To be Argued by:
MARSHA J. INDYCH
(Time Requested: 5 Minutes)

APL-2020-00044
New York County Clerk's Index No. 600979/09

Court of Appeals

of the

State of New York

J.P. MORGAN SECURITIES INC., J.P. MORGAN CLEARING CORP. and THE BEAR STEARNS COMPANIES LLC,

Plaintiffs-Appellants,

– against –

VIGILANT INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, FEDERAL INSURANCE COMPANY,

Defendants,

– and –

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., LIBERTY MUTUAL INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendants-Respondents.

OPPOSITION BRIEF FOR DEFENDANT THE TRAVELERS INDEMNITY COMPANY

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Defendant Travelers Indemnity Company ("Travelers") submits this brief in response to the brief filed by Plaintiff-Appellants J.P. Morgan Securities, Inc., J.P. Morgan Clearing Corp. and The Bear Stearns Companies LLC (collectively "Bear").

Travelers is the successor in interest by merger to Gulf Insurance Company ("Gulf"). Gulf issued two excess liability policies to The Bear Stearns Companies, Inc., and subscribed, along with several other insurers, to another excess policy issued by Federal Insurance Company ("Federal").[1] For clarity, all further references in this brief identify the insurer as "Travelers," including where the matter referred to is a policy issued or an action taken by Gulf.[2]

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[1] Gulf Policy No. GA 6080141-P provides $15 million in limits in excess of the $10 million self-insured retention and the $10 million primary limit. Gulf Policy No. GA 6080142-P provides $10 million in limits in excess of the retention and $40 million in underlying insurance. (R-1167-79; R-1202-14.) Gulf subscribed to a "quota share" policy issued by Federal, Policy No. 7023-24-81, through which Federal, Gulf and two other insurers provided coverage. Gulf provided $10 million in that policy as part of a total of $50 million, in excess of the retention and $50 million in underlying coverage. (R-1215-34.)

[2] There is no final judgment with respect to Travelers so this Court did not grant Bear leave to appeal as to Travelers. But Travelers' policies raise most of the same coverage issues, and contain most of the same relevant language, as the policies issued by the insurers as to which leave was granted. Travelers' interests will be affected by this Court's decision and therefore it properly files a brief in this appeal. *See Appalachian Ins. Co. v. Gen. Elec. Co.,* 8 N.Y.3d 162, 170 n.1 (2007).

QUESTIONS PRESENTED

Bear argues in its brief, and this Court may decide, the following questions addressed here:

1. Whether coverage is barred by an exclusion that says the policies do not apply to any Claim "based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled."

2. Whether the Supreme Court erred by awarding prejudgment interest against certain excess insurers including Travelers – erred because the excess policies are not required to pay any covered Loss until the limits of underlying insurance have been exhausted, which has not occurred.[3]

As explained below, Travelers submits that question 2 is not properly before the Court on this appeal, but because Bear argues the merits of that issue in its brief, Travelers responds here. On all other issues Travelers adopts the Brief of Defendants Vigilant Insurance Company and Federal Insurance Company and Defendant-Respondent Liberty Mutual Insurance Company (the "Vigilant Brief").

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[3] Bear's brief does not list any "Questions Presented" that include these issues but it does argue them (the exclusion at pages 36-40 and interest at pages 55-58).

I. THE PROFIT OR ADVANTAGE EXCLUSION BARS COVERAGE.

Each of the policies at issue contains or follows form to an exclusion which says the "policy shall not apply to any Claim(s) made against the Insureds ... based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled …." (R-1152, R-1170, R-1204, R-1217.) The plain and unambiguous language of that exclusion must be applied as written. *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177 (2008); *Country-Wide Ins. Co. v. Excelsior Ins. Co.*, 147 A.D.3d 407, 408 (1st Dep't), *leave to appeal denied*, 30 N.Y.3d 905 (2017).

That unambiguous language bars coverage for the amounts Bear demands here. Bear gained profit or advantage to which it was not legally entitled – it disgorged at least $20 million based on money it (not its customers) pocketed from the illegal trades. The Claims are based on and arose from that improper gain because the Claims originated from, were incident to and had connection with the gain. Contrary to Bear's argument, the exclusion does not apply only when the underlying claim requires proof that the insured acquired profit or advantage to which it was not legally entitled, as a legal element of the claim.

Bear admits the $20 million is not covered but insists it is entitled to coverage for the other $140 million it "disgorged," because, Bear says, that amount was based on its customer's gain. But the evidence supports a finding that the

entire $160 million, called "disgorgement" in the SEC order, in fact reflected Bear's own gain. Vigilant Brief at 14-17. So even if Bear's argument that the exclusion reaches only Bear's own gain and not the rest of its liability was accepted, at most that would establish the existence of a disputed issue of fact, *i.e.,* whether any of the disgorgement was not Bear's gain. It would not support the summary judgment Bear won below.

But in fact Bear's argument cannot be squared with the plain language of the exclusion. When the exclusion is triggered, the policy "shall not apply" to the "Claim." That means the exclusion does not merely bar coverage for the improper profit, but precludes coverage for any liability or expense arising from the "Claim."

A. The Exclusion Applies Because the Claim Was Based On and Arose From Gain to Which Bear Was Not Entitled and Which It Had to Disgorge.

As set forth in detail in the Vigilant Brief, Bear incurred the liability at issue by operating an illegal scheme to trade mutual fund shares. Bear allowed certain customers to engage in late trades, which were *per se* illegal under the "forward pricing rule," and market timing trades that were illegal because they violated the mutual funds' policies, and because Bear and its customers deceived the funds in order to effect those trades. Vigilant Brief at 9-13.

Bear admits it disgorged at least $20 million based on money that Bear, not its customers, received through this illegal trading scheme. (R-1080, ¶ 64; R-1096-98, ¶¶ 6, 10.) The SEC stated explicitly that the settlement in which that money was paid "deprive[d] Bear Stearns of the gains it reaped by its [illegal] conduct…." (R-3503.) And in the related civil actions by investors, based on the same illegal trading scheme, the plaintiffs explicitly alleged that Bear obtained illegal profits through that scheme.[4]

The exclusion applies to any Claim "based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled …." (R-1154-55). The words "based upon or arising out of" are broad. They are "understood to mean originating from, incident to, or having connection with." *Maroney v. New York Cent. Mut. Fire Ins. Co.*, 5 N.Y.3d 467, 472 (2005) (quoting *Aetna Cas. & Sur. Co. v. Liberty Mut. Ins. Co.*, 91 A.D.2d 317, 320-321 (4th Dep't 1983)); *see also Country-Wide Insurance*, 147 A.D.3d at

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[4] For example, the plaintiffs in the *Pflugrath* action alleged that "[b]y engaging in this improper conduct, Bear Stearns … generated illicit profits and revenues and received substantial fees and other remuneration for themselves and their affiliates to the detriment of plaintiff and other Class members …." (R-6338, ¶ 43.) The *Excelsior* complaint alleged that "Defendants employed devices, schemes and artifices to defraud and a course of conduct and scheme as alleged herein to unlawfully manipulate and profit from the Excelsior Funds' investments …." (R-1512, ¶ 124.) The *Pilgrim Baxter* and *Janus* complaints alleged that "Bear Stearns profited from its participation in the market timing and late trading scheme" (R-3556-57, ¶¶ 119-23, R-3636-38, ¶¶ 102-08), and engaged in illegal acts "to enrich … [itself] through undisclosed manipulative trading tactics" (R-3638, ¶ 108).

