IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

OPIOID MASTER DISBURSEMENT TRUST II, A/K/A OPIOID MDT II, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, ET AL., Defendants.	Case No. 22SL-CC02974 Division 2

PLAINTIFF'S OPPOSITION TO
ACE AND ASPEN JOINDERS TO CERTAIN UK INSURERS' MOTION TO DISMISS
FIRST AMENDED PETITION FOR DECLARATORY RELIEF

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Plaintiff, the Opioid Master Disbursement Trust II, also known as the Opioid MDT II (the "Trust"), for its Opposition to Joinders of Defendants ACE American Insurance Company and ACE Property & Casualty Insurance Company (together, "ACE") and Aspen Insurance UK, Ltd. ("Aspen") (collectively, "Moving Insurers") to Certain UK Insurers' Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief (the "ACE and Aspen Motions" or the "Motions")[1] states as follows:

As an initial matter, the ACE and Aspen Motions, while styled joinders to "motions to dismiss," do not, in fact, call for the dismissal of either ACE or Aspen from the case. The ACE and Aspen Motions address only *some* of the Moving Insurers' policies in this action, and both Defendants will remain in the case regardless of this Court's ruling here.

As to the merits, the ACE and Aspen Motions fail as a matter of law. ACE and Aspen contend that certain of their policies (respectively, the "ACE Policies" and the "Aspen Policies") "follow form" to—that is, incorporate by reference—forum selection endorsements in certain underlying policies issued by HDI-Gerling Industrial Insurance Company ("HDI" and the "HDI Policies").[2] They contend further that because those endorsements mandate the courts of England and Wales retain exclusive jurisdiction to litigate any disputes under the HDI policies, their policies incorporate that requirement as well. Therefore, they contend, this lawsuit must be dismissed as to those policies.

[1] Certain UK Insurers' Motion to Dismiss (hereinafter "Motion to Dismiss") asserts that, under forum selection provisions in their policies, any coverage disputes must be litigated in the courts of England or Wales. For reasons set forth in the Trust's opposition to that motion, the jurisdictional provisions are permissive rather than mandatory and exclusive, and therefore the Trust's choice of a Missouri forum for this litigation should not be disturbed. If the Court denies Certain UK Insurers' Motion to Dismiss, it follows that it must deny ACE's and Aspen's joinders to that motion as well. In that event, the Court need not reach the threshold issue posed by the ACE and Aspen Motions, which is whether the ACE and Aspen policies at issue follow form to (that is, incorporate by reference) the forum selection provisions in Certain UK Insurers' policies.

[2] ACE and Aspen each allege that certain of their policies follow form to HDI Policies Nos. B0509DY062911 & B0509DR539912. *See, e.g.*, ACE Mot. at 2 n.1; Aspen Mot. at 2.

ACE and Aspen are wrong on each point. First, while their policies do contain follow-form provisions, those provisions apply only to substantive coverage terms, not to procedural provisions such as forum selection clauses. This conclusion is supported by the plain language of the follow-form provisions, which refer to substantive coverage provisions, but not procedural or forum selection provisions. It also is supported by the fact that the ACE Policies contain provisions titled "LEGAL ACTIONS AGAINST US," which is where an insured reasonably would expect to see forum selection provisions, but which are silent on forum.

Second, a number of ACE and Aspen policies, not subject to the Motion to Dismiss, follow form to underlying policies that do not contain forum selection clauses at all,[3] which renders hollow ACE's and Aspen's contention that their policies must be litigated in England or Wales. Were that the case, all of the ACE and Aspen policies would follow form to policies with mandatory, exclusive forum selection clauses, and the follow-form provisions would make clear that they follow such provisions. But they do not.

Third, while ACE and Aspen cite to a small number of U.S. cases, none of the cases are from Missouri or apply Missouri law, and none of them actually hold that follow-form provisions comparable to those in the ACE and Aspen policies follow form on forum selection. Moreover, while ACE and Aspen contend that English law[4] applies to the construction of their policies, they tellingly do not cite a single case from England or Wales in support of their position. Indeed, English law is contrary to their position. Specifically, under English law, follow-form provisions

[3] In addition to the four excess policies brought to issue by their Motions (two excess policies per insurer), ACE and Aspen each issued *additional* policies (4 policies by ACE and 3 policies by Aspen) that have been named in the Trust's petition. *See* Ex. A to First Am. Pet. For Declaratory Relief ("FAP") (ACE Policies: G23883983, G23891839, G24902444, G25828537; Aspen Policies: K0A0DKT08A0E, K0A0DKT09A0E, K0A0DKT10A0E). These policies contain follow-form provisions, but the policies they follow do not contain forum selection clauses, and ACE and Aspen have not contested this Court's jurisdiction over these policies. (National Union Policy 15972632 (which does not contain a forum selection clause)). Therefore, ACE and Aspen will remain parties to this action regardless of the resolution of the Motions to Dismiss.

[4] For convenience, English and Welsh law shall be referred to collectively as "English law."

such as those in the ACE and Aspen policies follow form on substantive coverage only, not on forum selection clauses.

Fourth, even if the follow-form provisions were deemed not to be clearly limited to substantive coverage provisions, they would be, at best for Moving Insurers, ambiguous and, therefore, must be construed against them under standard rules of insurance contract construction. Had ACE and Aspen desired to limit jurisdiction to England and Wales, they were required to do so using clear and unambiguous language. An insured is not required to divine from a follow-form provision referring to substantive coverage that the provision also selects the forum for litigation against the insurer. Had ACE and Aspen intended their policies to mandate exclusive jurisdiction in England or Wales, they were obligated to state clearly that they follow form to exclusive, mandatory forum selection provisions in the followed policies. Or more to the point, they should have included provisions mandating exclusive jurisdiction in England or Wales in their policies themselves. But the Moving Insurers did none of these things.

* * *

But even if the ACE and Aspen Policies' follow-form provisions did incorporate the forum selection provisions in the HDI Policies, the ACE and Aspen Motions would fail. That is because the forum selection provisions in the followed HDI Policies are permissive, not mandatory and exclusive. They merely *allow* jurisdiction in the courts of England and Wales, but they do not preclude jurisdiction elsewhere, including in Missouri. Thus, jurisdiction in this Court is perfectly appropriate, and the Trust's selection of this forum, as the Plaintiff in this action, should not be disturbed.

For all these reasons, ACE's and Aspen's Motions to Dismiss must be denied.

FACTUAL BACKGROUND

This Opposition hereby incorporates by reference the entirety of the factual background section in the Trust's Opposition to Certain UK Insurers' Motion to Dismiss First Amended Petition for Declaratory Relief (the "Trust's Opposition to Certain UK Insurers' Motion to Dismiss"). In addition, the Trust states as follows:[5]

ACE issued two excess liability policies, Nos. G25834537 and G27048183, each with $10 million in policy limits and with policy periods from November 15, 2011 to November 15, 2012 and from November 15, 2012 to November 15, 2013, respectively. ACE Policies at 1. The policies were issued to Covidien plc, with an address listing its place of business as Mansfield, Massachusetts. *Id*. Aspen issued two excess liability policies, Nos. K0A0DKT11A0E and K0A0DKT12A0E, each with $25 million in policy limits and with policy periods of November 15, 2011 to November 15, 2012 and November 15, 2012 to November 15, 2013, respectively. Aspen Policies at 2, 12. The policies were issued to Covidien plc, with an address listing its place of business as Dublin, Ireland. *Id.* At the times the ACE and Aspen policies were issued to Covidien plc, it was the holding company of Mallinckrodt, whose opioid pharmaceutical business, the business that gave rise to Mallinckrodt's massive opioid liability for which the Trust is seeking coverage in this action, was centered in Missouri.[6]

