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SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089689

MIST PHARMACEUTICALS, LLC, Plaintiff-Petitioner, -vs- BERKLEY INSURANCE COMPANY, Defendant-Respondent.	ON PETITION GRANTED FROM FINAL DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Sat Below: Hon. Morris Smith, J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

SUPPLEMENTAL BRIEF OF PLAINTIFF-PETITIONER MIST PHARMACEUTICALS, LLC

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INTRODUCTION

Berkley Insurance Company ("Berkley") issued a directors and officers insurance policy ("Policy") to Mist Pharmaceuticals, LLC ("Mist") and Joseph Krivulka, Mist's chairman (together, "Mist Insureds"). The Policy obligated Berkley to defend the Mist Insureds against any claim for actual or alleged wrongful conduct and to pay any loss arising from such a claim. It also covered Krivulka in any capacity in which he was an insured, such as Mist's chairman.

CelestialRX Investments, LLC ("Celestial") and Krivulka were co-investors in Akrimax Pharmaceuticals, LLC ("Akrimax"). Celestial filed a lawsuit claiming that Krivulka wrongly diverted Akrimax corporate funds and opportunities to Mist and other Krivulka Family Entities ("Krivulka Entities"). Celestial also claimed that the Mist Insureds were jointly and severally liable for hundreds of millions of dollars in damages. The Mist Insureds disputed those allegations. At the inception of the lawsuit, based on the complaint allegations, Berkley confirmed that coverage *existed* for Krivulka in his Mist capacity but not in his capacity in other Krivulka Entities.

Berkley later withdrew its defense of the Mist Insureds – and denied coverage – based solely on the mistaken belief that Celestial's claim was not filed within the coverage period. The Mist Insureds brought this coverage action to re-establish Berkley's acknowledged defense obligation and secure indemnity

coverage for the claim. Finding that the claim fell within the Policy's coverage period, the trial court ordered Berkley to resume its defense of the Mist Insureds.

Later, Mist sought Berkley's consent to enter and contribute to a reasonable, court-approved settlement ("Settlement") of the sprawling years-long, multi-party, and multi-jurisdictional underlying actions. Mist provided Berkley with a mountain of evidence and multiple legal memoranda and analyses that supported the reasonableness of the Settlement. Despite stating it wanted to "meaningfully participate in settlement discussions," Berkley withheld its consent on the sham basis that Mist provided "woefully inadequate" information. Mist had no choice but to enter the Settlement and proceed against Berkley.

Only after the Settlement, and five years after the start of Celestial's lawsuit, did Berkley conjure a new-found theory – the Policy's capacity exclusion – to justify denying coverage to the Mist Insureds.

The trial court correctly decided that Mist provided Berkley with all the "information necessary" and Berkley "did not conduct any assessment of [Defense Counsel's] settlement recommendation." The court determined that, in violation of the Policy, Berkley unreasonably withheld its consent for the Mist Insureds to enter the Settlement. Applying Griggs v. Bertram, 88 N.J. 347 (1982) and Fireman's Fund Ins. Co. v. Security Ins. Co., 72 N.J. 63 (1976), the trial court held that Berkley's breach made it duty-bound to cover the

reasonable, good-faith Settlement. The court did not reach Berkley's post-Settlement justification denying coverage based on the capacity exclusion.

The Appellate Division reversed by unnecessarily and erroneously deciding an issue it should not have reached – its novel interpretation of the capacity exclusion. First, the panel failed to follow this Court's established principles in Griggs and Fireman's, which hold that when an insurer fails to promptly give reasons for refusing coverage and then unreasonably withholds consent for its insured to enter a reasonable and good-faith settlement, the insurer is required to provide coverage. On the basis of those cases, the panel should have affirmed the findings of the trial court that the Mist Insureds were entitled to coverage.

Second, in denying indemnity coverage to Mist on summary judgment, the panel improperly relied solely on "heavily disputed" allegations in the underlying actions, instead of actual factual findings and undisputed evidence as required by Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010).

Third, the panel failed to construe its novel interpretation of the capacity exclusion narrowly and against Berkley, as required by Flomerfelt, and consistent with the narrow interpretation that Berkley itself advanced for nearly five years – thus undermining Mist's reasonable and settled coverage expectations.

The Court should reverse the judgment of the panel and reinstate the trial court's November 2022 judgment in favor of the Mist Insureds.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. The Mist Insureds Face Numerous And Multi-Jurisdictional Underlying Actions.

In November 2015, Celestial brought suit in Delaware's Court of Chancery ("Delaware Action") against the Mist Insureds and numerous other defendants, including Akrimax and various Krivulka Entities controlled by Krivulka. Da267.[2]

Celestial and Krivulka were co-investors in Akrimax, and Celestial alleged that Krivulka, as Akrimax's "controlling member," engaged in schemes to wrongly divert corporate funds and opportunities (e.g., pharmaceutical licenses and royalties) from Akrimax to other entities controlled by Krivulka, i.e., Mist and the Krivulka Entities. Da267-326. Celestial also alleged that the Mist Insureds were jointly and severally liable for hundreds of millions of dollars in damages. Da321-322. In none of the Underlying Actions[3] did any court ever make a factual finding that the Mist Insureds engaged in wrongful conduct, and

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[1] The Procedural History and Statement of Facts are presented together for the Court's convenience and to avoid repetition.

[2] Citations to "Da" and "Dca" refer to the Appendix and Confidential Appendix, respectively, which Berkley filed in the Appellate Division proceedings. Citations to "Pa" refers to the Appendix that Mist filed in the Appellate Division.

[3] The Delaware Action as well as the New Jersey Action, defined herein, are collectively referred to as the "Underlying Actions."

the Mist Insureds never made any admission of wrongdoing. Dca425-26; Dca430.

In February 2018, following Krivulka's death, Celestial filed suit in the New Jersey Superior Court ("New Jersey Action"), asserting claims similar to those in the Delaware Action against the Mist Insureds, Akrimax, and other Krivulka Entities. Da328-406, 1112-1173. Celestial also sought, among other things, a stay of the distribution of Krivulka's estate. Da1111.

Finally, because of their pending motions-to-dismiss, defendants did not answer Celestial's complaints. Da114. Nevertheless, the Delaware and New Jersey Actions were heavily litigated through pre-answer motion and discovery practice and the Mist Insureds remained steadfast in their denial of all allegations asserted against them. Dca425-426; Dca430.

B. Mist's Directors & Officers Insurance Policy Issued By Berkley.

Berkley issued a "US ExecSuite Directors & Officers" policy to Mist for the period of April 8, 2014 to November 30, 2015 with a $2 million limit ("Policy"). Da231. Under the Policy, Berkley promised to "pay on behalf of" Mist and Mist's directors and officers "all Loss arising from any Claim first made against the [Insureds][4] during the Policy Period . . . for any actual or alleged

[4] The Policy covers "heirs, executors, administrators, and legal representatives of an Insured Person in the event of death" and, therefore, insures the Krivulka Estate.