408 (citation omitted). These Claims "originat[ed] from," were "incident to," and had a "connection with" Bear's improper profit and advantage, because it was disgorged as a direct result of the SEC Claim, and was explicitly alleged in the investor actions as detailed above.

Bear argues that exclusions must be construed strictly and any ambiguities in them resolved against the insurer. Bear Brief at 38. But it cites no case suggesting this exclusion is ambiguous. The words "based upon or arising out of" are not ambiguous. *Country-Wide,* 147 A.D.3d at 408. Neither are the words "profit or advantage to which the Insured was not legally entitled." They apply when the advantage or profit "result[s] from [the insured's] violation of law" and the insured is "required to return such profit." *TIG Specialty Ins. Co. v. Pinkmonkey.com, Inc.*, 375 F.3d 365, 370 (5th Cir. 2004); *see also Metropolitan District Comm'n v. QBE Americas, Inc.*, 416 F. Supp. 3d 66, 74 (D. Conn. 2019) (action to recover amounts unlawfully billed by the insured arose out of profit or advantage to which the insured was not legally entitled).

B. Bear's Attempts to Avoid the Exclusion Fail.

1. This Court Earlier Ruled Only That the Exclusion Did Not Support a Motion to Dismiss.

Bear argues this question was decided in its favor by this Court in the prior appeal. Bear Brief at 36-37. But that ruling contained only one sentence addressing application of the exclusion, which made clear it was a "pleading

standard" ruling: "Because Bear Stearns alleges, and the SEC order does not conclusively refute, that its misconduct profited others, not itself, this exclusion does not defeat coverage under CPLR 3211." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 337 (2013).

This Court correctly held that it was required to assume the truth of Bear's allegations at that stage of the litigation. Among those allegations, Bear stated that there was no evidence that "Bear Stearns itself had received any ill-gotten gain as a result of its customers' alleged late trading or deceptive market timing practices," (R-128-29, ¶ 8), and that the entire amount paid as "disgorgement" was covered by the policies, subject only to reduction for the self-insured retention (R-133, ¶ 25). This Court explicitly based its ruling on the understanding that "Bear Stearns *alleges* … that its misconduct profited others, *not itself* ...." 21 N.Y.3d at 337 (emphasis supplied). But the record now before the Court shows that Bear's misconduct profited not just others but Bear itself.

Bear has argued that it acknowledged during argument of the prior appeal that $20 million of the "disgorgement" was based on Bear's gain and was not covered, and therefore this Court's ruling in the prior appeal must implicitly have accepted the notion that the exclusion would not apply to the rest of Bear's payment notwithstanding Bear's own improper gain. But the opinion did not say

that; it relied explicitly on a reading of Bear's allegations to deny that the misconducted profited Bear at all. *Id.*

2. Under the Plain Language of the Exclusion, No Portion of the Liability Is Covered.

Bear argues the insurers "presented no evidence showing that the $140 million payment reflected a gain to Bear Stearns," and that "[g]ains by others are not gains to Bear Stearns and therefore do not trigger the Profit Exclusion." Bear Brief at 37. But the plain language of the exclusion says that if the *exclusion* is triggered the *policy* "does not apply" to the *Claim*. So even if the $140 million reflects gains to others and not Bear – which the insurers dispute – Bear still gained profit or advantage to which it was not entitled, that is, the $20 million it was forced to disgorge. Bear Brief at 37. The Claim therefore triggers the exclusion and no liability or expense resulting from the Claim is covered.

Bear in essence argues it can split one Claim into two, comprised of different amounts it had to pay because of the same misconduct and in the same proceeding. But the policy defines a "Claim" as "a civil proceeding commenced by the service of a complaint or similar proceeding," or an "investigation into possible violations of law initiated by any governmental body or … SRO … or any proceeding commenced by the filing of a notice of charges or formal investigative order or similar document …." (R-1153.) Thus the Claim, to which the policy

"does not apply" if the exclusion is triggered, is the proceeding or investigation in which the liability is imposed – not a discrete portion of the resulting liability. *See PNC Fin. Svcs. Group, Inc. v. Houston Cas. Co.*, 647 Fed. App'x 112, 118-119 (3d Cir. 2016) (exclusion was broader than an exception to the definition of Loss because the exclusion barred coverage for all amounts incurred including damages and claim expense).

Bear cites *Pereira v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 2006 WL 1982789 (S.D.N.Y. July 12, 2006), but that case involved an entirely different issue. There, the insurer argued that because one insured received gain to which he was not legally entitled, the exclusion barred coverage for all insureds. The court rejected this argument based on a provision that said a Wrongful Act by one insured would not be imputed to others. But the court did not address the argument Bear makes here – that when one insured must disgorge its own gain along with gain (allegedly) received by others, the exclusion should apply only to the insured's gain. The plain language of the exclusion refutes that argument.

Bear's other case, *Am. Century Servs. Corp. v. Am. Int'l Specialty Lines Ins. Co.,* 2002 WL 1879947 (S.D.N.Y. Aug. 14, 2002), applied New Jersey law and denied the insured's motion for summary judgment but did not rule on whether the insured might have some coverage notwithstanding the profit or advantage exclusion. That case also did not address Bear's argument that the exclusion can

bar coverage for part of the liability from a Claim but leave coverage in place for another part – which again is contrary to the plain language of the exclusion.

3. Improper Profit or Advantage Need Not Be a Legal Element of the Claim.

Bear argues the exclusion applies only if the underlying claim requires proof the insured obtained profit or advantage to which it is not legally entitled – in other words, that the improper profit or advantage is a legal element of the Claim. Bear Brief at 40. But the exclusion applies to a "Claim based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled." Bear cites no case that holds these words actually mean a "Claim of which one legal element is that the Insured gained personal profit or advantage to which the Insured was not legally entitled."

