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No. 63692-8

**COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION I**

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CERTAIN UNDERWRITERS AT LLOYD'S LONDON, subscribing to  
Policy Nos. A02BF387 and CJ352084,

Plaintiff/Appellant,

vs.

VALIANT INSURANCE COMPANY; and NORTHERN INSURANCE  
COMPANY OF NEW YORK,

Defendants/Respondents,

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REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

Respondents Valiant Insurance Company (“Valiant”) and Northern Insurance Company of New York’s (“Northern”) brief offers nothing that should dissuade this Court from reversing the trial court’s summary judgment order. As shown in Underwriters at Lloyd’s London’s (“Underwriters”) opening brief and reiterated herein, genuine issues of material fact exist regarding whether the property damage in the Underlying Action involved the same continuous occurrence (as Valiant and Northern contend) or separate distinct occurrences (as Underwriters contends) during Valiant and Northern’s three successive policy years.

Notwithstanding the factual questions that exist, this Court should find Valiant and Northern’s anti-stacking provision unenforceable because (1) it is ambiguous in light of other policy language providing that the policy limits apply separately to each consecutive annual period; (2) the anti-stacking provision conflicts with Washington law adopting the continuous injury trigger of coverage and permitting the stacking of policy limits in cases involving property damage that occurs in successive policy years; and (3) the anti-stacking provision violates public policy regarding full compensation of insureds, including protection of insureds from liability to third parties.

## B. ARGUMENT

### 1. The Underlying Action Involved Separate Occurrences of Water Intrusion That Occurred During Valiant and Northern's Successive Policy Years.

Underwriters' position that the Underlying Construction Defect Action involved separate occurrences in Valiant and Northern's successive policy years is not a novel one. Courts in various jurisdictions applying the continuous injury trigger of coverage have found that progressive injuries or damages are separate occurrences within each year of successive commercial general liability policies. *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 478-79, 650 A.2d 974 (N.J. 1994); *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 179 N.J. 87, 843 A.2d 1094 (N.J. 2004); *Nicor, Inc. v. Associated Electric and Gas Ins. Services Ltd.*, 362 Ill.App.3d 745, 841 N.E.2d 78 (Ill.Ct.App. 2005); *Cole v. Celotex Corp.*, 588 So.2d 376 (La.Ct.App. 1992); *U.E. Texas One-Barrington, Ltd. v. General Star Indem. Co.*, 332 F.3d 274 (5th Cir. 2003); *Ranger Ins. Co. v. Safety-Kleen Corp.*, 814 F.Supp. 744 (N.D.Ill. 1993); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 54 Cal.Rptr.2d 176 (Cal.Ct.App. 1996).

Similar to the above jurisdictions, Washington has adopted the continuous injury trigger of coverage in cases involving continuous and progressive property damage. *Gruol Constr. Co. v. Ins. Co. of North Am.*,

11 Wn.App. 632, 637-638 (1974). For purposes of insurance coverage, the time of an “occurrence” is the date when the property sustains damages, not when the wrongful act is committed. *Gruol, supra*, 11 Wn.App. at 636; *Villella v. Public Employees Mut. Ins. Co.*, 106 Wn.2d 806, 811, 725 P.2d 957 (1986). Thus, in the Underlying Action, the time of occurrence was not when Chateau Pacific was built but rather when Chateau Pacific sustained damage from water intrusion through different construction defects.

The evidence provided by Underwriters demonstrates that Chateau Pacific sustained property damage to various external and internal building components at different times through ten separate and distinct sources. CP 1 50, 154-155. Property damage appears to have begun shortly after completion of the building and occurred sporadically thereafter over a number of years. CP 148. This evidence supports Underwriters’ position that there were “separate occurrences” in Valiant and Northern’s successive policy years and not just one single continuous occurrence as Valiant and Northern contend.

Valiant and Northern’s contention that there was only one occurrence in the Underlying Action appears to be based on the fact that Chateau Pacific was a single structure for which the insured was the general contractor and responsible for the entire project. Resp. Br. at 3.