Wrongful Act." Da258. Berkley also has a "duty to defend any Claim for Damages which are covered by this Policy." Da254. The Policy defines "Loss" as "Damages [*i.e.*, settlement] and Costs of Defense." Da253.

With respect to settlements, the Policy states that "[a]n Insured shall not . . . enter into any settlement agreement [or] make any offer of settlement or compromise . . . without the Insurer's prior written consent." Da254. The Policy also states: "*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." Da254 (emphasis added).

The Policy includes a capacity exclusion that applies to Claims "[b]ased 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 [or] officer of [an uninsured] entity." Da261.

C. Berkley Accepted Coverage, But Then "Groundlessly" Denied Coverage Based on a Rejected (and Now-Abandoned) "Claims-Made" Defense.

In December 2015, Mist notified Berkley of the Delaware Action, and in March 2016, Berkley issued a letter confirming its obligation to cover the Mist Insureds under the Policy (with a reservation of rights) based on the allegations in the complaint. Da407. In its letter, Berkley expressly confirmed that the

Policy covered Krivulka when he acted in his Mist capacity but not when he acted in his capacity for other uninsured entities:

> [C]overage for Krivulka is limited to any actual or alleged [conduct] *in his capacity as the chairman of Mist Pharma* [i.e., Mist]. Coverage is therefore not available for Krivulka for allegations pertaining to his roles with Mist Acquisition, Mist Partners, Akrimax, or any other entity [i.e., uninsured entities].
>
> Da413 (emphasis added).

In agreeing to provide coverage for Mist and Krivulka (the Mist Insureds), Berkley also agreed to cover 10% of the total costs incurred in the combined defense of Mist and Krivulka in his capacity as Mist Chairman, as well as the other uninsured defendants involving Krivulka. Da417.

For years, Berkley would repeat that coverage was available to the Mist Insureds. Da426; Da1191; Dca402; Dca406; Dca436; Dca449. In July 2017, after Berkley was notified of a mediation in the Delaware Action, it confirmed that coverage was available for Krivulka "in his capacity as the chairman of Mist Pharma." Da426. However, a month later, in an August 17 letter, Berkley denied coverage and withdrew its defense of the Mist Insureds, giving as its *sole* basis that the "Claim" fell outside the coverage period. Da435-436. Berkley contended that the Claim was first made against the Mist Insureds in 2013 but that the Policy only covered Claims made during the Policy's April 2014 –

November 2015 period. Da435-436. Berkley never mentioned in its August 2017 letter that the capacity exclusion was a basis for its denial of coverage.

The Mist Insureds brought this coverage action and filed a motion for partial summary judgment to reestablish Berkley's duty to defend. Da47. During the duty-to-defend motion practice, Berkley cross-moved for summary judgment and relied exclusively on its "claims-made" argument and sought discovery to determine whether a "Claim" was made in 2013. Da53. The trial court ordered Mist to produce: (i) nearly 12,000 pages of discovery from the Delaware Action; (ii) sixty-four exhibits attached to affirmations submitted with motions filed in the Delaware Action; and (iii) deposition transcripts (including numerous exhibits) from the Delaware Action. Da53; Da1182-1183. Berkley never relied on or made reference to the capacity exclusion to support its denial or in connection with this motion practice.

In December 2018, after reviewing a "mountain of paper" produced by the Mist Insureds, the trial court held that no Claim was made in 2013 and that Berkley's withdrawal from the defense was "groundless." Da53; Da70-71; Da82; Da87-88; Da93; Da113; Da1004. The trial court reestablished Berkley's defense obligation. Da47. The court denied Berkley's motion for reconsideration and granted in full Mist's fee-shifting application, Da83-84; Da9, and the

Appellate Division denied Berkley's motion for leave to appeal, Da1004.

D. Berkley Advised Mist That It Would "Meaningfully Participate" In Settlement Discussions, But Then Wrongly Withheld Its Consent to the Settlement.

Beginning in November 2019, the parties to the multi-jurisdictional Underlying Actions, including the Mist Insureds, actively engaged in settlement discussions. Da140. Throughout the settlement negotiations from November 2019 through June 2020, Mist requested that Berkley consent and contribute to a reasonable Settlement. Dca401-448.

During this time, Berkley repeatedly expressed a willingness to participate in settlement negotiations consistent with its position advanced for years that coverage was available to the Mist Insureds. Dca401-402; Dca436; Dca449; Da1191. Berkley confirmed the "existence of potentially applicable coverage," Dca406; Dca449, stating it was "interested in being part of the process of settlement" and evaluating the "liability/exposure for Mist . . . , and the Estate of Joseph Krivulka limited to *his capacity for which he is an insured under the Berkley Policy*," Da1191 (emphasis added). Berkley sought "from Mist information to permit Berkley to evaluate and analyze the potential settlement value to and the exposure of Mist . . . so that *Berkley can meaningful[ly] participate in settlement discussions*." (Dca402 (emphasis added).) Berkley told Mist that if it provided that information, including "defense counsel's analysis of

liability/exposure for Mist Pharmaceuticals, and the Estate of Joseph Krivulka *limited to his capacity for which he is an insured* under the Berkley Policy," Dca406 (emphasis added), Berkley would provide settlement authority, Dca436.

To that end, Mist provided Berkley with information necessary to conduct the exposure analysis producing (i) nearly 12,000 pages of discovery, sixty-four exhibits, and deposition transcripts from the Delaware Action, Da53,1182-1183; (ii) pre-settlement case analyses and status updates prepared by Andrew Anselmi, Esq. ("Defense Counsel"); and (iii) three more Defense Counsel case and settlement analyses dated November 19, 2019, January 30, and March 3, 2020. Dca401-448. The trial court found Defense Counsel to be "a person with not only a complete knowledge of the facts, but also a veteran litigator with the legal knowledge and understanding of when a settlement is reasonable and in the best interests of a client and when it is not." Da115.

The information provided to Berkley established that the Mist Insureds were exposed to a potentially massive liability judgment in the professional judgment of Defense Counsel. Da122; Dca417-432. The information showed that (1) Mist received nearly 90% of the *allegedly* diverted royalty payments from Akrimax, Dca510; (2) Krivulka, as the 95.32% owner and chairman of Mist, exposed the Mist Insureds to either direct liability or joint and several liable under a conspiracy theory, Dca421, 426; and (3) all defendants faced

massive joint and several liability exposure, given that Celestial's alleged damages exceeded $300 million and Defense Counsel estimated a total reasonable exposure of *at least* $30 million. Da122.

