SUPREME COURT OF NEW JERSEY
Docket No.: 089689

MIST PHARMACEUTICALS, LLC, Plaintiff-Petitioner, v. BERKLEY INSURANCE COMPANY, Defendant-Respondent.	ON PETITION FOR CERTIFICATION FROM FINAL DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-001286-22 SAT BELOW: Hon. Morris Smith, J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

BRIEF OF DEFENDANT-RESPONDENT BERKLEY INSURANCE COMPANY

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PRELIMINARY STATEMENT

The instant Petition presents no cognizable basis under Rule 2:12-4 to warrant discretionary review of the ruling below in favor of Respondent Berkley Insurance Company ("Berkley"). The Appellate Division did something New Jersey courts do on a regular basis: it applied basic principles of insurance contract construction to hold that a policy exclusion bars coverage for underlying lawsuits brought against the policyholder ("Underlying Actions"). At the same time, it rejected Petitioner Mist Pharmaceuticals, LLC's ("Mist") novel expansion of this Court's decisions in Griggs v. Bertram, 88 N.J. 347 (1982), and Fireman's Fund Ins. Co. v. Sec. Ins. Co., 72 N.J. 63 (1976), to prevent Berkley from relying on that exclusion. Berkley raised and reiterated the subject "capacity" exclusion's potential applicability throughout the life of Mist's claim. New Jersey law does not support Mist's contention that Berkley's withholding of consent for the underlying settlement strips Berkley of its exclusion-based defenses to coverage. Through this Petition, Mist seeks to obtain a better policy than it bargained for, in contravention of New Jersey law.

The ruling below applies established precepts of New Jersey law to resolve a contract dispute between two corporate entities. The ruling for Berkley is entirely in keeping with this Court's jurisprudence and presents no issue of general public importance or "interests of justice" concern rendering certification appropriate under Rule 2:12-4. Berkley respectfully requests that the Court deny the Petition.

COUNTER-STATEMENT OF MATTER INVOLVED

I. PROCEDURAL HISTORY

Mist filed this action in September 2017 seeking a declaration that the subject directors and officers liability insurance policy ("Policy") affords coverage to Mist and its member/director, Joseph Krivulka, for an Underlying Action then pending in Delaware. (Da1-Da17.) Before responding to Berkley's discovery demands, Mist sought partial summary judgment on Berkley's duty to defend that action, focusing on whether Mist received a "Claim" before the Policy incepted. (Da89, Da100.) The court allowed limited discovery and further briefing solely related to the prior claim issue and granted Mist's motion in December 2018. Ibid.; (Da47-Da48; Da53; Da66.) Berkley was denied reconsideration and interlocutory review. (Da80-Da81; Da766-Da767; Da1004.) The court stayed the case in August 2019. (Da101.)

The stay was lifted on consent in July 2020. After certain limited discovery as permitted by the trial court was completed, Mist moved for partial summary judgment in November 2020 seeking a declaration regarding indemnity coverage for Mist's settlement of the Underlying Actions. (Da1088-Da1089.) Berkley cross-moved and in July 2021, the court denied both motions without prejudice. (Da98-Da99; Da1296-Da1297.) Mist moved for reconsideration of the July 2021 Order, and Berkley cross-moved for reconsideration. (Da1485-Da1486; Da1516-Da1517.) In October 2022, the trial court ruled for Mist. (Da133- Da137.)

A stipulated order on final judgment was entered November 18, 2022. (Da177-Da180.) On December 29, 2022, Berkley timely appealed from the judgment and earlier Orders. (Da181-Da194.) On January 1, 2023, Berkley filed an amended notice of appeal. (Da201-Da206.)

The Appellate Division reversed. (Pa3.) The court held Berkley's "capacity" exclusion ("Capacity Exclusion") bars coverage for the Underlying Actions because the loss alleged therein involved Krivulka acting, at least in part, as director of a non-insured entity. (Pa18-Pa21.) The court further found that this Court's decision in Fireman's did not apply to preclude Berkley from asserting the exclusion's application. (Pa15.)

