SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, Plaintiff, v. CANADIAN UNIVERSAL INSURANCE COMPANY, INC., et al., Defendants.	Case No.: BC005158 STATEMENT OF DECISION Phase IA Bench Trial Dept.: 7

On October 4 and 5 and November 1, 2, 4, 9, and 16, 2021, the Court conducted a bench trial of Phase IA of this bifurcated proceeding addressing whether Continental Casualty Company ("Continental") issued to Stauffer Chemical Co. ("Stauffer"), two excess insurance

policies naming Montrose Chemical Company ("Montrose") as an additional insured: (1) Policy No. RDX 9568040 ("8040"), effective August 3, 1961 - August 3, 1964 with policy limits of $4 million, in excess of $10 million in underlying coverage; and (2) Policy No. RDX9893626 ("3626") effective August 3, 1964 – January 1, 1965, with policy limits of $2 million, in excess of $10 million in underlying coverage. Neither side has the original or any photocopy of either policy.

Both sides have filed objections to the Court's [Proposed] Statement of Decision. Having read and considered the objections, the Court now issues its final Statement of Decision. As set forth below, the Court finds Montrose has successfully established the policies were issued under the terms alleged.

I. Montrose Has the Burden of Proving, by a Preponderance of the Evidence, that the Insurance Policies Were Issued and the Basic Terms of the Policies.

Montrose must prove Continental issued the two policies and "the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims." (*Dart Industries, Inc. v. Commercial Union Insurance Co*. (2002) 28 Cal.4th 1059, 1071 (*Dart II*).) In this case, the parties disagree as to the applicable standard of proof. Montrose, citing *Dart II*, argues the standard of proof is "preponderance" of the evidence. Continental, citing *Von Hasseln v. Von Hasseln* (1953) 122 Cal.App.2d 7, 12-13 (*Von Hasseln*) and the cases cited therein, argues the standard of proof is "clear and convincing" evidence.

The standard of proof in civil cases is "proof by a preponderance of evidence," except "as otherwise provided by law." (Evid. Code, § 115; *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1585 (*Ettefagh*).) "Law" includes "constitutional, statutory, or decisional law." (Evid. Code, § 160.) "Generally, a higher burden of proof applies only where particularly important individual interests or rights, which are more substantial than the loss of money, are at stake." (*People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, 37 [citing *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 365].) "While clear and

convincing evidence is occasionally required by caselaw, 'it remains an *alternative* to the standard of proof by preponderance of the evidence.'" (*Ettefagh,* at p. 1585.)

In *Dart II*, the Supreme Court expressly declined to determine whether "preponderance" or "clear and convincing" was the correct standard of proof. The Court of Appeal's adoption of the preponderance standard in an earlier appeal, *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2000) 92 Cal.Rptr.2d 174 (*Dart I*), made that standard the law of the case. (*Dart II, supra,* 28 Cal.4th at p. 1059, fn. 4.) The Court of Appeal in *Dart I* likewise had no reason to squarely decide the issue because Dart "failed to establish the terms and conditions of the lost policy by even a preponderance of the evidence." (*Dart I,* p. 179, fn. 5.) *Dart II* therefore provides no guidance on which standard of proof applies in this case.

The standard of proof "reflects the significance our society attaches to a given issue." (*Ettefagh, supra,* 150 Cal.App.4th at p. 1589 [citing *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 488 (*Weiner*)].) "When the preponderance of the evidence standard applies, the parties to an action share the risk of an erroneous determination more or less equally. [Citation.] 'Any other standard expresses a preference for one side's interests.'" (*Ettefagh,* at p. 1589; *Weiner,* at p. 488 [citing *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389].) In *Weiner,* the Supreme Court declined to apply a clear and convincing standard to prove formation of an oral partnership agreement. (*Weiner,* at p. 488.) It observed that "[p]roof by clear and convincing evidence is required" only if "'particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation"; the preponderance of evidence standard applies even to the imposition of "severe civil sanction[s]" such as disbarment and criminal prosecution because they "do not implicate such interests." (*Id.* at. pp. 487-488.)