Bear relies on *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376 (D. Del. 2002), but while it held the exclusion would apply if the profit or advantage was an element of the claim, it did not hold the exclusion applies *only* in such cases. Other courts hold it need not be an element. *See Johnson v. Federated Rural Elec. Ins. Exch'g*, No. CV 13-18, 2016 WL 7243526, *6-7 (D. Mont. Dec. 14, 2016) (exclusion applied to claim alleging conversion of funds even though the legal elements of conversion did not include obtaining profit or advantage to which the insured was not legally entitled).

The *Alstrin* court declined to apply the exclusion because the underlying complaints "fail to allege that the [insureds'] profit or gain was itself illegal and do not seek disgorgement of illegal profit or gain." 179 F. Supp. 2d at 400. But the SEC clearly alleged that Bear obtained profit or advantage to which it was not entitled – because it required Bear to disgorge $20 million that Bear received, in addition to seeking and obtaining information on Bear's gains from other business with the customers for which it facilitated late trades and deceptive market timing trades. And, as explained above, in the civil actions the investors explicitly alleged that Bear received illicit profits from this same scheme.

Bear cites *Federal Ins. Co. v. Sheldon,* 186 B.R. 364 (S.D.N.Y. 1995), but that case also does not hold that the profit or advantage must be a legal element of the claim. In that case, as in *Alstrin,* the insurer was not asked to indemnify disgorgement – which Bear demands here. And the incidental benefits to the insureds in *Sheldon*, such as continued employment, are very different from the gain in this case: fees paid to Bear specifically for its willing facilitation of illegal trades, and other profitable business given to Bear in exchange for its willingness to carry out those illegal trades. All of this was the object and the product of the illegal trading scheme. The other profitable business Bear acquired through this scheme also constitutes an advantage to which Bear was not legally entitled,

triggering the exclusion. *See Jarvis Christian Coll. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 197 F.3d 742, 748-49 (5th Cir. 1999).[5]

4. Application of the Exclusion Does Not Make Coverage Illusory.

Finally, Bear argues the insurers' reading would cause the exclusion to apply in every case, rendering coverage illusory. Bear Brief at 38-39. Bear relies on a statement in *Alstrin* asserting that "almost all securities fraud complaints will allege that the defendant did what they did in order to benefit themselves in some way," and concluding that the exclusion renders "broad coverage for 'Securities Claims'" in the policy "valueless." Bear Brief at 39 (quoting *Alstrin,* 179 F. Supp. 2d at 400).

But these policies extend coverage to Loss that Bear becomes legally obligated to pay as a result of a "Claim" for "Wrongful Acts." That provides coverage for a wide range of claims. The fact that the exclusion bars coverage for one type of claim for which Bear would like to be paid does not render the

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[5] Bear's other cases (which do not apply New York law) do not support its argument. In *Wintermute v. Kan. Bankers Sur. Co.*, 630 F.3d 1063 (8th Cir. 2011), the court reversed summary judgment in favor of the insurer but found an issue of fact as to whether the exclusion applied. *Id.* at 1070-73. In *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252 (4th Cir. 2006), no disgorgement was sought – in fact the claimant did not allege any benefit to the insured. *Id.* at 256 n.3. And in *OneBeacon Am. Ins. Co. v. City of Zion*, 119 F. Supp. 3d 821 (N.D. Ill. 2015), the court held the exclusion did not apply when the underlying complaint, contrary to the Claim at issue here contained only "sporadic general allegations" of illegal profit. *Id.* at 836-37.

coverage illusory. *See Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.,* 28 N.Y.3d 675, 685 (2017) ("[a]n insurance policy is not illusory if it provides coverage for some acts [subject to] a potentially wide exclusion") (alteration in original; internal quotation marks and citation omitted).

This case does not involve gain that is merely incidental to the violation, as was the case in *Alstrin* and *Sheldon.* The focus of the SEC proceeding, and the entire purpose of this illegal trading scheme, was to gain profit and advantage for Bear to which it was not entitled, through the facilitation of unlawful trades for favored customers in return for fees and other lucrative business. While summary judgment in favor of Travelers on the exclusion is warranted on the admissible evidence, at the very least, competent evidence exists that would allow a factfinder to conclude that the Claim arose out of Bear's improper gain and is not covered.

II. THE COURT SHOULD NOT ADDRESS PREJUDGMENT INTEREST, BUT IF IT DOES IT SHOULD HOLD THAT THE SUPREME COURT ERRED BY AWARDING INTEREST AGAINST THE EXCESS INSURERS.

A. This Court Should Not Address Interest.

In the ruling reversed by the Appellate Division, the Supreme Court granted summary judgment to Bear and ruled that certain of the excess insurers were required to pay all or part of their policy limits to cover Bear's "disgorgement," along with prejudgment interest on those amounts running from the time Bear paid the SEC. (R. 480-483.)

The excess insurers argued this "disgorgement" was not covered by their policies – but also argued that even if it was prejudgment interest could not be awarded against them, because the excess policies are not required to pay any covered Loss until exhaustion of underlying limits which has not yet occurred. Thus, even if the policies covered this "disgorgement," nothing is yet due from the excess insurers on which interest could run.

The Appellate Division did not address prejudgment interest; its ruling that Bear's "disgorgement" payment is not covered mooted that issue. *See J.P. Morgan Sec., Inc. v. Vigilant Ins. Co.*, 166 A.D.3d 1 (1st Dep't 2018). After remand the Supreme Court vacated the earlier judgment that included interest and entered a new judgment that awards *no money* at all. That judgment, now on appeal to this Court, only dismisses the claims against several excess insurers whose policies cannot be reached based on the Appellate Division's ruling.

The prejudgment interest question that was briefed but not decided in the Appellate Division – whether interest can run against excess carriers on amounts found to covered by their policies even though the exhaustion of underlying limits required to trigger those excess policies has not yet occurred – is not properly before the Court in this appeal. CPLR § 5501(a)(1) allows review of only non-final judgments or orders which "necessarily affect" the final judgment on appeal. To the extent the Appellate Division order reversed the Supreme Court's award of

prejudgment interest, that order did not "necessarily affect" the final judgment now before the Court. That judgment dismissed Bear's claims against several insurers at the top of the coverage "tower," and even if the Appellate Division had erred in ruling that prejudgment interest could be awarded, that ruling could not affect the final judgment, which contemplates that the four excess insurers in the highest layers have no liability to Bear (and thus necessarily no liability for prejudgment interest).

