norwood Terrace Health Ctr.*, No. A-1442-19, 2021 N.J. Super. Unpub. LEXIS 785, at *4-5 (App. Div. May 4, 2021), (affirming waiver where defendant had a "'defense strategy' to delay bringing this matter

[2] *See, e.g.,* Jay M. Feinman, *The Insurance Relationship as Relational Contract and the 'Fairly Debatable' Rule for First-Party Bad Faith,* 46 San Diego L. Rev. 553, 566-567 (2009). Pa46.

to the attention of the court in a motion to enforce the arbitration provision" for almost two years.) ASIC sat on its hands during the four prior stays in this case. Rather than waiting for the litigation stays to expire before seeking its own fifth stay to initiate a motion to compel arbitration, ASIC could have proactively used those stays to commence arbitration many years ago. *See* ASIC Br. at 4 n.2 (identifying 38 months of stay). Had ASIC timely exercised its right, the arbitration may have been decided by now. Even if the arbitration were not concluded, however, ASIC could have sought a further stay of this litigation to complete it, if necessary. Indeed, ASIC and/or its affiliates have moved to stay litigation in other actions. *See e.g.*, *EPIX Holdings*, 410 N.J. Super at 453 (ASIC affiliate American International Group, Inc. ("AIG") moved to compel arbitration of its claims even though other claims against other defendants were not subject to arbitration and had to be litigated). ASIC's failure to do so here – despite four prior stays in this case – strongly indicates a strategy of delay. This is particularly so given that ASIC waited over five years before first even mentioning arbitration.[3]

[3] If not an intentional delay tactic, ASIC's actions at best imply a recent change in strategy. But ASIC does not argue this. Instead, it asserts that it planned to seek arbitration all along, despite repeatedly demanding a jury trial, submitting a consequently misleading certification that no arbitration was known or anticipated, and declining to plainly include "arbitration" in any of its many affirmative defenses. If ASIC truly did intend to pursue arbitration from the outset, such "hide the ball" tactics should not be rewarded at Newport's expense now.

In any event, the litigation of other non-arbitrable issues in a case does not preclude arbitration or ASIC's obligation to timely preserve its arbitration rights. *Cole*, 215 N.J. at 283 ("Our analysis is not affected by the fact that non-arbitrable claims initially were present in the lawsuit as [plaintiff] asserted claims against [another defendant], who was not a party to the arbitration agreement.") As the Law Division correctly found, this factor weighs heavily against arbitration.

4. The Parties Have Conducted Extensive Discovery

The fourth *Cole* factor to consider is the extent of discovery conducted in the litigation. Here, the parties have essentially concluded document discovery. ASIC contends that only "limited discovery" has taken place. ASIC Br. at 16. However, the parties have exchanged extensive discovery, including over 266,000 pages of documents (the equivalent of over 88 boxes of documents) and 183 gigabytes of electronic information from Newport alone. Hearing Tr. 72:9-20; Pa2 (Cook Cert. ¶ 5). In addition, the parties have exchanged voluminous interrogatories covering all issues in the litigation. Hearing Tr. 72:21-73:2; Pa1-2 (Cook Cert., ¶ 2-4). While ASIC points out that no depositions have taken place in this case yet (Db33), AIG has received the benefit of at least 39 deposition transcripts and at least 17 expert reports from the underlying Utilities Litigation through the extensive discovery in this

litigation. Hearing Tr. 72:21-22; Pa2 (Cook Cert., ¶ 6). Therefore, many depositions relating to the facts of this case have already effectively been taken and ASIC likely would not have had access to such information through discovery in arbitration. In any event, belated motions to compel arbitration should be denied even prior to depositions if the movant has benefitted from significant written document discovery in litigation. *Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC,* 478 N.J. Super. 593, 612 (App. Div. 2024) (denying motion to compel arbitration prior to depositions noting that the "delay in moving to compel arbitration allowed it to obtain the early benefit of discovery that might not have been as easily obtainable in arbitration").[4]

Contrary to ASIC's characterization of the litigation to date as being essentially limited to the allocation of defense costs, the extensive discovery to date was not so limited. ASIC propounded 46 interrogatories to Newport seeking information on the full range of issues relevant to this litigation, including pollution damages. Hearing Tr. 72:21-73:2; Pa4 (Cook Cert. Exh. A.) For example, interrogatory 5 relates to dielectric fluid leak coverage under the Policy, and interrogatory 6 asks Newport to identify all pollution

[4] The sole case cited by ASIC is a federal New York case that did not analyze the seven *Cole* factors and considered a far timelier motion to compel arbitration only ten months into litigation – not six years. *See* Db33, citing *Brownstone Inv. Grp. LLC v. Levey*, 514 F. Supp. 2d 536, 541 (S.D.N.Y. 2007). It is therefore irrelevant and of no precedential value here.

conditions and damages that resulted from the alleged pollution conditions. Pa14 (Cook Cert., Exh. A at 10). Other interrogatories relate directly to trial of the matter. For example, interrogatory 45 requests Newport to identify all people Newport "will call as a witness at trial and set forth in detail all facts known by each such person regarding which they will testify" and interrogatory 43 requests all "expert witnesses whom Newport expects to call at trial in this litigation" with six specific sub-requests. Pa27-28 (Cook Cert., Exh. A at 23-24). Virtually the same set of facts relevant to analyzing ASIC's defense obligation are also relevant to analyzing its indemnity obligation.

Similarly, ASIC's voluminous 72 document demands cover the full range of litigation issues, including indemnity and trial. For example, document request 18 seeks all documents relating to the acquisition of the Property. Document request 22 seeks all documents between Newport and PSE&G relating to the collapse of the Sixth Street Pier and the leak of dielectric fluid in the Hudson River. Document request 72 seeks all documents upon which Newport will rely upon at trial. Pa30 (Cook Cert., Exh. B). Further, the extensive depositions taken in the Utilities Action bear directly on the issue of indemnity. Discovery has therefore been far more extensive than simply the allocation of defense costs. Indeed, as Judge Jablonski observed, "the term voluminous doesn't even address that particular word picture" of the

broad discovery to date here. Hearing Tr. 72:9-20. Accordingly, this factor weighs against arbitration.

5. ASIC Failed to Raise Arbitration in Its Pleading

The fifth *Cole* factor is whether the party seeking to compel arbitration raised the arbitration issue in its pleading. Here, as the Law Division correctly found, ASIC did not. In fact, ASIC did the polar opposite by including a jury demand in its responsive pleading and certifying that it was not seeking arbitration. Da207. Once again, this is a textbook waiver of arbitration. *See, e.g., Chavis*, 2021 N.J. Super. Unpub. LEXIS 785, at *7-8 (Affirming waiver of arbitration as "axiomatic" where defendants did not assert arbitration agreement in their answer; demanded a jury trial in their pleadings and waited nearly two years to enforce the arbitration provision.) at Pa68 (Cook Cert. Exh. E).