II. STATEMENT OF FACTS

A. The Underlying Actions

At issue are two underlying lawsuits in which CelestialRX Investments, LLC ("Celestial") sought damages from Mist and others. (Pa3-Pa6.) Celestial, along with Krivulka and Leonard Mazur ["Mazur"], was a co-member of an entity named Akrimax Pharmaceuticals, LLC, ("Akrimax"). (Pa3-Pa4 and Pa4 n.2.)

Celestial first sued in Delaware ("Delaware Suit"), for itself and derivatively for Akrimax. (Da269.) Its Amended Complaint named fifteen defendants, including Mist, Krivulka and other entities allegedly controlled by him ("KFEs"). (Da328; Da331-Da332; Da334-Da337.) None of those other entities -- including Mist

Acquisition, LLC, Mist Partners, LLC and others -- were insured by Berkley. (Da231.) The Delaware Suit claimed that Krivulka and Mazur, as members of Akrimax, breached their fiduciary duties owed to their partner Celestial in connection with the rights for numerous pharmaceuticals "for their own personal gain and for that of their own companies, the entity Defendants named herein." (Da330; Da347; Da359; Da384 – Da386.)

The Delaware Suit allegations focused on Krivulka and his conduct while serving in his capacity as a manager, member and officer of Akrimax, alleging:

> Krivulka manages and controls an entity (Defendant JJK Partners, LLC) which controls Akrimax and owns all voting Units in Akrimax. He is the sole manager of Akrimax, a member of Akrimax' Board of Directors, and an Akrimax officer. Krivulka thus completely controls Akrimax, directly and indirectly.

Da331-Da332. The suit claimed Krivulka funneled licensing agreements and money from Akrimax to the KFEs, without CelestialRX's knowledge. (Da105; Da330; Da347 – Da351.) Relatedly, it alleged Krivulka made Akrimax a named party to agreements involving Krivulka's companies solely to guarantee financial obligations and performance, for no consideration and without benefit to Akrimax. (Da105-Da106; Da344.) Further, Krivulka allegedly had been diverting opportunities to acquire product rights from Akrimax to the Mist Companies [defined to include Mist and non-insureds Mist Partners and Mist Acquisition] and other companies he or Mazur controlled and owned, and then transferring to

Akrimax rights that were limited or easily terminated for additional fees and liabilities Akrimax would not have incurred had it been allowed to acquire the rights free from Krivulka's self-dealing. (Da348, Da1213.) Celestial asserted claims for, *inter alia*, fraud, conversion, and breach of corporate duties. (Da483.)

Celestial also sued in New Jersey in April 2019 ("New Jersey Suit"), naming Mist among twenty-five defendants. (Da113; Da1112-Da1113.) The New Jersey Suit allegations lumped Mist into numerous causes of action against "all defendants except the Beneficiary Defendants," and none of the claims contained allegations specific to Mist. (Da1147-Da1172.) As in the Delaware Suit, the New Jersey Suit alleged Krivulka used his control of Akrimax to transfer pharmaceutical product rights from Akrimax to other KFEs. (Da1113; Da1116–Da1117.)

B. The Berkley Policy

The Berkley Policy was issued to Mist Pharmaceuticals, LLC for April 8, 2014 to November 30, 2015, with a $2,000,000 limit of liability inclusive of defense costs. (Da231-Da232.) Its insuring agreements extend coverage to "Loss arising from any Claim first made" against the Insured Persons or the Insured Entity during the Policy Period "for any actual or alleged Wrongful Act . . . ." (Da258.) "Insured" is defined as "any Insured Person or any Insured Entity" and "Insured Person" as "any past, present or future duly elected or appointed director or officer of an Insured Entity . . . ." (Da260.) As relevant to the Named Insured's directors and officers,

"Wrongful Act" is defined (ibid.) as:

> 1. with respect to the Insured Persons, any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Insured Persons in their respective capacities as such, or any matter claimed against them by reason of their status as Insured Persons, or any matter claimed against them arising out of their serving as a director, officer, trustee or governor of an Outside Entity in such capacities, but only if such service is at the specific request or direction of the Insured Entity.

The Policy's Capacity Exclusion (Da261) provides that Berkley "shall not be liable to make any payment for Loss in connection with a Claim made against any Insured":

> G. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor of any other entity other than an Insured Entity or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity[.]

A Policy condition precludes an Insured from settling a claim without Berkley's consent and further provides (Da254):

> The Insurer's consent shall not be unreasonably withheld, provided that the Insurer shall be entitled to full information and all particulars it may request in order to reach a decision regarding such consent. Any Loss incurred or settlements agreed to prior to the Insurer giving its consent shall not be covered hereunder.

C. Berkley's Communication Of Its Coverage Position

Mist notified Berkley of the Delaware Suit in December 2015. (Da538-Da539.) In March 2016, Berkley agreed to participate in Mist's defense while

reserving Berkley's rights. (Da407-Da417.) Berkley agreed to pay 10% of the fees charged by defense counsel representing the majority of the defendants. (Da416-Da417.) At the same time, Berkley reserved its rights under the Policy on various grounds, including pursuant to the Capacity Exclusion, and cautioned that "nothing herein should be construed as a waiver, modification or estoppel of any rights or defenses available to [Berkley] under the terms of the policy or any applicable insurance law and each of those rights and defenses remain expressly reserved." (Da413-Da417.) A Berkley July 2017 letter reiterated Berkley's reservation of rights under the Capacity Exclusion. (Da426-Da427.)

In August 2017, having determined the subject claim was first made prior to its Policy, Berkley disclaimed coverage and withdrew from Mist's defense. (Da434-Da438.[1]) In so advising Mist, Berkley incorporated all prior reservations of rights, including those in its March 2016 and July 2017 letters. (Da437-Da438.) This coverage action followed, at which time Berkley again advised Mist that the Capacity Exclusion served as a potential basis to deny coverage. (Da34.)

In October 2019, while this case was stayed, Mist advised Berkley of an upcoming settlement meeting and sought confirmation that Berkley was prepared to contribute its policy limits towards a settlement of the Underlying Actions. (Da1187-

[1] Berkley's August 2017 disclaimer was premised upon Mist's pre-policy receipt of Celestial's threat of litigation, a draft Complaint referenced in Delaware Suit filings, and the exchange of written term sheets and settlement agreements. (Da434-Da438.)

Da1188.[2]) Mist's brief letter provided no analysis of Mist's potential exposure. (Da1187-Da1188.) Berkley responded that "given the untimely notice of this mediation, the lack of any substantive information regarding Mist Pharmaceuticals' potential exposure in the 'Underlying Actions' and the lack of any substantive information at all as to the scope, terms, or details of the scheduled negotiations, it is impossible for Berkley to prepare to participate in the scheduled mediation in any meaningful way." (Da1191.) Berkley added (ibid.):

> As you are aware, the allegations in the CelestialRX Action do not target Mist Pharmaceuticals, or its actions, as the focus of the alleged damages . . . . Accordingly, at this time, Berkley is unable to provide any settlement authority for the mediation that was scheduled without its knowledge and without the provision of any meaningful valuation information. Berkley has been provided no information which indicates that the remaining Berkley Policy limits should be made available.

Thereafter, on November 19, 2019, counsel for Mist and other KFEs provided a "status and analysis" of the Underlying Actions, stating that, "[e]ven though we remain optimistic that the Court will ultimately find in favor of the Krivulka Defendants on liability, there is risk that the Court may find in Plaintiffs' favor on at least some issues." (Dca417-Dca424.) Counsel added that there seemed "little benefit in attempting to estimate allocations among different Krivulka Defendants because of the imprecise nature of such an exercise coupled with the overlapping

[2] By this point, the New Jersey Suit had been filed and Mist's letter referenced the Delaware Suit "and Related Claims." (Da1187.)

defense costs and overlapping liability exposure across claims and defendants." (Dca422.) A January 2020 letter from counsel likewise lumped all causes of action and litigations together and did not set forth Mist's particularized exposure. (Dca425-Dca428.) Mist agreed in principle to settle the Underlying Actions in February 2020. (Dca431.)

In June 2020, after a written settlement agreement was executed, Mist asked Berkley whether it would pay its remaining limit or otherwise contribute to the "Global Settlement" of $12 million.[3] Dca437. In response, Berkley advised of its continued willingness to engage in settlement discussion as to this action, but that such discussion had to account for a Mist allocation that was reasonable and Berkley's the Capacity Exclusion defense. (Dca449; Dca459 Dca461.)

LEGAL ARGUMENT

I. THE PETITION DOES NOT SATISFY RULE 2:12-4.

Rule 2:12-4 instructs: "Certification will not be allowed on final judgments of the Appellate Division except for special reasons." The rule warrants certification "only" as follows:

> if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of

[3] "Global Settlement" refers to the resolution of the Underlying Actions reached between Celestial and all defendants, which released over 28 individuals and/or entities including 12 different KFEs and Krivulka himself. (Da114; Da127.)

> the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.

R. 2:12-4.

The instant Petition pays lip service to the rule's requirements for securing certification but devotes little time explaining how those requirements are satisfied. They are not, and the Petition presents no basis warranting certification.

II. REFUSING TO PRECLUDE BERKLEY FROM RELYING ON ITS CAPACITY EXCLUSION DOES NOT CONFLICT WITH GRIGGS OR FIREMAN'S. [Responding to Error Complained Of No. 1]

Mist argues that allowing Berkley to assert the Capacity Exclusion as a bar to coverage following Mist's settlement of the Underlying Actions presents a conflict with this Court's rulings in Griggs, 88 N.J. 347, and Fireman's, 72 N.J. 63. Mist's argument is factually and legally flawed.

Mist's argument is premised upon a core factual misrepresentation that permeates its Petition. Specifically, it contends that Berkley initially communicated to Mist an interpretation of the Capacity Exclusion that only limited coverage rather than barred it entirely, but then "transformed" its position in 2020 to deny coverage. (Pb6.) The record is clear that Berkley did no such thing.

A review of Berkley's communication regarding its coverage position evinces the clear distortion made by Mist. Mist principally cites to an excerpt of Berkley's 2016 letter in which Berkley agreed to contribute to Mist's defense of the Delaware

Suit. (Pb4, citing Da413.) Mist ignores, however, the clear reservation of rights set forth in that letter as to the Capacity Exclusion. Nowhere in the March 2016 letter does Berkley advise, as Mist posits, that "the exclusion only barred coverage *for that portion* of Krivulka's conduct on behalf of uninsured entities. . . . ." (Pb4 (emphasis added in Mist's Petition.) To the contrary, Berkley "reserve[d its] rights under Exclusion G., which provides the following . . ." and then quoted the Capacity Exclusion. (Da413.) That reservation was not limited or qualified in any way.

Moreover, Berkley's reservation was reiterated on multiple occasions and never withdrawn. In a July 2017 letter to Mist, Berkley again expressly recited the Capacity Exclusion and reserved its rights. (Da426-Da427.) Further, Berkley's August 2017 letter then incorporated those prior reservations, and in November 2017, Berkley again asserted the Capacity Exclusion as a defense in answering this action. (Da34, Da438.) Mist's distorted version of the facts has no record support.

The Petition is also misguided regarding the law in urging unsupported expansion of this Court's long-standing jurisprudence. Mist first wrongly argues that Griggs mandates that Berkley "should be estopped from benefitting from its post-settlement No Coverage Interpretation." (Pb10-Pb11.) Mist's argument as to Griggs rests on its incorrect assertion that Berkley's reliance on its Capacity Exclusion in its cross-motion in 2020 constituted a previously "undisclosed coverage position." (Pb10-Pb11.) To the contrary, as set forth above and as the Appellate Division

recognized, "Berkley reserved its rights under the capacity exclusion repeatedly from its earliest communications with Mist regarding the claim." (Pa15.) Once that appropriate factual scenario is recognized, it is clear Griggs is inapposite.