However, this argument is too simplistic and ignores the complexities of construction defect litigation. The underlying cause of the problems at Chateau Pacific was broader than just defective construction of one building. The experts in the Underlying Action determined that water was entering the building through ten separate and distinct sources. CP 150. The fact that there were different defects in the building resulting in water entering the building at different times and different locations is relevant to show there were separate occurrences of property damage, not simply one single continuous occurrence.

Like the majority of jurisdictions, Washington follows the “cause” test to determine the number of occurrences. *Transcontinental Ins. Co. v. Washington Public Utilities Districts’ Utility System*, 111 Wn.2d 452, 467 (1988). Under this test, the court looks to the underlying cause or causes of the damage rather than to the number of individual claims or injuries. *Id.*

In determining the number of occurrences in a case involving continuous injury from plumbing leaks, the 5th Circuit Court of Appeal held that plumbing leaks under each building in an apartment complex were separate occurrences. *U.E. Texas One, supra*, 332 F.3d at 275. In *U.E. Texas One*, the owner of an apartment complex sought insurance coverage from its primary and excess insurers for damage to the

apartments caused by water leaks in the plumbing system. The apartment complex consisted of thirty residential buildings. *Id.* at 276. The owner discovered that several buildings had suffered foundation movement and above ground damage resulting from moisture changes in the soil beneath the foundations. *Id.* Although the cause of the moisture changes was disputed, there was evidence that nineteen buildings in the complex had experienced plumbing leaks. *Id.* The issue before the court was whether the damage to the nineteen buildings constituted one occurrence or nineteen occurrences. To determine the number of occurrences, the 5<sup>th</sup> Circuit applied the “cause” test stating:

..in determining the number of “occurrences” under the Fireman’s Fund policy, we should not focus on the alleged overarching cause, but rather on the specific event that caused the loss. In this case the losses arose when the pipes broke, not when they were installed. ... we agree with the district court that each leak constitutes a separate occurrence as a matter of law.

*Id.* at 278.

In *Cole*, the Louisiana Court of Appeal held that asbestos-related injuries to three individuals were separate occurrences. The court found that the individuals were exposed to different levels of asbestos at different times, under a variety of conditions, and at diverse job sites. *Id.* at 390. In addition, the individuals belonged to different crafts, worked in

different crews and their exposures were scattered and varied throughout the refinery. *Id.*

In their brief, Valiant and Northern acknowledge that construction defects alone are not damage. Resp. Br. at 9. Thus, the defective construction of Chateau Pacific is not the “occurrence”. The “occurrence” is the harm caused by the construction defects, i.e. water entering the building structure through ten different construction defects causing damage to various building components. As the evidence from the Underlying Action demonstrates, the property damage from water intrusion occurred at different times, in different locations, and from different sources. CP 150, 154-155.

Valiant and Northern’s contention that Underwriters is attempting to multiply the number of occurrences mischaracterizes Underwriters’ position. It is Underwriters’ position that there can be separate occurrences of water intrusion that take place in each year of successive commercial general liability policies triggering coverage under different insurance policies. This position is consistent with both the language in Valiant and Northern’s policies (which provide coverage for property damage caused by an occurrence that takes place during the policy period) as well as Washington law. *See, Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452, 470, 760 P.2d 337, 345-46 (1988) (Allegations of

multiple separate causes, continuing causes, or long-standing causes trigger liability under multiple policies.)

Moreover, Underwriters' position does not constitute a shift in Washington law or conflict with the holdings in *Gruol* or *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998). Those cases involved damage that occurred from a single source. *Gruol* involved dry rot damage caused by negligent backfilling while *B&L Trucking* involved pollution damage from leaching smelter slag. Here, there were ten distinct sources of water intrusion causing separate and distinct damage to the subject building at different times.

In addition, *Bordeaux, Inc. v. American Safety Indem. Co.*, 145 Wn.App. 687, 186 P.3d 1188 (2008) does not support Valiant and Northern's argument. The dispute in *Bordeaux* concerned the nature and meaning of a self-insured retention endorsement and its effect on subrogation rights between an insurer and its insured. *Id.* at 694. Contrary to Valiant and Northern's contention, the Court did not find the construction defects and resulting property damage that were at issue in the underlying case were one occurrence. In fact, the Court did not discuss the occurrence issue at all.

