Case No. S244737

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent;

CANADIAN UNIVERSAL INSURANCE COMPANY, INC., et al.
Real Parties in Interest.

ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal,
Second Appellate District, Division Three
Civil Case No. B272387

Los Angeles County Superior Court
Case No. BC 005158, Honorable Elihu Berle, Judge

BERKES CRANE ROBINSON & SEAL LLP
Steven M. Crane (SBN 108930)
scrane@bcrslaw.com
Barbara S. Hodous (SBN 102732)
bhodous@bcrslaw.com
515 South Figueroa Street, Suite 1500
Los Angeles, California 90071
Telephone: (213) 955-1150
Facsimile: (213) 955-1155
Attorneys for Defendants/Real Parties CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

I. INTRODUCTION

The Petition for Review of Montrose Chemical Corporation of California ("Montrose") should be denied. As explained below, this case does not present any conflict in California law, any need for deciding unsettled questions of law, or any other appropriate grounds for review by this Court. California Rules of Court 8.500(b).[1]

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[1] The excess insurer defendants who join Continental Casualty Company's and Columbia Casualty Company's Answer are: Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company; American Centennial Insurance Company; Lamorak Insurance Company (formerly known as OneBeacon America Insurance Company, as Successor-in-Interest to Employers Commercial Union Insurance Company of America, The Employers' Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company); Employers Mutual Casualty Insurance; Federal Insurance Company; Fireman's Fund Insurance Company; National Surety Corporation; Everest Reinsurance Company as successor in interest to Prudential Reinsurance Company ("Prudential") and Mt. McKinley Insurance Company as successor in interest to Gibraltar Casualty Company ("Gibraltar"); Providence Washington Insurance Company as successor by way of merger to Seaton Insurance Company, fka Unigard Security Insurance Company, fka Unigard Mutual Insurance Company; Transport Insurance Company (as successor-in-interest to Transport Indemnity Company); Munich Reinsurance America, Inc., f/k/a American Re-Insurance Company; AIU Insurance Company, American Home Assurance Company, Granite State Insurance Company, Landmark Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA; New Hampshire Insurance Company; Westport Insurance Corporation, formerly known as Puritan Insurance Company, former known as Manhattan Fire and Marine Insurance Company; Employers Insurance of Wausau.

This case concerns insurance coverage as to Montrose's liability for long-term environmental contamination arising out of the operations of its DDT plant in Torrance, California from 1946-1982. The proceeding from which Montrose petitions for review concerned the method by which Montrose may access its multiple excess insurance policies across the years of that continuing loss. The Court of Appeal addressed that issue with respect to a few of the many policies involved, based on settled law in continuous loss situations and the policy language in the policies at issue. It remanded the case so that the trial court could determine the effect of the policy language of *each* excess policy because it concluded it did not have a complete record from which it could make broader decisions. [Opinion of Court of Appeal is Attachment 1 to the Montrose Petition for Review, 14 Cal.App.5th 1306 (2017), hereafter "Opinion."]

There is no need to secure uniformity of decisions or to settle an important question of law. CRC 8.500(b)(1).

First, there are no California appellate opinions that adopt the "elective vertical stacking" position Montrose advances here.[2] There are

[2] A very recently decided case, *State of California v. Continental, et al*. 2017 Cal.App. LEXIS 846, not final as of this writing, included a ruling on exhaustion in the situation where the excess policies refer to underlying

also no California appellate opinions inconsistent with the conclusion of the Court of Appeal in this case that horizontal exhaustion principles of *Community Redevelopment Agency v. Aetna Casualty & Surety Company*, 50 Cal.App.4th 329, 340 (1996) should be applied to exhaustion of excess policies before higher level excess policies attach. There are no California appellate opinions that find *Community Redevelopment* was wrongly decided. And there are no California Supreme Court decisions that contradict the Court of Appeal Opinion here as to how the policy language (including "other insurance" clauses as referenced in Montrose's Issues Presented) affects the method of accessing excess policies in continuing loss cases.

Second, review is not necessary "to settle an important question of law." Again, because California law is settled that the policy language controls, there is no important issue to resolve. All the case law makes plain that attachment point determinations are made on the basis of the actual language in the policies. No case holds otherwise. The Court of

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self-insured retentions, rather than underlying insurance. That case is discussed at section II.A.3.*infra*. It does not discuss "elective vertical stacking." Moreover, it agrees with the *Montrose* Opinion that policy language controls, and that the policy language in the two cases differs materially, according to both courts, because of the self-insured retentions in the State insurance program.

Appeal applied this incontestable principle that the policy language controls. What Montrose requests would unsettle the law.

The horizontal exhaustion rule set forth in *Community Redevelopment* has been good law for more than twenty years, acknowledged repeatedly by other cases such as *Padilla Construction Company, Inc. v. Transportation Insurance Company*, 150 Cal.App.4th 984, 986-987 (2007); *Montgomery Ward & Company v. Imperial Casualty & Indemnity Co.*, 81 Cal.App.4th 356, 365 (2000); *Stonewall Insurance Company v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1852-1853 (1996). No California appellate decision has challenged the reasoning or the result in *Community Redevelopment* -- including the newest *State of California v. Continental* appellate decision.

In addition, the nature of Montrose's request for "elective vertical stacking" inherently unsettles the law because Montrose seeks for itself and other insureds to be allowed to, at its whim, pick which policies it wants to access in any order for any reason (see, e.g., page 39 of Petition). Such a ruling, by its very nature, would not settle the law as to Montrose or any other insured. Montrose's ad hoc approach provides no certainty -- or even a guiding principle -- and is contrary to California rules governing policy

interpretation and this policy language in particular. As Justice Mosk noted in dissent in *In Re Marriage of Assemi*, 7 Cal.4th 896, 912 (1994): "As a general matter, this court grants review in order to 'secure uniformity of decision or the settlement of important questions of law.' [citations] In this proceeding, the majority secure neither. Quite the contrary. They unsettle the law as it stands today and sow the seeds for a harvest of conflict in the future."

Third, this case is not in a posture conducive to review by the Supreme Court. The Court of Appeal concluded that the sequencing of access to the excess policies must be determined based on the language of the insurance policies and in context -- an unremarkable conclusion consistent with long-standing Supreme Court jurisprudence. *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1265 (1992)*; Producer's Daily Delivery Company v. Sentry Insurance Co.,* 41 Cal.3d 903, 916-917 (1986). Although the Court also determined that "[o]ur analysis of the policies, moreover, leads us to conclude that many of the policies attach not upon exhaustion of lower-layer policies within the same policy period, but rather upon exhaustion of *all* available insurance" [Opinion, 14 Cal.App.5th at 1327], importantly for purposes of the pending Petition for Review, the

Court of Appeal sent the case back to the trial court for further proceedings, as follows:

> [The Parties] did not provide the trial court, and have not provided this court, with all of the policy language or with copies of the policies themselves. The absence of these policies makes it impossible for us to 'interpret [policy] language *in context*, with regard to its intended function in the policy. [Opinion, 14 Cal.App.5th at 1337, italics in the Opinion.][3]

Thus, the Court of Appeal held that the sequence in which excess insurance policies can be accessed in this continuing injury context must be determined on a policy-by-policy basis and therefore it could not determine *on the record before it* that *each* of the more than 115 excess policies requires horizontal exhaustion.