ASIC argues that, even though it never once mentioned arbitration in its pleadings, it somehow preserved its arbitration rights through two general boilerplate affirmative defenses that "ASIC has not intentionally relinquished any right" and "the court lacks subject matter jurisdiction." (Db34-35.) However, the word "arbitration" appears nowhere in ASIC's answer or affirmative defenses. *Cole*, 215 N.J. at 277 ("we recognized certain circumstances can demonstrate waiver of a contractual arbitration right. Those

circumstances include ... filing an answer and counterclaim without referring to a contractual arbitration provision...") Cryptic references such as these are not reasonably sufficient to put Newport and other parties on notice of an intent to arbitrate.[5]

The New Jersey Supreme Court has explained that a court will consider an agreement to arbitrate waived ... if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense." *Cole*, 215 N.J. at 281. Here, ASIC did not even assert arbitration in its Answer, much less take other additional measures. *Rule* 4:5-4 requires that "[a] responsive pleading shall set forth specifically and separately . . . [each] affirmative defense." *Rule* 4:5-4. Although ASIC asserted 86 separate and specific affirmative defenses in its Answers, ASIC never referenced the arbitration clause, "arbitration and award," or an intent to arbitrate. *See* Da199-205; *Herrera*, 2024 N.J. Super. Unpub. LEXIS 951, at *14-15 (Affirming waiver where "Defendants asserted more than two dozen affirmative defenses with their answer, none of which mentioned a lack of jurisdiction due to the binding arbitration provisions.") Pa72(Cook Cert. Exh. F). This omission is significant because it failed to provide notice to Newport

[5] ASIC's citation to *Century Indem. Co. v. Viacom Inter., Inc.*, 2003 WL 402792 (S.D.N.Y. 2003) to support such cryptic references is inapposite. Db35, Da242. It is an unreported federal decision from another state that is not binding on this Court. Nor did it analyze the governing *Cole* factors at issue here.

that ASIC would seek to divert the substantial time and resources invested in litigation to an arbitration. *Ibid.*

In *Cole*, the Supreme Court found the failure to identify arbitration as an affirmative defense to be a significant indicator of waiver:

> Applying those factors to this case, we conclude that [defendant] engaged in litigation conduct that was inconsistent with its right to arbitrate the dispute with its former employee. [Defendant] was a party to the lawsuit for twenty-one months before seeking to invoke the arbitration provision. A twenty-one month delay is substantial, particularly in light of the fact that [defendant] otherwise failed to provide notice of its intent to seek arbitration. [Defendant] advanced thirty-five affirmative defenses in its answer, but it did not include arbitration as one of them. *See R.* 4:5-4. Although the failure to list arbitration as an affirmative defense is not dispositive of the issue...it does inform the waiver analysis.

Cole, 215 N.J. at 281 (2013) (citation omitted). Thus, the Supreme Court held that a movant's failure to identify arbitration among 35 affirmative defenses and delaying for 21 months waived arbitration rights. Here, ASIC failed to include arbitration as one of its 39 affirmative defenses and delayed its motion to compel arbitration for 71 months. *A fortiori*, as the Law Division here found, ASIC waived its arbitration rights by this measure as well. Hearing Tr. 74:4-5; *see also Cole*, 215 N.J. at 277 ("we recognized certain circumstances can demonstrate waiver of a contractual arbitration right. Those circumstances include ... filing an answer and counterclaim without referring to a contractual arbitration provision..."); *Chavis*, 2021 N.J. Super. Unpub. LEXIS 785, at *7-

8 (Affirming waiver of arbitration reasoning that "Defendants' litigation behavior here is far more egregious [than even in *Cole*] because they: (1) did not assert the arbitration agreement in their answer; (2) affirmatively demanded a jury trial in their pleadings; and (3) strategically waited nearly two years to take any measures to enforce the arbitration provision. Under these circumstances, waiver is axiomatic.") Pa68 (Cook Cert. Exh. E).

Perhaps most telling, however, is that ASIC's certification pursuant to *Rule* 4:5-1(b)(2) explicitly represented to Newport and this Court that ASIC did not contemplate arbitration of this case. Da207 ("The matter in controversy is not the subject of any other action pending in any court or any pending arbitration proceeding, and **no such other action or arbitration proceeding is presently contemplated**" (emphasis added)). ASIC has not since amended that certification and, as such, should be held to its sworn word. *See, e.g., Marmo*, 478 N.J. Super. at 613 (finding waiver of arbitration after movant signed *Rule* 4:5-1 certification that no arbitration was pending or contemplated); *Herrera,* 2024 N.J. Super. Unpub. LEXIS 951, at *14-15 ("[T]he pleadings filed by defendants strongly support the finding of waiver ... More pointedly, their *Rule* 4:5-1(b)(2) certification explicitly told the court and opposing counsel that no arbitration was contemplated . . . [S]uch a serious inaccuracy in a *Rule* 4:5-1(b)(2) certification has the capacity to waste

the public's judicial resources as well as those of opposing counsel.") The clear certification to the contrary negates any implied cryptic meaning that ASIC retroactively ascribes to its boilerplate objections above. Indeed, Judge Jablonski described ASIC's certification as "curious". Hearing Tr. 73:6-7. Newport and this Court were both entitled to reasonably rely on ASIC's representations and ASIC's failure to provide clear and reasonable notice of an intention to arbitrate, if it even had one at that time, constitutes waiver. As the Law Division correctly found, this factor weighs heavily against arbitration.

6. Proximity to the Date of Trial

The sixth *Cole* factor considers the proximity of the date on which the moving party sought arbitration to the date of trial. Although the initial discovery end date was set for November 30, 2019, indicating a trial in 2020, no trial date has been set. It should be noted, however, that we are six years closer to trial than we were at the outset of the case. Accordingly, as ASIC concedes, and the Law Division found, this factor weighs neither in favor nor against arbitration. Db37; Hearing Tr. 74:6-7.

7. Arbitration Prejudices Newport

The final *Cole* factor considers the resulting prejudice suffered by the non-moving party, if any. *Cole*, 215 N.J. at 281. The United States Supreme Court has more recently held that prejudice is not a requirement to find waiver

of arbitration rights. *Morgan v. Sundance, Inc.* 596 U.S. 411 (2022). Here, however, the significantly delayed arbitration ASIC now proposes would prejudice Newport in a number of ways.