In addition, Berkley was advised that the parties faced significant ongoing defense costs in the Underlying Actions if the case was not settled. Defense Counsel budgeted $4.255 million for just the Delaware Action, plus another $250,000 - $500,000 for an appeal in that action alone. Dca1586.

Mist kept Berkley informed of all material developments in the settlement discussions, Da1273, 1187-1188; Dca401-411, 437-448, and reminded Berkley that, under the Policy, it could not unreasonably withhold consent, Da1187-1188; Dca379-386, 401-411. Mist provided Berkley with a mass of information and detailed legal analyses in support of the reasonableness of a settlement but to no avail. In its stock responses, Berkley found each of Defense Counsel's "detailed" memoranda "woefully inadequate." Dca402. Proceeding under the pretense that it lacked sufficient information, Berkley refused consent to the Settlement. Dca412. Berkley did not rely on the capacity exclusion as its reason for withholding consent, nor did Berkley assert that the capacity exclusion completely barred coverage for the Settlement. Dca449.

Abandoned by Berkley and given the risk of a high-damages judgment, in June 2020, the Mist Insureds, along with the other underlying defendants, agreed

to a $12 million Settlement with Celestial. Da1274. Twenty-five percent of the Settlement – $3 million – was allocated to the Mist Insureds ("Mist Settlement Portion") in Defense Counsel's professional judgment. See Mist Pharm., LLC v. Berkley Ins. Co., 479 N.J. Super. 126, 135 (App. Div. 2024); Da115. On October 8, 2020, the Delaware Chancery Court approved the Settlement, thus establishing its reasonableness. Da1274-75; see also Mist Pharm., 479 N.J. Super. at 135.

E. Berkley Ignored Defense Counsel's Analyses Provided by Mist.

The Mist Insureds moved for summary judgment on Berkley's duty to indemnify their portion of the Settlement. Da78. The trial court searched in vain for evidence of Berkley's evaluation of the Settlement:

> [I]t appears to me that nowhere is a certification or affidavit from anyone employed by Berkley . . . identifying the specific reasons that 'it' concluded that the settlement rationale espoused by [Defense Counsel] . . . was not sufficient to enable Berkley to review, analyze, and evaluate the potential for a good faith negotiation and settlement.
>
> [Da1509].

In response to the trial court's inquiry, Berkley admitted it never submitted any such certification or affidavit. Da1511.

The trial court initially denied Mist's summary judgment motion for indemnification because it was unclear whether "the facts in the current record"

were "available to Berkley on June 24, 2020" when the Mist Insureds again requested contribution once the Settlement had been reached. ("July 2021 Opinion") Da121.

To answer the trial court's question regarding Berkley's "specific reasons" for withholding consent to the Settlement, Mist conducted a Rule 4:14-2(c) deposition of Berkley's corporate designee, Carol Threlkeld, regarding "[a]ll actions undertaken by Berkley to investigate, analyze, and assess coverage for the Claim under the Policy" and Mist's "request for consent of the Global Settlement." Da1681. Threlkeld, a licensed attorney, testified that she was the sole Berkley decisionmaker regarding Mist's request for contribution to the Settlement. Dca1728-34.

Ms. Threlkeld's deposition revealed that, despite the fact that Berkley possessed all of the information underlying Defense Counsel's settlement recommendation *before the June 24, 2020 Settlement*, Berkley performed no real claims investigation. Da1502-1507. Threlkeld confirmed that Berkley (1) undertook no meaningful or independent evaluation of the Settlement opportunity or of Defense Counsel's analyses, Dca1722; (2) did not consult with an attorney experienced in cases like the Underlying Actions, regarding Defense Counsel's settlement analyses and recommendation, Dca1679-1700; Da1507-1508; (3) and asserted attorney-client privilege when asked about Berkley's coverage

counsel's purported basis for disputing Defense Counsel's analyses and rejecting his settlement recommendation. Da1507-150. Threlkeld's assertion of privilege left the record devoid of any evidence that Berkley conducted any claim investigation or Settlement evaluation. Da1507-1508.

F. *After* the Settlement Was Achieved, Berkley, for the First Time, Asserts that the Capacity Exclusion Is a Complete Bar to Coverage.

After the Settlement was reached and five years *after* receiving notice of the Underlying Actions, Berkley first revealed its newfound position. Pa14. Berkley asserted that the allegations in the Underlying Actions – allegations Berkley had known throughout those five years – now had to be viewed through Krivulka's "dual" role in allegedly diverting assets from Akrimax (an uninsured entity) to Mist (an insured entity). Pa14; see also Mist Pharm., 379 N.J. Super. at 142. In an about-face, Berkley changed its 2016 – 2020 position from coverage is available to coverage is not available, arguing that the capacity exclusion afforded no coverage based on long-standing *allegations* of Krivulka's wrongful acts on behalf of Mist and uninsured entities.

G. The Trial Court Reconsiders Its July 2021 Opinion And Grants Summary Judgment in Favor of Mist.

Mist filed a motion for reconsideration of the trial court's July 2021 Opinion following the deposition of Berkley's corporate designee. Based on that deposition, the trial court found that "significant discovery since the Court

originally rejected Mist's argument in July 2021 has radically changed the landscape of the motion record which has, in turn, changed the Court's mind." ("October 2022 Opinion") Da168. The court found that Threlkeld "made it abundantly clear that [Berkley] did not conduct any assessment of [Defense Counsel's] settlement recommendation" and that Berkley "had the information necessary to provide consent to settle and unreasonably chose to refuse consent to Mist." Da168. The court stated that was so because "there was enough information already available to Berkley by virtue of the detailed status letters" and "mountain of paper" provided. Da168.

Therefore, the trial court held that "Berkley breached the Policy and that it acted unreasonably in refusing to grant consent to settle." Da171. In reaching that decision, the trial court applied Fireman's and Griggs to establish Berkley's duty to indemnify the Mist Settlement Portion. Da170-71. On November 18, 2022, the trial court granted Mist's motion for reconsideration, entered summary judgment requiring Berkley to honor its duty to indemnify, and ordered Berkley to pay its remaining policy limit of $1,751,567. ("Final Judgment") Da177. The court also awarded Mist its coverage litigation fees under Rule 4:42-9(a)(6), and pre-judgment interest. Da177.

H. The Appellate Division Reverses the Trial Court's Order Establishing Berkley's Duty to Indemnify by Considering the Capacity Exclusion.

The Appellate Division reversed the trial court's finding that Berkley owed a duty to indemnify the Mist Insureds based on a "matter of first impression" – a "dual" capacity exclusion first raised by Berkley *after* Berkley refused to consent to the Settlement. Mist Pharm., 479 N.J. Super. at 129-130. Relying solely on the *allegations* in the complaints of the Underlying Actions, the panel found that Celestial's loss "stemmed from Krivulka's self-dealing" as "Krivulka was acting in his capacity as both a director of Akrimax and majority shareholder of Mist" in diverting royalties and distribution rights from Akrimax (an uninsured entity) to Mist (an insured entity). Id. at 142. The panel framed a new "but for" analysis in construing the capacity exclusion "where the insured director/officer is alleged to have engaged in wrongful corporate acts in a dual capacity." Id. at 129. On that basis, the panel held that the capacity exclusion excused Berkley's duty to indemnify, id. at 130, despite the absence of any factual finding by any court that Krivulka engaged in wrongdoing in any capacity.

In fact, the Mist Insureds have consistently disputed and denied the complaint allegations. See, e.g., Mist Pharm., 479 N.J. Super. at 131 ("The favorability of the terms under which the [m]iddlemen [e]ntities were interposed between the company and third parties is heavily disputed," quoting the Delaware Court of Chancery, CelestialRX Invs., LLC v. Krivulka, No. 11733-VCG, 2017

WL 416990, at *2 (Del. Ch. Jan. 31, 2017)); Dca425–426 ("Plaintiff's claims are subject to serious flaws and the defendants have strong defenses . . . ."); Dca430 ("As you know, prior to reaching a settlement with the Plaintiffs, the Mist Insureds disputed and were defending against these allegations. The settlement with Plaintiffs also includes a 'no admission of liability' provision.").

Based on the same complaint allegations, the panel concluded that Berkley had no duty to indemnify but affirmed the trial court's determination establishing Berkley's duty to defend: "We discern no reason to disturb the December 5 order [establishing Berkley's duty to defend] as the record shows Berkley did not raise the capacity exclusion argument until the exchange of pleadings and argument [in December 2020][5] leading to the trial court's July 7, 2021 order." Mist Pharm., 479 N.J. Super. at 143. Thus, the panel also concluded that Berkley waited to raise the "dual" capacity interpretation until *after* the June 2020 Settlement. Ibid.

Nor did the panel disturb the trial court's finding "that [Berkley] did not conduct any assessment of [Defense Counsel's] settlement recommendation"

[5] In December 2020, Berkley asserted for the first time that coverage for the claim was totally barred by the capacity exclusion. Pa14. Berkley made that first-time assertion in its initial brief in opposition to Mist's motion for partial summary judgment that Berkley had a duty to indemnify and in support of its cross-motion for summary judgment in which it denied its duty to indemnify. Pa14.

and that it "had the information necessary to provide consent to settle and unreasonably chose to refuse consent to Mist." See Da168.

Unlike the trial court, the panel did not address the record as it appeared in June 2020 when Berkley refused to consent to the Settlement.

On February 11, 2025, this Court granted Mist's petition for certification, Mist Pharm., LLC v. Berkley Ins. Co., 260 N.J. 92 (2025), and on May 29, 2025, granted Mist's motion to submit supplemental briefing, see May 29, 2025 Order.

STANDARD OF REVIEW

Appellate courts "review[] the grant of a motion for summary judgment *de novo*, applying the same standard used by the trial court." Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Rule 4:46-2(c). To overcome summary judgment "the party opposing the motion [must] come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)).

ARGUMENT

I. BERKLEY VIOLATED THIS COURT'S DICTATES IN GRIGGS BY WAITING FIVE YEARS, UNTIL *AFTER* THE SETTLEMENT, TO INVOKE THE CAPACITY EXCLUSION AS A COMPLETE BAR TO COVERAGE.

Insurers have a duty to act in good faith in their dealings with their insureds. "[O]nce an insurer has had a reasonable opportunity to investigate, or has learned of grounds for questioning coverage, it then is under a duty promptly to inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned." Griggs, 88 N.J. at 357; accord Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 131 (1962); Sneed v. Concord Ins. Co., 98 N.J. Super. 306, 319 (App. Div. 1967). "Unreasonable delay in disclaiming coverage, or in giving notice of the possibility of such a disclaimer . . . can estop an insurer from later repudiating responsibility under the insurance policy." Griggs, 88 N.J. at 357. That is because "[i]t would be speculative, unproductive and unfair to try to surmise or recreate what avenues the insured might otherwise have pursued in such a situation if it had had a clear field to act on its own during the time the matter is preempted by the carrier. That course cannot be rerun." Id. at 362 (internal quotations omitted). Thus, "prejudice [to the insured's rights] should be presumed" even "where the insurer has not actually controlled the case." Id. at 359.

In short, because Berkley did not disclaim coverage before the Mist

Insureds agreed to the Settlement, Berkley should not be permitted to escape its indemnity obligation – after the Mist Insureds reasonably relied on the availability of insurance coverage under Berkley's longstanding position that coverage for Mist and Krivulka (in his Mist capacity) existed.

The record shows that Berkley did not raise the capacity exclusion as a complete bar to coverage until after the Mist Insureds had already entered the Settlement. Pa1-14. Even by the Appellate Division's own calculation, Berkley waited until five years *after* the initiation of the Underlying Actions and *after* Mist sought consent for, and entered, the Settlement to announce its newly discovered rationale for denying coverage – the capacity exclusion. Mist Pharm., 479 N.J. Super. at 143. Therefore, Berkley violated the dictates of Griggs by its woefully late disclosure of its no-coverage determination.

To be sure, Berkley knew all along of its supposed "grounds for questioning coverage." Griggs, 88 N.J. at 357. Berkley adopted its no-coverage position at the eleventh hour based on complaint allegations known to Berkley since the first hour when it had received notice of the Delaware Action in 2015. In fact, Berkley's claim notes from 2016 confirm that Berkley knew of the capacity issue based solely on complaint allegations: "Krivulka appears to own or control all of the entities at issue, and most of the allegations against Krivulka pertain to his position with these non-insured entities." Dca1816.

If complaint allegations were supposedly a sufficient basis to adopt a no-coverage position based on the capacity exclusion in December 2020, then those same allegations would have been a sufficient basis in 2016. Yet, Berkley did not deny coverage in March 2016 based on those allegations. And Berkley never informed Mist that the capacity exclusion would serve as an absolute bar to coverage for conduct undertaken by Krivulka in his Mist capacity. To the contrary, Berkley informed Mist in March 2016 that it permitted coverage under the capacity exclusion, i.e., that "coverage for Krivulka is *limited to any actual or alleged [conduct] in his capacity as chairman of Mist Pharma*." Da413 (emphasis added). Conversely, based on the capacity exclusion, Berkley advised "[c]overage is therefore not available for allegations pertaining to his roles with [uninsured Krivulka Entities]." Da413. In 2016, Berkley acknowledged its duty to cover a portion of the underlying defendants defense costs. Da417.

Berkley adhered to its coverage-is-available position for the next five years. Notably, even though an insurer's duty to defend turns on "a comparison between the allegations set forth in the . . . pleading and the language of the insurance policy," Flomerfelt, 202 N.J. at 444, Berkley never raised the capacity exclusion relying on the complaint allegations as a basis to avoid its duty to defend. Indeed, the trial court, correctly, "wonder[ed] why if this [capacity] exclusion had any applicability, Berkley would not have raised it during the

hard-fought briefing on the duty to defend." Da130.

Further, when Mist sought Berkley's participation in the Settlement discussions, Berkley led Mist to believe in "the existence of potentially applicable coverage." Dca449. To that end, Berkley sought information regarding "the exposure of Mist . . . so that Berkley can meaningfully participate in settlement discussions." Dca402. Surely, if Berkley believed it had no duty to provide coverage under the capacity exclusion, it would not have been requesting information "to meaningfully participate" in the Settlement.

Berkley breached its "duty promptly to inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned." See Griggs, 88 N.J. at 357. Because of Berkley's "[u]nreasonable delay in disclaiming coverage," it is now estopped from repudiating the coverage the Mist Insureds relied on when they agreed to the Settlement. See Griggs, 88 N.J. at 357. That the Mist Insureds suffered prejudice is presumed under Griggs. See id. at 362. But prejudice, in fact, does exist: Krivulka had died by the time of Berkley's disclaimer. What course Krivulka might have taken had he been advised of Berkley's no-coverage position will never be known. "That course [could not] be rerun." Id. at 362 (internal quotations omitted).

The Appellate Division erred by deciding a "matter of first impression" – the scope of the capacity exclusion. Under Griggs, the panel was required to

first determine whether Berkley "promptly" notified its insured that the capacity exclusion would result in no coverage. Had the panel applied Griggs, the analysis would have ended there, and Berkley would have been estopped from "repudiating responsibility" for coverage See id. at 357. Berkley's dallying for five years – and advancing a coverage-is-available interpretation for the exclusion and then changing course after the Settlement – is a classic example of an "[u]nreasonable delay in disclaiming coverage" under Griggs. See id. Insurers must not be permitted to strategically withhold their coverage positions until after the insured settles the case. An insured has a fundamental right to know the rules of the game long before the game is over.

In addition to Griggs, this Court's other precedents reinforce that Berkley should be estopped from benefitting from its post-settlement-no-coverage position. Equitable estoppel "is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." Knorr v. Smeal, 178 N.J. 169, 178 (2003). Therefore, this Court applied that doctrine to bar a late-filed motion to dismiss because "plaintiffs incurred significant expert and deposition costs" and because attorney and judicial resources were needlessly expended on a case that should have been disposed of earlier. Id. at 180.

Here, the Mist Insureds detrimentally relied on Berkley's coverage-is-

available interpretation of the capacity exclusion before Berkley repudiated that position. Before raising the capacity exclusion as an absolute defense based on complaint allegations it possessed since 2015, Berkley forced Mist to litigate a host of *other* issues over five-plus years, such as whether a "Claim" was made within the Policy period, the Mist Insureds' share of the overall liability for the Settlement, the sufficiency of information Mist provided to Berkley, the adequacy of Berkley's evaluation of the Settlement opportunity, and whether Berkley unreasonably withheld consent to the Settlement. Thus, Berkley had the Mist Insureds embroiled in seemingly futile litigation all the while it sat on its unrevealed no-coverage available position for the capacity exclusion. For that reason, Berkley should be equitably estopped from advancing its past-midnight, post-settlement interpretation of the capacity exclusion and, therefore, the Final Judgment of the trial court should be affirmed.

II. UNDER FIREMAN'S AND GRIGGS, BERKLEY BREACHED THE POLICY BY UNREASONABLY WITHHOLDING CONSENT TO THE SETTLEMENT OF A COVERED CLAIM, ALLOWING THE MIST INSUREDS TO SETTLE THE UNDERLYING ACTIONS.

A separate and independent basis for this Court to affirm the trial court's November 2022 Order is because Berkley breached the Policy by unreasonably withholding its consent to the Settlement. Berkley therefore left the Mist Insureds with no choice but to agree to a reasonable settlement rather than be exposed to a potentially ruinous damages judgment. Berkley's unreasonable

withholding of consent to the Settlement of the Underlying Actions now requires it to fund the Mist Settlement Portion under Fireman's and Griggs.

Had the Appellate Division followed the dictates of Fireman's and Griggs, it would have affirmed the trial court and never reached the "matter of first impression" addressed in its Opinion.

A. Berkley Breached the Policy By Unreasonably Withholding Consent to the Settlement.

Under the Policy, the Mist Insureds were required to secure Berkley's consent to a settlement. Da254. However, after the Mist Insureds provided "full information and all particulars [Berkley] may request in order to reach a decision regarding consent," the Policy stated that Berkley's consent "shall not be unreasonably withheld." Da254. Once Berkley had all the information necessary to form an opinion concerning the reasonableness of the settlement, it had a fiduciary duty to consent to the settlement rather than place its insured in financial jeopardy. See Lieberman v. Employers Ins. Co., 84 N.J. 325, 336 (1980) ("Particularly with respect to the settlement of claims . . . the relationship of the (insurance) company to its insured regarding settlement is one of inherent fiduciary obligation.") (internal quotations omitted).

The trial court correctly held that Berkley breached the Policy because it "had all the information necessary to provide consent to settle and unreasonably

chose to refuse consent to Mist." Da168. The Appellate Division left undisturbed the trial court's findings on this point.

Berkley had a "mountain of paper" to evaluate the settlement. See Da53; Da70-71; Da82; Da87-88; Da93; Da113; Da1004. But Berkley's corporate designee, Ms. Threlkeld, "made it abundantly clear that she did not conduct any assessment of [Defense Counsel's] recommendation." Da168.

If Berkley had reviewed the mountain of paper, it would have seen that the interrogatory responses of the Krivulka Entities (including the Mist Insureds) in the Delaware Action confirmed that of the $32 million of royalties paid by Akrimax to the Krivulka Entities, Mist received (and Krivulka in his Mist capacity accepted) the vast majority: $28 million (or nearly 90%). Although those facts do not constitute an admission of any wrongdoing, those facts gave Celestial the "cleanest shot" at establishing the Mist Insureds' liability in the professional judgment of Defense Counsel. Dca510.

In addition to two previously submitted Defense Counsel case analyses, Mist also furnished three more "detailed" case analyses in response to Berkley's serial requests for "more" information. Dca417; Dca425; Dca429. Those "detailed" reports – dated November 19, 2019, January 30, and March 3, 2020 – recounted the history of the Underlying Actions, provided status updates, analyzed Celestial's claims, addressed the liability exposure faced by the

defendants – including the Mist Insureds, and recommended attempting to settle the Underlying Actions. Dca417; Dca425; Dca429.

Berkley's rote response to each assessment was that they were "woefully inadequate." Dca402. Notably, during these exchanges, Berkley never invoked the capacity exclusion as its reason for withholding consent. Instead, Berkley demanded a "more complete analysis" of the defendants' respective liabilities with, essentially, mathematical precision – which could only have been achieved by litigating the Underlying Actions to finality. Dca416; Dca510. But requiring an insured to meet Berkley's perfect information standard would defeat this State's strong policy favoring settlements. "[T]he settlement of litigation ranks high in our public policy, " see Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (internal quotation omitted), and is not required under Griggs' reasonableness test, see Excelsior Ins. Co. v. Pennsbury Pain Ctr., 975 F. Supp. 32, 357 (D.N.J. 1996).

By summarily rejecting Defense Counsel's analyses and settlement recommendation with no evidential basis, Berkley violated Fireman's because "it gave only perfunctory, if any, consideration to the recommendations for settlement of those most familiar with the litigation and best in a position to evaluate the likelihood of a successful defense of the action – the attorney . . . designated to defend the . . . actions." See 72 N.J. at 68-69.

Despite receiving all "information necessary to provide consent," Berkley did nothing with that information and presented no evidence that it substantively considered the Settlement opportunity or it had a basis to dispute Defense Counsel's recommendation.[6] Instead, Berkley resorted to disparaging Defense Counsel, dismissing his case analyses as "written by a paralegal, at best." Dca1722. Yet, the trial court found Defense Counsel to be "a veteran litigator with the legal knowledge and understanding of when a settlement is reasonable and in the best interests of a client and when it is not." Da115.

At the Rule 4:14-2(c) deposition of Berkley's corporate designee, Ms. Threlkeld revealed that she was in no position to challenge Defense Counsel's analyses and settlement recommendation. Dca1676; Dca1668-69; Dca1750-51. Threlkeld testified that she was "unsure about the alter ego thing," which was a key basis for Defense Counsel's liability assessment. Dca1676. She also had no experience litigating fiduciary duty cases, like the Underlying Actions. Dca1750-51. Her lack of qualification was reinforced when she could not

[6] In connection with Mist's motion for reconsideration, Berkley submitted an affidavit from Berkley's corporate designee, Carol Threlkeld, to rehabilitate her deposition testimony. The trial court granted Mist's motion to strike the affidavit as a "sham affidavit." Da163. The Appellate Division did not disturb that ruling. See generally Mist Pharm., 479 N.J. Super. at 135-36. Further, Berkley did not file a cross-petition for certification of this, or any, issue.

identify a single element of any cause of action in the Underlying Actions. Dca1668-69.

Despite this lack of experience, Threlkeld did not undertake efforts to develop the knowledge base to permit Berkley to assess the Settlement opportunity. At no time prior to rejecting the Settlement did Berkley consult with an attorney who had experience litigating lawsuits like the Underlying Actions to reasonably assess (or challenge) Defense Counsel's analyses or settlement recommendation. Dca1679-1700; see also Da1507-1508.

When Threlkeld was asked for coverage counsel's supposed justification for refusing to consent to the Settlement opportunity, Berkley's counsel invoked the attorney-client privilege. Therefore, Berkley never proffered – indeed, it shielded – any competent evidence on this point. As the trial court found, "Berkley intentionally chose to prevent any discovery into the very facts that Berkley would need to establish it acted reasonably." Da153; Dca 1679-1700; see also Da1507-1508.

Accordingly, this Court should affirm the trial court's holding that Berkley – by withholding consent on the sham basis of a need for more information – breached the Policy. As the trial court held, "there was enough information already available to Berkley by virtue of the detailed status letters" and "mountain of paper," and yet Berkley conducted no claim evaluation. Da168.

B. Berkley's Breach of the Policy Entitled the Mist Insureds to Settle the Underlying Actions, And Therefore Berkley Must Pay the Mist Settlement Portion Up To Its Remaining Limits.

This Court should affirm the trial court's holding that Berkley breached the Policy by unreasonably withholding its consent to the Settlement and that Berkley must indemnify the Mist Insureds for their contribution to the Global Settlement up to the full remaining Policy limit of $1,751,567.

When an insurer breaches its fiduciary responsibility to its insured by unreasonably withholding consent to a settlement, the insured is "free, despite the limiting policy provisions, to protect his own interest in minimizing a potential liability in excess of the policy limits by agreeing to a reasonable, good faith settlement." Fireman's, 72 N.J. at 73. "[O]n proof of the insurer's default," the insured is then entitled "to recover from [the insurer] the amount of its policy limits." Ibid. "The *only* qualifications to this rule are that the amount paid in settlement be reasonable and that the payment be made in good faith." Griggs, 88 N.J. at 364 (emphasis added) (quoting Fireman's, 72 N.J. at 71). "While the right to control settlements reserved to insurers is an important . . . provision of the policy contract, it is a right which an insurer forfeits when it violates its own contractual obligation." Fireman's, 72 N.J. at 71 (internal citations omitted).

Under Griggs, the insured bears "the initial burden of producing 'the basic facts relating to the settlement' which demonstrate the 'operative evidential facts

as to its reasonableness and good faith.'" Burlington Ins. Co. v. Northland Ins. Co., 766 F. Supp. 2d 515, 528 (D.N.J. 2011) (quoting Griggs, 88 N.J. at 367). The trial court concluded that the Mist Insureds "met their burden of 'producing the basic facts' as to its reasonableness and good faith in agreeing to the . . . Settlement," which was approved by the Delaware court. Da171.

Once the insured has made this initial prima *facie* showing, the burden shifts to the insurer, who is "required to sustain the ultimate and major burden of demonstrating, by a preponderance of the evidence, that it is not liable because the settlement is neither reasonable nor reached in good faith." Griggs, 88 N.J. at 368. The trial court found that Berkley did not carry its burden. Da171-172. Indeed, the trial court also held that "Berkley presented no competent evidence that the court-approved Global Settlement was unreasonable or entered in bad faith, which is necessary to carry [Berkley's] 'heavy burden.'" Da171-172.