And even if this Court could decide the interest issue, it should not. Depending on the final resolution of the coverage issues now in dispute, it is possible no covered Loss will ever reach the excess policies – in which case the interest issue would remain moot. Furthermore, even if this Court concludes that some amount sought by Bear is covered and would reach one or more of the excess policies, there is no way to know at this time which excess policies will be reached, which policy language will be relevant to interest, and which excess insurers will have a stake in the issue. Among other things, Bear's claim for defense costs has never been decided by any court, and the resolution of that question will affect which excess policies might be reached.

In addition, while the interest issue was briefed and argued below, the Appellate Division did not address it. If the issue of prejudgment interest must be addressed it would be appropriate to present it first to that court. *See, e.g., Solow v.*

Wellner, 613 N.Y.S.2d 163, 165 (1st Dep't 1994); *Merson v. McNally*, 90 N.Y.2d 742, 750 (1997) (where Appellate Division had not addressed several issues presented by an appeal, this Court decided to "reverse and remit for consideration of these issues, without expressing any view on them").

B. If the Court Addresses the Issue It Should Hold That the Supreme Court Erred by Awarding Interest.

Bear argues the original judgment entered by the Supreme Court properly awarded interest against the excess insurers because they "repudiated" their coverage obligations, "acted together" with the primary as a "unified tower" in denying coverage, and caused Bear to lose the use of money that should have been paid. Bear Brief at 55-56.

The first two contentions are irrelevant, and the third simply wrong. By their express terms the excess policies do not pay Loss until the underlying limits are exhausted, and specifically, until the underlying insurers pay their full policy limits (or, as to one of the excess policies, until the underlying insurers either pay or are held liable to pay). The require exhaustion has not occurred. And the policies do not permit Bear to exhaust the underlying limits through its own payments of the settlements.

Bear concedes that excess policies may require exhaustion of underlying limits solely through payments by the underlying insurers and not payments by the

insured – and that such provisions are valid and enforceable. Bear Brief at 57. But Bear insists, without discussing any of the policy language, that "none of … [the] policies contains language providing that the only way to exhaust underlying coverage is by payment by the underlying Insurers." *Id.*

The actual policy language says otherwise. It unequivocally requires payment of the underlying limits by the insurers (or again, for one policy, either payment by the underlying insurers or a finding that they are liable to pay). Until this requirement is satisfied no money is due under the excess policies and prejudgment interest cannot be awarded against the excess insurers.

1. Prejudgment Interest Runs Only When Money Is Due and Remains Unpaid.

In an action for breach of an insurance policy, prejudgment interest may be awarded under CPLR § 5001 only after money is due under the policy and remains unpaid. *See, e.g.*, *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 202-03 (2d Cir. 2010); *Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.*, 43 A.D.3d 23, 33-34 (1st Dep't 2007); *Caiati of Westchester, Inc. v. Glens Falls Ins. Co.*, 265 A.D.2d 286, 286 (2d Dep't 1999); *Delcomyn v. Westchester Fire Ins. Co. of N.Y.*, 284 A.D. 1055, 1055 (2d Dep't 1954). This same rule applies to interest on money due under any contract. *See, e.g., Spodek v. Park*

Prop. Dev. Assocs., 279 A.D.2d 467, 468 (2d Dep't 2001), *aff'd*, 96 N.Y.2d 577 (2001); *Kesco Textile Co. v. Coit Int'l Inc.*, 41 A.D.2d 828, 828 (1st Dep't 1973).

Interest is not a penalty for breach. It is compensation to the non-breaching party for the loss of use of money, after it becomes due under the contract but remains unpaid. *See, e.g., Love v. State of New York*, 78 N.Y.2d 540, 544 (1991) ("interest is not a penalty … [but] simply the cost of having the use of another person's money for a specified period"); *Spodek*, 279 A.D.2d at 468; *Gelco Bldrs. v. Simpson Factors Corp.*, 60 Misc. 2d 492, 494 (Sup. Ct. 1969) ("interest is founded on the theory that there has been a deprivation of use of money or its equivalent").

Thus, even if this Court concludes that some amount Bear seeks here is covered by one or more of the excess policies, it still must determine *when* the excess insurers are obligated to pay, under the terms of their contracts. Until then no amount can be "awarded because of a breach of performance" of those contracts. CPLR § 5001(a). The Court must, of course, apply the clear and unambiguous language of each insurance contract as written. *Vigilant,* 10 N.Y.3d at 177.

These policies are clear and unambiguous. They are not required to pay any covered Loss until all underlying insurers have paid their full limits (or again, as to one of the policies, until the underlying insurers have paid or been held liable to

pay). That has not happened. Since the excess policies are not yet required to pay the excess insurers cannot have breached their contracts by failing to pay and there is no amount on which prejudgment interest could run.

2. No Payment Is Yet Due Under These Excess Policies.

a. No payment is yet due from Travelers.

The language relevant to interest in the two excess policies issued by Travelers[6] is the same. They promise to pay, up to the dollar limits of the policies and subject to all applicable terms and conditions, "Loss by reason of exhaustion by all payments, of all applicable underlying limits as specified in Item 4 of the Declarations …." Item 4 lists specific underlying policies and their policy limits – limits which must be exhausted before Travelers is required to pay. (R-1169-70; R-1203-04.)

The Travelers policies also make clear they provide coverage only "[i]n the event of exhaustion of all of the Limits of Liability of such Underlying Policy solely as a result of payment of Losses thereunder …." (R-1172; R-1206.) The word "thereunder" refers to the "Underlying Polic[ies]," which means the required exhaustion can only occur through payments made "under" those policies. The policies further state that Travelers' obligation to pay, *after* this required

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[6] Gulf Policy No. GA 6080141-P and No. GA 6080142-P (R-1167-79 and R-1202-14).

exhaustion, cannot be "increased, expanded or otherwise changed as a result of the … refusal to pay of any Underlying Insurer …." (R-1172; R-1206.)

In sum, to exhaust the underlying limits and trigger Travelers' obligation to pay, the underlying insurers must pay the limits of their policies. Bear cannot exhaust those underlying limits with its payments. Bear could pay "Loss," but it cannot pay the underlying "Limits" of an insurance policy, and of course it cannot make payments "under" those underlying policies.

In *JPMorgan Chase & Co. v. Indian Harbor Ins. Co.*, 98 A.D.3d 18 (1st Dep't 2012), the court construed an excess policy with language substantively the same as Travelers'. That policy "'shall apply only after all applicable Underlying Insurance … has been exhausted by actual payment *under* such Underlying Insurance ….'" *Id.* at 22 (emphasis supplied). The court held this excess policy was not required to pay until the underlying insurers paid their limits, and that the insured could not exhaust the underlying limits and trigger the excess coverage with its own payments of loss. 98 A.D.3d at 23.