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[3] Montrose asserts on page 19 of its Petition that the Court of Appeal stated "falsely" that Montrose did not identify the provisions which support its claim that excess policies attach upon the exhaustion of policies in the same policy year. But as the quoted portion of the Opinion shows, the Court of Appeal's stated concern was broader. Moreover, Montrose did not file a Petition for Rehearing calling the Court's attention to this alleged omission or misstatement of an issue or fact. See CRC 8.500(c)(2). Accordingly, the Supreme Court should decline to consider Montrose's current description of these facts. *People v. Guilford*, 228 Cal.App.4th 651, 660-661 (2014); *Torres v. Parkhouse Tire Service, Inc.*, 26 Cal.4th 995, 1000, fn. 2 (2001).

Fourth, the Issues Presented by Montrose are not suitable for Supreme Court review. They are directed to one particular policy provision which was not even the basis for the Opinion, is not contained in all the policies in this case, may vary from case to case, cannot be read in isolation from the rest of the policy, and has not been interpreted by the Supreme Court in the manner described by Montrose.

Montrose's Issues Presented are, at best, abstract propositions, disconnected from the Court of Appeal Opinion it presumably seeks to have reversed. Montrose purports to be seeking nothing more than answers to hypothetical questions about the effect of some abstract "other insurance" clause. Each Issue Presented is premised on the false assumption that the Opinion is based entirely on "boilerplate 'other insurance'" clauses "dictating" when excess insurers' obligations are triggered. The Issues Presented are formulated so as to suggest that the Opinion contradicts Supreme Court authority and "mandates" a sequencing approach to exhaustion. Neither is true; nothing in the Opinion contradicts Supreme Court authority, and the Opinion merely holds that what mandates the appropriate sequencing approach is the actual language of the policies in a continuing injury context.

Moreover, the language of the policies is what Montrose bargained for. And the recognition that insurance policies across the years of continuing injury are all implicated by a single continuing loss is a result of what Montrose itself demanded and obtained in *Montrose Chemical Corporation of California v. Admiral Insurance Company*, 10 Cal.4th 645 (1995). As explained in both the Court of Appeal Opinion and below, the decisions in *Dart Industries, Inc. v. Commercial Union Insurance Company*, 28 Cal.4th 1059 (2002) and *State of California v. Continental Insurance Company, et al*, 55 Cal.4th 186 (2012) ("*Continental*"), cited in the Issues Presented, while important cases for other principles, do not address the issues in this case.

Montrose's premise that the Opinion mandates, or "dictates," a horizontal exhaustion approach is false. The Court of Appeal ruled that while "many of the policies attach . . . upon exhaustion of *all* available insurance," (and gave examples at pages 1327-1329), it remanded for a determination by the trial court, in the continuing injury context and in light of the policies as a whole, ***whether each policy*** so provides. The Court of Appeal Opinion, therefore, does not "impose mandatory horizontal exhaustion" as Montrose repeatedly asserts. (See, e.g., pages 8 [in the

Issues Presented], 14, 20, 30, 31, 34, 36, 37, 41, etc.) Instead, the Court of Appeal directs the trial court to consider the policy language of each of the other excess policies to determine whether each policy provides for horizontal exhaustion under the principles set forth in the Opinion. Specifically in response to Montrose's arguments that "mandatory" horizontal exhaustion was being imposed, the Court of Appeal held:

> We do not agree that our holding in this case has the effect of "obligating" any policyholder to seek indemnification under any particular policy. *All* we hold today is that insureds must exhaust lower layers of coverage before accessing higher layers of coverage *if the language of the excess policies so requires*. . . . [Opinion, 14 Cal.App.5th at 1335, emphasis in Opinion.]

Thus, there is no basis for review by this Court at this time, particularly in light of the posture of this case and the present record.

II. REVIEW SHOULD NOT BE GRANTED BECAUSE THIS CASE DOES NOT MEET THE CRITERIA OF CALIFORNIA RULES OF COURT 8.500(b)(1)

A. There Is No Inconsistency In the Appellate Case Law Requiring Supreme Court Intervention

There is no California appellate case law that supports Montrose's theory that "elective vertical" exhaustion applies in a continuing injury case, let alone any involving the policy language at issue here. There is no California appellate case law interpreting the policy language and context here that contradicts the Opinion regarding horizontal exhaustion. Thus, there is no inconsistency or lack of uniformity among appellate cases requiring the Supreme Court's involvement. CRC 8.500(b)(1). Montrose makes no showing that there are inconsistencies between appellate cases that need to be resolved.

Instead, Montrose implies "lack of uniformity" by relying on certain Supreme Court cases that decided issues completely different than those involved here, mainly *State of California v. Continental, supra*, 55 Cal.4th 186[4] and *Dart, supra,* 28 Cal.4th 1059; trial court rulings, including trial court rulings from other states; and the recent Court of Appeal opinion in

[4] Montrose also relies on the *un*published 2009 appellate opinion in that same case, which likewise decided different issues than those involved here. See, Montrose Petition at 32, 35.

State of California v. Continental Insurance Company, 2017 Cal.App. LEXIS 846, a case concerning prejudgment interest, that is not final as of this writing and which the Court itself distinguished from the *Montrose* Opinion on its facts and policy language.

1. *Continental*, 55 Cal.4th 186 (2012)

Montrose attempts to show that the Opinion in this case is inconsistent with this Court's opinion in *Continental*. But as the Court of Appeal in the current case explained in detail at 14 Cal.App.5th 1323-1328, this Court in *Continental* did not address, let alone decide, exhaustion issues:

> As we now discuss, *Continental* does not dictate the result in this case. Importantly, both the relevant policy language and the issues confronting the *Continental* court were very different from the language and issues before us; and nothing in *Continental* suggests that, in the context of the present case, an insured has an absolute right to "select which policy(ies) to access for indemnification in the manner they deem more efficient and advantageous." [*Id*, at 1323]

Instead, the *Continental* decision determined two issues: (1) that an insured could "stack" the limits of triggered policies ***consecutively*** throughout the period of continuing damage -- and not just be restricted to coverage within a single policy period. [*Continental*, 55 Cal.4th at 201], and (2) that once triggered, a policy must pay "all sums" rather than a pro rata amount of property damage during the policy period. [*Id,* at 199] This Court found that the limits of such ***successive*** triggered policies could be "stacked." But the issue of how different levels of excess insurance exhaust was not before the Court. This Court in *Continental* was not asked to and did not decide exhaustion issues among different levels of excess insurance. As the *Montrose* Court of Appeal explained:

> [W]hile *Continental* held that each "triggered" policy may be called upon to respond to a claim (*Continental, supra*, 55 Cal.4th at p. 200), it did not consider when a higher-layer excess policy is "triggered" in the context of a long-tail environmental injury. That is, *Continental* discussed the "trigger of coverage" issue *temporally*, . . . Because it was not called upon to do so, the court in *Continental* did not consider the aspect

> of "trigger of coverage" before us in this case -- what lower-layer excess policies must be exhausted before a higher-layer excess policy is triggered. [Opinion, 14 Cal.App.5th at 1326-1327.]

This Court's decision in *Continental* did not grant policyholders license to "spike" coverage vertically through progressively higher levels of excess policies prior to exhaustion of lower level horizontal limits in other years triggered by the same loss. It did not even consider that question. A case is not authority for a proposition it did not consider. *Johnson v. Bradley*, 4 Cal.4th 389, 415 (1992).