First, as the Law Division found, Newport expended considerable time and expense in producing documents and other evidence for use in litigation and trial. Hearing Tr. 74:15-20 ("there is prejudice that is suffered by Newport under the circumstances. The time and expense to produce documents, they certainly – there was substantial efforts that were taken..."). That burden rested disproportionately on Newport, as the plaintiff property owner, compared to ASIC, an arms-length insurer and part of one of the largest families of insurers in the world, AIG. Such discovery tends to be much more rigorous, time consuming, costly and voluminous in litigation than arbitration. Accordingly, ASIC's belated arbitration demand, if granted, would effectively result in Newport's needless over-expenditure on discovery, thereby wasting Newport's (and this Court's) time and resources. Relatedly, Newport would also be prejudiced because ASIC obtained the benefit of this broader disproportionate discovery to use against Newport in arbitration. *See, e.g., Marmo,* 478 N.J. Super. at 612 (denying motion to compel arbitration noting that the "delay in moving to compel arbitration allowed it to obtain the early

benefit of discovery that might not have been as easily obtainable in arbitration.") Pa59 (Cook Cert. Exh. D).

Second, as the Law Division also correctly found, abandoning this litigation to compel arbitration after such a long delay would deprive Newport of the benefit of its bargain under the Policy. Hearing Tr. 75:19-22 ("abandoning this litigation would certainly deprive Newport of the benefit of the bargain under the policy.") In particular, it would conflict with and render moot Newport's negotiated Service of Suit provision in section U of the Policy that expressly provides Newport with the right to litigate ASIC's non-payment of damages claims, such as those alleged here. Da419. Pursuant to that negotiated contract term, ASIC specifically agreed to submit to court jurisdiction to litigate this particular type of claim.

To the extent these two provisions can be read together without conflict, the only reasonable interpretation is that any dispute may permissively be submitted to arbitration, but if Newport commences litigation concerning ASIC's non-payment of insurance costs (as Newport alleges here) absent an initial demand for arbitration, ASIC must submit to court jurisdiction. As set forth above, ASIC failed to preserve its arbitration right in its answer and voluntarily submitted to this Court's jurisdiction years ago. Conversely, the Policy cannot reasonably be interpreted to provide ASIC with a right to invoke

arbitration on a whim at any time regardless of how many years Newport has invested in litigation – nor could such contractual understanding or assent reasonably be imputed to Newport at the time the Policy was written. *See generally, Atalese v. U.S. Legal Servs. Grp., LP*, 219 N.J. 430, 442-43 (2014) ("because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent'" (citation omitted).)

Third, Newport is prejudiced because ASIC failed to provide timely notice of its purported intent to arbitrate. In fact, it did the opposite. Until recently, ASIC gave every indication that it would be participating in the litigation by twice signing a certification that it did not contemplate arbitration, demanding a jury, failing to include the arbitration clause among its prodigious number of affirmative defenses, and affirmatively availing itself of this Court's jurisdiction through dispositive and other motions for relief. Newport was entitled to rely on ASIC's actions and representations for the past six years and tailored its strategy for use at a jury trial. As Judge Jablonski found, "there was substantial efforts that were taken, all designed to have this matter designed to be – and to be tried before a jury...there was a – a belief that this matter was only going to be tried within the courtrooms within the

Superior Court as opposed to a conference room within the American Arbitration Association." Hearing Tr. 74:17-75:17. To belatedly abandon the Law Division and change forums now to an arbitration panel would effectively moot years of trial preparation work, expense, and litigation strategy. *See, e.g., Herrera,* 2024 N.J. Super. Unpub. LEXIS 951, at *14-15 (noting that delays in noticing arbitration can "drain[] plaintiff's resources" and "waste the public's judicial resources as well as those of opposing counsel.") Pa72 (Cook Cert. Exh. F). Although not required, this factor weighs against arbitration as the Law Division correctly found.

As demonstrated above, the balance of ASIC's conduct here, including failing to identify arbitration as an affirmative defense, signing a certification that no arbitration is contemplated, affirmatively participating in motions and discovery, and waiting almost six years to move for arbitration, provides clear and convincing evidence of waiver that respectfully requires denial of its motion.

B. ASIC Waived Arbitration by Electing to Litigate the Allocation Issue

ASIC repeatedly argues that it delayed arbitration with Newport for six years because it needed to litigate the allocation of defense costs with the other insurer defendants who would not be party to the arbitration. Db3, 22, 25-26. This, however, was not required.

As the New Jersey Supreme Court explained, a "party that intends to invoke its right to arbitrate in a case *where another party is a non-signatory to the arbitration agreement* may preserve its right by asserting arbitration in its answer as an affirmative defense, moving to compel arbitration in a timely manner, moving to stay the judicial proceeding, or notifying the other party to the arbitration agreement that its litigation conduct should not be considered waiver of its right to arbitrate the dispute." *Cole*, 215 N.J. at 283 (emphasis added). Here, ASIC did none of these.

ASIC instead made a voluntary tactical decision to waive its arbitration rights vis-à-vis Newport in order to pursue litigation of its allocation interests against the insurers together with the claims against Newport. ASIC was free to bifurcate its dispute with Newport from the other insurers and pursue an arbitration ruling on its own share of the allocation of Newport's defense costs in that arbitral forum along with the other claims asserted by Newport against it.

ASIC initially could not have known that claims against other insurers would be settled, or when that would occur. So ASIC was obligated from the outset to elect either litigation or arbitration of its dispute with Newport six years ago. It elected to litigate without notifying or preserving any arbitration rights to Newport.

The New Jersey Supreme Court has been clear that the presence of other non-arbitrable parties and claims to a dispute does not immunize a party from waiving its arbitration rights. *Cole*, 215 N.J. at 283 ("Our analysis is not affected by the fact that non-arbitrable claims initially were present in the lawsuit as [plaintiff] asserted claims against [another defendant], who was not a party to the arbitration agreement.") If ASIC had the right to arbitrate claims against Newport, it must timely exercise or preserve that right. It does not get to unilaterally toll its arbitration right - without notice - in order to unilaterally pursue claims against other parties. It does not get to first "wait and see" what develops for years with respect to other parties.

Here, ASIC argues that it was "impossible" to compel arbitration prior to settlements being reached between Newport and other insurer defendants. Not so. As the *EPIX* case demonstrates, the pending litigation claims against the other insurers here were no excuse even if the arbitration clause were mandatory. *EPIX*, 410 N.J. Super. at 480-81. However, whereas the mandatory *EPIX* clause required that disputes "must" be arbitrated, the permissive clause here provides only that disputes "may" be arbitrated. *A fortiori*, ASIC should have moved promptly to arbitrate the claims against it in this forum. Having failed to do so for six years, ASIC waived arbitration and its motion respectfully should be denied. *See also*, Part I.A.1, *supra*.