Indian Harbor was decided under Illinois law, but the principles it applied are consistent with New York law. Indeed, the First Department cited *Indian Harbor* in a later case that reached the same result under New York law. *Forest Labs., Inc. v. Arch Ins. Co.*, 38 Misc. 3d 260 (Sup. Ct. 2012), *aff'd*, 116 A.D.3d 628 (1st Dep't 2014) (where excess policy paid upon "exhaustion of the

Underlying Limits of Liability, solely as a result of actual payment of a Covered Claim pursuant to the terms and conditions of the Underlying Insurance thereunder," the Underlying Limits had to be paid by the insurers, not the insured, to exhaust the Underlying Limits and trigger the excess).[7]

The holdings in *Indian River* and *Forest Labs* are consistent with well-reasoned decisions in other jurisdictions. *See*, *e.g.*, *Martin Resource Mgmt. Corp. v. AXIS Ins. Co.*, 803 F.3d 766, 769 (5th Cir. 2015) (excess policy that "shall apply only after all applicable Underlying Insurance … has been exhausted by actual payment under such Underlying Insurance" unambiguously required payment of underlying limits by the insurer, not the insured); *Citigroup, Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 373 (5th Cir. 2011) (policy that "attaches '[i]n the event of the exhaustion of all of the limit(s) of liability of such "Underlying Insurance" solely as a result of payment of Loss thereunder'" unambiguously required payment of full limits by the underlying insurers, not the insured); *Great Am. Ins. Co. v. Bally*

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[7] *Indian Harbor* and *Forest Labs* were decided in a different factual context but the distinction is irrelevant here. In both cases the insureds settled with the underlying insurers for less than their full limits, but argued the underlying limits still were exhausted because the insureds paid loss equal to the difference between those limits and the amounts the insurers paid in the settlements. The First Department rejected that argument and required exhaustion solely through payments by the underlying insurers. The only difference in this case is this: the excess insurers in *Indian Harbor* and *Forest Labs* would never be required to pay because they were excused from paying their full limits by the settlements, but Bear did not make such settlements here, and still can obtain coverage under its excess policies if covered Loss reaches them – but only after the underlying insurers pay their limits.

Total Fitness Holding Corp., 06 Civ. 4554, 2010 WL 2542191 (N.D. Ill. June 22, 2010) (excess policy with the same language as Travelers required payment by the underlying insurer, not the insured).

These cases apply the unambiguous policy language as written, *Vigilant,* 10 N.Y.3d at 177, and are consistent with "the very nature of excess insurance coverage … that a predetermined amount of underlying primary coverage must be paid before the excess coverage is activated." *Ali v. Federal Ins. Co.,* 719 F.3d 83, 91 (2d Cir. 2013) (quoting *Gabarick v. Laurin Mar. (Am.), Inc.,* 649 F.3d 417, 422 (5th Cir. 2011)); *see also* J. Appleman, INSURANCE LAW & PRACTICE § 2.16 (2d ed. 2003) (an "excess policy … by its terms will only come into play once the limits of the primary policy have been exhausted").

Because the underlying insurers have not paid their limits Travelers is not yet required to pay. Prejudgment interest therefore cannot be assessed against Travelers. *See* cases cited at page 20-21, above. *See also, e.g., Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 796 (7th Cir. 2001) ("because Continental's policy does not come into play until the underlying limits of $41 million have been exhausted, Continental is not obliged to fund any of this settlement and cannot be required to pay interest for delay"); *TIAA-CREF Individual & Institutional Services, LLC v. Illinois Nat'l Ins. Co.*, C.A. No. N14C-05-178 JRJ [CCLD], 2017 WL 5197860, *6-8 (Del. Super. Oct. 23, 2017) (because

the plain language of the excess policies "delays attachment of each policy until … actual payment of underlying limit(s) by the underlying insurer(s)," and those underlying insurers had not yet paid, prejudgment interest could not be awarded against the excess insurers under CPLR § 5001), *aff'd,* 192 A.3d 554 (Del. 2018).

b. Bear fails to address the Travelers language here; its arguments about that language in the court below are wrong.

Bear argues the Travelers policies do not require payment by the underlying insurers, instead but allow Bear to exhaust the underlying limits with its own payments. But Bear does not discuss any of the relevant policy language. Bear Brief at 57.

Travelers assumes that in response to this brief Bear finally will address the language, and will present the arguments about that language that it made below but omitted from its opening brief here. In the lower court Bear pointed to language referring to exhaustion by "all payments," arguing this must include Bear's payments. But Bear ignored the rest of the insuring agreement, which does not require payment of a specific amount of "Loss," but rather exhaustion of "*all applicable underlying limits* as specified in Item 4 of the Declaration …." (R-1170, R-1204, emphasis supplied.) Those are the policy limits of specific insurance policies. As already noted, while Bear can pay "Loss," only the insurers can pay their "limits."

Furthermore, Condition C in the Travelers policies establishes "condition[s] to the Insurer's obligations under this Policy." (R-1171, R-1205.) These are things that must occur before Travelers has any obligation at all. *See, e.g., Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.,* 86 N.Y.2d 685 (1995); *Sulner v. G. A. Ins. Co. of N.Y.,* 224 A.D.2d 205, 205-06 (1st Dep't 1996) ("an express condition precedent, such as the one involved here, must literally be complied with before the claimant may recover"). The relevant condition here is exhaustion of the underlying limits "solely as a result of payment thereunder," meaning "under" the underlying policies. (R-1172; R-1206.) Only the insurers can make payments "under" their policies. So this condition cannot be met, and Travelers cannot have any "obligations under this Policy," until the underlying insurers pay their limits.

Below, Bear also pointed to language that says the "obligations under this Policy shall not be increased, expanded or otherwise changed as a result of the … refusal to pay of any Underlying Insurer." Bear argued this means Travelers cannot avoid the obligation to pay because the underlying insurer refused to pay. But this takes the language out of context and reverses its clear meaning. This phrase directly follows language that requires exhaustion through payments by the underlying insurers, "under" their policies. And it makes clear that the underlying insurer's refusal to pay does not "increase" or "expand" Travelers' obligation.

Read as a whole and in context, the phrase Bear wrongly relied on clearly means the requirement for exhaustion solely through payments by the underlying insurers cannot be disregarded because the underlying insurer refuses to pay.

Typical of exhaustion provisions in excess policies, this language is intended to allow the excess insurer to await the result of a coverage dispute between the insured and the primary before paying a share of loss – loss that may be found not to be covered at all, if the primary insurer prevails in the dispute concerning the policy language to which the excess policies follow form. *See, e.g.*, *TIAA-CREF*, 2017 WL 5197860 at *8 ("[the excess insurers'] ability to wait out good faith coverage disputes without breaching their own performance obligations is a benefit conferred upon them by the terms of the attachment provisions, regardless of whether the underlying insurer(s) have wrongfully denied coverage").

Below, Bear tried to avoid Condition C entirely by offering an illogical interpretation in which its exhaustion requirement does not apply at all. The condition says that upon exhaustion through payments by the underlying insurers Travelers provides insurance for "subsequent Loss." Bear argued this made Condition C irrelevant in this case, on the theory that Travelers' share of Bear's payments was not "subsequent Loss," but part of one large loss from a single claim. Essentially Bear rewrote the language to change "subsequent Loss" to "Loss from a subsequent claim."

But those are not the words used. The ordinary meaning of "subsequent" is "following in time, order or place." Merriam-Webster Online Dictionary (definition of "subsequent") (https://www.merriam-webster.com/dictionary/subsequent, accessed July 23, 2020). "Subsequent Loss" is simply Loss that Travelers pays following in "time" and "order" the payment by the underlying insurers. Whether their respective shares of Loss come from one claim or several is irrelevant, and nothing in Condition C suggests otherwise.

As noted above, the main purpose of exhaustion provisions such as this one is to allow the excess insurer to await the outcome of a coverage dispute between the insured and the primary insurer, paying only if the loss is found to be covered and after the primary pays its share. Whether the covered Loss comes from one claim or several makes no difference to that purpose. Ruling that the excess insurer is subject to interest if the Loss comes from one claim – but not if it comes from several claims, even with the same total Loss and the same refusal by the primary to pay – simply makes no sense. *See Union Carbide Corp. v. Affiliated FM Ins. Co.*, 16 N.Y.3d 419, 424 (2011) (rejecting interpretation of policy language as "implausible"); *see also XL Specialty Ins. Co. v. Level Global Investors, L.P.*, 874 F. Supp. 2d 263, 283 (S.D.N.Y. 2012) (courts must read policies to avoid illogical or absurd results).

c. The cases Bear cites on this language are not on point.

Bear cites *Zeig v. Mass. Bonding & Ins. Co.,* 23 F.2d 665 (2d Cir. 1928), but it does not apply here. It does not purport to apply the New York law that controls in this case (R-1170, R-1204), and plainly does not reflect that law as it stands today. Later New York decisions, including *Indian River* and *Forest Labs,* establish that policy language substantively the same as Travelers' requires exhaustion through payments only by underlying insurers, not the insured.

Furthermore, the policy in *Zeig* required underlying coverage to be "exhausted in the payment of claims to the full amount of the expressed limits of such other insurance," without specifying who must make the "payment" of "claims" in that "amount" – and importantly here, without requiring that the payments be made "under" the underlying policies. Travelers' policies specify that the underlying insurers must make the payments that exhaust their limits, and must do so "under" their policies.

In addition, *Zeig* turned in large part on an assumption that an excess insurer has no reason to care whether loss equal to the underlying limits is paid by the underlying insurer or the insured. *See* Bear Brief at 57. But, as explained above, Bear's excess insurers, whose policies incorporate the same substantive coverage provisions that the primary insurer is litigating with Bear, have an entirely reasonable interest in waiting for the outcome of that dispute before paying –

among them the fact that the excess insurers will not be required to pay at all if those provisions are found not to provide coverage.

In Bear's other case, *Pereira v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2006 WL 1982789 (S.D.N.Y. July 12, 2006), the court refused to dismiss a complaint against several excess insurers, based on an argument that the underlying insurer had to pay its limits before the excess coverage was triggered, because the underlying insurer was insolvent and could not pay. The court noted that requiring exhaustion solely through payments by the underlying insurer would mean the insured could never access the excess coverage; the court concluded that was not the only reasonable interpretation of the language before it. But this case does not involve insolvency of the underlying insurers, and in any event the Travelers policies contain language on that issue not addressed in *Pereira,* stating that Travelers' obligation cannot be "increased, expanded or otherwise changed as a result of the … insolvency … of any Underlying Insurer …." (R-1172, R-1206.)

d. No payment is yet due under the Federal policies or those following form to their language.

Federal issued two excess policies to Bear, one providing coverage from Federal alone,[8] the other a "quota share" policy written on the Federal policy form but subscribed to by Federal, Travelers, Liberty Mutual and National Union.[9]

In addition, National Union issued a policy above the quota share policy, and agreed with Bear that the policy would, on the issue relevant here, "follow the terms and conditions of" the Vigilant primary and the Federal quota share policy. (R-671.)[10]

Thus, the second layer Federal excess policy, the fourth layer quota share policy, and the fifth layer National Union excess policy are all subject to this language:

> The company shall provide the Insured with insurance during the Policy Period excess of the Underlying Insurance as scheduled in Item 2 of the Declarations. Coverage for any loss shall attach only after: 1) all Underlying Insurance carriers have paid in cash the full amount of their respective liabilities, 2) the full amount of the Underlying Insurance policies have been collected by the plaintiffs, the Insureds or the Insurers' counsel,

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[8] Policy No. 7023-24-27 provides $15 million in limits in excess of the $10 million retention and $25 million in underlying insurance (R-1180-1200).

[9] The quota share policy is Federal Policy No. 7023-24-81. *See* note 1 above.

[10] This policy, No. 278-73-26, provides $25 million in limits in excess of the $10 million retention and $100 million in underlying insurance. (R-1215-34.)

> and 3) all Underlying Insurance has been exhausted. Coverage under this policy shall then apply . . . .

(R-1185; R-1221.)

Bear conceded below that this language in the Federal policy form requires payment of underlying limits by the underlying insurers to exhaust their limits and trigger the excess policies. Bear also conceded that this language does not allow Bear to exhaust the underlying limits with Bear's own payments. *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.,* Brief for Plaintiffs-Respondents, First Dept., Mar. 13, 2018, at 31, 100 ("Bear First Dept. Brief").

The case law agrees. *See Indian Harbor*, 98 A.D.3d at 22-23 (excess policy that said the insurer "shall only be liable to make payment under this policy after the total amount of the Underlying Limit of Liability has been paid in legal currency by the insurers of the Underlying Insurance as covered loss thereunder" required payment by the underlying insurers, not the insured); *see also Citigroup,* 649 F.3d at 372-73 (excess policy that attached only "after the total amount of the Underlying Limit of Liability has been paid in legal currency by the insurers of the Underlying Insurance as covered loss thereunder" could be triggered only if the underlying insurers, not the insured, paid the underlying limits). Applying the language as written, according to Bear itself, the policies containing this Federal

provision have no obligation to pay until the underlying insurers (not Bear) pay the full underlying limits.[11]

e. No payment is yet due from Liberty Mutual.

Liberty Mutual issued an excess policy to Bear[12] that "only provides coverage when the Underlying Limit of Liability [the sum of all underlying insurance] is exhausted by reason of the insurers of the Underlying Policies paying or being held liable to pay in legal currency the full amount of the Underlying Limit of Liability as loss." (R-1248.)

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[11] The policies controlled by this Federal exhaustion language clearly include the fifth level National Union excess policy, No. 278-73-26. In an insurance binder executed by Bear and National Union in August 2001, the parties agreed that "notwithstanding anything contained in [National Union's Excess Policy]," National Union's coverage obligations "shall follow the terms and conditions of underlying Vigilant Insurance Company Policy No. 7023-22-82 and Federal Insurance Company Policy No. 7023-24-81 [the quota share policy] except … as set forth on the Declarations Page attached to Policy No. 278-73-26." (R. 671.) Although the Declarations Page attached to National Union's Excess Policy does not address exhaustion, R. 658, Bear nonetheless argued in the Appellate Division that as to National Union exhaustion would be satisfied by Bear's own payment to the SEC, claiming that the "Declarations Page states the Limit of Liability for the policy," which is "cross-referenced and amplified by the Limit of Liability section in the policy itself." Bear First Dept. Brief at 30. Contrary to Bear's assertion, however, the Declaration Page does not cross-reference the underlying policy. Moreover, Bear's logic is entirely circular. The purpose of the August insurance binder, which Bear proposed and signed, was to supersede the National Union Excess Policy with the terms of the Vigilant and Federal policies. While the basic terms of National Union Excess Policy were preserved by the Declaration Page exception, Bear's reading would render meaningless the binder's explicit statement that the National Union Excess Policy shall follow the Vigilant and Federal Policies "notwithstanding *anything* contained in the [National Union Excess Policy]." (R. 671 (emphasis supplied).)

[12] Liberty Mutual Policy No. 07355-010 provides $25 million in limits excess of the $10 million retention and $125 million in underlying insurance. (R-1245-53.)

The underlying insurers have neither paid nor been held liable to pay their limits. The judgment that held them liable was reversed by the First Department and vacated after remand. And even if that ruling is reversed and the underlying insurers are held liable to pay their limits, interest on any amount covered by Liberty's policy can only run from the time the underlying insurers are held liable to pay.

Bear argued below that the underlying insurers owed their limits when Bear paid the SEC. But Liberty's language requires payment only when the underlying insurers pay or are "held liable to pay," not when the insured sustains the loss. *See G-I Holdings, Inc. v. Reliance Ins. Co.,* No. 00-6189, 2004 U.S. Dist. LEXIS 29592, at *23 (D.N.J. Mar. 23, 2004) (excess policy with "held liable to pay" language was not triggered until judgment was entered against the underlying insurer); *Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co.,* 609 A.2d 440, 482 (N.J. Super. Ct. App. Div. 1992) (excess insurer with "held liable to pay" provision did not owe prejudgment interest even though the insured "lost the use of its money since it paid its share of the settlement").

3. Bear's Arguments on Interest Disregard the Clear Language of the Policies and the Relevant Statute.

Bear insists that "an award of prejudgment interest was mandatory to fully compensate Bear Stearns for the loss of use of the insurance proceeds – proceeds

that Insurers were instead undeservedly able to keep and use themselves." Bear Brief at 56. But this argument puts the rabbit squarely into the contractual hat, because it assumes, contrary to the plain contract language discussed above, that the excess policies were obligated to pay, and Bear was entitled to their proceeds, when Bear incurred the loss. In fact the language makes clear that the excess insurers are obligated to pay only when the underlying insurers pay their limits (or as to Liberty, when they pay or are held liable to pay).

Bear relies on *Matter of Aurecchione v. New York State Div. of Human Rights,* 98 N.Y.2d 21 (2002) and *Love v. State of New York,* 78 N.Y.2d 540 (1991). But *Aurecchione* was not a contract case and did not involve interest under CPLR § 5001. And in both cases defendants were obligated to pay the amounts on which interest was awarded. The issue in those cases was one not presented here: whether those defendants could reduce the amount of interest because the litigation was delayed for reasons not within their control. Here the contracts say the money is not due until events that have not yet occurred.

Bear also cites *Olin Corp. v. OneBeacon Am. Ins. Co.,* 864 F.3d 130 (2d Cir. 2017), but that case makes clear why prejudgment interest is *not* available here. The exhaustion provision in *Olin* said the excess coverage "shall not attach unless and until *the Insured,* or the Insured's Underlying Insurer, shall have paid *the amount of* the Underlying Limits …." 864 F.3d at 138 (emphasis supplied). That

language allowed the insured to trigger the excess coverage through its own payments as long as they were equal to the "amount of" the Underlying Limits. The excess policies here do not. They require exhaustion of the "limits" themselves, through payments by underlying insurers "under" their policies.

Bear further argues that the excess insurers must pay interest because they "repudiated" coverage and breached their policies – specifically, Bear says, by delaying their responses to Bear's demands, and by taking positions that the underlying actions did not present a "Claim" and that "disgorgement" was not covered. Bear Brief at 56 (citing *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.,* 151 A.D.3d 632 (1st Dep't 2017)).

But the First Department ruling Bear cites did not address exhaustion or when the excess insurers had to pay. Indeed, it did not say the excess insurers breached their contracts. It held only that their responses were a "denial of liability under the contracts," and therefore the insurers could not enforce obligations of the insured such as obtaining consent to settlements or providing cooperation to the insurers. 151 A.D.3d at 633. Those are obligations that protect the insurers' interests if coverage is provided, but they have nothing to do with the conditions precedent here that require exhaustion of underlying limits before the excess policy is required to pay. Those provisions do not require the insured to do anything; they

require the underlying insurers to pay their limits before the excess policy is triggered.

Furthermore, even if the excess insurers' "denial of liability" could be characterized as a "breach," interest still cannot be awarded. Interest runs only if the breach deprives the insured of money it should have had under the terms of the contract. Again, interest is not a penalty for breach; it is compensation for the loss of use of money plaintiff should have had. Even if there is a breach a court cannot award interest on amounts that are still not due under the terms of the contract at issue. *See, e.g., Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.,* 804 F.2d 787, 796 (2d Cir. 1986) (to "calculate interest due as of the date of anticipatory repudiation affords the plaintiff a windfall, and hence penalizes the defendant, in contravention of the compensatory purpose of section 5001"); *Manhattan Fuel Co. v. New England Petroleum Corp.,* 439 F. Supp. 959, 971 (S.D.N.Y. 1977) (interest ran separately on each commission payment from the date it came due under the contract, not on all payments from the date of the initial breach); *Spodek,* 279 A.D.2d at 468 (plaintiff was entitled to interest on each payment due under a note only "from the date each payment became due under the terms of the note").