The court applied the "preponderance" standard even though the *Weiner* defendant presented "a series of grave consequences" that he might suffer "from an erroneous determination that an oral joint venture or partnership agreement exists." (*Weiner, supra,* 54 Cal.3d at p. 488.) The Supreme Court replied that for each of the "serious consequences," an "equally serious" loss of rights might result to the plaintiff and there was no reason to tilt the "balance of interests" in favor of one party over the other. (*Ibid.*) Furthermore, "the serious

consequences flowing from a finding that a contract of any kind exists, be it oral or written, are not a sound basis for requiring a higher or lower burden of persuasion. While an oral contract may be easier to create than a written contract, and the precise terms of an oral contract may suffer from the faulty memories of the parties, *all* oral contracts suffer from these disabilities. We find no compelling reason to assign a higher burden of proof to partnerships or joint venture agreements than any other oral contract." (*Ibid.*)

Applying the reasoning of *Weiner*, the Court finds there are no important individual interests or rights justifying a heightened standard of proof in this case. Insurance policies are contracts and, consistent with *Weiner*, the "serious consequences flowing from a finding that a contract of any kind exists … are not a sound basis for requiring a higher or lower burden of persuasion." (*Weiner, supra,* 54 Cal.3d at p. 488.)

To support its argument in favor of a heightened standard of proof, Continental cites three very early Supreme Court cases: *Sherman v. Sandell* (1895) 106 Cal. 373, 375 (*Sherman*), *Bollinger v. Bollinger* (1908) 154 Cal. 695 (*Bollinger*), and *Harris v. Harris* (1902) 136 Cal. 379, 384 (*Harris*). All three are distinguishable because they involved an exception to the preponderance-of-the-evidence standard that does not apply here, namely, the standard of proof required to rebut the presumption that a holder of legal title to property also holds beneficial title. "The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing." (*Harris,* at p. 384; accord *Sherman,* at p. 375; *Bollinger,* at pp. 702-703.) This exception was eventually codified as Evidence Code section 662: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." (*Weiner, supra,* 54 Cal.3d at p. 486.) The section 662 exception, however, has nothing to do with the standard for proving lost contracts.

A later case, *Murray v. Guarantee Trust & Savings Bank* (1926) 79 Cal.App.69 (*Murray*), did not extend *Bollinger*, *Harris* and *Sherman* to all lost contracts. *Murray* was an action by Lucy Murray, the surviving wife of John Murray, to quiet title to property that John conveyed,

before he married Lucy, to his son by a former marriage. Lucy claimed John deeded the property to her several years before he died, but she could not find the unrecorded deed. Citing *Bollinger*, *Harris* and *Sherman*, the court wrote that "in order to establish the execution and contents of a lost instrument it is necessary that the evidence be clear, satisfactory, and convincing…." (*Id.* at p. 76.)

However, the fact the Lucy lost the deed was beside the point; the question was whether Lucy could defeat the son's claim to title, as acknowledged in the next sentence comparing Lucy's case to "actions to prove a trust by parol…." (*Ibid.*) Ultimately, *Murray* was not about lost instruments. It was about competing claims to title in line triggering the heightened standard addressed by *Sherman, Bollinger,* and *Harris.* And even if *Murray* arguably articulated a heightened standard for proving the contents of lost deeds, "this rule has not been extended to lost insurance policies. Indeed, a case decided shortly after *Murray* [*Clendenin v. Benson* (1931) 117 Cal.App. 674, 678], which did involve a lost insurance policy, made no mention of a heightened evidentiary burden." (*National American Ins. Co. of California v. Certain Underwriters at Lloyd's London* (9th Cir. 1996) 93 F.3d 529, 534, fn. 11.)