Similarly, *Polygon NW, LLC v. American Nat'l Fire Ins. Co.*, 143 Wn.App. 753, 189 P.3d 777 (2008) does not help Valiant and Northern. While *Polygon* involved the equitable reallocation of a settlement in an underlying construction defect lawsuit among various insurers, there was no discussion by the Court or issue in the case involving the number of occurrences or any issue regarding whether the damages arose from the “same occurrence” or “separate occurrences”.

Underwriters is not asking this Court to determine the number of occurrences involved in the Underlying Action. Rather, Underwriters is merely asking this Court to recognize that a genuine issue of material fact exists regarding whether the property damage in the Underlying Action involved the “same occurrence” or “separate occurrences” such that it was error for the trial court to grant summary judgment in Valiant and Northern’s favor on their anti-stacking provision.

**2. Jurisdictions Applying The Continuous Injury Trigger of Coverage Have Found Anti-Stacking Provisions Unenforceable.**

In jurisdictions that have adopted the continuing injury trigger of coverage in cases involving property damage occurring over a period of time through successive policy years, the courts have held anti-stacking, or non-cumulation, clauses unenforceable. *Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.*, 176 N.J. 25, 43-44, 819 A.2d 410 (N.J. 2003);

*Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 283 Ill.App.3d 630, 644, 670 N.E.2d 740 (Ill.Ct.App. 1996) (It would be illogical to enforce one insurer's clause in a situation involving a 'continuous occurrence' which can be looked at as a separate occurrence for the purpose of each policy).

*Spaulding* is an environmental pollution case involving property damage that occurred over a number of years. The insurer, Liberty, issued nine successive commercial general liability policies. Each of the policies contained a non-cumulation clause similar to Valiant and Northern's. In rejecting application of the non-cumulation clause, the New Jersey Supreme Court held that the non-cumulation's notion of a 'single occurrence' with multiple year effects was inconsistent with the continuous injury trigger theory which treats continuous property damage as a distinct occurrence triggering coverage under successive policy years. *Id.* at 44.

The reasoning of *Spaulding* applies to the present case. The notion of separate occurrences during successive policy years triggering multiple policies is consistent with the purpose of the continuous injury trigger which is to maximize the resources available to the insured to cover its liability to third parties arising out of damage that occurs over a number of years. Because an anti-stacking provision attempts to restrict the coverage

available to the insured in conflict with the continuous injury trigger, this Court should find the anti-stacking provision unenforceable.

**3. The Anti-Stacking Cases Cited by Valiant and Northern from Other Jurisdictions Are Inapplicable.**

Valiant and Northern contend that courts in other jurisdictions have upheld anti-stacking provisions in non-automobile cases. However, the cases cited by Valiant and Northern are not applicable for a number of reasons. First, the cases of *Progressive Premier Ins. Co. v. Cannon*, 889 N.E.2d 790, 794 (Ill.App.Ct. 2008) and *Hartford Ins. Co. v. Bellsouth Telecomm., Inc.*, 824 So.2d 234 (Fla.Ct.App. 2002) have no relevancy as they involved the application of an anti-stacking provision to two separate coverage parts in one insurance policy. In addition, these cases involved discrete injury incidents that occurred in a single policy year. The present case involves property damage resulting from separate occurrences in successive policy periods.

Second, *Hiraldo ex rel. Hiraldo v. Allstate Ins. Co.*, 840 N.E.2d 563 (N.Y.App.Ct. 2005) does not apply. The policies at issue in *Hiraldo* contained a provision stating that “all bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result

of one loss.”<sup>1</sup> Thus, the Court in *Hiraldo* found that the lead exposure caused only a single loss. Here, the Valiant and Northern policies do not contain a provision that all property damage shall be considered one loss or one occurrence. In addition, the policies in *Hiraldo* did not contain an annual limits provision like the Valiant and Northern policies which states that the limits apply separately to each consecutive annual period.

Similarly, Valiant and Northern’s reliance on *Endicott Johnson Corporation v. Liberty Mutual Ins. Co.*, 928 F.Supp. 176 (N.D.NY 1996) is misplaced. The policies at issue in *Endicott*, similar to the ones in *Hiraldo*, contained a “one occurrence” provision providing that “all ... property damage arising out of continuous or repeated exposure to substantially the same general conditions ... shall be considered as arising out of one occurrence.” *Id.* at 179. The Valiant and Northern policies contain no such provision. Moreover, as noted by the New Jersey Supreme Court in *Spaulding*, the Court in *Endicott* applied a different trigger of coverage, not the continuous injury trigger adopted by New Jersey and Washington. *See, Spaulding, supra*, 176 N.J. at 45, 819 A.2d at 422.

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<sup>1</sup> Similarly, the policies at issue in *Madison Materials Co. v. St. Paul Fire & Marine Ins. Co.*, 523 F.3d 541 (5th Cir. 2008) stated that “multiple related acts are to be treated as a single occurrence”.

4. **The Annual Limits Provision in Valiant and Northern's Policies Precludes Application of the Anti-Stacking Provision.**

Contrary to Valiant and Northern's contention, the annual limits provision in Section III of the commercial general liability coverage form in their policies is not reconcilable with the anti-stacking provision in Section IV of their policies. The annual limits provision in Section III - Limits of Insurance in Valiant and Northern's commercial general liability coverage form provides:

The limits of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.  
(Emphasis added.) CP 57-58, 82-83, 107-108.

This provision clearly establishes that the \$1 million per occurrence limits of each policy issued by Valiant and Northern apply separately to their respective policy periods as illustrated by the following chart:

Valiant	Northern	Northern
June 1, 1999 to June 1, 2000	June 1, 2000 to June 1, 2001	June 1, 2001 to June 1, 2002
\$1,000,000 per occurrence limit	\$1,000,000 per occurrence limit	\$1,000,000 per occurrence limit

The anti-stacking provision in Section IV of the commercial general liability coverage form attempts to restrict coverage under all three policies to only one policy limit.

Valiant	Northern	Northern
June 1, 1999 to June 1, 2000	June 1, 2000 to June 1, 2001	June 1, 2001 to June 1, 2002
\$1,000,000 per occurrence limit	\$0	\$0

The two provisions cannot be reconciled because what the annual limits provision provides to the insured, i.e. separate \$1 million per occurrence limits for three successive policy years, the anti-stacking provision attempts to take away from the insured, i.e. one \$1 million per occurrence limit for all three policy years. This is the exact scenario in which the Minnesota Supreme Court found ambiguity in *Columbia Heights Motors v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn. 1979) (“The reference in section 11 to a limitation on ‘total’ liability and the reference

in the insuring agreement to a limitation on annual liability raise a reasonable doubt regarding the limitations of liability.”)

None of the cases cited by Valiant and Northern, i.e., *Landico, Inc. v. American Family Mut. Ins. Co.*, 559 N.W.2d 438 (Minn.Ct.App. 1997), *Shared-Interest Mgmt., Inc. v. CNA Financial Ins. Group*, 283 A.D.2d 136, 725 N.Y.S.2d 469 (2001), or *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*, 660 So.2d 1136 (Fl. 1995), involve the interpretation of an annual limits provision with an anti-stacking provision. In fact, the basis for the Court’s decision in *Landico* and how it distinguished the *Landico* policies from the policies in *Columbia Heights Motors* was the absence of an annual limits provision in the *Landico* policies. *Landico, supra*, 559 N.W.2d at 441.