More particularly, during the policy periods of the ACE and Aspen Policies, Mallinckrodt had its principal place of business in Missouri, where it was involved in the development,

[5] The ACE Policies were attached to the ACE Motion as separate exhibits (Exhibits A & B); the Aspen Policies were attached to the Aspen Motion as a single exhibit (Group Exhibit A). All citations to the ACE Policies and Aspen Policies made herein refer to these attached exhibits. As the ACE Policies are substantially similar, and each policy was attached as a separate exhibit, pinpoint citations to the ACE Policies refer to the same page number on each separate ACE policy exhibit, even though only one pinpoint citation is provided. In contrast, the Aspen Policies were attached as a single exhibit, requiring two pinpoint citations for each citation to the Aspen Policies to include references to both policies.

[6] "Mallinckrodt" refers to Mallinckrodt plc and certain related debtor entities of the Chapter 11 Bankruptcy case, captioned *In re: Mallinckrodt plc*, No. 20-12552 (JTD) (Bankr. D. Del.).

manufacture, marketing, promotion, and sale of opioid pharmaceuticals. FAP ¶¶ 2, 84–92. As discussed in the Trust's Opposition to Certain UK Insurers' Motion to Dismiss, the Trust was established, pursuant to the Fourth Amended Plan of Reorganization of Mallinckrodt plc and certain related debtor entities, for the benefit of individuals and entities harmed by Mallinckrodt's role in creating, perpetuating, and contributing to the nationwide opioid crisis.

The ACE Policies state, in part:

> SECTION I. INSURING AGREEMENTS
>
> A. COVERAGE
>
> We will pay, on your behalf, "loss" arising out of an "occurrence" but only after all "underlying insurance" has been exhausted by the payment of the limits of such insurance for covered injury or damage that takes place during our policy period. If "underlying insurance" does not pay a "loss" for reasons other than the exhaustion of an aggregate limit of insurance, than we will not pay such "loss."
>
> The definitions, terms, conditions, limitations and exclusions of the first policy of "underlying insurance" in effect at the inception date of this policy (as identified in the Declarations), apply to this coverage unless they are inconsistent with provisions of this policy or relate to premium, subrogation, any obligation to defend, the payment of expenses, amounts of limits of insurance, cancellation or any renewal agreement.

ACE Policies at 4. The Aspen Policies state, in part:

> INSURING AGREEMENT
>
> This policy shall provide the Insured with Excess Insurance coverage in accordance with the same warranties, terms, conditions, exclusions and limitations as are contained in the Followed Policy(ies) set forth in Item 8 above and as attached on the inception date of this Policy, subject always to the premium, limits of liability, policy period, warranties, exclusions, limitations and any other terms and conditions of this Policy including any and all endorsements attached hereto which may be inconsistent with the Followed Policy.

Aspen Policies at 5, 15.

However the Court decides their Motions to Dismiss, ACE and Aspen will remain Defendants to this litigation, as each issued excess policies that Defendants themselves recognize

are not at issue in the Motion. *See* ACE Mot. at 3, n.2; Aspen Mot. at 1–2. That is because those policies follow form to National Union policies that do not contain forum selection provisions, and do not contain forum selection provisions of their own. The follow-form provisions in the ACE and Aspen Policies not at issue in the Motion are identical in all material respects to the follow-form provisions in the ACE and Aspen policies at issue in the Motion.

LEGAL STANDARDS

The movant has the burden on a motion to dismiss. *State ex inf. Riederer ex rel. Pershing Square Redevelopment Corp. v. Collins*, 799 S.W.2d 644, 651 (Mo. Ct. App. 1990). When reviewing a motion to dismiss, the Court should assume as true all facts alleged in a complaint, and liberally grant the non-movant all reasonable inferences deduced from the facts to determine the sufficiency of the pleadings. *Scott v. Tutor Time Child Care Sys., Inc.*, 33 S.W.3d 679, 682 (Mo. Ct. App. 2000).

"This court interprets insurance contracts by applying general rules of contract interpretation." *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 784 (Mo. Ct. App. 2013) (citing *Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 160 (Mo. banc 2007)). "The key is whether the contract language is ambiguous or unambiguous." *Id.* (quoting *Todd*, 223 S.W.3d at 160) (internal quotations omitted). "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010) (quoting *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007)).

"Words or phrases in an insurance contract must be interpreted by the court in the context of the policy as a whole and are not to be considered in isolation." *Miller*, 400 S.W.3d at 784 (quoting *Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 399 (Mo. Ct. App.1993)) (internal quotations omitted). "Absent an ambiguity, an insurance policy must be

enforced according to its terms. If, however, 'policy language is ambiguous, it must be construed against the insurer.'" *Seeck*, 212 S.W.3d at 132 (quoting *Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810, 814 (Mo. banc 1997)). "This rule, often referred to as the doctrine of '*contra proferentem*,' is applied 'more rigorously in insurance contracts than in other contracts' in Missouri." *Burns*, 303 S.W.3d at 509 (quoting *Mansion Hills Condo. Assoc. v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 637 (Mo. Ct. App. 2001)).

ARGUMENT

I. The ACE and Aspen Follow-Form Provisions Do Not Incorporate the Forum Selection Provisions of the HDI Policies.

A. Under the Plain Language of the ACE and Aspen Policies, the Follow-Form Provisions Do Not Incorporate Forum Selection Provisions.

The ACE and Aspen Policies contain provisions titled "COVERAGE" and "INSURING AGREEMENT," respectively. ACE Policies at 4; Aspen Policies at 5, 15. The ACE "COVERAGE" provision states, in relevant part, that the "definitions, terms, conditions, and limitations and exclusions of . . . 'underlying insurance' . . . apply to this ***coverage***." ACE Policies at 4 (emphasis added). The Aspen "INSURING AGREEMENT" provision states, in relevant part, that "[t]his policy shall provide the Insured with Excess Insurance ***coverage*** in accordance with the same warranties, terms, conditions, exclusions and limitations as are contained in the Followed Policy(ies)." Aspen Policies at 5, 15 (emphasis added). By referring to "COVERAGE" (or "coverage") and the "INSURING AGREEMENT," these provisions indicate to the insured that they deal with substantive coverage or the insurance provided by the policies, not the process of dispute resolution with respect to the policies.

Indeed, the ACE Policies have a separate section titled "LEGAL ACTION AGAINST US." ACE Policies at 8. A reasonable insured would view that provision as the place where the insurer would notify it of a purported forum selection requirement, not a follow-form provision embedded

in a "COVERAGE" portion of a policy that is silent on legal actions, and purportedly requires reference to another policy to determine where legal actions must be brought. And the silence of the "LEGAL ACTION AGAINST US" section on choice of forum would indicate to the reasonable insured that the policy does not impose any limitation on the insured's choice of forum for a legal action against the insurer. As noted above, language in an insurance policy must be construed in the context of the policy as a whole, and the existence of the "LEGAL ACTION AGAINST US" provision in the ACE policy undercuts ACE's (and Aspen's) contention that a follow-form provision that is silent regarding procedural or forum selection issues incorporates a provision in an underlying policy addressing the forum for actions against the insurer.

Although the Aspen policy does not have a separate provision on legal actions against the insurer, the ACE provision demonstrates that follow-form language that is silent on forum selection is not understood by insurers to be the place where legal actions against the insurer, including limitations on forum, are addressed.

The follow-form provisions also include exceptions. Each exception relates to substantive issues affecting the extent of the insurance coverage. ACE Policies at 4 ("unless they are inconsistent with provisions of this policy or relate to premium, subrogation, any obligation to defend, the payment of expenses, amounts of limits of Insurance, cancellation or any renewal agreement."); Aspen Policies at 5, 15 ("subject always to the premium, limits of liability, policy period, warranties, exclusions, limitations and other terms and conditions of this Policy."). The foregoing exceptions do not relate to the HDI Policies' procedural terms. They relate to the substantive aspects of the insurance agreement between the Moving Insurers and the insured—what is received and what is given.

The follow-form provisions' focus on coverage, together with the substantive follow-form exceptions, communicate to the insured that the scope of coverage of the ACE and Aspen policies is the same as the followed HDI Policies—that is, that they are intended to incorporate the *substantive coverage* provisions of the underlying policy, not any procedural provisions, which are not coverage provisions. *See* Dicey, Morris & Collins, The Conflict of Laws ¶ 12-080 (16th ed. 2022) 1 *Cal. Liability Insurance Practice: Claims & Litigation* § 1.5.2 ("An excess policy generally follows the form of the underlying primary coverage and is called 'following form' excess coverage, *i.e.*, the excess has the *same scope of coverage* as the primary policy.") (emphasis added).

B. Moving Insurers' Position Is Inconsistent with the Fact That Certain of Their Policies Follow Form to Underlying Policies Without Forum Selection Clauses.

A number of ACE and Aspen policies, not subject to the Motion to Dismiss, follow form to underlying policies that do not contain forum selection clauses at all, which renders hollow ACE's and Aspen's contention that their policies must be litigated in England or Wales. Had that been the case, all of the ACE and Aspen policies would have followed form to policies with mandatory, exclusive forum selection clauses, and the follow-form provisions would have made clear that they followed such provisions. Or more to the point, ACE and Aspen would have included mandatory, exclusive forum selection provisions in their policies themselves to make their intention in this regard clear. But they did none of these things. It simply makes no sense for ACE and Aspen to contend that some of their policies must be litigated in England or Wales, but other policies covering the same risks may be litigated in any other appropriate forum.

C. Moving Insurers' Out-Of-State Cases Do Not Support the Insurers' Position That Coverage-Focused Follow-Form Provisions Incorporate Forum Selection Provisions.

None of the cases cited by the Moving Insurers—not one of which is from Missouri[7]—address the precise issue here: whether follow-form provisions incorporate more than underlying substantive coverage obligations, such as a forum selection provision, when the follow-form language focuses on "coverage," and is silent on legal actions generally or forum in particular. Not one of ACE's and Aspen's cases holds that, or even analyzes whether, a forum selection provision is incorporated by a boilerplate follow-form coverage provision that does not clearly and explicitly apply to jurisdiction. The Moving Insurers' Motions do not explain why provisions pertaining to "coverage" that mention only *substantive* coverage provisions of the underlying HDI Policies should also be read to reach *procedural* provisions. They do not acknowledge or grapple with the obvious significance of the "LEGAL ACTIONS AGAINST US" section of the ACE policy at all.

In two of the five cases cited by the Moving Insurers, *Home Insurance Co. of Illinois (New Hampshire) v. Spectrum Information Technologies, Inc.*, 930 F. Supp. 825 (E.D.N.Y. 1996) and *AT & T v. Clarendon America Ins. Co.*, No. CIV.A.04C-11-167-JRJ, 2008 WL 2583007 (Del. Super. Ct. Feb. 11, 2008), the parties disputed the substantive issue of choice of law rather than a procedural issue, such as choice of forum. Moreover, in *Home* the parties did not even dispute the correct choice of law, and in *AT & T* the choice of law issue was in certain respects uncontested, as the court's decision that New York law applied to multiple excess policies was based primarily

[7] *C.B. Fleet Co. v. Aspen Ins. UK Ltd.*, 743 F. Supp. 2d 575 (W.D. Va. 2010); *AT & T v. Clarendon Am. Ins. Co.*, No. 04C-11-167-JRJ, 2008 WL 2583007 (Del. Super. Ct. Feb. 11, 2008); *Boeing Co. v. Agric. Ins. Co.*, No. C05-921C, 2005 WL 2276770 (W.D. Wash. Sept. 19, 2005); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001); *Home Ins. Co. of Illinois (New Hampshire) v. Spectrum Info. Techs., Inc.*, 930 F. Supp. 825 (E.D.N.Y. 1996).

on the insured's concession that the law of a single state must be applied to all policies at issue. *Home Ins. Co.*, 930 F. Supp. at 835 n. 9 ("The parties do not contest the applicability of New York law."); *AT & T*, 2008 WL 2583007, at *6 ("AT & T concedes that the law of a single state must be applied to the entire 1997 AT & T Program. Thus, the Court agrees with National Union that even though the ACE 4th excess policy sits above its policy (and thus cannot 'follow form'), the National Union Policy should be governed by New York law for consistency purposes."). There is simply no analogy to be made to this matter, where the Court is asked to consider, in a contested motion, whether a procedural forum selection provision is incorporated by a coverage-focused follow-form provision.

In the Moving Insurers' three remaining cases, *C.B. Fleet Co. v. Aspen Insurance UK Ltd.*, 743 F. Supp. 2d 575 (W.D. Va. 2010), *Boeing Co. v. Agricultural Insurance Co.*, No. C05-921C, 2005 WL 2276770 (W.D. Wash. Sept. 19, 2005), and *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587 (7th Cir. 2001), each court emphasized that the relevant insurer either had distinct knowledge of the underlying arbitration provisions at issue or expressly referenced the underlying arbitration provision in its excess policy, such that the parties' intent to arbitrate could not reasonably be disputed. In *C.B. Fleet*, the court found that an underlying arbitration provision was incorporated into an excess policy, but only after noting that the excess insurer's underwriter testified that she was cognizant while underwriting the excess policy that the underlying policy was governed by an arbitration provision, and that the parties exchanged multiple drafts of the underlying policy—each of which included the arbitration provision. 743 F. Supp. 2d at 579–580. The court remarked that "[t]he arbitration agreement was a term of the underlying Swiss Re policy, and *specifically a term about which Fleet and Aspen were on notice*, and has access to, before the issuance of the Aspen Insurance Binder." *Id.* at 584 (emphasis added). There is no suggestion in

the Petition, let alone the Motions, that there was any negotiation concerning or notice of the ostensibly incorporated HDI forum selection provision. Likewise, in *Boeing*, the court stated that each party to the contract at issue "knew of and expressly incorporated the arbitration provision" that the contract's follow-form provision was found to capture. 2005 WL 2276770, at *7. Once again, there is no indication here that the insurers or the insureds had knowledge of—let alone expressly incorporated—the forum selection provision under which the insurers now seek refuge. Finally, in *Sphere* the follow-form contract at issue explicitly referenced an "Arbitration Contract" that was to be governed by the "law and jurisdiction of the state of Illinois." 256 F.3d at 589. The ACE and Aspen Policies do not contain any language approaching the clarity and specificity concerning a supposed choice of forum as the language analyzed in *Sphere*. Further, rather than a forum selection provision, these three cases concern an arbitration clause, where the Federal Arbitration Act puts a heavy thumb on the scale in favor of arbitrability, even where there are doubts as to the meaning of a contract. *See Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W.3d 480, 483 (Mo. Ct. App. 2004) ("FAA favors arbitrability in the face of any doubts concerning the scope of arbitrable issues.").

In other words, the cases cited by ACE and Aspen—none of which concerns the choice of forum—do not stand for the proposition that an excess insurance policy's follow-form provision whose language speaks only to issues of insurance "coverage" also incorporates the forum selection provision of the followed policy. Because neither party has identified a single Missouri case that creates a bright line rule for this Court to follow, the Court should apply Missouri's rules of contract construction. Those rules hold that the plain language of the insurance contract must be interpreted "in the context of the policy as a whole . . . " *Miller*, 400 S.W.3d at 784. "Words or phrases in an insurance contract . . . are not to be considered in isolation." *Id.* Here, the only

contextually sensible reading of the ACE and Aspen Policies is that their follow-form provisions were focused on matters of coverage. There is no indication that the follow-form provisions are meant to reach procedural matters like jurisdiction.[8]

D. Even if the Follow-Form Provisions Were Deemed Not to Be Clearly Limited to Substantive Coverage Provisions, at Best for Moving Insurers They Would Be Ambiguous and Therefore Must Be Construed Against Them.

While the Trust believes that the follow-form provisions are clearly limited to substantive coverage provisions and do not apply to procedural matters such as the proper forum to resolve

[8] The Moving Insurers' Motions make passing reference to that portion of the HDI Policies' forum selection provision that relates to the choice of law to be applied in construing the Moving Insurers' policies, and contend that English law applies to their policies. *See, e.g.*, ACE Mot. 1; Aspen Mot. 1, 6. The Trust does not concede that English law applies. But it is telling that Moving Insurers do not provide a single citation to English law. Indeed, English law is contrary to their position. It holds generally that "general words of incorporation" like those in the Moving Insurers' policies do not capture procedural provisions like the forum selection clauses in the HDI Policies. *See, e.g.*, *Siboti K/S v. BP France SA* [2003] EWHC 1278 (Comm) (U.K.) ("'General words of incorporation' are to be distinguished from wording making a specific reference to a particular charterparty provision (for example, a charterparty arbitration clause). Accordingly, even comparatively wide wording such as 'all terms, conditions and exceptions as per charterparty' constitute 'general words of incorporation' for these purposes.").
Here, the ACE policies incorporate the "definitions, terms, conditions, limitations, and exclusions" of the primary policies, and the Aspen policies incorporate the "warranties, terms, conditions, exclusions and limitations" of the primary policies. As a forum selection provision is plainly not a "definition," a "limitation," or an "exclusion," the question of incorporation turns on whether the forum selection provision is a "term" or "condition" of the policy. English and Welsh courts have consistently held that general wording of exactly this sort is not effective to incorporate a jurisdictional or arbitration provision from one contract into a separate contract involving different parties (even if there is some overlap between the parties). *See* Dicey, Morris & Collins, The Conflict of Laws ¶ 12-080 (16th ed. 2022) ("the usual rule . . . extended to insurance . . . is that general words of incorporation of one set of provisions from another contract will not incorporate an arbitration or jurisdiction clause from the first contract."); *Pine Top Insurance Co Ltd v. Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476, 480 (U.K.) (finding that general language of incorporation provided only that "the risk undertaken by reinsurers was identical, as to period, geographical limits and nature of the risk, with the risk undertaken by the primary insurers"); *Excess Insurance Co Ltd v. Mander* [1995] CLC 838, 845 (U.K.) ("[T]he courts impute to the parties to the bill of lading contract a mutual intention by their use of general words of incorporation to write into their contract only the corresponding subject-matter of the incorporated contract because they are taken to treat merely ancillary or collateral provisions, such as an arbitration clause as by their very nature essentially personal to the parties to the incorporated contract."); *Trygg Hansa Insurance Co Ltd. v. Equitas Ltd* [1998] C.L.C. 979; *The Ethniki* [2000] C.L.C. 446 (U.K.); *Cigna Life Insurance Co of Europe SA-NV v. Intercaser SA de Seguros y Reaseguros* [2001] C.L.C. 1356 (U.K.); *Sea Trade v. Hellenic Mutual War Risks Association (Bermuda) Ltd "The ATHENA"* [2007] 1 All ER (Comm) 183 (U.K.); *Habas Sinai ve Tibbi Gazlar Isthisal Endustri A.S. v. Sometal S.A.L.* [2010] 1 All E.R. (Comm) 1143 (U.K.).
This rule applies equally to forum selection and arbitration provisions as both these procedural provisions are considered by English law to be ancillary to the subject matter of the contracts. *The Ethniki* [2000] C.L.C. 446, 453; *Siboti K/S v. BP France S.A.* [2003] EWHC 1278 (Comm) (U.K.); *AIG v. QBE* [2001] 2 Lloyd's Rep 268 (U.K.); *Prifti v. Musini Sociedad Anonima de Seguros y Reaseguros* [2003] EWHC 2796 (Comm) (U.K.). Accordingly, under English law, a court would not infer that the parties intended, by general words such as those in the Moving Insurers' follow-form clauses, to incorporate a forum selection provision into a later contract. The above-cited authorities are attached hereto as Attachments 1–10.