Von Hasseln also involved a lost deed. But like *Murray* it was, more importantly, a claim to title against a recorded titleholder. On his deathbed in 1950, the father of two brothers conveyed to one brother the title to a property. (*Von Hasseln, supra,* 122 Cal.App.2d at p. 8.) That brother recorded the deed. (*Ibid.*) The other brother then claimed that the father earlier conveyed the property to him (in 1942) via a deed that was not recorded. (*Ibid.*) While the court repeated the *Murray* dicta that purported to rely on *Bollinger*, *Harris* and *Sherman, Von Hasseln*, it is properly interpreted as requiring a heightened standard of proof to undermine the face of a recorded deed, not as establishing a new heightened standard for proving the contents of a lost contract. (*Id.* at p. 12.) And it was, in any event, superseded by the Supreme Court's decision in *Weiner*.

Continental's reliance on another early appellate decision, *Caine v. Brisco* (1926) 78 Cal.App 660 (*Caine*), is also misplaced. In that case, a real estate broker sued his client for nonpayment of a commission. (*Id.* at p. 662.) The client signed a contract promising to deliver

title to the buyer, but then refused to convey the property or pay the commission to the plaintiff. (*Ibid.*) According to the client-seller, the buyer signed a slip of paper agreeing the sale would not go through until the client-seller verified the buyer's financial wherewithal, but this paper was lost. (*Id.* at p. 667.) The buyer contradicted this testimony, testifying the slip of paper concerned the sale of furniture rather than any investigation of finances. (*Id.* at pp. 667-668.) The defendant appealed the trial court's ruling in favor of the plaintiff.

The appellate court found the defendant's evidence sorely lacking. It was "manifest, from the face of the record, that defendant failed to sustain" his burden of proving his affirmative defense, and that his testimony about the contents of the writing was "on its face [unsatisfactory]" and contradicted by the buyer's testimony. (*Caine, supra,* 78 Cal.App. at p. 668.) The court had no reason to address — and did not address — the standard of proof applied by the trial court, presumably because, regardless of the standard applied at trial, it was reviewing the record for sufficient evidence. "The question whether the defendant succeeded in sustaining the burden cast upon him … was, of course, one for the jury," and the jury's verdict "necessary implie[d] a finding" that the appellate court did not discuss or disturb. (*Id.* at pp. 669-670.)

The court did write that "where, as here, the contents of a lost or destroyed written document must be proved by parol testimony, thus placing sole reliance, for the support of an important issue, upon the frailties, or, as truly it may be said, the treachery of human memory, the burden of proving the fact necessarily carries with it more than the usual measure of responsibility." (*Caine, supra,* 78 Cal.App. at p. 669.) It also commented, without citation to any Supreme Court cases, that in general, "secondary proof of the contents of a written instrument imposing duties or obligations upon the parties thereto should be clear or not of doubtful character in probative worth." (*Ibid.*) These comments were dicta, however, not a holding that the terms of a lost contract must be proven by a standard higher than a preponderance of the evidence.

Importantly, the Legislature did not impose a heightened standard of proof to secondary evidence — that is, evidence offered to prove the contents of writings — when it later codified

the common law of evidence. Evidence Code Section 1521, subdivision (a) allows "the content of a writing [to] be proved by otherwise admissible secondary evidence" and empowers the Court to exclude such evidence if "a genuine dispute exists concerning the material terms of the writing and justice requires the exclusion" or admission of the secondary evidence "would be unfair." This language demonstrates the Legislature knew evidence offered to prove a writing's contents could be unreliable, but chose to address that concern by relying on the trial court's discretion to exclude secondary evidence, rather than by imposing a heightened standard of proof. The secondary-evidence rule in section 1521 contrasts with section 662, where the Legislature chose to require clear and convincing evidence to overcome the presumption that a party holding legal title is the beneficial owner of real property. The absence of a heightened standard of proof in the Evidence Code for secondary evidence offered to prove the content of a writing further persuades this Court that the preponderance standard applies in this case.