The trial court held that "[t]he reasonableness of the Global Settlement and [Defense Counsel's] minimum allocation of a significant amount to Mist is established based" on such factors as (1) the Mist Insureds' potential joint and several liability exposure that could have resulted in a recovery of the *entirety* of a judgment in the Underlying Actions against them; (2) the Mist Insureds' potential exposure arising from the $28 million payments that Akrimax made to

Mist in the *alleged* absence of any business justification; (3) the Mist Insureds potential jeopardy arising from Celestial's claimed damages of $300 million, and Defense Counsel's "reasonable estimated liability exposure of $30 million"; and (4) the Mist Insureds' potential expenditure of millions of dollars in defense costs in continued litigation in multiple forums. Da169.

"The Griggs standard does not call for 100% accuracy, but only that in light of all of the relevant facts and upon a reasonable inquiry, the insured agreed to a settlement amount that was reasonable and entered into in good faith." Excelsior Ins., 975 F. Supp. at 357. On that basis, the trial court ruled in favor of the Mist Insureds. Da176.

Accordingly, by its faithful application of Fireman's and Griggs, the trial court ordered Berkley to pay the Mist Settlement Portion of the Settlement. That holding should be affirmed.

III. NOT ONLY DID THE APPELLATE DIVISION UNNECESSARILY REACH THE CAPACITY EXCLUSION, BUT IN DECIDING THE ISSUE OF INDEMNIFICATION IT IMPROPERLY RELIED ON "DISPUTED" COMPLAINT ALLEGATIONS RATHER THAN FACTUAL FINDINGS, AND THEN GAVE THE EXCLUSION A SWEEPING RATHER THAN NARROW REACH, CONTRARY TO THIS COURT'S PRECEDENTS.

This case should have ended with an affirmance of the trial court's application of the principles set forth in Griggs and Fireman's. Instead, the Appellate Division imprudently decided to resolve an interpretation of the capacity

exclusion first raised by Berkley after the Settlement and the Delaware Court's approval of that Settlement. This Court need not address the capacity exclusion if it upholds the findings of the trial court that the Mist Insureds agreed to a reasonable settlement and entered into it in good faith.

However, if the Court does reach the capacity exclusion, it must also address (1) the panel's improper reliance on disputed factual allegations in determining whether Berkley had a duty to indemnify and (2) the panel's expansive, rather than narrow, interpretation of that exclusion – an interpretation that went well beyond how Berkley itself interpreted the exclusion for years.

A. In the Absence of Any Judicial Findings Against or Admissions of Wrongdoing By the Mist Insureds, Berkley Improperly Seeks to Avoid its Duty to Indemnify Based on "Heavily Disputed" Complaint Allegations.

Berkley has been aware of Celestial's complaint allegations since 2015. However, not until December 2020, based on those same complaint allegations, did Berkley take a no-coverage-is-available position based on an entirely new interpretation of the capacity exclusion.

A denial of indemnification must be based on factual findings, not on hotly contested allegations. No court has ever made a factual finding that Krivulka engaged in wrongful conduct in any capacity much less in multiple capacities. And Krivulka never made an admission to such wrongdoing – to the contrary he and Mist consistently disputed the complaint allegations.

The Appellate Division's decision does not take issue with those points. Rather than identifying any facts, the panel recounts how "[t]he Delaware court summarized the *allegations*" in *January 2017* – allegations the Delaware court found were "*heavily disputed*." Mist Pharm., 479 N.J. Super. at 131 (emphasis added) (internal quotations omitted). Further, the panel states that "[t]he record shows there were *disputed* issues of material fact concerning whether the capacity exclusion applied to bar coverage . . . when Mist moved for partial summary judgment on Berkley's duty to defend." Id. at 142 (emphasis added).

Nevertheless, the Appellate Division granted summary judgment to Berkley, holding it had no duty to indemnify the Mist Settlement Portion based solely on "disputed" complaint allegations. Summary judgment is only appropriate when "there is no genuine issue as to any material fact challenged." Rule 4:46-2(c); see also Brill, 142 N.J. at 529. Evidently, the panel conflated the standard of proof that applies to the duty to defend (disputed allegations) and the duty to indemnify (definitive, undisputed evidence).

The "duties to defend and to indemnify . . . are neither identical nor coextensive, and therefore must be analyzed separately." Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010). An insurer's duty to defend turns on "a comparison between the allegations set forth in the . . . pleading and the language of the insurance policy," id., whereas the duty to indemnify "arises only once liability

has been conclusively determined," 14 Couch on Ins. § 200:3; accord Flomerfelt, 202 N.J. at 457. Accordingly, to avoid its duty to indemnify, the insurer must present "definitive" evidence or findings from an underlying action that proves that coverage is excluded. See, e.g., Flomerfelt, 202 N.J. at 457. "'[T]he burden is on the insurer to bring the case within the exclusion.'" Id. at 442 (quoting Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1998)). In Flomerfelt, because there was no "definitive answer to the question, *as a matter of fact*, about the cause or causes that led to the plaintiff's injuries" to conclusively trigger an exclusion, "the record is not sufficiently developed to decide the question of the insurer's liability for indemnity." Flomerfelt, 202 N.J. at 457 (emphasis added); see also Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 277 (App. Div. 2008) (stating that insurers "could examine extrinsic evidence to determine whether . . . they had no duty to indemnify").

Here, neither the trial court nor any court in the Underlying Actions found that the "Claim" was based on the "*Wrongful Act* of [Krivulka] serving in [his] capacity . . . as director [or] officer . . . of [an uninsured] entity [Akrimax]." Da261. Nor did Mist or Krivulka make any such admission; they disputed liability. In the absence of such a finding or admission, there was no basis for the Appellate Division to make its own findings without conducting a hearing. Further, by allowing Berkley to rely on mere complaint allegations, rather than

evidence, the Appellate Division improperly excused Berkley from its "burden" to prove the exclusion applies with "definitive" evidence. Flomerfelt, 202 N.J. at 442–44.

To be sure, the panel breezily commented that "the undisputed record shows Krivulka used his position as an Akrimax director to require that Akrimax guarantee to Mist certain obligations . . . without consideration." See Mist Pharm., 479 N.J. Super. at 142. But the panel did so with but a passing reference to "12,000 pages of discovery." Id. Neither the panel nor Berkley cite to any undisputed evidence in the record in support of that statement. Rather, the record reveals that the panel and Berkley opted to rely only on disputed complaint allegations and not on that discovery. This is confirmed by Berkley's opposition brief to Mist's petition for certification where it still exclusively relied on complaint allegations. Berkley Opp. to Pet. for Cert. at 3-5.

At best, the panel's opinion is beset with contradictory statements, stating on the one hand, that "it is *undisputed* that Krivulka acted in a dual capacity," Mist Pharm., 479 N.J. Super. at 142 (emphasis added), and on the other hand that "there were *disputed* issues of material fact concerning whether the capacity exclusion applied to bar coverage," id. Thus, in determining whether Berkley breached its duty to indemnify, the Appellate Division erred by relieving

Berkley of its heavy burden to prove that the capacity exclusion applied based on definitive evidence.

B. The Appellate Division Erred By Broadly Interpreting the Capacity Exclusion Beyond Berkley's Original Coverage-Is-Available Position.

"In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Am. Motorists, 155 N.J. at 41 (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). For that reason, "exclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Flomerfelt, 202 N.J. at 442 (internal citations omitted).

The Appellate Division did not comply with this canon of interpretation, opting to expansively interpret a policy exclusion that was admittedly a "matter of first impression." See Mist Pharm., 479 N.J. Super. at 129. In adopting a novel "but for" analysis that appears nowhere in the Policy's capacity exclusion and seemingly was based on out-of-state non-binding case law, the panel held that, because "Krivulka was acting in his capacity as both a director of Akrimax and majority shareholder of Mist," the exclusion applied. See id. at 142. Under the Appellate Division's sprawling interpretation, if an insured acts in a 99% insured capacity and a 1% uninsured capacity, coverage vanishes.

First, the Appellate Division did not need to turn to other jurisdictions to interpret the capacity exclusion when Berkley had (correctly) advanced its narrow coverage-is-available position for years. Under that interpretation, Berkley properly limited coverage to Krivulka's conduct acting in his Mist capacity, while excluding coverage for Krivulka when he acted on behalf of uninsured entities. By ignoring that narrow construction in favor of the broader coverage-is-not-available when the insured acts in a dual capacity, the Appellate Division failed to heed this Court's long-established precedent that "'exclusions must be narrowly construed'" and "strictly construed against the insurer." Flomerfelt, 202 N.J. at 442 (citations omitted). Had Berkley subscribed from the outset to the dual capacity exclusion as discharging it from its duty to indemnify, Berkley would not have acknowledged, as it did, "the existence of potentially applicable coverage," Dca449, or have told Mist it needed information about the liability exposure of Mist and Krivulka in his Mist capacity to "meaningfully participate in settlement discussions," Dca402.

Second, the Appellate Division overlooked another fundamental principle that governs the interpretation of an insurance policy. When "the terms are not clear, but instead are ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Flomerfelt, 202 N.J. at 441. "A contract is ambiguous if it is reasonably

susceptible of two interpretations." Potomac Ins. Co. v. Pa. Mfrs. Ass'n Ins. Co., 425 N.J. Super. 305, 324 (App. Div. 2012). Even if the dual capacity interpretation were reasonable (it is not), Berkley's adherence for five years to a coverage-is-available interpretation confirms that there is at least another reasonable interpretation of the exclusion. Because that interpretation is "in favor of the insured," Flomerfelt, 202 N.J. at 441, the Appellate Division was required to apply it.

Third, because Berkley took a coverage-is-available position for five years and never took a no coverage position when Mist sought settlement authority from October 2019 – June 2020, the Mist Insureds had a reasonable expectation that coverage was available. Ambiguous terms must be resolved "in line with an insured's objectively-reasonable expectations . . . . Moreover, if an insured's 'reasonable expectations' contravene the plain meaning of a policy, even its plain meaning can be overcome." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992) (internal citations omitted).

Fourth, the expansive "but for" application of the Capacity Exclusion is contrary to this Court's review of exclusions with the "arising out of" phrase. As an initial matter, the Appellate Division overlooks that "an insurer's . . . use of the phrase 'arising out of' [in an insurance policy exclusion] . . . with no clarification of its intended meaning in circumstances arising from potentially

concurrent causes makes the phrase ambiguous." Flomerfelt, 202 N.J. at 456 (citing Am. Motorists, 155 N.J. at 29, 41–43*).*

Last, bypassing the precedents of New Jersey's courts, the panel exclusively relies on out-of-state decisions to address "a matter of first impression." See Langdale Co. v. Nat'l Union Fire Ins. Co., 609 Fed. Appx. 578 (11th Cir. 2015); Abrams v. Allied World Assurance Co., 657 F. Supp. 3d 1280 (N.D. Cal. 2023); Law Offices of Zachary R. Greenhill, P.C. v. Liberty Ins. Underwriters, 46 N.Y.S. 3d 105 (N.Y. App. Div. 2017). However, none of these cases support application of the capacity exclusion in this case.

Those cases do not address the issue where an insurer interpreted its capacity exclusion to permit "limited" coverage before later treating the exclusion as a complete bar to coverage. But that is what Berkley did for nearly five years before reversing course. Therefore, the courts in Langdale, Abrams, and Greenhill never addressed two competing interpretations of the capacity exclusion (both advanced by the insurer) and how those competing interpretations create ambiguity and set the reasonable expectations of the Insured that *some* coverage exists. This Court's precedents, however, governing those issues confirm that the capacity exclusion does not have the broad reach of those out-of-state cases. See Flomerfelt, 202 N.J. at 441.

Moreover, in Langdale, the court found that the insurer "timely and

properly denied coverage under [a capacity exclusion], the sole policy exclusion that it did identify in its initial letters denying coverage." 609 Fed. Appx. at 586. In this case, however, rather than "timely and properly den[ying] coverage," id., under the capacity exclusion, Berkley waited nearly five years, until after the Settlement was reached, to assert the capacity exclusion was an absolute coverage bar in violation of New Jersey law under Griggs. Further, in Abrams, the court held that the capacity exclusion did *not* bar coverage and rejected Langdale. See Abrams, 657 F. Supp. 3d at 1288 ("The Court declines to follow the two out-of-state cases," i.e., Langdale).

Accordingly, Berkley's and the panel's expansive interpretation of the capacity exclusion fails because it is directly contrary this Court's well-established precedents and the Mist Insureds' reasonable expectation of coverage, especially given Berkley's prior interpretation of the exclusion.

CONCLUSION

Mist respectfully requests that this Court (i) affirm the trial court's November 18, 2022 Final Judgment ordering Berkley to defend the Mist Insureds, indemnify the Mist Insureds' up to its remaining Policy limit for the Global Settlement, and to reimburse the Mist Insureds' for all of their coverage

litigation fees[7] and (ii) and reverse the Appellate Division's July 9, 2024 Opinion (with the exception of the panel's affirmance of Berkley's duty to defend).

Respectfully submitted,

LOWENSTEIN SANDLER LLP

Dated: June 19, 2025

/s/Lynda A. Bennett
Lynda A. Bennett
Eric Jesse

[7] If the Court grants Mist the relief requested, Mist respectfully requests that the Court remand this case to the trial court for the limited purpose of determining Mist's entitlement to recover its coverage counsel fees, incurred in connection with the appeals before the Appellate Division and this Court, under Rule 4:42-9(a)(6) (allowing for counsel fee "[i]In an action upon a liability or indemnity policy of insurance, in favor of a successful claimant").