ASIC can't have it both ways. The proper course would have been for ASIC to use the stays that ASIC repeatedly referred to in its brief to commence mandatory arbitration and then seek an extension of the stay here to complete its arbitration. Indeed, in other cases ASIC and/or its affiliates have done exactly that. For example, in *EPIX*, American International Group, Inc. ("AIG"), as affiliate of ASIC, moved to compel mandatory arbitration of its claims even though plaintiff's other claims against other defendants were not subject to arbitration and had to be litigated. *Id.* at 480. Unlike here, the contract in *EPIX* provided that disputes "must be submitted to arbitration". *Id.* at 460. The Appellate Division held that the fact that the AIG arbitration would not address the entire litigation among all eight parties was not a bar to the enforcement of the mandatory arbitration clause while the litigation against the non-arbitration defendants was still pending. *Id.* at 481.

ASIC failed to preserve or perfect its right for six years. By electing to litigate its allocation of defense costs in a single litigation rather than exercise its right to arbitrate its claims separately with Newport, ASIC knowingly and intentionally waived its arbitration right and this motion should respectfully be denied.

II. The Arbitration Clause Is Not Mandatory for Disputes Concerning ASIC's Non-Payment of Newport's Insurance Claim

ASIC argues that arbitration is mandatory under both the pollution Policy and the Umbrella Policy. Db15-20. However, the waiver issue applies even to mandatory arbitration clauses, so ASIC's waiver alone disposes of this appeal. A determination of whether the clause was mandatory or permissive therefore need not be reached by this Court. But even if ASIC did not waive arbitration (which it did), the Law Division's denial of ASIC's motion should still be affirmed because the Policy's arbitration clause is permissive (not mandatory), and the Umbrella Policy's narrow mandatory provision does not apply here. Arbitration, therefore, respectfully should not be compelled on this basis here.

A. The Policy's Arbitration Clause is Permissive

ASIC argues that the Law Division incorrectly ruled that the pollution Policy's arbitration clause is not mandatory. Db15. Aside from the fact that waiver applies to mandatory arbitration policies, the Law Division correctly held that the use of the word "may" between sophisticated parties indicates permissive, rather than mandatory, intent. Hearing Tr. 76:2-23. Even if it did not, there can be no reasonable interpretation to infer that Newport ever intended to agree to empowering ASIC with the unilateral right to nullify six

years of litigation (or conceptually more) with such a belated arbitration demand. Nor is there any evidence in the record below to suggest that. ASIC's six-year "hide-the-ball" strategy for "gotcha" arbitration should not be rewarded.

The validity of an arbitration agreement is a question of law for the Court to decide. *Kernahan v. Home Warranty Adm'r. of Fla., Inc.*, 236 N.J. 301, 316 (2019) ("Whether a contractual arbitration provision is enforceable is a question of law," accordingly we need not defer to the trial court's "interpretative analysis" unless it is "persuasive."). Here, Section F of the Policy provides that disputes between the parties "may" be submitted to arbitration. Da376-77. ASIC's decision to incorporate this permissive language into the clause of its pre-printed Policy form is significant. The word "may" is not compulsory and does not require arbitration of disputes, as is commonly found in other similar provisions. Had the parties intended to mandate arbitration of all disputes, they would have used the compulsory word "shall." The parties knew this because the word "shall" appears 10 times elsewhere in the arbitration section alone. Da376-77. Contractual construction must give meaning to this deliberate word choice to reflect the permissive, rather than mandatory, nature of this arbitration clause. *See generally, Schor v. FMS Fin. Corp.*, 357 N.J. Super. 185, 191 (App. Div. 2002)

("the terms of the contract must be given their plain and ordinary meaning ... the court should not torture the language of a contract to create ambiguity" (internal citations and quotations omitted).

The permissive intent of this provision as written is underscored by the Parties' inclusion of a service of suit provision, which requires that ASIC "will" submit to court jurisdiction at Newport's request specifically for non-payment disputes, such as the one alleged by Newport here. Section U of the Policy provides that "it is agreed that in the event of failure of [ASIC] to pay any amount claimed to be due [under the Policy], [ASIC], at the request of [Newport], will submit to the jurisdiction of a court of competent jurisdiction..." Da419.

Read together to give both clauses harmonious meaning, any dispute may permissively be submitted to arbitration, but if Newport commences litigation concerning ASIC's non-payment of insurance costs (as Newport alleges here) absent an initial demand for arbitration, ASIC must submit to court jurisdiction.[6] Put differently, the parties designed the arbitration clause

[6] ASIC notes that during argument below, ASIC's counsel mentioned that if ASIC had "moved immediately" for arbitration, counsel "believe[d]" ASIC would have been successful. Db16. However, that comment was based on a mere belief given trial court preferences to promptly refer cases to arbitration, not a mandatory legal requirement, and emphasized that had ASIC not strategically delayed six years it would not have waived arbitration. *See* Part I.A.1, *supra*.

to be permissive in order to accommodate Newport's desire to litigate non-payment claims against ASIC.

Any other interpretation would render the service of suit provision essentially meaningless. This is particularly so if ASIC is now empowered to unilaterally nullify Newport's litigation right after six years of litigation. Indeed, there can be no reasonable interpretation of these provisions to infer that Newport intended to grant ASIC such an unfettered right. *Kernahan.*, 236 N.J. at 317 ("[a]n arbitration agreement is valid only if the parties intended to arbitrate because parties are not required 'to arbitrate when they have not agreed to do so" (citation omitted)); *Atalese*, 219 N.J. at 442-43 ("because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent" (internal quotation and citation omitted)). The reasonableness of this interpretation is also supported by ASIC's subsequent decision not to reference arbitration in its Answer, ASIC's certification that no arbitration was contemplated, and ASIC's affirmative request for a jury in this litigation, rather than a bench trial that would be more akin to arbitration. The totality of these circumstances suggests a permissive – not mandatory – arbitration clause.

New Jersey courts routinely find that use of the word "may" instead of "shall" denotes permissive language and is not the type of clear and unmistakable language used to memorialize a party's knowing waiver of its right to pursue remedies in court.

ASIC's citation to *Del. River Partners* is misplaced and is distinguishable in several respects. Db17. First, it is an unreported decision that is not precedential and has not been followed or cited since its holding. There, the defendant timely moved to dismiss "pursuant to the arbitration clause" just one month after the complaint was filed - unlike here, where ASIC waited six years. *Del. River Partners, LLC v. R.R. Constr.*, A-2613-20, 2022 N.J. Super. Unpub. LEXIS 1134 at *1-2 (App. Div. June 24, 2022). Also, unlike here, there was no service of suit provision. To the contrary, there was a clear three-step process that the parties "shall have the rights set forth in" the arbitration clause if negotiations failed to resolve "any dispute". *Id.* at 10-11. Thus, unlike *Del. River Partners*, reading this Policy's provisions in its entirety does not evince Newport's "clear intent to waive the right to sue in court." *Id.* at 10 (citing *Medford Twp. Sch. Dist. v. Schneider Elec. Bldgs. Ams., Inc.*, 459 N.J. Super. 1, 7 (App. Div. 2019)).

Nor does the language that either party "may" file for arbitration convey the type of clear and unmistakable assent to mandatory arbitration. *See, e.g.,*

Atalese, 219 N.J. at 442-43. But even if it did, it would only logically apply to the commencement of a dispute. There was no clear and unambiguous waiver by Newport to subsequently consent to arbitration at any time after a litigation had already been filed by one party – particularly six years after litigation had been commenced. Straining to interpret the language in that manner would undermine the efficiency and expense rationales that typically underpin inclusion of an arbitration clause itself. Regardless, however, of whether the arbitration was permissive or mandatory, ASIC waived any right that it had to arbitration long ago as set forth above.

B. The Narrow Mandatory Umbrella Policy Clause Does Not Apply

ASIC's motion also makes a half-hearted argument that arbitration is required because of a very narrow arbitration clause in the ASIC Umbrella Policy. Db.19-20. Endorsement 14 to the Umbrella Policy contains a mandatory arbitration clause requiring that disputes regarding the scope of the pollution exclusion "shall" be arbitrated:

> In the event of a disagreement as to the interpretation of Exclusion Q of this policy or a disagreement as to the interpretation [sic] any endorsements attached to this policy amending Exclusion Q, the disagreement shall be submitted to binding arbitration before a panel of three (3) arbitrators.

Da383. This Umbrella Policy arbitration clause, however, is limited to disputes concerning the meaning of Exclusion Q. Exclusion Q, which is titled "Pollution", excludes pollution from coverage under the Umbrella Policy, and defines pollution for purposes of the exclusion. Da381.

However, Newport has not disputed that Umbrella Policy excludes pollution damages as defined therein, so this mandatory arbitration provision is not applicable here. While ASIC argues that the "best proof" of this dispute is that Newport has not withdrawn the entire Umbrella Policy claim (Db19), a claim generally under the Policy does not necessarily trigger this mandatory arbitration provision. Instead, the dispute must relate specifically to the far narrower issue of the interpretation of Exclusion Q. ASIC's brief fails to identify a single pending specific dispute between ASIC and Newport concerning the definition of pollution under Exclusion Q that would trigger that mandatory arbitration clause in the Umbrella Policy. Indeed, ASIC concedes that the settlements in the case to date between Newport and various other insurers all had pollution exclusions as well.

Second, even if the claims here related to the narrow mandatory arbitration provision in Exclusion Q of the Umbrella Policy concerning the scope of ASIC's pollution exclusion, waiver still applies to such mandatory arbitration clauses. *See, e.g., Cole*, 215 N.J. at 281-83 (applying test to find

waiver of mandatory contractual right to arbitration). ASIC failed to raise the Umbrella Policy's arbitration clause in its Answer or affirmative defenses, signed a contradictory *Rule* 4:5-1 certification that no arbitration was contemplated under the Umbrella Policy, failed to move to compel arbitration for six years, and actively litigated this policy by filing an opposition to Newport's cross-motion for partial summary judgment relating to the Umbrella Policy on October 2, 2020. *See* Part I.A, *supra*. Therefore, as with the Policy, ASIC similarly waived any arbitration rights it had under the Umbrella Policy as well.

Third, ASIC concedes that other carrier defendants have settled the non-pollution claims with Newport. Db19-20. Accordingly, ASIC cannot now claim – six years later – that it was futile to raise arbitration of any indemnity claim under the Umbrella Policy until now. Indeed, ASIC has argued that the case has primarily concerned the indemnity claims with the other insurers, including at one umbrella insurer, that also had pollution exclusions – which have now been settled with Newport. Db19. ASIC's Umbrella Policy is unlikely to ever be triggered because of its high attachment point in the insurance tower. So ASIC cannot reasonably argue that it had the only pollution-exclusion policy that could not proceed with arbitration until now. Accordingly, the narrow Umbrella Policy provision does not require

arbitration of this claim and, in any event, has been waived through ASIC's own conduct – and lack thereof.

CONCLUSION

For the foregoing reasons, Newport respectfully requests that this Court deny ASIC's motion to compel arbitration in its entirety.

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Dated: January 24, 2025

NEWPORT ASSOCIATES DEVELOPMENT COMPANY AND NEWPORT ASSOCIATES PHASE I DEVELOPERS LIMITED PARTNERSHIP,

Plaintiffs-Respondents,

V.

CHUBB CUSTOM INSURANCE COMPANY, MT. HAWLEY INSURANCE COMPANY, INDIAN HARBOR INSURANCE COMPANY,

Defendants-Respondents,

AIG SPECIALTY INSURANCE COMPANY F/K/A CHARTIS SPECIALTY INSURANCE COMPANY F/K/A AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendant-Appellant,

ALLIED WORLD ASSURANCE COMPANY (U.S.) INC., ALLIED WORLD NATIONAL ASSURANCE COMPANY, ALTERRA AMERICA INSURANCE COMPANY, ASPEN AMERICAN INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, NATIONAL SURETY CORPORATION, MARKEL AMERICAN INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NAVIGATORS

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO.: A-000295-24 T2

Civil Action

On Appeal From:
SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY
DOCKET NO.: HUD-L-003482-18
Sat Below:
Hon. Jeffrey R. Jablonski, A.J.S.C.

INSURANCE COMPANY, NORTH AMERICAN SPECIALTY INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, PHILADELPHIA INDEMNITY INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC., ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, AND LIBERTY INTERNATIONAL UNDERWRITERS INC.,

Defendants-Respondents.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT AIG SPECIALTY INSURANCE COMPANY

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Dated: February 7, 2025

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PRELIMINARY STATEMENT

Newport's Opposition boils down to the argument that ASIC waived its right to arbitrate Newport's Indemnity Claim because of the sheer amount of time that elapsed between commencement of the DJ Action and ASIC's motion to compel. However, that is not the test under *Cole v. Jersey City Medical Center*, 215 N.J. 265 (2013). Rather, the disfavored remedy of waiver should not apply given the unique facts of this case, which establish that the Indemnity Claim was not ripe until Newport's settlements with the Utilities and insurers ("Newport's settlements"); thus, the dispute could not have been resolved in arbitration prior to that point. Newport's claims for defense could only be finally resolved via a single allocation proceeding involving all insurers with potential liability. Indeed, Newport itself pressed for a single proceeding to resolve its defense claims. While Newport suggests that ASIC should have demanded arbitration earlier, it is clear that an arbitration before 2024 would have been pointless in any event.

Newport does not dispute that there can be no waiver of the right to arbitrate if an earlier demand for arbitration would have been futile. *See Chassen v. Fidelity National Financial, Inc.,* 836 F.3d 291 (3d Cir. 2016). As noted, a bilateral arbitration between ASIC and Newport before 2024 would have been futile because Newport's Indemnity Claim was not ripe at that time and the other insurers possessed independent contribution rights against ASIC which would have

rendered any resolution between ASIC and Newport meaningless.

This backdrop provides important context for ASIC's litigation activity, and establishes that there are no grounds for waiver as Newport argues. Discovery in this case has primarily been driven by the other insurers and focused on Newport's defense claims. ASIC's partial summary judgment motion solely concerned defense cost allocation and was made in concert with Newport and the other insurers to attain a binding resolution on that issue. Importantly, Newport and judicial economy benefited from ASIC's litigation activity because it eliminated any risk resulting from inconsistent results between the DJ Action and arbitration. The resolution of the defense claims has yielded a brand-new case involving Newport's Indemnity Claim. Newport has engaged new counsel and entered into Case Management Order No. 6, which treats the Indemnity Claim as a new litigation with its own set of deadlines for written, document and deposition discovery, expert discovery, and dispositive motion practice. Da391-93.

Finally, the arbitration clauses in ASIC's Pollution and Umbrella Policies, by their plain terms, are mandatory and applicable to this dispute. Newport's arguments would render the Pollution Policy's arbitration clause meaningless and ignore settled FAA case law. Contrary to Newport's contention, the Pollution Policy's Service of Suit clause states it is subject to the arbitration clause; thus, it has no bearing on ASIC's arbitration rights. Further, arbitration under the Umbrella

Policy – which is only available over disputes regarding the pollution exclusion – is mandated because Newport's Indemnity Claim involves, among other things, the allocation of pollution and non-pollution damages.

ARGUMENT

I. ASIC Has Not Waived Its Right to Arbitration Under *Cole*

In this appeal, Newport bears the burden of overcoming the presumption against waiver afforded under New Jersey law and the FAA[1] with clear and convincing evidence that ASIC voluntarily and intentionally relinquished its contractual right to arbitrate Newport's Indemnity Claim.[2] It has failed. The totality of the circumstances here establishes that ASIC has not waived its right to arbitration.

A. ASIC's Arbitration Demand Was Timely

Newport does not dispute that under *Chassen*, if an earlier demand for arbitration would have been a futile exercise, arbitration cannot be waived. *Chassen*, 836 F.3d at 292. Nevertheless, Newport implores this Court to deprive ASIC of its contractual right to arbitrate Newport's Indemnity Claim because it allegedly would be unprecedented for a New Jersey court to allow arbitration after 5 ½ years of litigation. Pb12. Newport also argues that a ruling for ASIC would

[1] *Cole*, 215 N.J. at 276-78.
[2] Unless otherwise indicated, all defined terms used herein have previously been defined by ASIC in its initial brief.

encourage insurers to drag coverage litigation on for years before seeking to compel arbitration. Pb13. Newport's hyperbole disregards the unique facts of this case, which involved resolution of defense claims in a multi-party litigation in which any bilateral arbitration between ASIC and Newport prior to 2024 would have been pointless. It also disregards the fact that the DJ Action was stayed for 38 months (the majority of the 5 ½ years) *at Newport's behest* in order to obtain a binding resolution of its insurers' defense obligations to it.

1. Arbitration Would Have Been Futile Before 2024

The relevant passage of time here is approximately five weeks: June 24, 2024 (the date the Law Division lifted the fourth stay following Newport's settlements) through August 1, 2024 (the date of ASIC's motion to compel arbitration). Newport's position that ASIC could have moved to compel arbitration (but intentionally did not) before 2024 distorts the nature of the litigation and ignores the undisputed fact that Newport's Indemnity Claim was not ripe until Newport's settlements with the Utilities. If a claim is not ripe, *ipso facto*, it is futile to seek to arbitrate it.[3] Plainly recognizing this, Newport completely glosses over the status of its Indemnity Claim, and focuses instead on what purportedly could have happened had ASIC sought arbitration in 2018. Newport posits three

[3] Newport wrongly argues that ASIC defines "futility" as "ripeness". Pb17-18. As this case and *Chassen* demonstrate, there are many circumstances under which it may be futile to seek arbitration. Ripeness is just one example.

"possible outcomes", (Pb15) all of which ignore the following key facts in this case. First, Newport's Indemnity Claim was not ripe and could not have been arbitrated in 2018. Second, a bilateral arbitration before 2024 could not have achieved a final and binding resolution of ASIC's obligations because of the other insurers' contribution rights. Moreover, the idea that Newport would have participated in an arbitration with ASIC and risked not being made whole (Pb15-16) does not withstand scrutiny. Newport would never have left itself exposed to recovering less than all of its alleged damages.

Newport's attempt to compare the futility of arbitration here to the risk of settlement by a single defendant when others go to trial is unsound. *Id.* at 16. The arbitration Newport envisions would not have even resulted in a final judgment as to ASIC's allocable share. Subsequent litigation to finally decide the insurer's contribution claims would have ensued. Thus, "the standard waiver analysis should not apply in [this] futility context." *Chassen,* 836 F.3d at 296.[4]

Newport tries to distinguish between the type of futility here (*i.e.*, futility

[4] The *Potomac* case demonstrates this point. In *Potomac*, an insurer-defendant, PMA, believed it had finally resolved the insured's indemnity and defense claims after the parties entered into a settlement and release. However, after the settlement, OneBeacon sued PMA for contribution of defense payments and PMA had to relitigate its share. *Potomac Ins. Co. of Illinois ex. Rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 215 N.J. 409, 415-17 (2013). Newport disingenuously argues that *Potomac* supports its argument against futility (Pb19); however, neither waiver nor futility were issues in that case.

because of ripeness and an inability to achieve a meaningful result) and futility due to a change in the law present in *Chassen*. Pb17-18. However, as the *Chassen* court explained, there are many situations, such as ripeness and administrative exhaustion, where a waiver analysis is inapplicable because it would be senseless to require a party to undertake a pointless gesture. *Chassen*, 836 F.3d at 296.[5]

Newport relies on *EPIX Holdings Corp. v. Marsh & McClennan Cos., Inc.*, 410 N.J. Super 453 (2009) to try to show that Newport's non-arbitrable claims against its other insurers were not an impediment to bilateral arbitration. Newport's argument misses the point. Newport and *all* of its insurers, including ASIC, needed to resolve their dispute over the proper allocation of defense costs in a single proceeding (which is exactly what the mediator and the parties concluded; *see* Dra0005-6, 0015-16).[6] Accordingly, the fact ASIC remained in the DJ Action to try to reach a binding resolution of the defense allocation issue does not demonstrate waiver. *EPIX* stands for the unremarkable position that litigation and arbitration can proceed simultaneously as to different parties. The *Cole* case makes this point too. Neither case, however, concerned an *Owens-Illinois* allocation,

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[5] Newport wrongly argues that ASIC equates futility with inefficiency. It is ASIC's position that futility exists here because the Indemnity Claim was not ripe and the defense claim would have resulted in a meaningless award given the other insurer's contribution rights.

[6] ASIC includes Newport's February 5, 2021 Brief in Response to Indian Harbor's Motion for Partial Summary Judgment to demonstrate the factual point that Newport argued that the court was required to allocate <u>all</u> insurers' duty to defend.

contribution rights, or facts rendering arbitration futile.

Finally, allowing a party to arbitrate notwithstanding years of litigation is not unprecedented. In *Fasano v. Li,* No. 16 CIV. 8759 (KPF), 2023 WL 6292579, at *10 (S.D.N.Y. Sept. 27, 2023), the court held that an over six year delay, given the facts, did not constitute waiver. Newport asks this Court to ignore *Fasano* because it was decided by a New York federal district court. Pb12. However, the New Jersey Supreme Court held that federal court decisions provide "guidance" when analyzing the issue of arbitral waiver, and cited Third and Second Circuit decisions in crafting New Jersey's test for waiver. *Cole*, 215 N.J. at 278-80.

B. ASIC's Participation in the DJ Action Does Not Support Waiver

According to Newport, ASIC should be prohibited from arbitrating its Indemnity Claim because ASIC participated in partial summary judgment motions to determine the proper allocation of Newport's defense costs. However, the defense allocation dispute is precisely why arbitration was futile. ASIC could only achieve an actual resolution of its defense obligations if it participated with the other parties in those motions. Moreover, Newport benefited from ASIC's participation in the DJ Action; it allowed Newport to obtain complete relief on its defense claims. This Court should not deprive ASIC of its right to arbitrate Newport's Indemnity Claim – which was not the subject of any ASIC motion or submission below – when Newport benefited by ASIC staying in the DJ Action to

achieve finality on the defense issues.

C. Newport's Allegations of a "Delay Strategy" Are Baseless

Newport's assertion that ASIC's motion to compel arbitration is a delay tactic that enables insurers to make investment income on the funds they purportedly owe is baseless. Pb22. Newport has not cited a single fact in making this accusation against ASIC. Newport's contention that ASIC's failure to seek arbitration during the four stays in the DJ Action (when a bilateral arbitration was futile) somehow shows that ASIC is acting with ulterior motives is equally infirm. *Id.* at 23. ASIC's decision to seek arbitration once Newport settled with the Utilities and other parties to the DJ Action was a function of the developments in those cases. Once Newport's Indemnity Claim was ripe and ASIC became the sole defendant in the DJ Action and could obtain complete and binding relief in arbitration, it promptly exercised its rights.

D. Discovery on the Indemnity Claim To-Date has Not been "Extensive" and Would be Available in Arbitration

Newport paints a picture of the parties having conducted "extensive discovery" in the DJ Action on its Indemnity Claim that is misleading. It wrongly claims that the parties have "essentially concluded" document discovery and served interrogatories "covering all issues in the litigation." Pb24. To date, discovery in the DJ Action has primarily focused on the duty to defend. Db5-6. ASIC and the other insurers' discovery requests were virtually identical and, to the

limited extent they sought indemnity-related information, they did so only to understand what Newport was asking the insurers to defend. Importantly, the time and expense that Newport incurred in producing documents and deposition transcripts would have been the same regardless of ASIC. Newport's defense claims sought millions of dollars; there is no conceivable scenario where Newport could pursue those claims without producing the relevant documents to all insurers.[7] As for Newport's Indemnity Claim, it is essentially a brand new proceeding which requires a significant amount of additional discovery.[8]

Newport admits that there have been no depositions in the DJ Action, but it tries to downplay this fact by focusing on deposition transcripts from the Utilities Litigation that it produced to all insurer-defendants. This is a red-herring. Newport's insurance claims were not at issue in the Utilities Litigation. Therefore, those deposition transcripts cannot substitute for depositions in this coverage dispute. Newport's reliance on *Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC,* 478 N.J. Super. 593 (App. Div. May 24, 2024) to argue that the lack of depositions does not foreclose a finding of waiver is specious. In *Marmo*, the

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[7] The facts here are analogous to *Century Indem. Co. v. Viacom Int'l, Inc.,* No. 02 CIV. 2779(DC), 2003 WL 402792, at *7 (S.D.N.Y. Feb. 20, 2003), where the court determined that an insurer in a complex dispute had not waived its right to arbitration despite the amount of discovery its adversary had produced.

[8] Indeed, after the Law Division lifted the fourth stay, Newport served dozens of subpoenas on third-party vendors as part of discovery on the Indemnity Claim.

plaintiff – who invoked the court's jurisdiction – was the party who sought arbitration. Here, ASIC is not the plaintiff. In *Marmo*, the plaintiff obtained discovery from the defendant but refused to provide discovery to the defendant before it moved for arbitration. Here, both ASIC and Newport have provided limited written and document discovery and neither party has been deposed. In *Marmo,* the case was worth less than $1 million; thus, the applicable AAA Construction Industry Arbitration Rules made it unlikely that there would be significant discovery. The claims in this case far exceed $1 million; as such, it qualifies as a large complex case where the AAA rules grant the arbitrators "broad arbitrator authority to order and control the exchange of information, including depositions."[9] Dra0031-33. Thus, unlike *Marmo,* there is no basis to conclude that ASIC would not have received the same discovery in arbitration that the parties have already provided, as well as additional discovery, as this is a large complex dispute.

E. ASIC's Pleadings Do Not Support a Finding of Waiver

According to Newport, this Court should consider ASIC's purported failure to use the word "arbitration" in its affirmative defenses and Rule 4:5-1(B)(2) certification as a significant factor in finding waiver, because Newport lacked notice that arbitration was on the table. Pb27-28. Newport, however, is a

[9] Pursuant to the arbitration clause in the Pollution Policy and the Umbrella Policy, the AAA Commercial Rules will govern the arbitration. Da376-77; Da383.

sophisticated insured (represented by experienced counsel), which was equally aware of the ASIC Pollution and Umbrella Policies' arbitration clauses. The reference to the Law Division's lack of jurisdiction in ASIC's affirmative defenses clearly applies as the Law Division should have granted ASIC's motion to compel because arbitration deprived the court of jurisdiction. Similarly, ASIC reserved its rights under **all** of the terms and conditions of the ASIC Policies, and arbitration is indisputably a condition in those Policies. Newport's claim that ASIC's affirmative defenses were "cryptic references" that it could not decipher (*id*.), thus, lacks credence. *See Viacom*, 2003 WL 402792, at *6 (holding that an insurer's failure to specifically reference arbitration in its answer or certification did not support a finding of waiver of its arbitration rights).[10]

Similarly, ASIC's Rule 4:5-1(B)(2) certification, which stated that ASIC did not "presently" contemplate arbitration was accurate when filed; based on the posture of the case at that time, arbitration was not yet a viable option. D398a-400a. While Newport accuses ASIC of "hid[ing] the ball" (Pb23), Newport should have understood that not "presently" contemplating arbitration did not foreclose future arbitration.[11] Finally, while ASIC (and other parties) demanded a jury trial,

[10] Newport's contention that this Court should disregard the *Viacom* decision because it is a New York federal decision does not comport with *Cole*. *Infra* at 7.
[11] Newport's reliance on *Herrera v. Paramount Freight Sys. Inc* , No. A-0424-23, 2024 N.J.Super. Unpub. LEXIS 951 (App. Div. May 24, 2024) is misplaced, as that case involves a two-party dispute in which there were no allegations of futility.

this reflected the case status in 2019 when arbitration would have been futile. It was not until Newport's settlements that arbitration became a viable dispute resolution mechanism. Based upon the case's unique circumstances, this factor should be given little weight as arbitration is justified under the totality of the circumstances.

F. Newport Will Not Suffer Any Prejudice

Newport's allegations of prejudice are simply a repeat of its other arguments. Newport claims that its prejudice results from producing "voluminous" discovery in the case; having to proceed in arbitration although the Service of Suit clause in the ASIC Pollution Policy allegedly permits litigation; and the supposed "delay" in bringing the arbitration. As discussed *supra,* Newport's arguments regarding discovery and the timeliness of ASIC's motion to compel arbitration are meritless. As discussed *infra,* its arguments concerning the Service of Suit clause also are without merit.

II. The ASIC Pollution Policy's Arbitration Clause is Mandatory

Newport claims that because the arbitration clause in the ASIC Pollution Policy states that disputes between the parties "may" be submitted to arbitration it is a permissive clause. Pb39-40. The word "may," however, cannot be read in isolation. *See J.L. Davis & Assocs. v. Heidler*, 263 N.J. Super. 264, 271 (App. Div. 1993) (under New Jersey's rules of construction, meaning should be given to all contract provisions). The clause provides that either party may demand arbitration,

and once that happens, "the arbitration **shall** be conducted" – which means it is mandatory once demanded. Da377 (emphasis added). Newport ignores this critical language, apparently because it knows that case law interpreting similar arbitration clauses does not support its position. *See e.g., Del. River Partners LLC v. R.R. Constr.,* 2022 N.J.Super. Unpub. LEXIS 1134, at *9-10 (App. Div. June 24, 2022) ("We recognized that 'when an arbitration provision specifically permits either party to select arbitration, once invoked, the other party may be bound to arbitrate the dispute.'")(internal citations omitted).[12]

Newport also fails to address *PPT Research, Inc. v. Solvay USA, Inc.,* 2021 U.S.Dist. LEXIS 127031, at *12 (E.D.Pa. July 7, 2021), which holds that courts uniformly have rejected the argument that the use of the word "may" automatically renders an arbitration clause permissive, and have instead "interpreted arbitration clauses using the word 'may' to be mandatory on the grounds that such language merely manifests the parties' intent that arbitration be obligatory if either party so chooses." *Id*. *PPT Research* is an FAA case which identifies federal courts in Pennsylvania, New York, and Delaware that have reached the same conclusion. *Id.* The Law Division recognized these authorities but disregarded them merely

[12] Newport claims that *Del. River Partners* does not support ASIC's interpretation because there was no service of suit clause at issue there. Pb43. That is an irrelevant distinction because the Pollution Policy's Service of Suit clause is expressly *subject to* the arbitration clause.

because they were from other jurisdictions. T1 76:5-6. ASIC submits that New Jersey would be an outlier if it were to decide that this clause does not reflect the parties' intent to require arbitration if either party chooses it. Significantly, **during oral argument below, Newport conceded that if ASIC had demanded arbitration at the outset of the case, Newport would have been required to arbitrate**.[13] T1 31:14-16.

Finally, Newport cites to the Service of Suit clause and claims that it somehow overrides the arbitration clause. Pb42. Newport's argument once again is made by ignoring key text which states that Service of Suit Clause is "subject to" the arbitration clause. This language wholly defeats Newport's argument that the Service of Suit clause supersedes the arbitration clause; the contract makes it clear that the opposite is true.

III. The Umbrella Policy's Mandatory Arbitration Clause Applies

Newport admits that the Umbrella Policy's arbitration clause, which applies to the Policy's pollution exclusion, is mandatory (Pb44), but argues the clause is inapplicable because it is undisputed that pollution claims are not covered. In so doing, Newport erroneously states that "ASIC has failed to identify a specific pending dispute between ASIC and Newport concerning the exclusion's definition

[13] Newport's attempt to walk back this concession make no sense (Pb41), and the record speaks for itself.

that would trigger arbitration." Pb45. ASIC has stated that the Policy's pollution exclusion is central to Newport's Indemnity Claim because the dispute involves, among other things, the allocation of pollution and non-pollution damages. Db19-20. Newport's Opposition also raises serious questions concerning Newport's refusal to dismiss the Umbrella Policy from the DJ Action. Indeed, Newport admits it settled the Utilities Litigation, which means it is no longer incurring any material costs in connection with its Indemnity Claim. Moreover, Newport represents that "ASIC's Umbrella Policy is unlikely to ever be triggered because of its high attachment point in the insurance tower." Pb46. Yet, the dispute inevitably involves a determination of whether certain aspects constitute pollution or non-pollution damages, and as long as Newport insists on keeping the Umbrella Policy in the case, the pollution exclusion and its arbitration clause are in play.

CONCLUSION

For the foregoing reasons, ASIC respectfully request that the Court reverse the Order, and grant ASIC such other and further relief that is just and proper.

Respectfully,

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