Applying the preponderance standard also makes policy sense because, as discussed in *Weiner*, there are no important individual rights or interests at stake in this case beyond alleged monetary loss. It makes further sense for the reasons explained in *Remington Arms Company v. Liberty Mutual Insurance Co.,* (D. Del. 1992) 810 F.Supp.1420 (*Remington*), where the District Court considered whether the Federal Rules of Evidence impose a heightened burden for proving the contents of a lost insurance policy. As in this case, the *Remington* plaintiff argued the standard was preponderance of the evidence whereas the defendant argued it was clear and convincing evidence. The court observed that every case on Wigmore's "exhaustive list" of cases applying the clear-and-convincing standard "involve[d] situations in which the danger of fraud is highly prevalent," such as lost wills or oral contracts. (*Id*. at p. 1425.) But lost insurance policies "are in no way analogously vulnerable to fraud because the nature of the documents used to prove the existence and contents of these policies is usually comprised of business records and standard forms made by and found in the possession of the party against whom they are being offered." (*Id*. at pp. 1425-1426.) Instead of a heightened standard of proof, the hearsay rules safeguard the reliability of the evidence. "The same rationale which permits this type of evidence a presumption of reliability in the face of the inherent danger of hearsay

[supports the conclusion] that the use of such evidence does not merit a requirement of a higher standard of proof." (*Id*. at p. 1426.) Accordingly, *Remington* applied the preponderance-of-the-evidence standard, noting there was "no allegation of fraud" and "[t]he only dispute [was] whether the evidence produced by plaintiff has been sufficient to carry plaintiff's burden of proof." (*Ibid*.)

Remington's reasoning is persuasive here because the parties have formally stipulated Continental does not assert that Montrose lost or destroyed either policy with fraudulent intent. (Stipulation of Facts and Law, ¶¶ 8-9.) Continental also makes no allegation of fraud as to Montrose's contention the policies were issued and contained certain terms. The concerns that a lesser standard would encourage the "evil practices which it was the object of the statute of frauds to prevent" and allow important issues to be decided based solely on "the frailties, or, as truly it may be said, the treachery of human memory" are not present here. (*Caine, supra,* 78 Cal. App. at p. 669.) Preponderance of the evidence is the correct standard to apply.

II. Montrose Proved the Existence and Terms of 3626 and 8040 By a Preponderance of Evidence.

The Court conducted extensive hearings, at trial, regarding the admissibility of trial exhibits and stated the basis for each of its rulings to admit or exclude evidence. All of these proceedings were on the record. The Court therefore declines to recount these rulings in this Statement of Decision.

The preponderance of evidence standard is defined as proof that a fact is "more likely to be true than not true" and described as evidence that outweighs the evidence on the other side in its effect on the trier of fact. (Evid. Code, § 115; *Environmental Law Foundation v. Beech-Nut Nutrition Corp*. (2015) 235 Cal.App.4th 307, 322.) Under either definition, the Court is persuaded Montrose has met its burden.

A. Montrose Proved Continental Issued 8040 and 3626 as Alleged.

To support its contentions, Montrose offered a panoply of evidence, some of which was persuasive and some of which was not. In deciding that Montrose successfully carried its burden of proof, the Court relied on the following evidence and disregarded the remainder.

1. Continental Conceded that 3626 Was Issued.

Continental's witness, Mr. Barriball, conceded 3626 was issued, answering "yes" to the question, "[I]s it fair to say that Continental issued an excess third-party liability policy to Stauffer with the policy number RDX-9893626, correct?" (Tr. 526:4-9.) That testimony from a highly credible witness was persuasive.

2. The Marsh & McLennan Invoices Provide Persuasive Evidence 8040 and 3626 Were Issued.

There is no dispute Marsh & McLennan ("MM") was Stauffer's insurance broker in the 1960s. The MM invoices (Exhs. 134-005 and 133-003) provide key evidence Continental issued both 8040 and 3626. Through the testimony of Ms. Mulrennan, Montrose established the invoices were retained in Stauffer's files until she retrieved them in the 1980s. The location of the invoices provides circumstantial evidence MM issued both invoices and delivered them to Stauffer. The "Marsh & McLennan" letterhead is circumstantial evidence MM was the source of the invoices.