2. *Dart*

Montrose is also mistaken that this Court's decision in *Dart, supra,* 28 Cal.4th 1059 addresses the issues in this case -- much less compels a different result. Montrose repeatedly cites to *Dart* as support for the proposition that "other insurance" clauses are relevant only to allocation among insurers and not to the policyholder's right to recover under the policies containing such clauses. See, e.g. Issue Presented no. 2. As the Court of Appeal in the present case recognized and cogently explained, *Dart* does not control, or even address, the issues in this case. ("Montrose's

assertion about 'other insurance' clauses finds no support in *Dart*.") [Opinion, 14 Cal.App.5th at 1332]:

> [I]n so urging, Montrose ignores a key difference between *Dart* and the present case -- namely, that the insurer in *Dart* was a *primary* insurer, while the insurers in the present case are *excess* insurers. The difference between primary and excess insurance in this context is material. In *Dart*, the 'other insurance' clause was held not to extinguish the insurer's duty to the insured under the relevant primary policies because such duty attached 'when continuous or progressively deteriorating damage or injury first manifests itself' and covered 'the full extent of the policyholder's liability (up to the policy limits)." [Citation to *Dart* at 28 Cal.4th at 1080.] The excess policies at issue in the present case, however, attach only after other identified insurance is exhausted, not immediately upon the occurrence giving rise to liability. (Croskey . . . at ¶ 8:176-8:177.) Thus, because exhaustion of

> underlying insurance is an explicit prerequisite for the attachment of excess insurance -- and because an 'other insurance' clause may define the insurance that must be exhausted before the excess insurance attaches - *Dart*'s statement that apportionment among insurers has no bearing on the insurers' obligations to the policyholder simply does not apply in the present context." [Opinion, 14 Cal.App.5th at 1333, emphasis in original.]

The discussion in *Dart* that Montrose relies on involved an analysis of the application of incompatible "other insurance" clauses in ***primary*** policies that is not involved here. *Dart* does not discuss exhaustion; it does not concern excess policies or excess attachment points. Instead, it concerns the burdens on an insured to prove the existence, terms and conditions of a lost ***primary*** policy. One of the issues was who has the burden to prove the terms of an "other insurance" clause in a lost/missing primary policy. As the *Montrose* Opinion explains about *Dart*, "It was undisputed that Commercial Union was a primary insurer . . . . Thus, an "other insurance' clause -- whatever its terms - was irrelevant to

Commercial Union's obligation to provide *primary* coverage to its insured." [Opinion, 14 Cal.App.5th at 1332, emphasis in Opinion.]

The "excess other insurance" clause cases cited by Montrose (e.g., *Fireman's Fund Insurance Company v. Maryland Casualty Company*, 65 Cal.App.4th 1279, 1304 (1998)) [Petition at 25-26] concern disputes between ***primary*** insurers where each was disputing whether their policies were in a position "excess" to other primary insurance. That situation has no relevance here. As the Court of Appeal explained in the Opinion [at 1334], references to "other insurance" "may play different roles in different policies." In some circumstances, "'other insurance' clauses may be relevant to determining whether two policies provide the same level of coverage -- and, thus, the order in which excess policies attach." *Id*. In cases concerning a dispute between two insurers for equitable apportionment, courts look to see if the "other insurance" clauses of the various insurers' policies conflict, and if so, determine the method for resolving the conflict. If both insurers' policies contain "excess other insurance" clauses, the literal result might be that neither would provide coverage, so the courts do not permit that result, referring to the competing clauses in that context as "mutually repugnant." In such cases, the courts

disfavor the implementation of the provision making one primary policy "excess" over another. Instead, the courts have held the two primary policies should pro rate because if one were transformed into an excess policy, the insured would not have the benefit of that primary insurance it paid for.

In connection with its discussion of "other insurance" clauses in the context of *Dart,* this Court merely held that the primary insurer was "therefore incorrect that Dart's inability to prove the type of 'other insurance' clause found in its policy cancels [the primary insurer's] own obligations as a primary insurer." *Dart,* at 1081. This holding has nothing whatsoever to do with the issues in the current case as to the application of language in excess policies that requires exhaustion of "other valid and collectible" insurance before they attach, as the Court of Appeal in this case recognized.

3. Recent *State of California v. Continental* Court of Appeal Decision

Montrose also argues that the recently issued Court of Appeal decision in *State of California v. Continental Insurance Company, et al,* 2017 Cal.App. LEXIS 846 is inconsistent with the Opinion in this case. That decision, filed September 29, 2017, after the 2012 remand from this

Court, and not yet final, addressed whether prejudgment interest under Civil Code section 3287(a) was appropriate under the circumstances of that case in light of the numerous issues that had to be determined before the defendant excess insurers could know what they owed. Whether the excess policies there supported horizontal or vertical exhaustion was one of such issues.[5] The Court held that the policy language at issue controlled, and explicitly distinguished the language of the State's policies and the entire State insurance program from other cases on the grounds, among others, that the State's program involved underlying self-insured retentions. The Court held that because the State's excess policies expressly stated they were excess "over the insured's retention," *Montgomery Ward*, which concerned first level excess policies sitting directly over self-insured retentions, applied rather than *Community Redevelopment*, where the excess policies at issue were excess of other insurance policies. The recent *Continental* Court of Appeal did not reject *Community Redevelopment* or horizontal exhaustion principles -- it simply decided that the State of California's policy language, which included self-insured retentions rather

[5] It should be obvious that the prior decision by this Court in *Continental*, in 2012, did not address the issue of horizontal versus vertical exhaustion; if it had, as Montrose argues, the issue would not have been involved in the more recent appellate decision in that case.

than underlying insurance, was distinguishable from the language in *Community Redevelopment*. The policies here -- like the policies in *Community Redevelopment* -- are situated above insurance policies, not self-insured retentions. [See coverage chart, Attachment 2 to Montrose Petition for Review.]

Respondent trial court in the present case noted the same distinction as between an insurance program with primary insurance such as Montrose's and the State's program with self-insured retentions instead [1PA1 pp. 53-55]. The Court of Appeal similarly noted the distinction between this case and *Montgomery Ward*: "*Montgomery Ward* concerned the obligations of excess insurers to an insured in the context of a self-insured retention, which the court concluded was not 'other collectible insurance with any other insurer' within the policy language before it [citation]; it is therefore irrelevant to our analysis." [Opinion at 1331, footnote 6.] The *Continental* Court of Appeal decision mentions the *Montrose* Opinion in passing, in a footnote, noting the distinction between the two cases: "We note . . . that *Montrose* is distinguishable from our case on multiple grounds, including . . . an at least partly self-insured retention." 2017 Cal.App. LEXIS 846 *27, fn 5.

Thus, the recent *Continental* Court of Appeal decision neither creates a lack of uniformity nor applies here. Indeed, it was decided based on the same principle that the Court in *Montrose* used -- that the policies must be construed based on the policy language involved.

Montrose has not made and cannot make a showing that this Court's review is warranted based on lack of uniformity among appellate courts.[6]

B. Review Is Not Necessary To Settle an Important Question of Law

In an effort to portray the ruling of the Court of Appeal as an important question of law that needs to be settled now, Montrose characterizes the ruling as "unprecedented" and a "forced allocation" depriving policyholders of their rights. In fact, the record shows Montrose itself argued to the trial court in this case that a horizontal exhaustion approach would ***maximize*** its coverage in this case, not deprive it of coverage. [e.g., 4PA17 pp. 1022-1023] The record also demonstrates that Montrose itself espoused horizontal exhaustion as an amicus in *Continental*, in connection with the briefing on "all sums" and whether the

[6] Although Montrose cites to trial court cases, some unpublished, and other cases from other jurisdictions, such cases do not qualify as inconsistent case law under CRC 8.500(b)(1).

policies can be “stacked” across multiple policy periods. Montrose argued in 2008 to the Fourth District Court of Appeal in that same case that an insured should be entitled to stack its policy limits across the years of continuing damage precisely ***because*** "as a general rule, California requires horizontal exhaustion." For example, Montrose argued:

> Following *Montrose v. Admiral*, in *Community Redevelopment* . . . (“*CRA”*), the court made clear that stacking of multiple consecutive policies was the governing rule in California . . . Thus, by generally requiring horizontal exhaustion of primary coverage before excess coverage is reached, *CRA* ***mandates*** the stacking of coverage from multiple policies spanning multiple policy periods." (emphasis by Montrose in original) [Montrose amicus brief at 30-31, 4PA17 pp. 997-998].

Contrary to Montrose’s current assertions, the question as to how to exhaust underlying excess policies in a continuing injury context is not a matter of first impression in California or a departure from settled law.

Instead, the Court of Appeal ruling is based on long-standing law -- including *Community Redevelopment* -- applied to the policy language here. No cases challenge the reasoning of *Community Redevelopment*. Rather, a few isolated cases find that *Community Redevelopment* was factually distinguishable or that the policy language at issue compelled a different result. But such cases do not question the correctness of the *Community Redevelopment* holding or its application to continuing loss situations.[7]

For example, *Montgomery Ward*, *supra*, 81 Cal.App.4th 356, holds that in connection with an insurance program with multiple self-insured retentions, those self-insured retentions are not the same as and do not function the same as primary insurance. In so holding, the court recognized that horizontal exhaustion of all primary insurance was the settled law: "In *Community Redevelopment*. . . , this court applied, in a continuing loss case, the long-settled rule 'an excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until all of the primary insurance has been exhausted.' The court explained this general rule 'favors and results in what is called 'horizontal exhaustion.'" [*Id*, at 365]

[7] Notably, the Montrose Petition barely mentions *Community Redevelopment*.

Montgomery Ward merely held that self-insured retentions do not constitute "primary insurance."[8] It did not overrule or criticize *Community Redevelopment*. It did not endorse "vertical exhaustion" -- elective or otherwise.

The important question of law -- that the policy language controls -- has long been decided and the Court of Appeal applied that bedrock principle here. There is no issue that requires the Supreme Court to intervene and settle.

III. THE POSTURE OF THIS CASE DOES NOT SUPPORT REVIEW BECAUSE THE COURT OF APPEAL DECIDED THE RECORD WAS INCOMPLETE FOR PURPOSES OF DECIDING HOW EACH EXCESS POLICY IS TO BE ACCESSED

The Court of Appeal addressed and carefully analyzed the case law raised by the parties. The Court held: "Our analysis of the policies, moreover, leads us to conclude that many of the policies attach not upon

[8] The recent *Continental* Court of Appeal decision characterizes *Montgomery Ward* as holding that "vertical exhaustion ordinarily applies to self-insured retentions" [2017 Cal.App.LEXIS 846, *21] But that overstates what *Montgomery Ward* held. *Montgomery Ward* did not endorse "vertical exhaustion." It merely held that the horizontal exhaustion principle laid out by *Community Redevelopment* did not apply in the case at issue because the self-insured retentions did not constitute underlying other insurance. Therefore, only a single retention would apply before the first layer of insurance attached. The case said nothing about how higher levels of excess insurance above actual insurance would exhaust.

exhaustion of lower-layer policies within the same policy period, but rather upon exhaustion of *all* available insurance. A few examples will illustrate the point[.]" [Opinion, 14 Cal.App.5th at 1327, emphasis in original.] The Court then proceeded to hold that certain policy language in American Centennial, Continental and Columbia policies requires horizontal exhaustion of all underlying insurance, but that the Court did not have a sufficient record to determine if each of the other excess policies in the case similarly required such exhaustion. [Opinion, 14 Cal.App.5th at 1327-1329.]

It is notable that the specific policy language of American Centennial, Continental and Columbia policies the Court of Appeal analyzed in the Opinion was not the so-called "boilerplate standard 'other insurance' clause" Montrose quotes at page 19 of its Petition for Review and on which Montrose bases its Issues Presented and other arguments. That fact alone demonstrates the falsity of Montrose's premise that the Opinion was based on a boilerplate "other insurance" clause and makes the Issues Presented merely abstract and hypothetical.

In addition, in Issues Presented no. 1, Montrose refers to "the standard 'other insurance' condition." The specific provisions discussed in

the *Montrose* Opinion are not "conditions," but are instead in the insuring agreements and in definitions of words found in the insuring agreements. [See, e.g. Opinion, 14 Cal.App.5th at 1327-1329, citing the insuring agreements of the American Centennial policies, and the indemnification provisions of the Continental and Columbia policies.]

As to the policy language at issue, the Court of Appeal was more measured than is Montrose in its Petition. The Court held, "We caution that the foregoing discussion [concerning American Centennial, Continental and Columbia policy language] addresses just a few of the excess policies at issue, and thus nothing we have said should be understood to apply to *all* of the excess policies before us." [Opinion, 14 Cal.App.5th at 1329, emphasis in original.] The Court went on to say the record did not contain all of the policy language or the copies of the policies themselves and therefore the Court "cannot conclude that *each* of the more than 115 policies at issue requires 'horizontal exhaustion' of the underlying policy layers for each policy year." [Opinion, 14 Cal.App.5th at 1337, emphasis in original; *see also* Opinion at 1321.]

If the record was not sufficient for the Court of Appeal to decide that each of the excess policies requires exhaustion of all underlying insurance,

no purpose would be served by granting the Petition for Review by the Supreme Court. The Supreme Court will have no better record. Likewise, it could not be clearer that Montrose's Petition is based on the hyperbolic assertion that the Court of Appeal decided in favor of mandatory horizontal exhaustion based on boilerplate "other insurance" condition clauses.

IV. THE ISSUES PRESENTED ARE ABSTRACT ISSUES UNCONNECTED TO THE COURT OF APPEAL OPINION, NOT BASED ON THE ACTUAL POLICY LANGUAGE, AND MISTAKENLY RELIANT ON CASES THAT DID NOT DECIDE THESE SAME ISSUES

The "Issues Presented" in the Montrose Petition concern what Montrose describes as "the standard 'other insurance' condition." In Issue no. 1, Montrose implies that such "standard" provisions serve no purpose in the policy and are relevant only to contribution disputes between insurers, citing *Dart, supra,* 28 Cal.4th 1059. First, ignoring a provision in a policy violates basic contract interpretation rules. Nor does a court look only to a single provision to interpret a policy; the policy must be interpreted as a whole, with all provisions considered. California Civil Code section 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the

other."); *Palmer v. Truck Insurance Exchange*, 21 Cal.4th 1109, 1115 (1999).

Next, the Montrose policies contain various provisions that refer to "other insurances," "other valid and collectible insurance," and so forth. They are not all the same. For example, the Continental and Columbia "other insurance" provision discussed in the Opinion is different than the one quoted in Montrose's Petition. Indeed, no specific "other insurance" language was discussed in *Dart* because that case concerned a lost [primary] policy where the parties did not know the terms of the policy. Furthermore, the *Montrose* Opinion does not decide the meaning of all "other insurance" provisions, let alone the provision Montrose relies on in its petition. Thus, Issue No. 1 is merely a hypothetical question, with no basis in what the Opinion actually decided.

Montrose's Issue Presented no. 2 is also based on "other insurance" provisions and asks the abstract and speculative question whether the presence of such clauses [apparently without regard to the rest of the policy language] "effectively impos[es] mandatory horizontal exhaustion of excess coverage in contravention of" *Continental, supra*, 55 Cal.4th 186, *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th

38(1997) and *Montrose v. Admiral, supra,* 10 Cal.4th 645. There is much wrong with that formulation of an issue. First, one provision of a policy cannot be considered in isolation from the rest of the policy. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." California Civil Code section 1641; *Holz Rubber Co. v. American Star Insurance Co.*, 14 Cal.3d 45, 56 (1975). Next, as explained elsewhere in this Answer, the Court of Appeal did not impose "mandatory horizontal exhaustion." Horizontal exhaustion will apply if the policy language so requires. There is nothing remarkable about that proposition. Lastly, horizontal exhaustion is not in contravention of any of the Supreme Court cases referred to in the Issue Presented.

Indeed, the horizontal exhaustion principles set forth in *Community Redevelopment* are explicitly derived from *Montrose v. Admiral, supra*, 10 Cal.4th at 686-687. As a result of the holding in *Montrose v. Admiral*, a policy in one time period during which there was some continuing damage might be excess to a policy in another time period during which there was some continuing damage arising out of the same occurrence. *Community Redevelopment, supra,* 50 Cal.App.4th at 338-340.

As Justice Croskey noted, "a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose*." *Id,* at 340. *See also, Stonewall, supra,* 46 Cal.App.4th at 1852-1853, where the court applied "horizontal allocation of the risk" to liability as between primary and excess insurers, "rather than the 'vertical' approach . . . . the 'horizontal' approach seems far more consistent with *Montrose's* continuous trigger approach." *Padilla, supra,* 150 Cal.App.4th at 986-987 ("[A] horizontal exhaustion rule should be applied in continuing loss cases because it is most consistent with the principle enunciated in *Montrose*. . .); *Montgomery Ward, supra,* 81 Cal.App.4th at 365 (explaining that the horizontal exhaustion holding in *Community Redevelopment* arose out of the continuing injury trigger of *Montrose*).

Horizontal exhaustion principles are similarly not in contravention to the 2012 Supreme Court decision in *Continental, supra,* 55 Cal.4th 186, which addressed different issues, not the method of accessing excess policies. [See discussion at section II.A.1. above.]. Nor do they conflict with *Aerojet-General*, which did not concern principles of exhaustion or how to access excess policies. *Aerojet-General* held, among other things,

that in a continuous loss situation, once ***successive*** policies are triggered under *Montrose v. Admiral*, each policy is responsible for "all sums," i.e. "the insurer is responsible for the full extent of the insured's liability ..., not just for the part of the [injury or] damage that occurred during the policy period." *Aerojet, supra*, 17 Cal.4th at 57-59. As with this Court's opinions in *Continental* and *Montrose v. Admiral*, *Aerojet* recognizes that policies over time can apply to the same continuous loss.

Issue Presented no. 2 is simply another abstract, hypothetical question that is not grounded in the specifics of this case and thus not appropriate for review.

V. THE COURT OF APPEAL CORRECTLY DECIDED THAT CERTAIN POLICY LANGUAGE IS INCONSISTENT WITH ELECTIVE VERTICAL STACKING

For the reasons set forth above, this case is not one that meets the standards for Supreme Court review or is in a procedural posture for such review. Moreover, the Court of Appeal decision was correct.

A. Horizontal Exhaustion of All Underlying Policies Triggered by a Continuing Loss Is Most Consistent with the Principles of *Montrose v. Admiral*

As the Opinion properly recognizes, there is no case law or policy language that supports Montrose's as hoc "elective vertical" exhaustion

approach. And Montrose cites none.

It is a well-established principle that excess insurers have no duty to indemnify, if at all, until all applicable underlying insurance has been exhausted, even where there is more underlying insurance than originally contemplated. *Olympic Insurance Company v. Employers Surplus Lines Insurance Company*, 126 Cal.App.3d 593, 600 (1981). ("A secondary policy, by its own terms, does not apply to cover a loss until the underlying primary insurance has been exhausted. This principle holds true even where there is more underlying primary insurance than contemplated by the terms of the secondary policy.")

The *Community Redevelopment* court found the language that provided the policy was excess to "the applicable limits of any other underlying insurance collectible by the [insured]" implicated horizontal exhaustion.

Access to multiple policies over many policy periods triggered by the same continuing injury is exactly what Montrose sought and obtained in *Montrose v. Admiral.* And, as multiple California appellate courts have held, horizontal exhaustion is the approach most consistent with the

principles of *Montrose v. Admiral*[9] because it recognizes that a continuing injury can trigger multiple policies across the years of that continuing injury and that higher level policies can thereby become excess of lower level policies in other years where the policy language requires exhaustion of vertically underlying insurance and other valid and collectible insurance.

The Court of Appeal Opinion quotes policy language from American Centennial, Continental Casualty and Columbia Casualty policies that, like the language in *Community Redevelopment*, makes the policies excess of all underlying insurance, not just vertically underlying insurance. [Opinion. 14 Cal.App.5th at 1327-1329.] As to other policies, the Court remanded for the trial court to determine whether, as excess insurers urge, each of the other policies at issue also contains or incorporates language that the policy is excess to both vertically underlying limits ***and*** "other insurance" or variants of that phrase, in accord with *Community Redevelopment*.

B. Horizontal Exhaustion Is Not A Restriction on Coverage Nor Does It Deprive Montrose of Coverage

In a continuous loss case such as this, concerning insurance coverage for long-term environmental contamination, the method by which an insured may access its excess insurance policies across the years of

[9] See discussion at section IV, *supra*.

continuing loss is a matter of sequence, not a restriction on coverage. Montrose's Petition for Review mischaracterizes the result of the Court of Appeal decision as being one that deprives Montrose of coverage. The decision does no such thing. In fact, Montrose acknowledges that it has sufficient insurance coverage for its environmental liability and that horizontal exhaustion maximizes its coverage. [Opinion, 14 Cal.App.5th at 1335, footnote 8; 4PA17 pp. 1022-1023.]

The policy requirement of exhaustion of lower-lying insurance simply means that Montrose will have already received the benefit of that lower-lying insurance from multiple policy periods before it accesses higher level policies.

C. In A Continuing Loss Context, Higher Layer Excess Insurance Is Accessed When Lower Layer Excess Policies Are Exhausted

Montrose argues that the California horizontal exhaustion cases such as *Community Redevelopment, Padilla, Stonewall*, hold only that all underlying ***primary*** insurance, including that in other policy periods, must be exhausted before any excess policy is implicated -- and therefore that the same horizontal exhaustion principle does not apply to the exhaustion of lower level ***excess*** policies. [Petition at 31, 35-36] It just happens that the

amount of money involved in *Community Redevelopment, Stonewall* and *Padilla* was not sufficiently high to require access to higher level insurance, as Montrose seeks here. So the language of the holdings refers only to whether all the primary insurance must be exhausted before the lower level excess policies attach because that is all that was required to indemnify the insured in those cases.

But, as the Court of Appeal here emphasized: "Montrose suggests no reason why we should differently interpret *first-layer* excess policies (that is excess policies immediately above primary policies) and *higher-level* excess policies (excess policies immediately above other excess policies.)" [Opinion, 14 Cal.App.5th at 1331, emphasis in original].

Significantly, no California appellate authority holds the horizontal exhaustion principle should ***not*** be applied at excess levels. Montrose argues that the recent *Continental* Court of Appeal decision supports Montrose's position that horizontal exhaustion should not apply to higher layer excess policies. Despite Montrose's characterization, that decision does not so hold. It adopted vertical exhaustion on the basis that the excess policies are situated over self-insured retentions. Therefore, that Court had no reason to address the manner in which horizontal exhaustion principles

would be applied at higher excess levels with respect to underlying insurance.

There is no reason based in either the policy language or insurance law principles why horizontal exhaustion should not apply to excess policies, as the Court of Appeal here has noted. [Opinion, 14 Cal.App.5th at 1331.] Montrose does not suggest, nor is there a rationale for, treating underlying triggered lower level excess policies differently from underlying triggered primary insurance policies with respect to the question of how underlying insurance must exhaust before indemnity is owed in a continuing injury situation. The very reason for the articulation in *Community Redevelopment* is based on the policy language of the ***excess*** (not the primary) policies and the continuous injury principle established in *Montrose v. Admiral*. Thus, it is equally applicable to higher level excess policies.

VI. MONTROSE'S OTHER ARGUMENTS IGNORE THE POLICY LANGUAGE AND MISCHARACTERIZE THE LAW

In its effort to bolster its argument that the Opinion is inconsistent with previous appellate rulings, Montrose advances arguments that do not withstand scrutiny.

A. Horizontal Exhaustion Does Not Equate To “Pro Rata”

One of Montrose’s themes is that horizontal exhaustion is the same as pro rata allocation, and pro rata allocation was rejected by the Supreme Court in *Continental*, *supra*, 55 Cal.4th 186. By this argument, Montrose sets up a false equivalency. Pro rata allocation is not the same as horizontal exhaustion. The two concepts do not even answer the same question. Horizontal exhaustion (or any approach to exhaustion) is a method of determining when an excess policy is first implicated -- here, in a continuing injury context. That is, which policies must be exhausted by the same "occurrence" before a particular excess policy attaches? Pro rata allocation, on the other hand, provides that policies, both primary and excess, are responsible only for the property damage taking place solely within the particular policy period of the policy at issue. It is contrasted with the "all sums" approach, which holds that a policy is responsible for all the damage (up to the policy's limits) if any portion of the continuing damage takes place within the policy period -- even if the damage continues after the policy period. The issue of "pro rata" versus "all sums" is a different inquiry than which policies must be exhausted before an excess policy is implicated. Pro rata versus "all sums" controls how a policy pays; exhaustion controls when

an excess policy pays. Accordingly, Montrose's argument that horizontal exhaustion is inconsistent with the "all sums" ruling of the Supreme Court opinion in *Continental* is meritless.

B. Contrary To Montrose's Assertion, "Other Insurance" Clauses Must Be Given Effect In The Circumstance At Issue

As set forth in the Opinion, "at least some of the" excess policies at issue contain provisions that make them excess to vertically underlying policies in the same policy period ***plus*** "other valid and collectible" insurance, that is, other insurance triggered by the same occurrence.

Montrose repeatedly refers to "other insurance" clauses as being what it dubs "boilerplate standard 'other insurance' clauses" as though they were to be utterly ignored. [See, e.g. Montrose Petition for Review at pp. 10, 11[10], 19, 22, 25 et seq.] The rules of contract interpretation do not permit Montrose to simply treat as surplusage the "other insurance" or "other valid and collectible insurance" language of the policies. California Civil Code section 1641; *Palmer, supra,* 21 Cal.4th at 1115. As the

[10] Montrose's statement in footnote 2 on page 11 that the insurers do not dispute all the policies contain "boilerplate 'other insurance' language" is wrong. Insurers do not consider such provisions to be "boilerplate" and the various "other valid and collectible insurance" or "other insurance" provisions are not all the same.

Montrose Opinion recognizes, “Case law establishes that “other insurance” provisions must be given effect according to their terms.” [Opinion, 14 Cal.App.5th at 1330, capitalization omitted.] Courts do not rewrite contracts for any purpose. *Aerojet-General, supra*, 17 Cal.4th at 75.

As between the insured and the insurer who have contracted with each other, these provisions must be given effect. They determine the attachment point for an excess policy, i.e., by describing what policies must be exhausted before a particular excess policy is implicated -- including where the other insurance was issued for another policy period also triggered by the continuing loss. *See, Community Redevelopment, supra*, 50 Cal.App.4th at 341.

In *Peerless Casualty Company v. Continental Casualty Company*, 144 Cal.App.2d 617, 624 (1956), the Court of Appeal held that "when a policy which provides excess insurance above a stated amount of primary insurance contains provisions which make it also excess insurance above all other insurance which contributes to the payment of the loss together with the specifically stated primary insurance, such clause will be given effect as written." *Id*, at 626. As a result, the Court in *Peerless* held that the excess policy did not attach because ***all*** the underlying policies had not been

exhausted; the Court rejected a vertical exhaustion approach. *Olympic Insurance* cited *Peerless* with approval in reaching its conclusion that all underlying insurance must be exhausted before an excess policy applies, "even where there is more underlying primary insurance than contemplated by the terms of the secondary policy." *Olympic*, *supra*, 126 Cal.App.3d at 600. Montrose and each of its insurers whose policies contain "other insurance" policy language have contracted one with the other, and thus, the policy language cannot be ignored. *See also*, *Stonewall, supra*, 46 Cal.App.4th at1859. ("We believe that the Supreme Court intended by *Montrose* that in determining disputes between an insured and insurer(s), the policy language to be considered includes the 'other insurance' clauses of the policies on the risk.")

C. Horizontal Exhaustion Does Not Impose "Needless Litigation" On The Policyholder

Montrose argues that "mandatory" horizontal exhaustion undercuts the policyholder's option not to seek coverage under a particular policy. [Petition at 37 et seq.] Montrose then sets forth some hypothetical reasons why it ***may*** choose not to seek coverage under a particular underlying policy -- including that it might "not want to disturb an existing commercial relationship with a company that continues to provide coverage." Or that

some policies contain pollution exclusions. Montrose's argument is that a ruling that lower level policies must exhaust before the higher level policies attach requires Montrose to litigate with respect to certain policies it might not otherwise select, in order to access the higher level policies. Montrose describes this as "needless litigation." Montrose's reasoning is fallacious for several reasons.

First, the policy language says what it says. The language of an excess policy cannot be ignored simply because Montrose does not wish to "disturb an existing commercial relationship" with the company that issued the underlying policy. [See p. 39 of Petition] The policies do not provide that they are excess over underlying limits "unless Montrose decides it does not want to go after that underlying insurance." *See, e.g., Certain Underwriters at Lloyds of London v. Superior Court (Powerine)*, 24 Cal.4th 945, 967 (2001):

> [W]e decline to rewrite the provision . . . . We will not do so for the insured itself, in order to shift to the insurer some or all of the potentially substantial costs that might be imposed on the insured . . . Neither will we do so for

> considerations of public policy, in order, perhaps, to promote the outcome itself through such a shifting of costs -- for example, to advance the cleanup of a contaminated site and the abatement of the contamination's effects by calling on the insurer's resources in supplement to those of an insured that is prosperous or in place of those of an insured that is not.

Next, the Court of Appeal ruling will not force Montrose to litigate issues it otherwise would not have chosen to litigate; Montrose has already chosen to sue all its insurers under policies allegedly issued from 1961 to 1985 [4PA17 p. 854 et seq.], including those with pollution exclusions, so it plainly intends to try to access all of those policies. [See also the coverage chart Montrose attached as Attachment 2 to its Petition for Review.] It is Montrose who chose to litigate against all these insurers.

Furthermore, there is no evidence that the application of the principle of horizontal exhaustion will create a morass of coverage issues that no party or court will be able to resolve. *Community Redevelopment* has been the leading case since 1996 and has not triggered a profusion of

cases. If anything, having a settled rule based on policy language -- as exemplified by *Community Redevelopment* -- reduces rather than increases the amount and complexity of litigation. Montrose's solution, that the policyholder can decide on an ad hoc, case-by-case basis which method of exhaustion would be most favorable to it at a particular point in time, will promote needless litigation and uncertainty.

Montrose also argues that what it characterizes as "mandatory horizontal exhaustion" requires the policyholder to become engaged in contribution disputes between insurers. [Petition at 41 et seq.] Montrose describes this as a "protracted coverage allocation circus." But Montrose's argument is entirely speculative, and, in fact, contrary to how contribution actions work. Montrose has no basis for asserting that it would have to be involved in any future contribution disputes among insurers in the event any such disputes ever arise.

VII. CONCLUSION

For all the reasons set forth above, Montrose's Petition for Review should be denied and the case remanded to the trial court for further action in accord with the Opinion of the Court of Appeal.

DATED: October 25, 2017 BERKES CRANE ROBINSON & SEAL LLP

By: _____

STEVEN M. CRANE
BARBARA S. HODOUS
Attorneys for Defendants/Real Parties
CONTINENTAL CASUALTY
COMPANY and COLUMBIA
CASUALTY COMPANY

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rules 8.204(c), 8.486(6), I certify that this ANSWER TO PETITION FOR REVIEW contains 8,370 words, not including the Tables of Contents and Authorities, the caption page, Verification page, signature blocks or this Certification page.

DATED: October 25, 2017

STEVEN M. CRANE

PROOF OF SERVICE

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At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 515 South Figueroa Street, Suite 1500, Los Angeles, CA 90071.

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Sansanee M. Wells

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Brook B. Roberts, Esq. John M. Wilson, Esq. Drew T. Gardiner, Esq. LATHAM & WATKINS 12670 High Bluff Drive San Diego, CA 92130 Tel: 858.523.5400 Fax: 858.523.5450 Brook.Roberts@lw.com John.Wilson@lw.com Drew.Gardiner@lw.com	Attorneys for Plaintiff, MONTROSE CHEMICAL CORPORATION OF CALIFORNIA
Kenneth Sumner, Esq. Lindsey A. Morgan, Esq. SINNOTT PUEBLA CAMPAGNE & CURET PC 2000 Powell Street, Suite 830 Emeryville, CA 94608 Tel: 415.352.6200 Fax: 415.352.622 Ksumner@spcclaw.com Lmorgan@spcclaw.com	Attorneys for AIU INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; LANDMARK INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; and NEW HAMPSHIRE INSURANCE COMPANY
Max H. Stern, Esq. Jessica E. La Londe, Esq. DUANE MORRIS LLP One Market Plaza Spear Street Tower, Suite 2200 San Francisco, CA 94105-1127 Tel: 415.957.3000 Fax: 957.3001 MHStern@duanemorris.com JELaLonde@duanemorris.com	Attorneys for AMERICAN CENTENNIAL INSURANCE COMPANY

Bruce H. Winkelman, Esq. CRAIG & WINKLEMAN LLP 2140 Shattuck Avenue, Suite 409 Berkeley, CA 94704 Tel: 510.549.3330 Fax: 510.217.5894 bwinkelman@craig-winkelman.com	Attorneys for MUNICH REINSURANCE AMERICA, INC. (formerly known as American Re-Insurance Company)
Richard B. Goetz, Esq. Zoheb P. Noorani, Esq. Michael Reynolds, Esq. O'MELVENY & MYERS LLP 400 South Hope Street Los Angeles, CA 90071 Tel: 213.430.6000 Fax: 213.430.6407 Rgoetz@omm.com Znoorani@omm.com Mreynolds@omm.com	Attorneys for TIG INSURANCE COMPANY (Successor by Merger to International Insurance Company)
Alan H. Barbanel, Esq. Ilya A. Kosten, Esq. BARBANEL & TREUER, P.C. 1925 Century Park East, Suite 350 Los Angeles, CA 90067 Tel: 310.282.8088 Fax: 310.282.8779 abarbanel@btlawla.com ikosten@btlawla.com	Attorneys for LAMORAK INSURANCE COMPANY, (formerly known as OneBeacon American Insurance Company, as Successor-in-Interest to Employers Commercial Union Insurance Company of America, The Employers Liability Assurance Corporation, Ltd., and Employers Surplus Lines Insurance Company), and Transport Insurance Company (as Successor-in-Interest to Transport Indemnity Company)
Bryan M. Barber, Esq. BARBER LAW GROUP 525 University Avenue, Suite 600 Palo Alto, CA 94301 Tel: 415.273.2930 Fax: 415.273.2940 bbarber@barberlg.com	Attorneys for EMPLOYERS INSURANCE OF WAUSAU

Peter L. Garchie, Esq.
James P. McDonald, Esq.
LEWIS BRISBOIS BISGAARD
& SMITH LLP
701 B Street, Suite 1900
San Diego, CA 92101
Tel: 619.233.1006
Fax: 619.233.8627
Peter.Garchie@lewisbrisbois.com
James.McDonald@lewisbrisbois.com

Attorneys for EMPLOYERS MUTUAL CASUALTY COMPANY

Charles R. Diaz, Esq.
Gailann Stargardter, Esq.
ARCHER NORRIS
777 S. Figueroa Street, Suite 4250
Los Angeles, CA 90017
Tel: 213.437.4000
Fax: 213.437.4011
cdiaz@archernorris.com
gstargardter@archernorris.com

Andrew J. King, Esq.
ARCHER NORRIS
2033 North Main Street, Suite 800
Walnut Creek, CA 94569
Tel: 925.952.5508
Fax: 925.930.46620
aking@archernorris.com

Attorneys for FIREMAN'S FUND INSURANCE COMPANY and NATIONAL SURETY CORPORATION

Elizabeth M. Brockman, Esq.
SELMAN & BREITMAN, LLP
11766 Wilshire Boulevard, Suite 600
Los Angeles, CA 90025-6538
Tele: 310.445.0800
Fax: 310.473.2525
ebrockman@selmanlaw.com

Attorneys for FEDERAL INSURANCE COMPANY

Linda Bondi Morrison, Esq. Ryan B. Luther, Esq. TRESSLER LLP 2 Park Plaza, Suite 1050 Irvine, CA 92614 Tel: 949.336-1200 Fax: 949. 752-0645 lmorrison@tresslerllp.com rluther@tresslerllp.com	Attorneys for ALLSTATE INSURANCE COMPANY (solely as Successor-In-Interest to Northbrook Excess and Surplus Insurance Company)
Kevin G. McCurdy, Esq. Vanci Y. Fuller, Esq. MCCURDY & FULLER LLP 800 South Barranca, Suite 265 Covina, CA 91723 Tel: 626.858.8320 Fax: 626.858.8331 Kevin.mccurdy@mccurdylawyers.com Vanci.fuller@mccurdylawyers.com	Attorneys for EVEREST REINSURANCE COMPANY (as Successor-in-Interest to Prudential Reinsurance Company) and MT. MCKINLEY INSURANCE COMPANY (as Successor-in-Interest to Gibraltar Casualty Company)
Kirk C. Chamberlin, Esq. Michael Denlinger, Esq. CHAMBERLIN & KEASTER 16000 Ventura Boulevard, Suite 700 Encino, CA 91436 Tel: 818.385.1256 Fax: 818.385.1802 kchamberlin@ckbllp.com mdenlinger@ckbllp.com	Attorneys for PROVIDENCE WASHINGTON INSURANCE COMPANY (Successor by way of Merger to Seaton Insurance Company, formerly known as Unigard Security Insurance Company, formerly known as Unigard Mutual Insurance Company)
Thomas R. Beer, Esq. Peter J. Felsenfeld, Esq. HINSHAW & CULBERTSON LLP One California Street, 18th Floor San Francisco, CA 94111 Tel: 415.362-6000 Fax: 415.834.9070 tbeer@mail.hinshawlaw.com pfelsenfeld@mail.hinshawlaw.com	Attorneys for HDI-GERLING INDUSTRIE VERSICHERUNGS, AG (formerly known as GERLING KONZERN ALLGEMEINE VERSICHERUNGS-AKTIENGESELLCHAFT)

Jordan E. Harriman, Esq. LEWIS BRISBOIS BISGAARD & SMITH LLP 633 West 5th Street, Suite 4000 Los Angeles, CA 90071 Tel: 213.250.1800 Fax: 213.250.7900 Joprdan.Harriman@lewisbrisbois.com	Attorneys for GENERAL REINSURANCE CORPORATION and NORTH STAR REINSURANCE CORPORATION
Michael J. Balch. Esq. BUDD LARNER PC 150 John F. Kennedy Parkway Short Hills, NJ 07078-2703 Tel: 973.379.4800 Fax: 973.379.7734 mbalch@buddlarner.com	Attorneys for GENERAL REINSURANCE CORPORATION and NORTH STAR REINSURANCE CORPORATION
Andrew T. Frankel, Esq. SIMPSON THATCHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017-3954 Tel: 212.455.2000 Fax: 212.455.2502 afrankel@stblaw.com	Attorneys for TRAVELERS CASUALTY AND SURETY COMPANY (as Successor-in-Interest to The Aetna Casualty & Surety Company) and THE TRAVELERS INDEMNITY COMPANY
Peter Jordan, Esq. Jessica R. Marek, Esq. Deborah Stein, Esq. SIMPSON THATCHER & BARTLETT LLP 1999 Avenue of the Stars, 29th Floor Los Angeles, CA 90067 Tel: 310.407.7500 Fax: 310.407.7502 pjordan@stblaw.com jmarek@stblaw.com dstein@stblaw.com	Attorneys for TRAVELERS CASUALTY AND SURETY COMPANY (as Successor-in-Interest to The Aetna Casualty & Surety Company) and THE TRAVELERS INDEMNITY COMPANY

Andrew McClosky, Esq.
McCLOSKEY WARING, WASIMAN & DRURY LLP
12671 High Bluff Drive, Suite 350
San Diego, CA 92130
Tel: 619.237.3095
Fax: 619.237-3789
amccloskey@mwwllp.com

Attorneys for WESTPORT INSURANCE CORPORATION (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire and Marine Insurance Company)

Randolph P. Sinnott, Esq.
SINNOTT, PUEBLA CAMPAGNE & CURET, ALPC
550 S. Hope Street, Suite 2350
Los Angeles, CA 90017
Tel: 213.996.4200
Fax: 213.892.8322
RSinnott@spcclaw.com

Attorneys for ZURICH INTERNATIONAL (BERMUDA) LTD., HAMILTON BERMUDA

Philip R. King, Esq.
COZEN O'CONNOR
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
Tel: 312.382.3100
Fax: 312.382.8910
pking@cozen.com

John Daly, Esq.
COZEN O'CONNOR
707 17th Street, Suite 3100
Denver, CO 80202
Tel: 720.479.3900
Fax: 720.479.3890
jdaly@cozen.com

VIA FEDERAL EXPRESS
Court of Appeal
Second Appellate District, Division 3
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

VIA FEDERAL EXPRESS
Hon. Carolyn B. Kuhl
Superior Court of the State of California
County of Los Angeles
Department 309
600 South Commonwealth Avenue
Los Angeles, CA 90005

Hon. Elihu M. Berle
Superior Court of the State of California
County of Los Angeles
Department 323
600 South Commonwealth Avenue
Los Angeles, CA 90005

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MONTROSE CHEMICAL CORPORATION OF CALIFORNIA v. S.C (CANADIAN UNIVERSAL INSURANCE COMPANY)**
Case Number: **S244737**
Lower Court Case Number: **B272387**

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Bruce Winkelman Craig & Winkelman, LLP 124455	bwinkelman@craig-winkelman.com	e-Service	10-25-2017 2:10:45 PM
Bryan Barber The Barber Law Group 118001	bbarber@barberlg.com	e-Service	10-25-2017 2:10:45 PM
Charles Diaz Archer Norris 097513	cdiaz@archernorris.com	e-Service	10-25-2017 2:10:45 PM
Deborah Stein Simpson Thacher & Bartlett LLP 224570	dstein@stblaw.com	e-Service	10-25-2017 2:10:45 PM
Elizabeth Brockman Selman Breithman, LLP 155901	ebrockman@selmanlaw.com	e-Service	10-25-2017 2:10:45 PM
Frederick Bennett Superior Court of Los Angeles County CTCSL-001	fbennett@lacourt.org	e-Service	10-25-2017 2:10:45 PM
Gailann Stargardter	gstargardter@archernorris.com	e-	10-25-2017

Archer Norris 00250749		Service	2:10:45 PM
Ilya Kosten Barbanel & Treuer P.C. 00173663	ikosten@btlawla.com	e-Service	10-25-2017 2:10:45 PM
John Wilson Latham & Watkins - San Diego 229484	john.wilson@lw.com	e-Service	10-25-2017 2:10:45 PM
John Wilson Latham & Watkins LLP 00229484	john.wilson@lw.com	e-Service	10-25-2017 2:10:45 PM
Jordon Harriman Lewis Brisbois Bisgaard & Smith, LLP 117150	jordon.harriman@lewisbrisbois.com	e-Service	10-25-2017 2:10:45 PM
Kenneth Sumner Sinnott Dito Moura & Puebla, APLC 00178618	ksumner@spcclaw.com	e-Service	10-25-2017 2:10:45 PM
Kevin Mccurdy McCurdy & Fuller, LLP 115083	kevin.mccurdy@mccurdylawyers.com	e-Service	10-25-2017 2:10:45 PM
Kirk Chamberlin Chamberlin Keaster & Brockman LLP 132946	kchamberlin@ckbllp.com	e-Service	10-25-2017 2:10:45 PM
Linda Morrison Tressler LLP 00210264	lmorrison@tresslerllp.com	e-Service	10-25-2017 2:10:45 PM
Max Stern Duane Morris, LLP 154424	mhstern@duanemorris.com	e-Service	10-25-2017 2:10:45 PM
Paul White Tressler LLP 00146989	pwhite@tresslerllp.com	e-Service	10-25-2017 2:10:45 PM
Peter Garchie Lewis Brisbois Bisgaard & Smith 105122	peter.garchie@lewisbrisbois.com	e-Service	10-25-2017 2:10:45 PM
Peter Jordan Simpson Thacher & Bartlett LLP 259232	pjordan@stblaw.com	e-Service	10-25-2017 2:10:45 PM
Randolph Sinnott Sinnott Puebla Campagne & Curet 107301	rsinnott@spcclaw.com	e-Service	10-25-2017 2:10:45 PM
Richard Goetz O'Melveny & Meyers 115666	rgoetz@omm.com	e-Service	10-25-2017 2:10:45 PM
Steven Crane Berkes Crane Robinson & Seal LLP 108930	scrane@bcrslaw.com	e-Service	10-25-2017 2:10:45 PM
Thomas Beer Hinshaw & Culbertson, LLP 148175	tbeer@mail.hinshawlaw.com	e-Service	10-25-2017 2:10:45 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10-25-2017

Date

/s/Steven Crane

Signature

Crane, Steven (108930)

Last Name, First Name (PNum)

Berkes Crane Robinson & Seal LLP

Law Firm