disputes under the policies at issue, at best for Moving Insurers the follow-form provisions are ambiguous in this regard, and must be construed against them. When faced with such ambiguity in an insurance policy, the Court "must construe[]" the provision against the insurer. *See Seeck*, 212 S.W.3d at 132 ("If, however, 'policy language is ambiguous, it must be construed against the insurer.'") (quoting *Gulf Ins. Co.*, 936 S.W.2d at 814); *see also Burns*, 303 S.W.3d at 509 ("This rule, often referred to as the doctrine of '*contra proferentem*,' is applied 'more rigorously in insurance contracts than in other contracts' in Missouri.") (quoting *Mansion Hills Condominium Assoc.*, 62 S.W.3d at 637). This presumption is even stronger in the context of a motion to dismiss. *See Scott*, 33 S.W.3d at 682 ("When reviewing a motion to dismiss, this court will treat all facts alleged as true and give the non-moving party the benefit of all reasonable inferences deduced from the facts."). The Court should decline ACE's and Aspen's invitation to read into their policies a choice of forum that they did not make.

II. Jurisdiction in Missouri Is Appropriate for the Reasons Provided in the Trust's Opposition to Certain UK Insurers' Motion to Dismiss.

Even if ACE and Aspen were correct that their policies' follow-form provisions incorporate the HDI Policies' forum selection provision, jurisdiction in this Court nonetheless would be appropriate for the reasons set forth in the Trust's Opposition to Certain UK Insurers' Motion to Dismiss, which are incorporated herein by reference and not repeated to avoid burdening the Court. If the Court were to find that the follow-form provisions of the ACE and Aspen Policies incorporated the procedural provisions of the HDI Policies—a position with which the Trust disagrees, for all the reasons discussed above—their Motions still fail. *See* Trust's Opp'n to Certain UK Insurers' Mot. to Dismiss at 8–18.

Specifically, the HDI Policies' non-exclusive, non-mandatory forum selection clause merely reflects the parties' consent to English or Welsh jurisdiction, if it otherwise would have

been proper to litigate there. The HDI Policies do not mandate or limit the jurisdiction of any dispute to England or Wales. Nothing in the HDI Policies' forum selection clauses bars a party from filing an action anywhere else, including Missouri. The Trust's action in this Court is perfectly appropriate, and its choice of forum, as the plaintiff in this action, should be honored. Thus, the ACE and Aspen Motions to Dismiss for lack of jurisdiction must be denied.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court deny Defendants ACE American Insurance Company and ACE Property & Casualty Insurance Company and Aspen Insurance UK, Ltd.'s Joinders to Certain UK Insurers' Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief, and deny their Motions to Dismiss from this matter the specific policies identified therein for lack of jurisdiction.

Dated: November 23, 2022
St. Louis, MO

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CERTIFICATE OF SERVICE

Pursuant to Missouri Rule of Civil Procedure 55.03(a), the undersigned hereby verifies that he signed the original foregoing document.

The undersigned hereby certifies that on November 23, 2022, a true copy of the foregoing was served, via electronic filing pursuant to Missouri Rules of Civil Procedure Rule 103.08, to all parties of record, and that a true copy of the foregoing was served via email pursuant to Missouri Rules of Civil Procedure Rule 43.01(c)(1)(D), to the attached service list.

/s/ *P. Tyler Connor*
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