Having admitted the MM invoices under the ancient-writings exception to the hearsay rule (Evid. Code § 1331), the Court accepts as true that MM billed Stauffer according to the terms stated in the invoices. The stated terms support Montrose's contentions. Both invoices identify the insured and the insurer because they are addressed to "STAUFFER CHEMICAL COMPANY" and name Continental ("CONTL CAS" or "CONT CAS") as the "INSURANCE COMPANY." Both contain an "INVOICE DATE" ("10/25/61" for 8040 and "9/08/64" for 3626) and specify a three-year term, stating the "MO. DAY YR" for the "EFFECTIVE" and "EXPIRATION" dates as "8 01 1" and "8 03 4" for 8040 and "8 03 4" and "8 03 7" for 3626. Both invoices also identify all seven digits of the alleged policy numbers and two of the three

letters, stating a "POLICY NUMBER" of "DX9568040" for 8040 and "DX9893626" for 3626 (identifying the prefix as DX instead of RDX.) Both invoices also identify a "PREMIUM" ("$8,000" for 8040 and "$4,000" for 3626.)

The invoices are evidence Continental issued the policies described in them. As Stauffer's broker, MM had every reason to bill (and collect its commission from) Stauffer for policies issued and no reason to bill Stauffer for insurance policies unless and until the policies were issued. The Court also found evidentiary value in Mr. Connolly's testimony that the premiums charged and the coverage supplied under each invoice were consistent. As Mr. Connolly pointed out, MM billed Stauffer $8,000 for $4 million in coverage under 8040 and $4,000 for $2 million in coverage under 3626, suggesting a consistent premium of $4,000 for every $2 million in coverage under both policies.

Montrose also offered a November 7, 1961 internal Stauffer memorandum ("interoffice correspondence") apparently authored by "W.H. Winans" a few weeks after the 8040 "INVOICE DATE" of MM 10/25/61. (Exh. 134-003.) The "subject" line of the memo is "Excess Umbrella Liability Insurance Continental Casualty Policy PX9568040 August 3, 1961 – 1964"; the body of the memo states, "Attached is bill in the amount of $8,000, representing premiums for the above captioned policy providing $4,000,000 Umbrella Excess Coverage of $10,000,000. Will you kindly pay this to Marsh & McLennan, New York, at your early convenience."

At trial, the Court accepted the memorandum as authentic and admitted it to lay a foundation for the 8040 invoice as an "ancient writing." "Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter." (Evid. Code, § 1331.) The Court found that the memo's request for payment per the MM invoice is evidence Stauffer "acted upon [the invoice] as true," allowing the Court to admit the statements contained in the invoice for the truth of the matters stated.

The memo's request for payment was itself probative and not inadmissible hearsay. "[B]ecause a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated." (*People v. Jurado* (2006) 38 Cal.4th 72, 117.) Thus, the memo's

request for payment — and particularly the request for payment "at your earliest convenience" — is admissible and also supports an inference Stauffer paid the invoice which, in turn, supports an inference the 8040 policy was issued.

The Court finds additional evidentiary value in the policy terms recited in the memorandum: "$4,000,000 Umbrella Excess Coverage of $10,000,000." While this recitation of terms is arguably hearsay because it makes an assertion of fact, it has non-hearsay evidentiary value to the extent it corroborates other admitted evidence such as the MM invoice and the Royal Globe policy (see Section II(A)(3) below). The fact the terms identified in the memorandum and in the Royal Globe policy are identical circumstantially supports Montrose's contention that such a policy was issued.

Continental provided no evidence MM withdrew the invoices or that Stauffer did not pay them. Given the undisputed testimony Continental had a seven-year document destruction program in place in the 1960s, its inability to find copies of the policies creates no inference they were or were not issued. The Court likewise draws no inference from the fact that Montrose and Stauffer could not find the original policies or any copies of them. Neither the long lapse of time — over fifty years after 3626's policy period ended — nor Kelly's testimony he "[does] not know "whether [Stauffer] actually had a document retention policy but understood, assumed and expected it had such a policy and would have held on to copies of insurance policies supports an inference the policies were or were not issued. (Tr. 180 – 183.)