The statute says that interest must "be computed from the earliest ascertainable date the cause of action existed, *except that* interest upon damages

incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred …." CPLR § 5001 (emphasis supplied). Damages are not incurred as a result of an excess insurer's breach until money is due under its policy and not paid.

Bear also attempts to erase the distinctions between the separate policies it negotiated by insisting that all of the insurers "acted together as a unified insurance tower in response to a single large covered loss" and "denied coverage collectively, compelling Bear Stearns to pay for the SEC settlement out of its own pocket and bring this action …." Bear Brief at 56. But the excess insurers are not parties to the primary insurer's contract, or to one another's. Each insurer has its own contract with Bear. Their limitations cannot be disregarded because the excess insurers took the same positions as the primary with respect to coverage.

Travelers, for example, shared the primary insurer's view that Bear's payments were not covered, but never suggested it would "continue to deny coverage in the event that [Bear] … prevails in its coverage claim" against the primary. *See TIAA-CREF,* 2017 WL 5197860 at *9. Travelers told Bear that if coverage was found to exist under its policies that coverage "would attach only upon the exhaustion of the limit of liability underlying each of the [Gulf] Policies by the payment of covered Loss." (R-2165-68.) This is consistent with the

exhaustion provisions, which "serve to insulate [the excess insurers] from liability until [the insured] has resolved its coverage dispute with the underlying insurer(s)." *TIAA-CREF,* 2017 WL 5197860 at *9.

Bear next contends that the statute allows interest against the excess insurers based on the *primary insurer's* failure to pay. Bear argues the statute requires only that it be deprived of money by *some* breach of contract, and that it need not be a breach by the party against which interest is awarded. Bear Brief at 58. But the statute allows interest only "*upon a sum awarded because of* a breach of performance of a contract …." CPLR § 5001(a) (emphasis supplied). Any "sum awarded" against an excess insurer would consist of its policy limits or some portion of them. Those limits cannot be awarded "because of" a breach of some other insurance contract to which the excess insurer is a stranger. They can only be awarded against the excess insurer "because of" a breach in its own performance under its own contract, specifically, a failure by to pay money due under *its* policy.

Finally, Bear argued below, and the lower court ruled (R-478), that it is unfair for excess insurers to benefit from a primary insurer's erroneous denial of coverage by deferring payment of the excess limits and avoiding interest. But this is not an equity matter and the court has no discretion to vary the timing of interest to accomplish an "equitable" result. *See* CPLR § 5001(a), (c); *Ayromlooi v. Staten*

Is. Univ. Hosp., 7 A.D.3d 475 (2d Dep't 2004) (breach of contract action is legal not equitable); *Walters Motorcars v. Mazda Motor of Am.*, 169 Misc. 2d 737, 740 (Sup. Ct. 1996) (court has no discretion to change the date from which interest is computed in non-equity action).

In any event, deferral of the payment obligation and the running of interest until the underlying insurers pay is not inequitable. It is what the parties agreed to. *See TIAA-CREF,* 2017 WL 5197860 at *7-8. Bear is a sophisticated insured, *see Vigilant,* 10 N.Y.3d at 178, and was aided by a major broker in the negotiation of these policies. If Bear did not want excess policies that pay only after the underlying insurer pays, Bear could have negotiated different language. *See, e.g., Olin,* 864 F.3d at 138. Bear's policies do not contain such language and it cannot call upon this Court to rewrite the contracts to insert it.

Prejudgment interest is a creature of statute. *Manufacturers & Traders Trust Co. v. Reliance Ins. Co.,* 8 N.Y.3d 583 (2007). The statute treats excess insurance policies like any other contract, allowing interest only from the date the contract says money is due. These "insurance contracts, like other agreements," must "be enforced as written …." *J.P. Morgan,* 21 N.Y.3d at 334.[13]

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[13] Bear and the lower court also relied on several cases that Bear did not cite here and that do not support its arguments. *Schwartz v. Liberty Mut. Ins. Co.,* 539 F.3d 135, 149 (2d Cir. 2008) (*see* R-436), applied a California statute to impose interest on excess insurers acted in bad faith by withholding consent to a settlement. There is no allegation of bad faith here, New York law applies, and *Schwartz* declined to decide "whether an excess insurer would begin to accrue

CONCLUSION

For the reasons stated here and in the Vigilant Brief, this Court should affirm the judgment and the ruling by the Appellate Division that Bear's payment of $140 million in "disgorgement" is not covered by the insurance policies at issue. That would render the issue of prejudgment interest moot, but even if the interest issue is not moot this Court should not address it in this appeal. To the extent necessary it first should be addressed below. If the Court does address prejudgment interest it should hold that the excess insurers are not obligated to pay interest because no amount is yet due under their policies, because the required exhaustion of underlying limits has not yet occurred.

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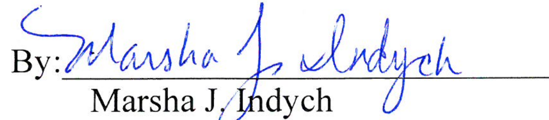
responsibility for prejudgment interest … prior to the exhaustion of underlying coverages …." *Id.* at 150. *Varda, Inc. v. Ins. Co. of N. Am.,* 45 F.3d 634, 640 (2d Cir. 1995), did not address exhaustion and held only that a provision that required payment 30 days after final judgment was ambiguous. The relevant language here is not ambiguous and Bear has not argued it is. *Granite Ridge Energy, LLC v. Allianz Global Risk,* 979 F. Supp. 2d 385 (S.D.N.Y. 2013), held prejudgment interest would not be deferred until the insured submitted a proof of loss because the insurer disclaimed coverage and thus waived the requirement. But as already noted, the exhaustion requirements are not conditions that require the insured to take some action to secure coverage, and a disclaimer of coverage, even if erroneous, does not alter the contractual provisions that govern when covered Loss must be paid.

Dated: August 19, 2020
New York, New York

Respectfully submitted,
FAEGRE DRINKER BIDDLE & REATH LLP

By: 

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NEW YORK STATE COURT OF APPEALS
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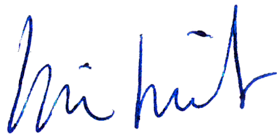

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