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.

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

**After Grant of Review and Transfer to Court of Appeal to Vacate Order Denying Writ of Mandate and Order to Show Cause
Supreme Court Case No. S236148**

**After Denial of Petition for Writ of Mandate by the Court of Appeal,
Second Appellate District, Division Three
Civil Case No. B272387**

**Petition from the Superior Court of the State of California
for the County of Los Angeles, Case No. BC 005158,
Honorable Elihu Berle, Presiding**

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY IN SUPPORT OF PETITION FOR REVIEW

LATHAM & WATKINS LLP
BROOK B. ROBERTS (STATE BAR NO. 214794)
BROOK.ROBERTS@LW.COM
*JOHN M. WILSON (STATE BAR NO. 229484)
JOHN.WILSON@LW.COM
DREW T. GARDINER (STATE BAR NO. 234451)
DREW.GARDINER@LW.COM
12670 HIGH BLUFF DRIVE
SAN DIEGO, CALIFORNIA 92130
(858) 523-5400 ● FAX: (858) 523-5450

Attorneys for Petitioner Montrose Chemical Corporation of California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

RULES

I. INTRODUCTION

In a decision of incalculable import for large-scale environmental and similar property damage claims, the Second District Court of Appeal ("DCA") has decreed a new rule that standard "other insurance" provisions obligate policyholders suffering a continuous loss to horizontally exhaust their excess indemnity coverage across multiple separate policies and years (including policies with more restrictive terms) as a prerequisite to accessing coverage under any single triggered excess policy. With one fell swoop, the DCA has undermined, if not contradicted, decades of this Court's precedent and flatly negated policyholders' established right to call upon individual contracts according to their terms. (Opinion at p. 1333.) It is difficult to imagine a more sweeping, impactful ruling affecting insurers, policyholders, beneficiaries, and the courts, with decades of litigation and billions of coverage dollars hanging in the balance.

While Insurers downplay the significance of the Opinion, the DCA repeats the fundamental legal error made by Respondent Superior Court that first prompted this Court to grant review last year. Both decisions mandate "horizontal exhaustion" for any excess policy containing boilerplate "other insurance" clauses like those found in Montrose's Policies. This includes virtually every comprehensive general liability

("CGL") policy written in California and nationwide for the past several decades.

The Opinion directly conflicts with this Court's *Dart* decision, which discussed "disfavored" "other insurance" provisions at length, and held they relate solely to inter-insurer allocation ***after*** the policyholder has been fully indemnified. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080 ("*Dart*").) The Opinion also creates a published conflict among the Courts of Appeal. In *State of California v. Continental* (2017) 15 Cal.App.5th 1017, 1028-1037 ("*Continental II*"), the Fourth District Court of Appeal just reached the opposite conclusion from the DCA on several key issues, including (i) whether *Dart* controls the interpretation of "other insurance" provisions contained in all excess policies, (ii) whether the "rule" of horizontal exhaustion discussed in *Community Redevelopment Agency v. Aetna Casualty & Surety Co*. (1996) 50 Cal.App.4th 329 ("*CRA*"), is limited to primary insurance, and (iii) the practical impacts of mandatory horizontal exhaustion on policyholders. The express conflict between the Opinion and *Continental II* heightens the turmoil created by the DCA's unprecedented "other insurance" formulation.

Contrary to the arguments presented in Insurers' Answers,[1] the proper purpose, meaning and application of "other insurance" provisions is

---

[1] Real Parties in Interest Continental Casualty Company and Columbia Casualty Company (collectively, "Continental") filed the main Answer,

squarely presented to this Court on a complete record. All of the relevant policy language was stipulated as part of the parties' cross-motions for summary judgment. (See 1PA6 at pp. 118-231; 1PA7 at pp. 208-231.) Given the many years of Montrose's coverage program, the record includes virtually every variation of this standard form "other insurance" provision offered by major insurers writing CGL coverage.[2]

As the Insurers have readily conceded, the legal issues in this Petition will govern the relationships and priorities among the scores of policies in Montrose's multi-layer, multi-year, multi-insurer program. If the DCA's erroneous interpretation of "other insurance" provisions is allowed to stand, the question of how policyholders can access the coverage they purchased will be hopelessly confused as courts attempt to reconcile this case with *Dart* and *Continental II*. This Petition presents the ideal

---

joined by the vast majority of insurers who are defendants in the proceedings below. Real Parties in Interest Travelers Casualty and Surety Company (formerly known as Aetna Casualty and Surety Company) and The Travelers Indemnity Company (collectively, "Travelers") filed a separate brief ("Travelers' Answer"). Continental, Travelers and the joining defendants are referred to as "Insurers."

[2] (E.g., 8PA33 at p. 2011 ["Each of the policies at issue contains or incorporates language that the policy is excess to 'other valid and collectible insurance,' or variants of that phrase."]; Insurers' Opposition to Montrose's Writ Petition at 28 ["[E]ach of the excess insurers' policies either itself contains or follows form to and incorporates language that makes the policies excess of vertically underlying coverage and excess of all 'other insurances,' 'other collectible insurance' or 'other valid and collectible' insurance."]; see generally *infra* section II.A.1 at 11-12.)

vehicle for timely, efficient, and definitive resolution of these weighty issues, which ultimately must be resolved by this Court.