The Court also draws no inference from Montrose's last-minute production of readable copies of the MM invoices after failing to identify them in its earlier Interrogatory Answers. Mr. Gardiner and Mr. Kelly testified they were not aware of the invoices until Stauffer's successor, Astrazeneca, produced them in response to a trial subpoena. The Court accepts this testimony because the witnesses were credible and because, throughout the litigation, Montrose had every incentive to find evidence supporting its claims and had no incentive to withhold it.

The Court acknowledges Continental's strong objection to Montrose's late production of the MM invoices and related documents. However, exclusion of evidence is a relatively extreme remedy for late compliance with discovery especially where, as here, there is no evidence of

willful or repeated violations. If Continental was surprised[1] by the late production, its remedy was to move to continue the trial and reopen discovery. Although the Court offered to allow Continental additional time (TR. 21:7-9.), Continental did not take up this offer, apparently preferring to argue for exclusion under the Secondary Evidence Rule, Evidence Code § 1521(a). The Court finds no unfairness or other basis for excluding the documents under the Secondary Evidence Rule. Under the circumstances of this case, it would be an abuse of discretion to exclude the documents.

3. The Royal Globe Policy Provides Persuasive Evidence 8040 Was Issued.

Continental offered no evidence Royal Globe did not issue the overlying excess policy admitted as Exhibit 105. The "Underlying Limits" provision in the Royal Globe policy provides persuasive evidence Continental issued 8040. While it is somewhat difficult to read the photocopy, the Court understands Section II, "Underlying Limits," to state the following:

> $4,000,000 each accident or occurrence – Combined Single Limit bodily Injury and/or Property Damage insured by the Continental Casualty Company Policy RDX 9568040 8/3/61- 8/3/64 IN EXCESS OF $10,000,000 . . . issued by the Lloyds and British Companies Policies . . .IN EXCESS OF [General Liability policy issued by Insurance Co. of North America] . . . and renewals thereof….

(Exh. 105-004.) This clause provides persuasive evidence both that Continental issued 8040 and that it contained the described terms. It identifies all ten letters and digits in the complete 8040 policy number including the RDX prefix, and the dates are consistent with the MM 8040 invoice.

The Court accepts Mr. Connolly's expert testimony that, in the insurance industry, excess insurers like Royal Globe write policies that carefully identify the underlying insurer and the terms and limits of the underlying coverage. These are critical facts for the insured and for the overlying insurer because they memorialize the parties' agreement and reliance on the fact that the insured has secured underlying coverage with specified limits that must be exhausted before the overlying insurer's duties are triggered. The identity of the underlying carrier is important

[1] Montrose produced largely illegible copies of the M&M invoices long before trial, putting Continental on notice the invoices existed. The late-produced invoices appear to be clearer copies of the same documents.

because the overlying insurer needs to know the insured has adequate underlying coverage in place. If the underlying carrier cannot competently service its policy or lacks the financial wherewithal to responsibly defend and pay out as necessary, the overlying insurer may be on the hook. For all of these reasons, the Court finds Exhibit 105 to be highly persuasive as to the existence of 8040 and its terms.

4. The Form Policy Provides Persuasive Evidence of the Terms of 8040 and 3626.

There is persuasive circumstantial evidence 3626 and 8040 were issued on Continental's standard form. (Exh. 108.) Mr. Barriball testified that "RDX" — the prefix for the policy number that appears on the form — was Continental's standard prefix for excess third-party coverage policies. He identified Exhibit 108 as a Continental form policy for such coverage used in the 1960s. He also testified he was not aware of any modifications to the form or of any other forms used. Montrose's expert, Mr. Connolly, testified that form policies were very much the norm for excess policies in the 1960s and there was essentially no market for manuscript policies.

This testimony and the fact that Continental used its standard form for Policy No. RDX9896954 (Exh. 109-006) ("6954") — the policy covering the three-year period after 3626 — supports an inference Continental would have used the same form for 8040 and 3626.