Griggs provides no support for Mist's novel suggestion that an insurer that appropriately and repeatedly alerts its insured to its reservation of rights as to potential application of a policy exclusion can be barred from relying on that exclusion when coverage is evaluated by a court after the underlying claim has resolved. Griggs did not present such a scenario. Rather, the insurer there received notice of potential claim as to a fight involving its insured, and then further notice of a claim being made, but did not communicate with the insured regarding potential coverage until after suit was filed over a year later. 88 N.J. at 354. The Court framed the issue as whether the insurer "having failed for a substantial period of time to notify its insured of the possibility of noncoverage, was estopped to deny coverage of the claim against its insured." Id. at 355. Here, by contrast and as recognized by the Appellate Division, Berkley notified its insured of such possibility early and often. (Pa15.)

Tellingly, Mist's very argument as to why Griggs applies is only made by Mist leaving out (with ellipses) a critical clause in quoting from Griggs. (Pb9.) The statement Mist purports to quote reads as follows in Griggs: "Unreasonable delay in disclaiming coverage, or in giving notice of the possibility of such a disclaimer, even

before assuming actual control of a case or defense of an action, can estop an insurer from later repudiating responsibility under the insurance policy." 88 N.J. at 357 (emphasis added). Yet Mist's brief omits the underlined clause. (Pb9.) That clause highlights Griggs' inapplicability where, as here, an insurer gives its insured early and repeated notice as to an exclusion's potential application. The ruling below does not conflict with Griggs.[4]

Further, absent a Griggs estoppel (where prejudice is presumed), New Jersey law is clear that courts cannot create coverage by estoppel without establishing detrimental reliance. See Greenberg & Covitz v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 312 N.J. Super. 251, 265 (App. Div. 1998) modified on other grounds, 161 N.J. 143 (1999); Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 450 N.J. Super. 400, 413-14 (App. Div. 2017). There is no support in the record, and Mist has made no showing to establish the requisite detrimental reliance.

Recognizing that this case does not present circumstances warranting a presumption of prejudice to the insured under Griggs, Mist further advances a common law equitable estoppel argument. (Pb11-Pb12.)[5] To establish equitable

[4] Mist's "accord" citation to Merchants Indem. Corp. v. Eggleston, 37 N.J. 114 (162), provided without explanation, should be ignored. Regardless, Eggleston (a waiver case) is inapt as Mist controlled its defense with its chosen counsel, while accepting Berkley's ten percent contribution subject to its reservation of rights. (Da416-417.)

[5] Mist's efforts to raise this argument for the first time in this Petition should be denied as procedurally improper and waived. Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021).

estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. Knorr v. Smeal, 178 N.J. 169, 178 (2003). Tellingly, Mist made no effort before the Appellate Division to even assert any proof of prejudice, instead relied solely on Griggs based on a purported presumption of prejudice. Mist has made no factual showing regarding any purported reasonable reliance to its detriment upon Berkley's reservation of rights with respect to the Capacity Exclusion. Accordingly, Mist's additional argument is further without merit.

Mist next claims inconsistency with Fireman's, 72 N.J. 63, again advocating an impermissible expansion of the Court's decision. That case held that an insurer that refused in bad faith to contribute its policy limits to a reasonable settlement could not rely upon the "voluntary payments" and "no action" conditions in its policy to deny coverage. Id. at 66-67.

The established bad faith of the insurer -- something not present here -- was a touchstone for the analysis in Fireman's. Id. at 67-71. More importantly, the only right the insurer forfeited was its "right to control settlements" – which right the insurer sought to enforce by refusing coverage based upon the policy's "voluntary payment" and "no action" provisions. Id. at 71 (quoting Warren v. The Employers' Fire Insurance Co., 53 N.J. 308, 311-312 (1969)), for the proposition that: "Before

an insurance company will be heard to allege the breach of a contractual provision by plaintiff, the insurance company must be able to assert its own lack of any breach."); see also Baen v. Farmers Mut. Fire Ins. Co. of Salem Cnty., 318 N.J. Super. 260, 267 (App. Div. 1999) (relying upon Fireman's for proposition that "[w]hen an insurer violates its contractual obligations to the insured, it forfeits its right to control settlements.")

Fireman's did not hold - as Mist urges - that an insurer forfeits its ability to assert applicable policy exclusions in defense to coverage as a result of withholding consent to settle in alleged breach of the insurance contract. 72 N.J. at 71. That case did not present that question. No doubt reflecting that fact, the Petition does not cite a single case applying Fireman's to expand the scope of a policy's coverage as Mist would have the Court do here. (Pb12-14.) Indeed, such a misapplication of Fireman's would run squarely afoul of long-standing New Jersey precedent dictating that courts should not fashion a better policy for the insured than was agreed to by the parties. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010).

Mist's brief argument as to Fireman's rests on two erroneous premises. First, it modifies the wording of Appellate Division ruling to claim that the court attributed to Berkley a certain assertion and then attacks the ruling as modified. (Pb13 (quoting, with modification, Pa15.) The actual language used by the court in this portion of the decision below does not square with Mist's read. Next, Mist repeats the factual

error that drives its Petition – the suggestion that Berkley represented to Mist that the Capacity Exclusion was not a complete bar to coverage. (Pb14.) In addition to being factually wrong as outlined above, these arguments have nothing to do with whether Fireman's strips an insurer of its exclusion-based defenses based on a refusal to consent to an underlying settlement. It does not, as outlined above.

In sum, the Appellate Division's decision does not conflict with Griggs or Fireman's.

III. THE APPELLATE DIVISION'S APPLICATION OF THE CAPACITY EXCLUSION TO BAR COVERAGE DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT. [Responding to Errors Complained Of Nos. 2 and 3]

In holding the Capacity Exclusion applicable to bar coverage, the Appellate Division evaluated the exclusion's plain language as guided by the State's "well-settled jurisprudence" regarding the construction of insurance contracts. (Pa15-Pa18.) It recounted in detail a decision from the Eleventh Circuit construing a similar "capacity" exclusion under similar facts and adopted its "sound interpretation" while also footnoting case law from other jurisdictions employing "a similar approach to analyzing dual capacity claims." (Pa19 and Pa19 n.3. It then concluded the "clear language" of Berkley's Capacity Exclusion precludes coverage here because the loss alleged in the Underlying Actions involved Krivulka acting in a "dual capacity," for both Mist and Akrimax. Pa20-Pa21. Nothing about this thoroughly-reasoned construction exercise warrants the rare step of discretionary review.

The decision is entirely consistent with Flomerfelt v. Cardiello, 202 N.J. 432 (2010). Flomerfelt did not construe a "capacity" exclusion, which in and of itself should dispense with this argument. Mist nonetheless claims conflict with Flomerfelt because, it posits, the ruling below did not construe the exclusion "narrowly" and did not find "arising out of" ambiguous. Pb16-Pb18. To the contrary, there is no conflict with Flomerfelt or any other New Jersey precedent here.

Mist's argument ignores entirely that Berkley's Capacity Exclusion contains different language than the exclusion in Flomerfelt, which renders this Court's decision in Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 552, recon. den. 251 N.J. 4790 (2020), the more appropriate touchstone. While Flomerfelt construed the linking phrase "arising out of," the Capacity Exclusion contains other linking language such as "in any way involving," akin to the connecting phrases found in Norman to broaden the subject exclusion's application. 251 N.J. at 555. The Appellate Division ruling appropriately relied upon Norman and creates no conflict with Flomerfelt. Pa17-Pa18 (citing Norman, 251 N.J. at 542).[6]

Mist further claims conflict with Flomerfelt because the ruling below held the exclusion applicable without "definitive" findings from the Underlying Actions.

[6] Also worth noting, insofar as Flomerfelt involved the construction of "arising out of," it did so in an entirely distinguishable context – where the actual facts, as opposed to what was alleged in the underlying complaint, might or might not implicate the controlled dangerous substances exclusion at issue. 202 N.J. at 451.

(Pb14-15.) Flomerfelt is distinguishable on this point because there, the Court determined that the underlying complaint allegations obligated the insurer to defend; it declined, however, to rule on indemnity coverage because the record did not provide a "definitive answer" as to a causation issue dispositive of whether an exclusion applied. 202 N.J. at 457. Here, by contrast, the Appellate Division found that the "the loss alleged by Celestial" implicated the Capacity Exclusion such that Berkley did not owe coverage. Pa20-Pa21. It is black letter New Jersey law that where the underlying complaint allegations create no potential that the insured will be held liable for a judgment that is covered by the subject policy, there can be no duty to indemnify. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992). That is, the absence of an indemnity obligation can unquestionably be determined by the underlying suit's allegations, Trustees of Princeton University v. Aetna Cas. and Sur. Co., 293 N.J. Super. 296, 301, and it is irrelevant whether it was proven in the Underlying Actions that Krivulka actually engaged in the acts complained of. As the court below recognized, the underlying claims as alleged indisputably involved Krivulka acting in a "dual capacity" such that the exclusion was squarely implicated and Berkley owed no coverage. (Pa20-Pa21; Da347-Da348; Da352-Da353; Da1125-Da1126; Da1135-Da1137.) Flomerfelt therefore provides no basis for certification.

IV. THE RULING BELOW PRESENTS NO QUESTION OF GENERAL PUBLIC IMPORTANCE AND NO "INTEREST OF JUSTICE"

CONCERN UNDER R. 2:12-4.

We dispense lastly with two prongs of Rule 2:12-4 that Mist mentions with little elaboration. First, it argues certification is warranted because the appeal presents a question of general public importance, specifically "this State's public policies to promote settlement and make efficient use of judicial and party resources." (Pb2) Mist ignores that the question to which it points must be one "which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court." R. 2:12-4. It makes no case for those qualifiers being satisfied, and they are not.

Regardless, the public policy encouraging settlement is not impacted by the Appellate Division ruling in any way. Mist agreed to what it asserts was a reasonable settlement of the Underlying Actions, taking into account its potential exposure in connection with the claims asserted against it. (Dca437-Dca438.) When it made that decision, it had not received any promise from Berkley that coverage would be afforded as to that settlement. To the contrary, Berkley had repeatedly reserved its rights under the Policy, including with respect to applicability of the Capacity Exclusion and to Berkley's rights under the consent-to-settle provision and its related concerns regarding allocation to Berkley's insureds. (Da413-Da417; Da426-Da427; Dca412-Dca416.) Berkley's coverage position had no impact as to whether Mist should have settled as it did – by its own telling, it was reasonable in doing so.

Mist also wrongly claims an "interest of justice" concern. As explained above, on the record before it, the Appellate Division properly applied New Jersey law to hold the Capacity Exclusion precludes coverage for the Underlying Actions.

V. RESPONSE TO MIST'S COMMENTS ON RULING BELOW

The Appellate Division ruling refusing to preclude Berkley from relying on its Capacity Exclusion was entirely in keeping with Griggs and Fireman's. The court did not "condone" any failure to advise Mist of a coverage position because there was no such failure; the court appropriately recognized and gave credence to Berkley's repeated reservation of rights with respect to the exclusion found applicable to bar coverage. The court's construction of the exclusion likewise was entirely in keeping with this Court's precedent.

CONCLUSION

For the foregoing reasons, Mist puts forth no basis upon which certification is warranted. Berkley respectfully requests that the Court deny the Petition.

Respectfully submitted,
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Dated: October 9, 2024

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