II. LEGAL DISCUSSION

A. Review Is Necessary to Reconcile the DCA's Expansive "Other Insurance" Interpretation with this Court's Precedent on that "Disfavored" Clause

1. The DCA's "Other Insurance" Interpretation Will Impact the Interpretation of All Excess CGL Policies

Review of the DCA's decision is essential to correct its pronouncements elevating standard "other insurance" conditions to a provision that overrides specific attachment language and determines when an excess policy is triggered. (Cal. Rules of Court, rule 8.500(b)(1).)

After Respondent Superior Court first announced a general rule of mandatory horizontal exhaustion of excess coverage, this Court granted Montrose's Petition for Review and directed the DCA to issue an order to show cause why the relief sought by Montrose should not be granted. On remand, the DCA effectively reached the same result as Respondent, holding that "other insurance" clauses "define the insurance that must be exhausted before the excess insurance attaches" and therefore are "relevant to determining . . . the order in which excess policies attach." (Opinion at pp. 1333-1334.) Most consequentially, the DCA ruled as a matter of law that standard "other insurance" language in excess CGL policies ***does require*** that other excess policies be exhausted as a condition to the

insured's coverage under any individual policy. (*Ibid*.; see *id*. at 1335-1336 [recognizing that the result of the Opinion's "other insurance" analysis is "mandatory horizontal exhaustion" for any policy in Montrose's portfolio containing that language].) These conclusions conflict with this Court's ruling in *Dart* regarding the limited purpose and application of "other insurance" conditions, and the recent decision in *Continental II* rejecting the same arguments made here. (See *Dart*, *supra*, 28 Cal.4th at p. 1080; *Continental II*, *supra*, 15 Cal.App.5th at pp. 1032-33.)

Without this Court's corrective action, when the parties return to the trial court, the Superior Court will be required to apply the DCA's incorrect conclusions of law interpreting standard "other insurance" language. Thus, there is nothing "speculative" about the harm that Montrose seeks to avoid, as Insurers and Travelers wrongly suggest. Furthermore, without review by this Court, the insurance industry undoubtedly will seize upon the DCA's interpretation of the "other insurance" language, contained in virtually all excess policies, to restrict policyholders from accessing the coverage they purchased.

Hoping to avoid additional review by this Court and delay final resolution of the legal issue that they previously agreed to prioritize, the Insurers now disavow the wide-ranging consequences of the Opinion. Despite conceding multiple times below that each of the Policies contain standard "other insurance" language, and arguing that this language was

critical to resolving the parties' dispute, Insurers now ignore these admissions and contend that further development of the record is necessary to resolve the legal issue this Court previously ordered should be examined.

Insurers should not be permitted to disingenuously reverse course and terminate this portentous legal debate midstream. Reviewing Respondent's order as informed by the DCA's Opinion (and *Continental II*), this Court can definitively resolve the meaning and import of "other insurance" provisions in excess policies. The law desperately needs clarification that policyholders and beneficiaries may access insurance proceeds once coverage is proven solely under the language of the policy in question, rather than turning on all "other insurance."

Insurers joined Montrose in representing—both to the Superior Court and the DCA—that the policy language stipulations entered by the parties contain the language necessary to resolve the legal issue presented. (See 1PA6 at pp. 118-231; 1PA7 at pp. 208-231; accord Request for Judicial Notice in Support of Reply, Ex. 1 at 28:6-8] [Continental's counsel: "The parties categorically agreed that this is the relevant language that the Court has to make the decision on."]; *id.* at 27:8-15 [Continental's counsel: "The parties stipulated to the relevant policy language . . . that

language is in the record and it's quoted in the various statements of undisputed fact."].)[3]

Importantly, as part of these representations to the courts, Insurers expressly confirmed that each of the Policies ***do*** contain "other insurance" provisions. (See *supra* at 8, fn.2.) Based on the parties' stipulations, Respondent found that all of the Policies contain the "standard language" of "other insurance" provisions. (See 1PA1 at pp. 55:26-56:6.) As the Fourth District explained, there is "no reason to treat the other-insurance clause" differently because of slight variations of this boilerplate language, wherever it appears in a particular policy. (*Continental II*, *supra*, 15 Cal.App.5th at p. 1033.)[4]

Insurers further attempt to downplay the Opinion by contending that it turned on unique, individualized policy language of select policies. Although the DCA examined the insuring agreements of three insurers' policies, the court explicitly relied upon those policies' "other insurance" language, which can be found in all policies, to support its horizontal

---

[3] Montrose cited the stipulations, which contain the relevant "other insurance" provisions for each Policy, to the DCA. (See Writ Petition at 61, fn.20; Combined Reply at 34-35.)

[4] Similarly, Respondent deemed the minor differences in standard "other insurance" language so insignificant that it concluded the provisions uniformly mandated horizontal exhaustion. (See 1PA1 at pp. 58:15-23 ["The presence of 'other insurance' clauses would preclude the use of a vertical exhaustion approach even for those excess policies specifically identified in a particular excess policy that must first be exhausted."].)

exhaustion ruling. (See Opinion at p. 1328 ["The 'other insurance' clause . . . provides that the American Centennial policies are excess to both *scheduled and unscheduled* policies."]; *id.* at p. 1329 ["The 'other insurance' clause[] . . . expressly states that the Continental and Columbia policies shall not cover losses for which the insured has other insurance."].)

The proper purpose, meaning and application of these "other insurance" provisions is now squarely presented for this Court to resolve, providing critical guidance not only to Respondent, but to all the courts of this State grappling with this pivotal and broad-reaching issue.

2. The DCA Wrongly Refused to Follow the *Dart* Analysis

As explained in Montrose's Petition, the DCA's attempt to distinguish *Dart* was groundless. (See Petition at 27-28.) *Dart* did not limit this Court's rationale to primary coverage, or hint at any reason why standard "other insurance" provisions should assume a role in excess policies that they do not play in primary policies, as the DCA and Respondent wrongly held. (See Opinion at p. 1333 ["This difference between primary and excess insurance in this context is material."]; 1PA1 at p. 56:26-27 ["'other insurance' clauses have broad implications when they appear in excess insurance policies"].)

The Insurers fail to muster any support for the DCA's decision to disregard *Dart*. The majority of the Insurers' discussion is simply rote

quotation of the DCA's Opinion. (See Answer at 18-20.) In addition, the Insurers contend that *Dart* can be dismissed because that case arose in a different factual context. (*Id*. at 20.) However, *Dart*'s discussion of lost policy reconstruction confirms Montrose's position. *Dart* found the missing boilerplate "other insurance" language to be ***so unimportant*** that its absence could not prevent enforcement of a missing policy. (See *Dart, supra*, 28 Cal.4th at p. 1080 ["[E]ven if Commercial Union had a 'null and void with excess' 'other insurance' clause, all that would be established is that it had a right to seek some kind of contribution from successive insurers also liable to *Dart*."].) Obviously, if "other insurance" clauses had the momentous significance the DCA ascribed to them—determining the amount and attachment point of policy coverage—this Court could not have enforced a policy in their absence. The facts and law of *Dart* both establish the irrelevance of "other insurance" to underlying policy limits and horizontal exhaustion.

B. Review Is Necessary to Secure Uniformity of the Law By Resolving The Direct Conflict Between the DCA Opinion and *Continental II*

The discord created by the DCA's new and broad-reaching "other insurance" interpretation is compounded by the fact that a different Court of Appeal just reached the opposite conclusion on each of the salient issues, creating competing appellate positions. The Court should also grant review to resolve this conflict before it wreaks havoc on courts and

litigants. (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 861 [The Court has an "important role . . . to secure harmony and uniformity in the decisions [of the Courts of Appeal], their conformity to the settled rules and principles of law, [and] a uniform rule of decision throughout the state[.]"].)

The (now final) decision in *Continental II* directly conflicts with the DCA's ruling as to:

- whether this Court's decision in *Dart* controls the interpretation of "other insurance" provisions in California;
- whether *Community Redevelopment*'s "rule" of horizontal exhaustion is limited to primary insurance; and
- whether mandatory horizontal exhaustion unfairly impacts policyholders.

On each of these questions, the courts reached the ***exact*** opposite conclusion:

DCA Opinion	***Continental II***
"Montrose contends, '[O]ther insurance' clauses govern the rights and obligations of insurers covering the same risk vis-à-vis one another, but do not affect a policyholder's right to recovery under those policies.' Montrose's assertion . . . finds no support in *Dart*." (Opinion at p. 1332.)	"[O]ther insurance clauses are intended to apply in contribution actions between insurers, not in coverage litigation between insurer and insured." (*Continental II*, *supra*, 15 Cal.App.5th at p. 1032 (citing *Dart*).)
"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." (Opinion at p. 1333.)	"Continental argues that *Dart* is inapplicable because it did not involve any issue as to excess policies or exhaustion. Nevertheless, the language that we have quoted was not dictum." (*Continental II*, at p. 1033.)
"Montrose urges that *Community Redevelopment* is not relevant to our analysis because that case involved primary coverage . . . We do not agree." (Opinion at p. 1331.)	"*Community Redevelopment* . . . held that . . . horizontal exhaustion ordinarily applies to *primary* insurance. . . *Community* is not controlling[.]." (*Continental II*, at p. 1034.)
"Montrose also contends . . . that Montrose could not obtain coverage under *any* Policy, because each Policy purports to require Montrose to first exhaust *all* 'other valid and collectible insurance' in other policy periods.' This claim is without merit." (Opinion at p. 1334, fn.7.)	"Under Continental's approach, a court could not determine the amount *any* insurer owes without first determining what *every* insurer owes . . . This would deprive the State of the timely indemnity that it bargained for." (*Continental II*, at p. 1033.)
"Montrose next argues that mandatory horizontal exhaustion penalizes policyholders for their 'prudent decision' to purchase additional coverage. Not so." (Opinion at p. 1335.)	"It would be paradoxical if the fact that the State prudently decided to protect itself further . . . actually made it harder for the State to obtain indemnity from any one insurer." (*Continental II*, at p. 1036.)

Despite these direct conflicts between the DCA and the Fourth District, Insurers actually attempt to recast the *Continental II* decision as "agreeing" with the DCA. (Answer at 7.) The Fourth District, however, expressly rejected Continental's argument to this effect, explaining that "***we disagree with [the Opinion] for the reasons we have already stated***." (*Continental II*, *supra*, 15 Cal.App.5th at p. 1036, fn. 5 (emphasis added).)

Thus, the Opinion and the decision in *Continental II* are irreconcilable. Policyholders (and others) urgently need this Court to resolve this dispute, to "secure harmony and uniformity" in the decisions of the Courts of Appeal, and to provide definitive guidance regarding these weighty issues. (*Briggs*, *supra*, 3 Cal.5th at p. 861; see also *People v. Manzo* (2012) 53 Cal.4th 880, 884 [granting review "[b]ecause of [a] published conflict" between Courts of Appeal].)

C. Review is Necessary to Confirm There Is No "Established Rule" of Horizontal Exhaustion in California

In granting Insurers' motion for summary adjudication, Respondent erroneously held there is a "well-established rule that horizontal exhaustion should apply in the absence of policy language specifically describing and limiting the underlying insurance." (1PA1 at p. 54:14-17.) The DCA compounded that error, wrongly asserting that "case law" "establishes that 'other insurance' provisions" dictate horizontal

exhaustion of excess policies. (Opinion at pp. 1322, 1330-1332 (discussing *CRA*).)[5]

Echoing this refrain, Insurers contend that review by this Court is unwarranted because "[t]he horizontal exhaustion rule set forth in [*CRA*] has been good law for more than twenty years[.]" (Answer at 9.) However, prior to the DCA's Opinion, ***no California appellate court*** had ever required a policyholder to horizontally exhaust its excess indemnity coverage across multiple separate policies and years as a prerequisite to vertically accessing indemnity coverage under another triggered excess policy. To the contrary, in its previous ruling in *State v. Continental*, the Fourth District stated unequivocally: "the horizontal exhaustion rule ***only*** governs the relationship between the primary and excess insurers." (*State of California v. Continental Ins. Co.* (2009) 170 Cal.App.4th 160, 184 (emphasis added), affd., *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 ("*Continental*").)[6]

---

[5] The DCA stated unambiguously that "we do not agree" with Montrose's argument that *CRA* "did [not] announce any rule about a policyholder's right to access higher-lying coverage before the exhaustion of excess policies in different policy periods." (*Id.* at p. 1331.)

[6] Insurers devote multiple pages to mischaracterizing Montrose's *amicus curiae* briefs in *Continental* in favor of "***stacking***" as somehow espousing a rule of horizontal ***exhaustion***. (See Answer at 25-26.) "Stacking" is a term of art used to refer to the insured's right to obtain coverage under multiple policies where they are all implicated by a continuous loss. Exhaustion, by contrast, is the requirement in an excess policy as to what predetermined, specified amount of underlying

As in the proceedings below, Insurers' Answers fail to cite a single California decision applying a horizontal exhaustion rule in the context of ***excess*** coverage. Instead, each of the cases cited by Insurers as purportedly supporting horizontal exhaustion—*Olympic*, *CRA*, *Stonewall*, *Padilla*, *Montgomery Ward* and *Peerless*—concerned the exhaustion of ***primary*** insurance before excess coverage attaches, typically in evaluating whether the insurer had a duty to "drop down" and defend.[7]

---

coverage must be paid before coverage attaches and the excess insurer's contractual obligations arise.

Prior to *Continental*, insurers attempted to limit continuous damage coverage in two ways. First, they argued that policyholders must allocate liability "pro rata" across all triggered policies. (See *Continental*, *supra*, 55 Cal.4th at p. 198.) Alternatively, the industry insisted insureds should not be allowed to "stack" policies, but rather must be limited to a single vertical "spike" (i.e. one period of primary and overlying excess policies) as the sole source of coverage, even if the policy limits of that "spiked" coverage tower were insufficient to cover the continuous damage spanning multiple policy years. (See *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, 1189 .)

As *amicus* in *Continental*, Montrose argued that: (1) the "pro rata" allocation scheme was inconsistent with this Court's long-standing "all sums" rule; and (2) the "all sums" and continuous trigger rules should be construed together to allow insureds to "stack" coverages, meaning that the insured could obtain indemnity from multiple independent policies, provided each was triggered according to its own language. Ultimately, the Court of Appeal and this Court adopted the positions advocated by Montrose.

7 (See *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 600 ["A secondary policy, by its own terms, does not apply to cover a loss until the underlying ***primary insurance*** has been exhausted."]; *CRA*, *supra*, 50 Cal.App.4th at p. 339 [excess policy "does not cover a loss, nor does any duty to defend the insured arise, until *all*

Insurers recognize that the aforementioned cases only concerned the exhaustion of primary insurance, but suggest that was merely a byproduct of the amount at issue, not because of the fundamental distinction between primary and excess insurance. (Answer at 39.) However, as the Fourth District observed, the *CRA* court explicitly relied upon the distinction between primary and excess coverage in concluding that horizontal exhaustion should be the rule for ***primary*** policies:

> [*CRA*] reasoned that a primary policy is qualitatively different from an excess policy; the defense and indemnity obligations under a primary policy are immediate; whereas under an excess policy, they are merely contingent.

---

of the ***primary insurance*** has been exhausted"]; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-1853 [adopting "'horizontal allocation of the risk' approach to liability ***as between primary and excess carriers***"]; *Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 986 ["California's rule of 'horizontal exhaustion' in liability insurance law requires all ***primary insurance*** to be exhausted before an excess insurer must 'drop down' to defend an insured."]; *Montgomery Ward & Co. v. Imperial Casualty & Indem. Co.* (2000) 81 Cal.App.4th 356, 364-365 ["Under the principle of horizontal exhaustion, all of the ***primary policie*****s** must exhaust before any excess will have coverage exposure" and "the principle of horizontal exhaustion ***does not apply*** to SIR's in these circumstances."] (emphases added).)

Insurers particularly misconstrue *Peerless Casualty Co. v. Continental Casualty Co.* (1956) 144 Cal.App.2d 617. As this Court noted, *Peerless* merely stands for the proposition that "excess insurance does not attach until all ***primary*** insurance has been exhausted." (See *McConnell v. Underwriters at Lloyds of London* (1961) 56 Cal.2d 637, 646 (citing *Peerless*).) This unremarkable result is no different than the litany of other cases holding that primary coverage should be utilized before an insured may access excess policies for a defense.

> Thus, an excess insurer should not be required to defend or to indemnify as long as any primary insurer is still sitting on its hands.

(*Continental II*, *supra*, 15 Cal.App.5th at p. 1034). There is nothing in the *CRA* decision which intimates that the court's rationale would have been the same if evaluated in the context of exhausting excess coverage, which is "qualitatively different" than primary policies.

Like Respondent and the DCA, Insurers ***do not even attempt*** to address the clear distinctions between primary and excess coverage—most notably, the increased premiums paid for primary insurance which contains an often-unlimited duty to defend third-party claims. (Compare *Legacy Vulcan Corp. v. Super. Ct.* (2010) 185 Cal.App.4th 677, 695"[T]he defense obligation falls on the primary insurer, whose greater premium reflects that risk."]) with Answer at 40 ["There is no reason based in . . . insurance law principles why horizontal exhaustion should not apply to excess policies[.]"].)

Accordingly, the suggestion that granting Montrose's Petition would "unsettle the law" is precisely backward. The DCA's Opinion—by announcing a new rule of excess horizontal exhaustion that not even *CRA* endorsed, artificially limiting the meaning of *Dart*, and calling into question this Court's trigger of coverage jurisprudence—is the decision which creates confusion for policyholders and insurers about their respective

obligations. Allowing that confusion to remain would deprive California policyholders of critical rights this Court has long recognized.

1. Insurance Policies Are Individual Contracts That Can Be Exercised (Or Not) By the Policyholder According To Their Terms

This Court repeatedly has declared the fundamental principle that a policyholder has the contractual right to obtain immediate indemnification of its liabilities under any insurance policy(ies) triggered by a covered loss. (E.g., *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 57 & fn.10. ["'successive' insurers 'on the risk when continuous or progressively deteriorating [property] damage or [bodily] injury first manifests itself' are ***separately and independently*** 'obligated to indemnify the insured'" (emphasis added)]; *Continental*, *supra*, 55 Cal.4th at p. 200 [once "'the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from ***any*** of the remaining insurers [that were] on the risk'" (internal citation omitted; alterations in original; emphasis added)].)

Applying this well-established principle in the context of obtaining indemnity from triggered excess policies, the policyholder should be able to choose whether to exercise its rights under each individual policy, consistent with the policyholder's reasonable expectations at the time of contracting. Contrary to Insurers' dismissive characterization, this

is not an "ad hoc approach" (see Answer at 9), but rather the exercise of a basic right this Court has long endorsed.

As the party holding the contractual right to indemnity, the insured should be permitted to select from the available coverage to satisfy its liabilities. (See *Continental, supra*, 55 Cal.4th at p. 200; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1088 [where multiple policies are triggered, each insurer must "honor its separate and independent contractual obligation[.]"].) Insurance policies are individual contracts between the policyholder and insurer, and must be interpreted accordingly. (See *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 78, fn.31 ["As a general rule, insurance policies should be interpreted as if no other insurance is available."].)

In contrast, mandatory horizontal exhaustion is a contractual fiction developed in litigation by Insurers to restrict that right and require a spreading of the policyholder's liability across all policy periods regardless of which policy the insured targets—the same result the Insurers sought, and were denied, in *Continental*. Because mandatory horizontal exhaustion would function as an improper end-run around *Continental*, Insurers attempt to divorce the concepts of mandatory horizontal exhaustion and pro rata allocation. (See Answer at 41-42 ["Pro rata versus 'all sums' controls how a policy pays; exhaustion controls when an excess policy pays."].) But

this ignores the practical effect of what the Insurers seek to accomplish. While mandatory horizontal exhaustion may differ in application from pro rata allocation in some circumstances, the underlying question as to each is the same: Is the insured obligated to spread coverage horizontally before tapping available vertical coverage? The answer from *Continental*, which upheld the independent obligation for "all sums" coverage under each triggered policy, is a resounding "no," meaning mandatory horizontal exhaustion, like pro rata allocation, is an improper limitation on policyholders' indemnity rights.

2. An Artificial Rule of Mandatory Horizontal Exhaustion Unfairly Prejudices Policyholders

Contrary to the argument advanced by Travelers, this prejudicial scheme compelling Montrose to unnecessarily litigate issues is not "speculative." (See Travelers' Answer at 7.) A case in point is the insurance issued by Continental: three policies from the 1960's (without pollution exclusions) which, according to their terms, each attach once $10 million of underlying excess coverage has been exhausted. Although Montrose's liabilities are sufficient to exhaust the underlying coverage for all three of those policies, to access the Continental policies under mandatory horizontal exhaustion, Montrose must first litigate the pollution exclusion under at least ten other policies issued by different insurers from

1971 onward.[8]

Mandatory horizontal exhaustion would thus prevent Montrose and similarly-situated policyholders from exercising their contractual rights under separate and independent policies until first litigating coverage issues under different policies, thereby perversely rewarding ***insurers*** for the ***policyholder's*** prudent decision to purchase additional coverage in other years. This fundamentally unjust outcome is at odds with California law. (See *Continental II*, 15 Cal.App.5th at p. 1036 ["It would be paradoxical if the fact that the State prudently decided to protect itself further by buying insurance covering most of its retentions actually made it harder for the State to obtain indemnity from any one insurer."].)[9]

---

[8] Insurers' only rejoinder is that because Montrose has sued all of its insurers (both with and without pollution exclusions), "it plainly intends to try to access all of those policies." (Answer at 46.) Not so. Montrose pleaded a separate cause of action against each of its Insurers and may reasonably determine to pursue its claims against only certain insurers, given the differing terms of the Policies at issue.

[9] Travelers suggests that the uncertainty created by the DCA's ruling, and its impact on the parties' ability to reach negotiated resolution of disputes prior to trial, is an insufficient justification for review. (Travelers' Answer at 8-9.) Contrary to the false claim that Montrose's "real purpose" in litigating the exhaustion issue is an attempt to "increase settlement leverage," it was Insurers who initially expressed a desire to seek a legal ruling regarding the appropriate method of exhaustion that should govern the excess policies at issue in the wake of the Supreme Court's ruling in *Continental*. Because the issue had been dividing the parties in settlement discussions, Montrose agreed to do so. Respondent endorsed the parties' approach.

III. CONCLUSION

The DCA and Respondent Superior Court should have followed this Court's prior decisions to properly limit standard "disfavored" "other insurance" provisions, and to reject a mandatory horizontal exhaustion requirement for indemnity under excess policies. Instead, these courts' radical departure from precedent has upended established policyholder rights to collect under individual CGL policies where coverage is otherwise proven, and created a direct conflict among the Second and Fourth District Courts of Appeal. The resulting confusion will needlessly multiply and protract litigation, waste judicial resources, and deprive policyholders and beneficiaries of prompt indemnification in virtually every multi-insurer continuous damage lawsuit.

Montrose therefore respectfully requests that the Court grant review to resolve the important questions of law concerning exhaustion, "other insurance," and the right of policyholders to promptly access available excess policies in accordance with their terms for triggering coverage.

DATED: November 6, 2017

Respectfully submitted,

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson
Drew T. Gardiner

By: s/ John M. Wilson
John M. Wilson
Attorneys for Petitioner
Montrose Chemical
Corporation of California

IV. CERTIFICATE OF WORD COUNT

I certify, pursuant to rule 8.504(d)(1), California Rules of Court, that the attached Reply in support of Petition for Review 4,867 words, including footnotes, as measured by the word count of the computer program (Microsoft Word) used to prepare this brief.

DATED: November 6, 2017

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson
Drew T. Gardiner

By: _____
Drew T. Gardiner
Attorneys for Petitioner
Montrose Chemical
Corporation of
California

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130, and my electronic service address is jaime.garcia@lw.com.

On November 6, 2017, I served the following documents described as:

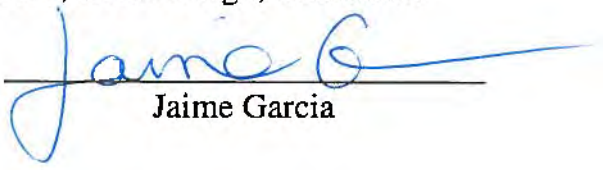
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S COMBINED REPLY IN SUPPORT OF PETITION FOR REVIEW

on the interested parties listed below by via TrueFiling by submitting an electronic version of the above-described document to TrueFiling through the user interface at www.truefiling.com:

SEE ATTACHED SERVICE LIST

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

Executed on November 6, 2017, at San Diego, California.



Jaime Garcia

SERVICE LIST

California Court of Appeal
Second District, Division Three

Kenneth Sumner, Esq. Lindsey A. Morgan, Esq. SINNOTT, PUEBLA, CAMPAGNE & CURET APLC 2000 Powell Street, Suite 830 Emeryville, CA 94608 Telephone: (415) 352-6200 Facsimile: (415) 352-6224 ksumner@spcclaw.com LMorgan@spcclaw.com	Counsel 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 Spear Tower One Market Plaza, Suite 2200 San Francisco, CA 94105-1127 Telephone: (415) 957-3000 Facsimile: (415) 957-3001 MHStern@duanemorris.com JELaLonde@duanemorris.com	Counsel for American Centennial Insurance Company
Bruce H. Winkelman, Esq. CRAIG & WINKELMAN LLP 2140 Shattuck Avenue, Suite 409 Berkeley, CA 94704 Telephone: (510) 549-3330 Facsimile: (510) 217-5894 bwinkelman@craig-winkelman.com	Counsel for Munich Reinsurance America, Inc. (formerly known as American Re-Insurance Company)
Alan H. Barbanel, Esq. Ilya A. Kosten, Esq. BARBANEL & TREUER, P.C. 1925 Century Park East, Ste. 350 Los Angeles, CA 90067 Telephone: (310) 282-8088 Facsimile: (310) 282-8779 abarbanel@btlawla.com kkosten@btlawla.com	Counsel for 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), and Transport Insurance Company (as Successor-in-Interest to Transport Indemnity Company)

Steven M. Crane, Esq. Barbara S. Hodous, Esq. BERKES, CRANE, ROBINSON & SEAL LLP 515 S. Figueroa Street, Suite 1500 Los Angeles, CA 90071 Telephone: (213) 955-1150 Facsimile: (213) 955-1155 scrane@bcrslaw.com bhodous@bcrslaw.com	Counsel for Columbia Casualty Company and Continental Casualty Company
Peter L. Garchie, Esq. James P. McDonald, Esq. LEWIS BRISBOIS BISGAARD & SMITH LLP 701 B Street, Suite 1900 San Diego, CA 92101 Telephone: (619) 233-1006 Facsimile: (619) 233-8627 Peter.Garchie@lewisbrisbois.com James.McDonald@lewisbrisbois.com	Counsel for Employers Mutual Casualty Company
Bryan M. Barber, Esq. BARBER LAW GROUP 525 University Avenue, Suite 600 Palo Alto, CA 94301 Telephone: (415) 273-2930 Facsimile: (415) 273-2940 bbarber@barberlg.com	Counsel for Employers Insurance of Wausau
Kevin G. McCurdy, Esq. Vanci Y. Fuller, Esq. MCCURDY & FULLER LLP 800 South Barranca, Suite 265 Covina, CA 91723 Telephone: (626) 858-8320 Facsimile: (626) 858-8331 kevin.mccurdy@mccurdylawyers.com vanci.fuller@mccurdylawyers.com	Counsel 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 LLP 16000 Ventura Boulevard, Suite 700 Encino, CA 91436 Telephone: (818) 385-1256 Facsimile: (818) 385-1802 kchamberlin@ckllplaw.com mdenlinger@ckllplaw.com	Counsel 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)

Elizabeth M. Brockman, Esq. SELMAN & BREITMAN LLP 11766 Wilshire Boulevard, Suite 600 Los Angeles, CA 90025-6538 Telephone: (310) 445-0800 Facsimile: (310) 473-2525 ebrockman@selmanlaw.com	Counsel for Federal Insurance Company
Linda Bondi Morrison, Esq. Ryan B. Luther, Esq. TRESSLER LLP 2 Park Plaza, Suite 1050 Irvine, CA 92614 Telephone: (949) 336-1200 Facsimile: (949) 752-0645 lmorrison@tresslerllp.com RLuther@tresslerllp.com	Counsel for Allstate Insurance Company (solely as Successor-in-Interest to Northbrook Excess and Surplus Insurance Company)
Charles Diaz, Esq. ARCHER NORRIS, PLC 777 S. Figueroa Street, Suite 4250 Los Angeles, CA 90017-1540 Telephone:(213) 437-4000 Facsimile: (213) 437-4011 cdiaz@archernorris.com Andrew J. King, Esq. ARCHER NORRIS, PLC 2033 North Main Street, Suite 800 Walnut Creek, CA 94569 Telephone: (925) 952-5508 Facsimile: (925) 930-6620 AKing@archernorris.com	Counsel for Fireman's Fund Insurance Company; National Surety Corporation
Jordon E. Harriman, Esq. LEWIS, BRISBOIS, BISGAARD & SMITH LLP 633 West 5th Street, Suite 4000 Los Angeles, CA 90071 Telephone: (213) 250-1800 Facsimile: (213) 250-7900 Jordon.Harriman@lewisbrisbois.com	Counsel 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 Telephone: (973) 379-4800 Facsimile: (973) 379-7734 mbalch@buddlarner.com	Counsel for General Reinsurance Corporation and North Star Reinsurance Corporation

Thomas R. Beer, Esq. Peter J. Felsenfeld, Esq. HINSHAW & CULBERTSON LLP One California Street, 18th Floor San Francisco, CA 94111 Telephone: 415-362-6000 Facsimile: 415-834-9070 tbeer@mail.hinshawlaw.com pfelsenfeld@mail.hinshawlaw.com	Counsel for HDI-Gerling Industrie Versicherungs, AG (formerly known as Gerling Konzern Allgemeine Versicherungs-Aktiengesellschaft)
Richard B. Goetz, Esq. Zoheb P. Noorani, Esq. Michael Reynolds, Esq. O'MELVENY & MYERS LLP 400 South Hope Street, Los Angeles, California 90071 Telephone: (213) 430-6000 Facsimile: (213) 430-6407 rgoetz@omm.com znoorani@omm.com mreynolds@omm.com	Counsel for TIG Insurance Company (Successor by Merger to International Insurance Company)
Andrew R. McCloskey MCCLOSKEY, WARING, WASIMAN LLP & DRURY LLP 12671 High Bluff Drive, Suite 350 San Diego, CA 92130 619.237.3095 (phone) 619.237.3789 (fax) amccloskey@mwwllp.com	Counsel for Westport Insurance Corporation (formerly known as Puritan Insurance Company, formerly known as The Manhattan Fire and Marine Insurance Company)
Andrew T. Frankel, Esq. SIMPSON THACHER & BARTLETT, LLP 425 Lexington Avenue New York, NY 10017-3954 Telephone: (212) 455-2000 Facsimile: (212) 455-2502 afrankel@stblaw.com	Counsel for Travelers Casualty and Surety Company (formerly known as The Aetna Casualty & Surety Company) and The Travelers Indemnity Company
Peter Jordan, Esq. Jessica R. Marek, Esq. Deborah Stein, Esq. SIMPSON THACHER & BARTLETT, LLP 1999 Avenue of the Stars, 29th Floor Los Angeles, CA 90067 Telephone: (310) 407-7500 Facsimile: (310) 407-7502 pjordan@stblaw.com dstein@stblaw.com JMarek@stblaw.com	Counsel for Travelers Casualty and Surety Company (formerly known as The Aetna Casualty & Surety Company) and The Travelers Indemnity Company

Randolph P. Sinnott, Esq.
SINNOTT, PUEBLA, CAMPAGNE & CURET, APLC
550 S. Hope Street, Suite 2350
Los Angeles, California 90071
Telephone: (213) 996-4200
Facsimile: (213) 892-8322
RSinnott@spcclaw.com

Philip R. King, Esq.
COZEN O'CONNOR
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
Telephone: (312) 382-3100
Facsimile: (312) 382-8910
pking@cozen.com

John Daly, Esq.
COZEN O'CONNOR
707 17th Street, Suite 3100
Denver, CO 80202
Telephone: (720) 479-3900
Facsimile: (720) 479-3890
jdaly@cozen.com

Counsel for Zurich International (Bermuda) Ltd., Hamilton Bermuda

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On November 6, 2017, I served a courtesy copy of the following document:

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S REPLY IN SUPPORT OF PETITION FOR REVIEW

by serving a true copy of the above-described document in the following manner:

BY FEDEX

I am readily familiar with the office practice of Latham & Watkins LLP for collecting and processing packages for delivery by FedEx, which practice is that when packages are deposited with the Latham & Watkins LLP personnel responsible for depositing packages with FedEx, such packages are picked up by a representative of FedEx that same day in the ordinary course of business:

Clerk of the Superior Court
Los Angeles Superior Court
Central Civil West Courthouse
600 South Commonwealth Ave.
Los Angeles, CA 90005

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on November 6, 2017, at San Diego California.

Michelle Wright

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **john.wilson@lw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST	Application to File Oversized Reply Brief
REQUEST	Application to File Combined Reply
REPLY TO ANSWER TO PETITION FOR REVIEW	Combined Reply In Support of Petition for Review
REQUEST	RJN ISO Reply Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Andrew Mccloskey McCloskey Waring & Waisman LLP 179511	amccloskey@rmwllp.com	e-Service	11-06-2017 5:15:29 PM
Andrew Frankel Simpson Thacher & Bartlett, LLP NY2409423	afrankel@stblaw.com	e-Service	11-06-2017 5:15:29 PM
Barbara Hodous Berkes Crane Robinson & Seal LLP 102732	bhodous@bcrslaw.com	e-Service	11-06-2017 5:15:29 PM
Bruce Winkelman Craig & Winkelman, LLP 124455	bwinkelman@craig-winkelman.com	e-Service	11-06-2017 5:15:29 PM
Bryan Barber The Barber Law Group 118001	bbarber@barberlg.com	e-Service	11-06-2017 5:15:29 PM
Carolyn Scott Latham & Watkins - San Diego	carolyn.scott@lw.com	e-Service	11-06-2017 5:15:29 PM
Charles Diaz Archer Norris 097513	cdiaz@archernorris.com	e-Service	11-06-2017 5:15:29 PM
David Goodwin Covigton & Burling LLP 104469	dgoodwin@cov.com	e-Service	11-06-2017 5:15:29 PM
Deborah Stein Simpson Thacher & Bartlett LLP	dstein@stblaw.com	e-Service	11-06-2017 5:15:29 PM

224570			
Elizabeth Brockman Selman Breithman, LLP 155901	ebrockman@selmanlaw.com	e-Service	11-06-2017 5:15:29 PM
Frederick Bennett Superior Court of Los Angeles County CTCSL-001	fbennett@lacourt.org	e-Service	11-06-2017 5:15:29 PM
Ilya Kosten Barbanel & Treuer P.C. 00173663	ikosten@btlawla.com	e-Service	11-06-2017 5:15:29 PM
Jordon Harriman Lewis Brisbois Bisgaard & Smith, LLP 117150	jordon.harriman@lewisbrisbois.com	e-Service	11-06-2017 5:15:29 PM
Jordon Harriman Lewis Brisbois Bisgaard & Smith LLP 117150	jordon.harriman@lewisbrisbois.com	e-Service	11-06-2017 5:15:29 PM
Karina Avina Lewis Brisbois Bisgaard & Smith LLP	Karina.Avina@lewisbrisbois.com	e-Service	11-06-2017 5:15:29 PM
Kenneth Sumner Sinnott Dito Moura & Puebla, APLC 00178618	ksumner@spcclaw.com	e-Service	11-06-2017 5:15:29 PM
Kevin Mccurdy McCurdy & Fuller, LLP 115083	kevin.mccurdy@mccurdylawyers.com	e-Service	11-06-2017 5:15:29 PM
Kirk Chamberlin Chamberlin Keaster & Brockman LLP 132946	kchamberlin@ckbllp.com	e-Service	11-06-2017 5:15:29 PM
Linda Morrison Tressler LLP 00210264	lmorrison@tresslerllp.com	e-Service	11-06-2017 5:15:29 PM
Max Stern Duane Morris, LLP 154424	mhstern@duanemorris.com	e-Service	11-06-2017 5:15:29 PM
Michael Balch Budd Larner, P.C. 2587483	mbalch@buddlarner.com	e-Service	11-06-2017 5:15:29 PM
Peter Garchie Lewis Brisbois Bisgaard & Smith 105122	peter.garchie@lewisbrisbois.com	e-Service	11-06-2017 5:15:29 PM
Peter Jordan Simpson Thacher & Bartlett LLP 259232	pjordan@stblaw.com	e-Service	11-06-2017 5:15:29 PM
Randolph Sinnott Sinnott Puebla Campagne & Curet 107301	rsinnott@spcclaw.com	e-Service	11-06-2017 5:15:29 PM
Richard Goetz O'Melveny & Meyers 115666	rgoetz@omm.com	e-Service	11-06-2017 5:15:29 PM
Steven Crane Berkes Crane Robinson & Seal LLP 108930	scrane@bcrslaw.com	e-Service	11-06-2017 5:15:29 PM

Thomas Beer Hinshaw & Culbertson, LLP 148175	tbeer@mail.hinshawlaw.com	e-Service	11-06-2017 5:15:29 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.

11-06-2017

Date

/s/John Wilson

Signature

Wilson, John (229484)

Last Name, First Name (PNum)

Latham & Watkins - San Diego

Law Firm