5. Policy 6954 Provides Persuasive Evidence Continental Issued 3626.

The parties stipulated that Continental issued 6954 as of January 1, 1965. (Exh. 109.) The first page of the policy identifies the complete policy number for 3626 in a box at the top of the page. On the standard form, that box is labeled "renewal or replacement no." (Exhs. 109, 108.) Mr. Barriball explained that, as the form was used at Continental, the 3626 policy number in this box meant that 6954 was a replacement policy for 3626. This makes sense because January 1, 1965, the inception date for 6954, was only 5 months into 3626's three-year term; based on the inception date, Policy 6954 could not have been a "renewal" or a "new" policy. The fact that the two policy numbers (RDX9896954 and RDX9898040) have the same "RDX"

prefix and the same first three digits (989) is also circumstantial evidence supporting Montrose's contentions.

Continental's identification of 3626 as the policy replaced by 6954 is persuasive evidence 3626 was issued and, like 6954, was issued in the standard form.

6. The Employers' Policy Adds to Montrose's Evidence.

The Employers Liability Assurance Corporation ("Employers") issued a follow-form policy on August 28, 1964, agreeing that "subject to all the terms and conditions of Policy No. RDX9893626 issued by Continental Casualty," it would provide excess umbrella liability coverage to Stauffer of $3 million excess of $12 million. (Exh. 107-1.) As noted above, the underlying insurer and specified exhaustion point are critical terms in excess policies. The fact that the Employers policy refers to 3626 and was issued for August 3, 1964 to January 1, 1968 — the same inception date as 3626 — is persuasive evidence Continental issued 3626 and that it underlay the Employers policy.

7. That 3626 and 8040 Filled Gaps in Stauffer's Coverage Towers Is Circumstantial Evidence Supporting Montrose's Contentions.

As Mr. Connolly explained, large companies like Stauffer engaged brokers like MM to build and maintain towers of primary and excess coverage with no gaps. Evidence that the policy periods and terms of coverage for 3626 and 8040 filled a gap in the towers for the applicable years is additional circumstantial evidence the policies were issued.

B. Continental Failed to Present Any Rebuttal Evidence.

Continental offered no affirmative evidence rebutting Montrose's proof that Continental issued 8040 and 3626. It did not, for example, offer evidence 8040 or 3626 was cancelled or rescinded. Nor did it offer evidence another insurer provided equivalent excess coverage for the same periods. Continental's defense primarily raised questions about the admissibility, weight, and reliability of Montrose's evidence. Notwithstanding Continental's attacks on Montrose's

evidence, the Court finds that Montrose established its contentions by a preponderance of the evidence.

III. The Court Declines to Interpret the Form Policy at this Stage in the Proceedings

In its Objection, Continental argues Montrose failed to prove a material term of the policies, i.e., whether the policy limits provisions apply "per occurrence" or "per accident." Continental also urges the Court to find that policy limits applied on an "accident" rather than an "occurrence" basis. As noted above, the Court finds that 8040 and 3626 included the same terms as the form policy (Exhibit 108) which identifies policy limits for "each accident or occurrence." The Court finds that the meaning of "each accident or occurrence" is a question of contract interpretation that is not at issue in this Phase IA trial.

III. Conclusion

The Court finds the weight of the evidence favors Montrose and that Montrose's contention Continental issued 8040 and 3626 is more likely true than not true. Specifically, the Court finds (1) Continental issued Policy No. 8040 to Stauffer for a policy period of August 3, 1961 – August 3, 1964, with $4 million policy limits, attachment point $10 million (excess of primary limits), and the other terms stated in Exhibit 108; and (2) Continental issued Policy No. 3626 to Stauffer for a policy period of August 3, 1964 – August 3, 1967, with $2 million policy limits, attachment point $10 million, and the other terms stated in Exhibit 108; the Court further finds that Continental replaced 3626 with 6954 issued January 1, 1965.

Dated: _____ _____

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT