SUPREME COURT OF NEW JERSEY
Docket No.: 089689

MIST PHARMACEUTICALS, LLC, Plaintiff-Petitioner, v. BERKLEY INSURANCE COMPANY, Defendant-Respondent.	ON PETITION 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.

SUPPLEMENTAL BRIEF OF DEFENDANT-RESPONDENT BERKLEY INSURANCE COMPANY

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PRELIMINARY STATEMENT

The Appellate Division correctly held that the unambiguous Capacity Exclusion in the directors and officers insurance policy issued by Respondent, Berkley Insurance Company ("Berkley"), barred coverage for underlying lawsuits against Petitioner, Mist Pharmaceuticals, LLC ("Mist Pharmaceuticals"), and Joseph Krivulka ("Krivulka") that involved Krivulka's status with a non-insured entity. Mist Pharmaceuticals obfuscates the record and New Jersey law in seeking to overturn that well-reasoned Appellate Division decision by ignoring key facts and relevant decisions from this Court that are fatal to its argument. It ignores multiple reservation of rights letters sent by Berkley and, more egregiously, ignores this Court's decision in Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, recon. denied, 251 N.J. 579 (2022), a case heavily relied upon by the Appellate Division. It does so because those letters and that case are fatal to its arguments.

The Capacity Exclusion in Berkley's Policy bars coverage for Loss "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Acts of an Insured Person serving in their capacity as a director, officer, employee, member or governor of any entity other an Insured Entity." Krivulka was an owner of the Named Insured, Mist Pharmaceuticals, while also serving as an owner/member and officer of Akrimax Pharmaceuticals, LLC ("Akrimax"), which was not an insured under the Policy. Krivulka's co-shareholder

in Akrimax, CelestialRX Investments, LLC ("CelestialRX"), sued Krivulka, Mist Pharmaceuticals, and numerous other non-Insured, entities allegedly controlled by Krivulka (the "Krivulka Family Entities" or "KFEs") in New Jersey and Delaware based upon fiduciary duties that Krivulka allegedly owed to CelestialRX because of their co-ownership of Akrimax.

The Appellate Division, relying upon Norman and other State and federal court decisions, correctly held that the Underlying Actions against Mist Pharmaceuticals do not exist but for his capacity *as a director of Akrimax*. Thus, the Capacity Exclusion applies on its face because the Underlying Actions were "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving" alleged wrongdoing by Krivulka in his capacity *as a director of Akrimax*.

Mist Pharmaceuticals ignores this Court's decision in Norman, which interpreted similar exclusionary language to that at issue here, holding that the phrase "arising out of, related to, caused by, contributed to by, or in any way connected with" is clear, should be construed broadly, and does not require "any element of causation." Id. at 552. Without addressing Norman even once, Mist Pharmaceuticals argues that the Berkley Policy's exclusionary language, which uses an almost identical phrase, is ambiguous and should be construed narrowly. The

Appellate Division correctly recognized that Norman applies and that the Capacity Exclusion bars coverage for the Underlying Actions.

To prevent the Court from reaching the dispositive exclusion, Mist Pharmaceuticals seeks to shift the focus of this appeal to arguments based on estoppel that necessitate an unsupported expansion and misreading of New Jersey law. The Appellate Division appropriately refused to stretch the estoppel doctrine beyond any cognizable form adopted by New Jersey courts. This Court respectfully should do the same.

Berkley is not estopped from denying coverage because it consistently reserved its rights as to the Capacity Exclusion. In Griggs v. Bertram, 88 N.J. 347, 362-363 (1982), this Court held that an insurer has a duty to promptly inform its insured of the possibility that coverage will be denied or questioned. Berkley did exactly what Griggs prescribes. As the Appellate Division observed, "Berkley reserved its rights under the capacity exclusion repeatedly from its earliest communications with Mist Pharmaceuticals regarding the claim." Mist Pharms., LLC v. Berkley Ins. Co., 479 N.J. Super. 126, 138 (App. Div. 2024). Mist Pharmaceuticals ignores that, on at least four separate occasions before Mist Pharmaceuticals settled the Underlying Actions, Berkley reserved its rights to disclaim coverage based on the Capacity Exclusion. Reservation of rights letters,

like the ones Berkley sent, protect the insurer's rights while informing insureds of possible grounds for denial of coverage. Thus, Griggs does not apply here.

Moreover, Berkley did not waive its right to rely on the Capacity Exclusion by unreasonably refusing to consent to the settlement of the Underlying Actions. As a threshold matter, Berkley's refusal to consent to the disproportionate allocation of the global settlement to Mist Pharmaceuticals was reasonable. Mist Pharmaceuticals appeared to be situated identically to the other KFEs, yet Mist Pharmaceuticals proposed to allocate an outsized share of liability to Mist Pharmaceuticals. Mist Pharmaceuticals failed to support this disproportionate allocation, and Berkley refused to consent. The Appellate Division concluded that the trial court failed to consider Berkley's justifications for withholding its consent, in stark contrast to the facts in the key case upon which Mist Pharmaceuticals relies, Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 72 N.J. 63 (1976), where it was held an insurer that improperly withholds its consent to settle is estopped from asserting *coverage defenses based on consent to settlement or voluntary payments*. Mist Pharms., 479 N.J. Super. at 130. Mist Pharmaceuticals stretches the limited estoppel in Fireman's Fund into a complete waiver of *all coverage defenses*. That is not what Fireman's Fund holds.

The Appellate Division correctly rejected Mist Pharmaceuticals' estoppel arguments and held that the Capacity Exclusion applies. Berkley respectfully urges this Court to affirm the Appellate Division's decision.

STATEMENT OF FACTS

I. STATEMENT OF FACTS

A. The Berkley Policy

Berkley issued the Policy to Mist Pharmaceuticals for the policy period April 8, 2014, to November 30, 2015, with a $2,000,000 limit of liability inclusive of defense costs. ("Policy"). Da231-Da232. Subject to its terms, conditions, and exclusions, the Policy's insuring agreement extends 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.

The Policy's Capacity Exclusion 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[.]

Da261.

The Policy precludes an Insured from settling a claim without Berkley's consent and further provides:

> 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.

Da254.

B. The Underlying Actions

In the Underlying Actions, CelestialRX sought damages from Mist Pharmaceuticals, Krivulka and numerous other non-insured entities. Pa3-Pa6. On March 8, 2016, CelestialRX, a co-member of Akrimax with Krivulka, filed an Amended Complaint[1] in Delaware Chancery Court ("Underlying Action (Delaware)") against 15 defendants, including Mist Pharmaceuticals and other KFEs, to:

> stop, reverse and remedy the grossly blatant and deliberate usurpation of opportunity in bad faith, fraud, conversion and bad faith breaches of duties committed by Defendant

[1] CelestialRX's original Complaint was filed in Delaware on November 20, 2015. Da268a.

> Joseph J. Krivulka, Akrimax's manager and controlling member, and Defendant Leonard Mazur ["Mazur"], also a member of Akrimax, for their own personal gain and for that of their own companies, the entity Defendants named herein.

Da330.

The Chancery Court in the Underlying Action (Delaware) described that action as: "[A]ris[ing] from allegedly improper self-dealing transactions by two members of a three- member limited liability company." Da485.

The Underlying Action (Delaware) asserted seven causes of action against "[a]ll Defendants," however, none of them contain specific allegations directed to Mist Pharmaceuticals or seek relief against Mist Pharmaceuticals individually. Da351; Da380-Da403. The allegations group Mist Pharmaceuticals with the other KFEs, such as Mist Partners and Mist Acquisition, which are not insured under the Policy. Da351; Da231.

The Underlying Action (Delaware) focused on Krivulka and his conduct while serving in his capacity as the managing member of CelestialRX – it asserted: "Krivulka manages and controls an entity . . . which controls Akrimax and owns all voting Units in Akrimax. He is the sole manager of Akrimax, a member of Akrimax's Board of Directors, and an Akrimax officer" and "Krivulka thus completely controls Akrimax, directly and indirectly." Da331-Da332.

CelestialRX alleged that Krivulka made Akrimax a named party to agreements involving KFEs for the sole purpose of guarantying financial obligations

and performance for no consideration and without any benefit to Akrimax. Da105-Da106; Da344. In the Underlying Action (Delaware), CelestialRX also alleged that Krivulka had been "diverting opportunities to acquire product rights from Akrimax in favor of the Mist Companies 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 directly free from Krivulka's self-dealing." Da348, Da1213. In the Underlying Action (Delaware), CelestialRX's claimed damages primarily related to the drug Tirosint, which is used to treat hypothyroidism. Da6; Da122. All alleged diverted rights and agreements entered into regarding Tirosint involved Mist Acquisition, a non-insured, not Mist Pharmaceuticals. Dca593-Dca643; Da364; Da498.

CelestialRX later filed an additional Complaint in the Superior Court of New Jersey on April 12, 2019 ("Underlying Action (New Jersey)"), naming Mist Pharmaceuticals among 25 other defendants, including more than 14 KFEs. Da113; Da1111. CelestialRX's Complaint lumped Mist Pharmaceuticals into numerous causes of action against "all defendants except the Beneficiary Defendants," and none of the causes of action contained specific allegations as to Mist Pharmaceuticals. Da1146-Da1171. Like the Underlying Action (Delaware), the Underlying Action (New Jersey) alleged that Krivulka utilized his control of

Akrimax to transfer pharmaceutical product rights from Akrimax in favor of other Krivulka companies. Da113; Da1112.

C. Berkley's Reservations of Rights Under the Capacity Exclusion.

Mist Pharmaceuticals notified Berkley of the Underlying Action (Delaware) on December 8, 2015. Da538-Da539. Mist Pharmaceuticals jointly retained defense counsel with the other KFEs in the Underlying Action (Delaware) prior to providing notice to Berkley.[2] Da1270.

After engaging in a preliminary investigation, on March 9, 2016, Berkley sent a letter to Mist Pharmaceuticals in which it reserved its rights to disclaim coverage on the basis of certain potentially applicable policy provisions. Da407-Da417. Specifically, Berkley reserved its rights regarding the application of the Capacity Exclusion. Id.

Notwithstanding its reservation of rights, Berkley agreed to contribute to Mist Pharmaceuticals' defense. Because Mist's counsel also represented numerous other non-Insured defendants, Berkley agreed to reimburse 10% of the firm's fees in the Underlying Action (Delaware). Da407-Da417.

Berkley issued another reservation of rights letter on July 21, 2017, after Mist Pharmaceuticals advised that a mediation of the Underlying Action (Delaware) was

[2] That defense counsel continued to defend Mist Pharmaceuticals, and numerous other defendants in the Underlying Actions until settlement. Da1270, Da1275.

scheduled shortly. Da421-Da429. Berkley requested additional information about a motion to dismiss ruling, which Mist Pharmaceuticals had not previously mentioned to Berkley. Da421-Da427. The July 2017 reservation of rights again quoted the Capacity Exclusion and advised Mist Pharmaceuticals that Berkley reserved its rights to disclaim coverage under that exclusion. Da426-Da427.

In August 2017, after further investigation, Berkley determined the subject claim was first made prior to the inception of the Policy and disclaimed coverage on that basis. Da434-Da438.[3] The August 2017 letter incorporated all prior reservations of rights, including those in its March 2016 and July 2017 letters, stating specifically that "each of those rights and defenses remain expressly reserved." Da437-Da438.

D. Mist Pharmaceuticals' Coverage Action Against Berkley

Shortly after Berkley's disclaimer on the timing-of-claim issue, Mist Pharmaceuticals filed this action (the "Coverage Action") in September 2017 seeking, among other things, a declaration as to Berkley's defense obligation for the Underlying Action (Delaware) in response to the disclaimer. Da1-Da17. In its Answer, Berkley raised the Capacity Exclusion as an affirmative defense, stating:

[3] Berkley's August 2017 disclaimer was premised upon Mist Pharmaceuticals' pre-policy receipt of Celestial's threat of litigation, a draft Complaint referenced in Underlying Action (Delaware) filings, and the exchange of written term sheets and settlement agreements which Berkley believed supported a position that the claim had been first made prior to the inception of the Policy. Da434-Da438.

> Coverage for CelestialRX's claims against Mist Pharma is barred to the extent the allegations in the Underlying Action are based upon, arise out of, directly or indirectly result from or in consequence of, or in any way involve a "Wrongful Act" of an "Insured Person" serving in their capacity as a 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 a director, officer, trustee, employee, member or governor of such other entity.

Da34a.

Mist Pharmaceuticals filed an early motion for partial summary judgment, and the trial court ultimately found that Berkley must contribute to Mist Pharmaceuticals' defense. Da47-Da48; Da53; Da66; Da89; Da100; Da1182-Da1183. Because the Underlying Actions, including the subsequently filed Underlying Action (New Jersey), were ongoing, the trial court stayed the Coverage Action pending resolution of the Underlying Actions. Da101.

E. Mist Pharmaceuticals Enters into a Global Settlement Without Berkley's Consent

By letter dated October 28, 2019, Mist Pharmaceuticals advised of a "principal to principal" settlement meeting and stated that "Berkley must be prepared to contribute the entire and remaining limit of the Policy to a settlement." Da1187. Mist Pharmaceuticals demanded confirmation by Berkley within four days that Berkley "is prepared to tender its full and available policy limits to fund a settlement of the Underlying Action [sic]." Da1187-Da1188. The letter did not

provide any analysis of Mist Pharmaceuticals' potential exposure, an analysis that Berkley had requested since 2016. Da421-Da428; Da434-Da438; Da1187-Da1188.

In response, by letter dated November 1, 2019, Berkley cautioned that its participation in any settlement discussions:

> is subject to a full and complete reservation of rights to seek recoupment and/or reimbursement of any amounts expended. Berkley does not believe it owes any coverage obligation to Mist Pharmaceuticals for this claim and has expressed that view to Mist Pharmaceuticals in its coverage position letters and in the litigation between the parties. Nothing herein should be construed as a waiver of those positions or Berkley's rights in that regard.

Da1190.

After setting forth that reservation of rights, Berkley responded to Mist Pharmaceuticals' demand and stated 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 further stated:

> 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.

Ibid.

In response to Berkley's requests, defense counsel for Mist Pharmaceuticals and numerous other defendants, including the non-insured KFEs provided a "status and analysis of the litigations and arbitration" on November 19, 2019. Dca417-Dca424. That letter stated 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." Dca421. The November 19 letter provided no legal justification for this statement, nor did it include a breakdown of the nature of the various claims in the Underlying Actions, or which, if any, actually created exposure to Mist Pharmaceuticals, as opposed to other non-insured defendants. Dca417-Dca424. Despite Berkley's repeated requests for this exact information, the letter stated 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 defense costs and overlapping liability exposure across claims and defendants." Dca422. In response, Berkley made it clear that, although it was prepared to engage in these settlement discussions, its "coverage position regarding these claims has been previously provided and is not waived." Dca403.

On January 30, 2020, defense counsel purported to provide additional

analysis, but again ignored Berkley's request for an individualized analysis and lumped all causes of action and litigations together without identifying the actual exposure as to the insured, Mist Pharmaceuticals. Dca425-Dca428. Notably, that letter stated on the one hand that "Plaintiffs' claims are subject to serious flaws and the defendants have strong defenses," yet failed to actually discuss those flaws or outline the "strong defenses." Dca425-Dca426.

On February 7, 2020, Berkley again advised Mist Pharmaceuticals that defense counsel's letter "fails to support the position that Mist Pharma's exposure comes anywhere close to Berkley's limit" and reiterated Berkley's basis for not consenting to the proposed settlement. Dca412-Dca416. Mist Pharmaceuticals responded by letter dated March 3, 2020, but again failed to provide any differentiation or analysis of the potential liability of Berkley's insured versus the other non-Insured defendants. Dca429-Dca432.

On June 24, 2020, Mist Pharmaceuticals, along with the other non-Insureds, settled the Underlying Actions for $12 million. (the "Global Settlement"). Da1274-Da1275. The Global Settlement resolved both of the Underlying Actions and provided a release to over 28 individuals and/or entities including 12 different KFEs and Krivulka himself. Da114; Da127. The next day, Mist Pharmaceuticals again inquired "whether Berkley is prepared to tender its full remaining policy limit (or make any other indemnity payment) toward the Global Settlement." Dca437. Mist

Pharmaceuticals did not provide any additional information to support any particular allocation of the Global Settlement to Mist Pharmaceuticals. Dca437-Dca448. Rather, Mist Pharmaceuticals baldly proclaimed that the Global Settlement would be allocated as follows: 25% to Mist Pharmaceuticals, 25% to Akrimax, 25% to Mazur, and the 25% to the remaining KFEs. Dca445.

Berkley responded by letter dated July 7, 2020, detailing why it did not believe that Mist Pharmaceuticals should be allocated an equal share to Akrimax or all the remaining KFEs, who appeared similarly situated to Mist Pharmaceuticals with regard to their exposure in the Underlying Actions. Dca452. Berkley stated that: "[b]ased on the allegations of the complaints and the information in our possession, there is no reasonable basis for such a significant allocation to Mist Pharmaceuticals." Ibid. Up to the entry of the Global Settlement, Mist Pharmaceuticals never provided a logical basis for the disproportionate allocation of the settlement to itself when all KFEs were equally exposed to the same causes of action.

F. Mist Pharmaceuticals Resumes the Coverage Action

After the Global Settlement, in July 2020, the stay in the Coverage Action was lifted. Da101. On November 6, 2020, notwithstanding that Berkley was seeking fulsome discovery regarding the Global Settlement, Mist Pharmaceuticals moved for summary judgment on the duty to indemnify. Da1088. On December 7, 2020,

Berkley cross-moved for summary judgment, arguing that the Capacity Exclusion barred coverage for the Global Settlement. Da1296. In July 2021, the trial court denied both motions without prejudice, finding questions of fact. Da98-Da99; Da119.

On May 11, 2022, after further discovery, Mist Pharmaceuticals filed a motion for reconsideration of the trial court's July 7 order, which denied its motion for summary judgment. Da1484. Berkley also filed a motion for reconsideration and, in support, attached the affidavit of Berkley employee, Carol Threlkeld. Da1515; Da1660. On February 24, 2022, Threlkeld was deposed as a fact witness in her role as claim adjuster in this matter and as Berkley's corporate designee. Dca1609. During her deposition, she testified that she was the person responsible for handling the Mist Pharmaceuticals claim and made the coverage decisions; she reviewed the documents provided by Mist Pharmaceuticals; and the memos from defense counsel were insufficient to support the commitment of the policy limits to the settlement. See, Dca1617-Dca1620 (T9:3-12:19); Dca1621 (T13:2-15); Dca1623-Dca1628 (T15:2-20:20); Dca1675 (T67:2-22); Dca1722-Dca1723 (T114:20-115:14); Dca1723 (T115:2-7); Da1677.

On October 12, 2022, the trial court granted Mist Pharmaceuticals' motion for reconsideration of the July 2021 order and denied Berkley's cross-motion. Da133-Da135. On November 18, 2022, the court entered the parties' stipulated order on

final judgment and Berkley timely filed a notice of appeal. Da177-Da180; Da181-Da200.

On July 9, 2024, the Appellate Division reversed the trial court and granted summary judgment in Berkley's favor. The Appellate Division held that the Capacity Exclusion barred coverage for the Underlying Actions. Mist Pharms., LLC, 479 N.J. Super. at 142. The Appellate Division found no basis for waiver or estoppel, noting that the "undisputed record shows that, as early as March 2016, Berkley notified Mist the capacity exclusion may apply to either bar or limit coverage." Id. at 133.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019) (citing Bhagat v. Bhagat, 217 N.J. 22, 38, (2014)). Summary judgment should be granted:

> if the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

R. 4:46-2(c).

If there are no material facts in dispute, it is for the court to determine the motion on applicable law. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954).

II. THE APPELLATE DIVISION CORRECTLY HELD THAT THE CAPACITY EXCLUSION BARS COVERAGE FOR THE UNDERLYING ACTIONS.

The Capacity Exclusion in the Policy bars coverage for Loss "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving Wrongful Act of an Insured Person serving in their capacity as a director, officer, employee, member or governor of any other entity other than Insured Entity." Any Loss that Mist Pharmaceuticals or Krivulka may have sustained in the Underlying Actions arose out of, directly or indirectly resulted from, and/or in any way involved alleged wrongful acts by Krivulka in his capacity with Akrimax. Accordingly, the Capacity Exclusion squarely applies. The Appellate Division's holding is consistent with New Jersey precedent and case law from other States applying the Capacity Exclusion in similar circumstances. Mist Pharmaceuticals tries to avoid this result by arguing that the Appellate Division should never have reached the Capacity Exclusion in the first instance. To the limited extent Mist Pharmaceuticals addresses the merits of Capacity Exclusion, its arguments are unavailing.

A. The Unambiguous Text Of The Capacity Exclusion Demonstrates That It Applies To The Underlying Actions.

Although this Court has not directly addressed a capacity exclusion until now, the Capacity Exclusion in Berkley's Policy uses common insurance policy language that this Court has interpreted on many occasions.

In New Jersey, the interpretation of an insurance policy is a question of law. Selective Ins. Co. of Am. v. Hudson East Mgmt Ost. Med., 210 N.J. 597, 605 (2012). As the Appellate Division properly recognized, insurance policies are construed using contract principles and a policy must be "enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Norman, 251 N.J. at 552 (citations omitted). Moreover, policy terms "are given their 'plain and ordinary meaning.'" Id. (citation omitted). Policy language is ambiguous if the "policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured." President v. Jenkins, 180 N.J. 550, 563 (2004). Courts should not strain, however, to find ambiguity and "'should not write for the insured a better policy of insurance than the one purchased.'" Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990) (quoting Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)).

Exclusions are presumptively valid and will be given effect if "specific, plain, clear, prominent, and not contrary to public policy." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (quoting Doto v. Russo, 140 N.J. 544, 559

(1995)). Such is the case here. As the Appellate Division noted, this Court has interpreted the phrase "arising out of" broadly:

> The critical phrase "arising out of," which frequently appears in insurance policies, has been interpreted expansively by New Jersey courts in insurance coverage litigation. "The phrase 'arising out of' has been defined broadly in other insurance coverage decisions to mean conduct 'originating from,' 'growing out of' or having a 'substantial nexus' with the activity for which coverage is provided.

Mist Pharms., 479 N.J. Super. at 139, (quoting Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 35 (1998)). Indeed, "[t]his construction applies whether the phrase appears in a coverage grant or an exclusion." Id. at 140 (citing Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29 (1998) and Prudential Prop. & Cas. Ins. Co. v. Brenner, 350 N.J. Super. 316, 322 (App. Div. 2002)).

The Capacity Exclusion in Berkley's Policy applies not just to Loss "arising out of" wrongful acts alleged in an outside capacity but to Loss "*in any way involving*" such alleged wrongful acts. Recognizing this added breadth, this Court recently held that "a causal relationship between [the insured's] conduct and [the] plaintiff's injuries was not required in order for the exclusionary clause to apply; rather, any claim 'in any way connected with' [the insured's] operations or activities in a county identified in the exclusionary clause [was] not covered under the policy." Norman, 251 N.J. at 543.

The Underlying Actions generally alleged that Krivulka engaged in self-dealing, using his position as a director of Akrimax to direct licensing agreements and money from Akrimax to entities he controlled, including Mist Pharmaceuticals. Although Krivulka was also an officer of Mist Pharmaceuticals, the claim against him and Mist Pharmaceuticals originated from Krivulka's relationship with CelestialRX as co-shareholders of Akrimax. As the Appellate Division correctly observed, the Underlying Actions "could not have occurred but for" Krivulka's capacity with Akrimax. Mist Pharms., 479 N.J. Super. at 142. Thus, the Underlying Actions arose out of Krivulka's outside capacity, or, at the very least, in any way involved that capacity. The Capacity Exclusion applies on its face.

Mist Pharmaceuticals relies on the legal precept that exclusions are to be construed narrowly and that ambiguous provisions are interpreted in favor of coverage. Mist Pharmaceuticals then endeavors to create such an ambiguity. Mist Pharmaceuticals suggests that the Capacity Exclusion is ambiguous because, in its view, Berkley took two different interpretations of that provision. This argument mischaracterizes Berkley's position. Berkley consistently advised Mist Pharmaceuticals that the Capacity Exclusion may preclude coverage for the Underlying Actions and repeatedly reserved its rights to deny coverage under the Capacity Exclusion. Specifically, Berkley communicated its position that the

Capacity Exclusion may preclude coverage to Mist Pharmaceuticals on the following occasions:

- March 9, 2016, letter to Mist Pharmaceuticals; Da407-Da417
- July 21, 2017, letter to Mist Pharmaceuticals; Da421-Da429
- Berkley's November 27, 2017, Answer to the Coverage Action Complaint; Da21-Da42 and,
- July 7, 2020, letter to Mist Pharmaceuticals. Dca449.

Notably, on November 1, 2019, in response to Mist Pharmaceuticals' request for consent to settle, Berkley specifically advised that "any participation by Berkley in settlement is subject to a full and complete reservation of rights to seek recoupment and/or reimbursement of any amounts expended" and that Berkley "does not believe it owes any coverage obligation to Mist Pharmaceuticals for this claim" for the reasons previously communicated. Da1190a. Simply put, Berkley's reliance on the Capacity Exclusion should not have come as a surprise to Mist Pharmaceuticals.

Berkley warned Mist Pharmaceuticals from the outset that the Capacity Exclusion may preclude coverage. Berkley did not take two different coverage positions, as Mist Pharmaceuticals suggests. Mist Pharmaceuticals cannot create an ambiguity simply because it disagrees with Berkley's position, and this Court should not strain to find ambiguity where none exists. See Longobardi, 121 N.J. at 537,

("[A] court should not engage in a strained construction to support the imposition of liability.")

That Berkley agreed to defend subject to a reservation of rights does not create an ambiguity. Moreover, any such agreement to defend does not act as an admission of a duty to indemnify by an insurer. See L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 497 (App. Div. 2004) (an insurer may defend an insured while reserving its right to challenge an indemnity obligation). Reservation of rights letters act as defense mechanisms for insurers to preserve defenses while providing a defense to an insured. Provision of such a defense should be encouraged and not be misconstrued as a tacit admission of coverage.

Berkley repeatedly warned that the Capacity Exclusion could apply to bar coverage for a settlement and ultimately invoked that exclusion. Berkley's reading of the Policy did not change over time, and, as a result of its coverage position, Mist Pharmaceuticals received the benefit of a defense. Berkley should not be punished for affording Mist Pharmaceuticals that benefit, while reserving its rights to disclaim coverage. See, S.T. Hudson Eng'rs, Inc. v. Pennsylvania Nat. Mut. Cas. Co., 388 N.J. Super. 592, 606 (App. Div. 2006) (provision of a defense from an insurer "is itself a meaningful benefit") (quoting Rosario v. Haywood, 351 N.J. Super. 521, 534-35 (App. Div. 2002)).

Mist Pharmaceuticals also contends that the phrase "arising out of", as used in the Capacity Exclusion, without "further clarification" creates an inherent ambiguity because of the possibility of concurrent causation. (citing Flomerfelt v. Cardiello, 202 N.J. 432, 456 (2010)). That is plainly not the law of New Jersey, where there are cases too numerous to cite construing insurance policy provisions containing the phrase "arising out of" without finding ambiguity.

In Flomerfelt, this Court interpreted an exclusion in a homeowner's policy for claims "[a]rising out of the use, ... transfer or possession" of controlled dangerous substances" to not definitively apply to bar all *potential for* coverage for a lawsuit brought by a woman who overdosed on drugs and alcohol at a house party such that the insurer had a duty to defend. Flomerfelt, 202 N.J. at 451, 457. The Court found that the exclusion required a "substantial nexus" between the drugs, the house party, and the injury. Id. at 455. It was not, however, clear from the record whether claimant ingested drugs at the party or whether those drugs, versus the alcohol, were the cause of her injuries. Id. at 456. The Court thus found that the exclusion did not necessarily apply, such that the insurer had a duty to defend. Id. at 457. Alternatively, the Court stated that, as applied to the facts of the underlying case, the phrase "arising out of" could be ambiguous without further clarification. Id. at 456. Subsequent cases refused to extend this alternate holding from Flomerfelt. See e.g., Liberty Ins. Corp. v. Tinplate Purchasing Corp., 743 F. Supp. 2d 406, 415 (D.N.J.

2010) ("[T]he [Flomerfelt] court only found the phrase "arising out of" to be ambiguous within the very specific factual circumstances of that case,"); N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., 2011 U.S. Dist. LEXIS 27718, *6 (D.N.J. Mar. 17, 2011), aff'd, 467 F. App'x 156 (3d Cir. 2012) ("Flomerfelt decision does not stand for the proposition that the term 'arising out of' in an insurance policy exclusion should be interpreted as unclear and ambiguous in all instances").

Mist Pharmaceuticals does not point to any concurrent causation issue in the Underlying Actions like the possibility of a claimant ingesting drugs before the house party in Flomerfelt. Krivulka could not have breached any fiduciary duty owed to CelestialRX but for his status at Akrimax—there is no other concurrent cause of the scheme.

Moreover, a key issue in Flomerfelt was whether the exclusion should have included "further clarification." As an example of "further clarification" the Court pointed to exclusions where, the phrase "arising out of" as accompanied by other qualifying phrases such as "based on, arising out of, or in any way involving." Id. at 452. In such instances, "courts separately consider the meaning of each phrase and then collectively analyze the intent of the exclusion to decide whether the complaint falls within its scope." Id. The Capacity Exclusion here includes precisely the "qualifying phrases" that the Court suggested in Flomerfelt makes exclusions unambiguous. The Appellate Division, citing Norman, correctly reasoned that the

qualifying phrase "in any way involving" signals an increased breadth to the Capacity Exclusion. Mist Pharms., 479 N.J. Super. at 140. Indeed, this Court's recent decision in Norman is clear that prefatory language such as utilized in the Policy's Capacity Exclusion should be interpreted broadly and does not require causation. Norman, 251 N.J. at 555. Thus, Flomerfelt and Norman bolster Berkley's reading of the Capacity Exclusion.

Mist Pharmaceuticals also makes a slippery-slope argument, stating that the Appellate Division's reading of the Capacity Exclusion would vitiate coverage if an insured acts "in a 99% insured capacity and a 1% uninsured capacity." Mist Pharmaceuticals' Brief at 37. The Appellate Division expressly rejected a percentage-based approach and noted that, whatever the percentage, here "Krivulka's actions constituted a sufficient basis to trigger the capacity exclusion." Mist Pharms., 479 N.J. Super. at 142. In other words, Krivulka's capacity with Akrimax was hardly trivial. The Underlying Actions allege a scheme of self-dealing and breaches of duties owed to partners/co-shareholders that could only have been perpetrated because of Mr. Krivulka's role with Akrimax. This case does not present a scenario that challenges the outer reaches of the Capacity Exclusion—it falls squarely within its ambit.

For all of these reasons, the unambiguous text of the Capacity Exclusion precludes coverage for the Underlying Actions.

B. Caselaw Relied Upon By The Appellate Division Confirms That The Capacity Exclusion Applies.

Numerous courts in multiple jurisdictions have found—like the Appellate Division below—that the Capacity Exclusion is unambiguous and enforceable as written in circumstances as here where an insured acts in a dual capacity. The Appellate Division adopted the reasoning of Langdale Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn., 609 Fed. Appx. 578 (11th Cir. 2015), which is directly on point. In Langdale, the insured entity was a holding company that owned several family businesses. Id. at 580. Certain of its directors and officers were sued by minority shareholders for breach of fiduciary duty. Id. The defendants were also trustees of a family trust in which the plaintiffs / minority shareholders were beneficiaries and which owned significant shares in the holding company. Id. The suit alleged that the defendants misrepresented the value of the family trust's shares in the insured holding company to get plaintiffs to sell their shares back to the holding company at a significant discount. Id. The Eleventh Circuit, applying Georgia law, found that a substantially similar capacity exclusion barred coverage because the lawsuit arose out of the insureds' wrongful acts as a trustee of the family trust, which was not an insured under the policy. Id. at 586. The Appellate Division reasoned that, as in Langdale, the plaintiff in the underlying lawsuits alleged self-dealing. Mist Pharms., 479 N.J. Super. at 142. Krivulka was acting in a dual capacity; he "used his position as an Akrimax director to require that Akrimax

guarantee to Mist certain obligations—including over $28 million in royalties and distribution rights as well as a termination provision—without consideration." Id. Thus, Mist Pharmaceuticals' claimed loss "arose from and could not have occurred but for Krivulka's conduct in his capacity as a director of Akrimax." Id.

Along similar lines, in Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2018 Del. Super. LEXIS 1533, at *5 (Del. Super. Ct. Nov. 30, 2018), a Delaware court applied a capacity exclusion to bar coverage where an insured was alleged to have acted in a dual capacity. In Goggin, a creditors' committee sued the directors and officers of a bankrupt company alleging that they schemed to form and use outside entities they controlled to defraud the company's creditors. Id. at *2. The court held that a similarly worded capacity exclusion barred coverage because the underlying lawsuit would fail but for the directors' and officers' roles as managers and members of the outside entities they created. Id. at *5.[4]

[4] Courts in other states have similarly found capacity exclusions to apply to bar coverage where an insured acts in separate capacity for an uninsured entity. See, e.g., Cont'l Cas. Co. v. Adams, No. 3: CV-02-1122, 2003 U.S. Dist. LEXIS 16434, at *22 (M.D. Pa. Sept. 12, 2003) (applying capacity exclusion where "[t]he check kiting scheme could only be effectuated by actions taken by individual insureds in the discharge of their duties as directors and officers of both the insured entity, HSC, and the uninsured entity, HSCM"); L. Offs. of Zachary R. Greenhill, P.C. v. Liberty Ins. Underwriters, Inc., 147 A.D.3d 418, 420 (N.Y. App. Div. 1st Dep't 2017) (applying capacity exclusion where underlying lawsuit "ar[o]se out of Greenhill's capacity as the president and CEO of Dwight China and senior manager and partner in the program formed in China").

Even in cases where the capacity exclusion was found *not* to apply, the reasoning supports its application here. That is, in those cases, the exclusions were found to be unambiguous but the facts did not support their application in the specific case. For example, in Abrams v. Allied World Assurance Co. (U.S.) Inc., 657 F. Supp. 3d 1280, 1288 (N.D. Cal. 2023), the court reasoned that the exclusion did not apply because, unlike in Langdale and Goggin, the claims asserted against the Insureds in the Underlying Action arose solely from actions in their capacities as executives for the Insured. Similarly, in Niagara Fire Ins. Co. v. Pepicelli, Pepicelli, Watts & Youngs, P.C., 821 F.2d 216, 220–21 (3d Cir. 1987), the Third Circuit found that an outside business exclusion, which was similar to the Capacity Exclusion, did not apply. The court reasoned that, while the insured lawyer happened to be a director and officer of one of his clients, a malpractice lawsuit by another client was wholly unrelated to that capacity and only involved his capacity as a lawyer. Ibid.

This body of case law is consistent with the purpose of the Capacity Exclusion, which is to "avoid coverage where a claim against a named insured in any way involves actual or alleged conduct of individual insureds as agents of an uninsured entity." Cont'l Cas. Co., 2003 U.S. Dist. LEXIS 16434, at *32-33. Not enforcing the exclusion would give "officers and directors of closely held entities a 'blank check' to engage" in illegal activity on behalf of an uninsured entity while

seeking the protection of an insured entity's coverage. Id. at *24.[5] At a more fundamental level, it is well-established in New Jersey that the unambiguous language of insurance policies should be enforced as written, and courts "'should not write for the insured a better policy of insurance than the one purchased.'" Longobardi, 121 N.J. at 537 (quoting Walker Rogge, Inc., 116 N.J. at 529).

Mist Pharmaceuticals' main quibble with this body of caselaw is that it comes from out of state. Mist Pharmaceuticals reiterates that this is a matter of first impression in New Jersey but cites no avoidance doctrine or canon of construction under which the Appellate Division should not have cited these cases or reached this issue. Id. New Jersey courts often decide cases without a precisely on-point decision from this Court and in doing so, correctly look to cases from other states. See, e.g., Princeton S. Invs., LLC v. First Am. Title Ins. Co., 437 N.J. Super. 283, 286 (App. Div. 2014) ("Plaintiff cites no cases from this State or from any other jurisdictions that so hold. On the other hand, defendant cites case law from other jurisdictions that is both on point and persuasive."); State v. Montgomery, 427 N.J. Super. 403, 407 (App. Div. 2012) ("There is no New Jersey authority directly on point. However, numerous jurisdictions have held …"). Far from committing an error, the Appellate

[5] Though the Appellate Division focused on the on-point Langdale case, it also cited Adams, Greenhill, and Pepicelli approvingly. Mist Pharms., 479 N.J. Super. at 141-142.

Division was simply doing its job in relying on persuasive out of state authority to bolster its conclusion. This Court can and should do the same.

C. The Appellate Division Properly Relied On Undisputed Facts.

Mist Pharmaceuticals' argument is notable for what it lacks—a direct explanation of why the Capacity Exclusion should not apply to the specific facts of the Underlying Actions. Instead of tackling the Capacity Exclusion head-on, Mist Pharmaceuticals deflects by arguing that the Appellate Division improperly relied on disputed facts to reach its conclusion. In so arguing, Mist Pharmaceuticals conflates the standard on summary judgment and the standard for analyzing the duty to indemnify. The Appellate Division granted summary judgment in Berkley's favor because there were no material disputes of fact in the present coverage action. Mist Pharms., 479 N.J. Super. at 136-137, (discussing summary judgment standard). The Appellate Division did not hold that there were no disputed facts in the Underlying Actions, nor was it required to do so for the Capacity Exclusion to apply.

New Jersey law is clear that if there is no possibility of coverage based upon the allegations of a Complaint, then there is no duty to indemnify. Hartford Ins. Group v. Marson Constr. Corp., 186 N.J. Super. 253, 260 (App. Div. 1982) (it is the "obligation to indemnify, either actual or potential, which invokes the duty to defend,"); see also, Memorial Properties, LLC v. Zurich American Ins. Co., 210 N.J. 512, 530 (2012) (holding that an insurer had no duty to indemnify because there was

no possibility of coverage based upon the allegations in a complaint.) There was no dispute that the Underlying Actions alleged that Krivulka, based upon his status as the controlling member of Akrimax, stripped Akrimax of valuable assets for his own benefit and for the benefit of the KFEs, and breached duties Krivulka owed CelestialRX as co-shareholders in Akrimax. Mist Pharms., 479 N.J. Super. at 131. The Appellate Division recognized that, given that the existence of these allegations was not disputed, there was no possibility of coverage because the allegations fell squarely within the Capacity Exclusion. Id. at 142.

Whether Krivulka actually did what he was alleged to have done is beside the point—Berkley cannot be required to consent to a settlement of matters where any liability would necessarily implicate the Capacity Exclusion. That Berkley agreed to pay defense costs subject to a reservation of rights does not create an obligation to indemnify for a settlement of that claim. Berkley agreed to pay defense costs as it investigated a complex claim with complex corporate relationships before finalizing a coverage position.

The Appellate Division thus properly applied the standards for summary judgment and the duty to indemnify.

III. MIST PHARMACEUTICALS CANNOT MANUFACTURE COVERAGE BY STRETCHING INAPPLICABLE ESTOPPEL DOCTRINES IN WAYS NO COURT HAS RECOGNIZED

To avoid the clear application of the Capacity Exclusion, Mist Pharmaceuticals turns to estoppel in an attempt to prevent consideration of that exclusion entirely. In arguing for estoppel, Mist Pharmaceuticals seeks to improperly expand two New Jersey Supreme Court precedents — the Griggs case and the Fireman's Fund case — which have no application here. Mist Pharmaceuticals fails to cite a single case adopting an estoppel theory under the circumstances that are before this Court. Accordingly, this Court should reject Mist Pharmaceuticals' novel and unsupported estoppel arguments, as the Appellate Division did below.

A. Berkley Cannot Be Estopped From Relying On The Capacity Exclusion After Repeatedly Advising Mist Pharmaceuticals That It Reserved The Right To Deny Coverage Based On That Exclusion

Mist Pharmaceuticals invokes Griggs to attempt to avoid the clear import of the Capacity Exclusion. Griggs, 88 N.J. at 363-364. Griggs found that an insurer was estopped from denying coverage where it unreasonably delayed in informing an insured individual of a coverage defense that was known to the insurer, thus prejudicing the insured's ability to defend itself. The circumstances here -- where Berkley repeatedly reserved its rights as to potential application of the Capacity Exclusion and where Berkley was not controlling the defense -- are nothing like those in Griggs. Indeed, applying Griggs to find estoppel would turn well-established New Jersey law regarding reservations of rights on its head. This Court

should decline the unprecedented application of Griggs urged by Mist Pharmaceuticals. Berkley did precisely what New Jersey law, and Griggs in particular, requires of an insurer.

1. Mist Pharmaceuticals Failed To Raise This Argument at the Trial Level

As an initial matter, Mist Pharmaceuticals did not raise its Griggs estoppel argument before the trial court. It is well-established in New Jersey that "our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available." See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Just as the Appellate Division did not consider this argument, neither should this Court as the issue is not properly before it.

2. Mist Pharmaceuticals Erroneously Expands Griggs

A careful review of Griggs makes clear that it is not applicable here. In Griggs, this Court addressed the narrow circumstances where courts may equitably estop an insurer from asserting a policy exclusion, noting that "the strongest and most frequent situation" is when an insurer assumes control of an insured's defense and fails to raise a valid defense in a reservation of rights to deny coverage at a later time. Griggs, 88 N.J. at 356. The Court also considered whether estoppel might apply to an insurer that does not assume control of its insured's defense but fails "for an unreasonable period of time to inform its insured of the possibility of a disclaimer

of coverage notwithstanding the insurer's early notification of a possible claim and awareness of grounds for disclaimer." Id. at 357.

The Griggs Court applied equitable estoppel in the circumstances before it because the insurer's conduct was "a material encroachment upon the rights of an insured to protect itself by handling the claim directly and independently of the insurer." Id. at 359. Specifically, the Court relied upon the fact that (1) the insurer had the exclusive right to control the defense; (2) it received timely notice but failed to advise of the potential for no coverage until eighteen months later; and (3) the insured was justified, based upon the insurer's silence, in expecting that the insurer was protecting its interests. Id. at 360-362.

This case is wholly unlike Griggs. Griggs recognizes that an insurer can appropriately preserve its potential defenses to coverage for a claim by notifying its insured of the "possibility" or "potential" that coverage may not be owed. Id. at 362. Unlike the insurer in Griggs, Berkley did just that. As the Appellate Division correctly noted, "Berkley reserved its rights under the capacity exclusion repeatedly from its earliest communications with Mist regarding the claim." Mist Pharms., 479 N.J. Super. at 138. New Jersey law is clear that the function of reservation of rights letters, like the series of letters issued by Berkley, is to protect the insurer's rights while informing insureds of possible grounds for denial of coverage. See Passaic Valley Sewerage Comm'rs. v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 616

(2011); see also, Certain Underwriters at Lloyd's v. Drosos, 2025 U.S. Dist. LEXIS 55513 at *13 (D.N.J. 2025) ("Plaintiff, faced with a complicated and developing Underlying Action, acted appropriately in providing a defense while unequivocally reserving its rights to deny coverage based on an applicable Policy exclusion").

As noted supra, Berkley reserved rights and advised Mist Pharmaceuticals of the potential for no coverage under the Capacity Exclusion on numerous occasions, including, (1) March 9, 2016, three months from Berkley's receipt of the first notice of Underlying Action (Delaware), Da407-Da417; (2) July 21, 2017, Da426-Da427; (3) in its August 2017 letter disclaiming coverage based upon the timing of the claim, Da437-Da438; (4) November 27, 2017, in its Answer to Mist Pharmaceuticals' Complaint filed in the instant action, Da34; and (5) November 1, 2019 letter, sent over seven (7) months before the entry of the Global Settlement, in which Berkley advised that, "Berkley does not believe it owes any coverage obligation to Mist Pharmaceuticals for this claim and has expressed that view to Mist Pharmaceuticals in its coverage position letters and in the litigation between the parties." Da1190.

Therefore, Mist Pharmaceuticals' argument that it "reasonably relied" upon the availability of coverage when it entered into the Global Settlement in June 2020 and that Berkley hid its coverage position has no basis in the record and strains credulity.

Mist Pharmaceuticals fails to cite a single New Jersey case finding estoppel

where an insurer timely issued a valid reservation of rights as to a coverage defense, as Berkley did here, and urges a sea change of New Jersey law. Griggs instructs that "[u]nreasonable 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). Here, Berkley gave notice of the possibility of disclaimer under the terms of the Capacity Exclusion from the outset and on multiple subsequent occasions. Berkley's conduct does not in any way involve the type of "delay" found problematic by the Court in Griggs and does not implicate the narrow estoppel concept approved in Griggs.[6]

Moreover, unlike Griggs, Mist Pharmaceuticals had retained joint counsel with numerous other Krivulka controlled entities (and other defendants). By the time Mist Pharmaceuticals provided its first notice to Berkley, it had already been defending itself, with counsel it retained. It continued to do so in the face of the reservation of rights letters provided by Berkley. At no time did Berkley "materially encroach" upon Mist Pharmaceuticals' rights to protect itself in the Underlying Actions.

[6] Mist Pharmaceuticals' "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 Pharmaceuticals controlled its defense with its chosen counsel, while accepting Berkley's ten percent contribution subject to its reservation of rights. Da416-417.

This Court should not extend Griggs to the factual circumstances presented here. To do so would upend the well-settled law regarding insurers' reservation of rights and the historical practices of insurers to advise insureds of potential coverage defenses by way of a reservation of rights letter.

3. Mist Pharmaceuticals Fails to Establish Prejudice

Even if Mist Pharmaceuticals were able to convince this Court that estoppel is available, it would still need to establish the required elements of estoppel, which include prejudice. That it cannot do.

Prejudice on the part of the insured is an essential ingredient of estoppel. Customarily, equitable estoppel requires proof of detrimental reliance yielding prejudice. Northfield Ins. Co. v. Mt. Hawley Ins. Co., 454 N.J. Super. 135, 142 (App. Div. 2018) ("the estoppel doctrine has no application absent a showing of prejudice to or detrimental reliance by the insured"). The Griggs Court addressed this issue by stating:

> Thus, the question is whether prejudice can be imputed where, as here, an insurer receives timely notice of the possibility of a claim, is entitled to avail itself of its contractual right to investigate the incident, learns of a basis for disclaimer, and does not alert its insured as to potential noncoverage until after a legal action is actually brought.

88 N.J. at 359.

In determining whether an insurer should be estopped from asserting

exclusionary defenses under a policy because of prejudice to the insured, the test is whether the insurer's acts or omissions "constituted[d] a material encroachment upon the rights of an insured to protect itself by handling the claim directly and independently of the insurer." Reliance Ins. Co., 292 N.J. Super. 365, 375 (App. Div. 1996) (quoting Griggs, 88 N.J. at 359); see also Northfield Ins. Co., 454 N.J. Super. at 142. To establish equitable 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). "The doctrine 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." Id. "Estoppel, unlike waiver, requires the reliance of one party on another. . . In short, to establish equitable estoppel, [defendants] must show that [plaintiff] engaged in conduct, either intentionally or under circumstances that induced reliance, and that [defendants] acted or changed their position to their detriment." Id. (citations omitted).

New Jersey courts have repeatedly declined to find that the insured was prejudiced where the insurer neither assumed control of the defense nor delayed responding to a claim. See Cont'l Ins. Co. v. Beecham, Inc., 836 F. Supp. 1027, 1047 (D.N.J. 1993) (the insured could not show it was prejudiced where the insurer neither assumed control of the defense of the claim nor failed to take any measures for an

unreasonable length of time); Reliance Ins. Co., 292 N.J. Super. at 376-377 (the insured did not suffer prejudice where there was no indication that the insurer's actions prevent the insured from conducting an investigation or assuming defense of the suit); Liberty Ins. Corp., 743 F. Supp. 2d at 418 (no prejudice where the insurer reserved its rights to disclaim coverage in a letter confirming receipt of the claim and the insured assumed total control of the settlement negotiations and defense); Kennedy Univ. Hosp. v. Darwin Nat'l Assurance Co., 2017 U.S. Dist. LEXIS 53603, at *8 (D.N.J. Apr. 7, 2017) (the insured was not prejudiced where the insurer reserved all rights and defenses and did not prevent the insured from taking action to defend itself).

Mist Pharmaceuticals has not shown that Berkley's purported delay in denying coverage impacted its ability to protect itself in the Underlying Actions in any cognizable way. Mist Pharmaceuticals controlled its own defense at all times. Mist Pharmaceuticals bizarrely claims that it was prejudiced because Krivulka had died by the time of Berkley's disclaimer. Mist Pharmaceuticals asserts that "[w]hat course Krivulka might have taken had he been advised of Berkley's no-coverage position will never be known." Mist Pharmaceuticals' Brief at 22. It does not follow from such speculation that Mist Pharmaceuticals was prejudiced. In any event, by the time Krivulka died in 2018, Mist Pharmaceuticals was well aware that the Capacity Exclusion could apply given the multiple reservation of rights letters and

the Answer in this Coverage Action. Any claims of prejudice are pure conjecture and lacking in support. Krivulka's death does not change that.

Thus, even if there was a cognizable basis for estoppel here, (which as discussed supra, there is not), Mist Pharmaceuticals has failed to establish prejudice, which is an essential element.

B. Berkley Is Not Estopped From Asserting The Capacity Exclusion Based Upon A Purported Breach Of The Consent To Settle Condition

1. Berkley's Consent Was Not Unreasonably Withheld

The Policy provides that:

> [a]n Insured shall not admit or assume liability, enter into any settlement agreement, make any offer of settlement or compromise, stipulate to any judgment, agree to arbitration, or incur Costs of Defense without the Insurer's prior written consent. The 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.

Da254.

Consent to settle conditions in insurance policies are enforceable so long as an insurer has not waived compliance with the condition or otherwise engaged in activity that would estop it from raising the condition as a defense to coverage. Kindervater v. Motorists Cas. Ins. Co., 120 N.J.L. 373, 375 (E. & A. 1938); see also

Allied World Assurance Co. (US) v. Benecard Servs., No. 17-12252, 2020 U.S. Dist. LEXIS 94810, at *44-46 (D.N.J. May 31, 2020) (no indemnity coverage because of insured's failure to comply with consent to settle clause). "Since the insured wants to spend not its own money, but someone else's money, the issue is not whether the insured had a reasonable basis to pay a particular amount in settlement, but whether the insurer had a reasonable basis not to agree to pay that amount of money in settlement." Allan D. Windt, Insurance Claims and Disputes, § 6:29, 6-293 n.1 (6th ed. 2019); see also Apollo Educ. Grp., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 250 Ariz. 408, 415 (Ariz. 2021) ("The insurer may also choose not to consent to the settlement if it exceeds the insurer's reasonable determination of the value of the claim, including the merits of plaintiff's theory of liability, defenses to the claim, and any comparative fault.").

Mist Pharmaceuticals was one of many defendants involved in the Global Settlement. None of the other defendants were insureds under the Policy. Thus, to determine what was a reasonable settlement allocation to its insured, Berkley had to assess Mist Pharmaceuticals' relative exposure vis-à-vis the non-insureds. Berkley repeatedly asked Mist Pharmaceuticals' defense counsel for this information. See Da1190; Dca402-Dca403; Dca405-Dca406; Dca412-Dca416; Dca452. Mist Pharmaceuticals failed to provide the requested information. Far from seeking "perfect information" as Mist Pharmaceuticals alleges, Berkley was simply trying to

get foundational information that any insurer would need under the circumstances. Mist Pharmaceuticals points to various interrogatory responses and other materials from which it contends Berkley could have gleaned its liability. However, nothing that Mist Pharmaceuticals provided supported the disproportionate allocation to Mist Pharmaceuticals that was thrust at Berkley.

The record is clear that Berkley was not provided any evaluation before the Global Settlement in June 2020 to support the disproportionate allocation as compared to other KFEs with respect to the allocation of the Global Settlement. Defense counsel omitted any breakdown of the nature of the various claims, or which claims – if any – actually created exposure to Mist Pharmaceuticals, arguing that there seemed "little benefit" in attempting to do so. Dca422; Dca425-Dca426 (stating "Plaintiffs' claims are subject to serious flaws and the defendants have strong defenses" but failing to discuss the purported flaws and defenses).

Mist Pharmaceuticals relies upon defense counsel's opinion that Mist Pharmaceuticals' exposure in the Underlying Actions was at least $30 million and that Celestial RX had the "cleanest shot" of establishing liability as to Mist Pharmaceuticals in comparison to the other defendants in the Underlying Action. Dca510. Neither of those opinions by defense counsel were provided to Berkley until months after the Global Settlement. These post-hoc attempts to justify Mist Pharmaceutical's unilateral settlement are irrelevant and should be ignored. In any

event, each of the "liability analysis" provided by defense counsel failed to provide any actual analysis of exposure of Mist Pharmaceuticals. Dca417-Dca424; Dca425-Dca428; Dca429-Dca432. The letters incorrectly conflated allegations against the "Mist Insureds," or actions by Krivulka in his individual capacity, or on behalf of other entities, with actions specific to Mist Pharmaceuticals' liability. Dca417-Dca424; Dca425-Dca428; Dca429-Dca432. Further, defense counsel's reliance on Mist Pharmaceuticals' potential joint and several liability or exposure based upon an alter ego theory was unhelpful because, as defense counsel admitted in his deposition, such theories of liability were also asserted by CelestialRX against all other, non-insured KFEs. Dca497-Dca500. As those non-insured entities faced the same exposure, it did not explain why there was a disproportionate allocation to Mist Pharmaceuticals.

Thus, Berkley's basis for refusing to consent to the Global Settlement in which its insured was similarly situated to other KFEs receiving a far smaller allocation was reasonable. Recognizing that justification for withholding consent, the Appellate Division proceeded to apply the Capacity Exclusion. Mist Pharms., 479 N.J. Super. at 142.

This Court should do the same.

2. Fireman's Fund Estoppel Does Not Apply To Assertion Of The Capacity Exclusion.

This Court need not reach estoppel because Berkley's refusal to contribute to the Global Settlement was entirely reasonable, however, even if this Court disagreed, Berkley cannot be estopped from asserting the Capacity Exclusion as a bar to coverage. Essentially, Mist Pharmaceuticals argues for an impermissible expansion of this Court's decision in Fireman's Fund to bypass Berkley's contractual rights and secure for itself a better insurance contract than it purchased. In Fireman's Fund, this Court held that an insurer that unreasonably refused to consent to a settlement was estopped from denying coverage based on a provisions pertaining to control of the settlement. Fireman's Fund, 72 N.J. at 71. Contrary to Mist Pharmaceutical's argument, Fireman's Fund does not stand for the proposition that an insurer forfeits coverage defenses as a result of an unreasonable withholding of consent to settlement. Id.

The question in Fireman's Fund was whether an insurer could rely upon the "voluntary payments" and "no action" conditions of its policy (provisions which generally prohibit an insured from making payments without seeking the insurer's prior approval), when it refused in bad faith to contribute its policy limits to a reasonable settlement, where the exposure to the insured was well in excess of the policy limit. Id. at 71. Under those circumstances, the Court held the insurer could not rely upon the "voluntary payments" and "no action" conditions in its policy to

deny coverage, solidifying the proposition that an insurer cannot unreasonably withhold its consent to settle and then deny coverage because the insured paid the settlement without the insurer's permission. Id.

The critical distinction between the situation here, and that in Fireman's Fund was a finding of bad faith in refusing to consent to the settlement. Id. at 67-71. Additionally, unlike in Fireman's Fund, the existence of indemnity coverage remained at issue here.

More importantly, the only right the insurer forfeited in Fireman's Fund was its "right to control settlements" – which the insurer sought to enforce by refusing coverage based upon the policy's "voluntary payment" and "no action" provisions. Id. at 71-72 (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 Fund for proposition that "[w]hen an insurer violates its contractual obligations to the insured, it forfeits its right to control settlements.").

Fireman's Fund did not hold - as Mist Pharmaceuticals urges without providing any supporting case law - that an insurer forfeits its ability to assert applicable policy exclusions as a defense to coverage as a result of withholding

consent to settle in alleged breach of the insurance contract.

The Fireman's Fund court framed the issue as follows:

> The principal question presented on this appeal is the effect, if any, to be given to *[the "voluntary payment" and "no action"] provisions* in a situation in which it appears that: . . . that the insurance company, in refusing to contribute its policy limits to the settlement, *is acting in bad faith -- a fact established in the later action instituted on the insured's behalf against the insurance company.*

72 N.J. at 66-67. (emphasis added).

It logically and practically follows that an insurer cannot argue both that its refusal to consent to a settlement was reasonable and then after the insured settles, assert a voluntary payments defense. However, that logic does not extend to all other defenses an insurer may have. The only issue in Fireman's Fund was whether the insurer could rely upon the voluntary payments and "no action" conditions of the policy after it breached its obligation to settle in good faith; not whether the claim at issue was covered in the first instance. In this regard, it is noteworthy that the Fireman's Fund court quoted New Jersey Manufacturers Indemnity Insurance Co. v. United States Casualty Co., 91 N.J. Super. 404, 407-08 (App. Div. 1966), as follows:

> Where an insurer wrongfully refuses coverage and a defense to its insured, so that the insured is obliged to defend himself *in an action later held to be covered by the policy*, the insurer is liable for the amount of the judgment obtained against the insured or of the settlement made by him. . . . The only qualifications to this rule are that the amount paid in settlement be reasonable, and that the payment be made in good faith.

Fireman's Fund, 72 N.J. at 71 (emphasis added). Mist Pharmaceuticals has failed to provide this Court with any New Jersey decision in which a court extends the estoppel contemplated by Fireman's Fund beyond defenses pertaining to the control of the settlement.

The Appellate Division correctly distinguished this matter from Fireman's Fund. Berkley's refusal to consent to the disproportionate settlement allocation of the Global Settlement to its insured was reasonable, even if the Court were to disagree, Fireman's Fund does not prevent Berkley from applying the Capacity Exclusion.

CONCLUSION

For the foregoing reasons, Berkley respectfully requests that the Court affirm the ruling of the Appellate Division.

Respectfully submitted,
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Dated: July 10, 2025

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