Moreover, the case *General Refractories Co. v. Insurance Co. of N. Am.*, 906 A.2d 610 (Pa.Super.Ct. 2006) cited by Valiant and Northern has no relevancy to this case. The issue in *General Refractories* was whether a one month policy extension created a new policy term and new policy limits. Here, there was no extension of the Valiant and Northern policy periods. Valiant and Northern issued three separate one-year consecutive policies with \$1 million per occurrence limits per year. Under the annual limits provision in Section III, the \$1 million per occurrence limits in Valiant and Northern’s policies apply separately to each policy

year. Because the anti-stacking provision attempts to limit the available policy limits under all three years to only one policy year, it conflicts with the annual limits provision creating ambiguity which must be construed against Valiant and Northern.

**5. The Anti-Stacking Provision Violates Public Policy.**

Valiant and Northern argue that commercial general liability insurance is not about compensating the insured but about protecting the insured against loss and injury to others for which the insured might be liable. Resp. Br. at 32. Underwriters does not dispute that liability insurance includes protection of the insured from third party claims. There are many public policy considerations where insurance policies are concerned. As the Washington Supreme Court recognized:

[I]nsurance policies ... are simply unlike traditional contracts, i.e., they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affect members of the public-frequently innocent third persons-the maximum protection possible consonant with fairness to the insurer.

*Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 358-59, 997 P.2d 353 (2000) citing *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975).

Under their respective policies, Valiant and Northern agreed to pay a new \$1 million per occurrence limit for each annual policy period. As consideration for that agreement, the insured Stratford paid three separate policy premiums. CP 44, 68, 93. To allow Valiant and Northern to escape their promise to pay under two of their three insurance policies violates public policy as it would result in a windfall to these insurers at the expense of Stratford and innocent third parties.

Here, Valiant and Northern attempt to use the anti-stacking provision in their respective policies to reach outside each particular policy and restrict the coverage available under their other separate triggered policies. Such an attempt by an insurer was rejected by the Washington Supreme Court in *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988).

In *Transcontinental*, the insurer had issued two consecutive annual policies. Both policies contained the following language: "For the purpose of determining the limit of the company's liability, all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* The insurer argued that the foregoing language limited the amount of coverage available under both policies to one policy. *Id.* The Court

rejected the insurer's argument finding that "when read within the context of the policy as a whole, this policy provision determines the limits of Transcontinental's liability per occurrence per policy year." *Id.* The Court held that coverage could exist under both policy years based on the bondholders' allegations of multiple separate causes, continuing causes, or long-standing causes. *Id.*

Similar to the policies at issue in *Transcontinental*, the Valiant and Northern policies are three separate and distinct policies with separate declaration pages, coverage forms and endorsements for each policy year. CP 42-47, 66-72, 91-97. Each Valiant and Northern policy states that it is effective for a specified "policy period" and each policy contains separate "limits of liability" which, under the annual limits provision, apply separately to each policy year. CP 44, 68, 93.

Based on the fact that the Underlying Action involved allegations of separate and distinct construction defects resulting in separate and distinct property damage that occurred at different times over a number of years, coverage is triggered under all three Valiant and Northern policy years. Thus, the insured, Stratford, is entitled to receive the benefit of the insurance premiums it paid for coverage under all three policies and recover the applicable limit of liability for each year the liability policies

are in effect for property damage caused by an occurrence that takes place in each year.

6. **Northern Has Not Satisfied Its Burden to Prove Its “Continuous Damage Endorsement” Bars Coverage.**

Northern’s “Continuous Damage Endorsement” in its June 1, 2001 to June 1, 2002 policy purports to exclude coverage for injury or damage which first occurs prior to the policy period. CP 116. In its brief, Northern contends that the Underlying Actions involved a single ‘occurrence’ - or ‘continuous or progressively deteriorating injury or damage’ which Northern further contends “had to have begun prior to the policy’s effective date of June 1, 2001.” Resp. Br. at 45.

Contrary to Northern’s assertion, Underwriters is not misinterpreting its “Continuous Damage Endorsement”. In order for the exclusion to act as a bar to coverage, Northern must prove, by affirmative evidence, that all of the alleged property damage occurred prior to the policy’s inception on June 1, 2001. If any property damage first occurred during Northern’s June 1, 2001 to June 1, 2002 policy period, the exclusion does not apply. Northern has failed to provide any evidence showing the dates of any property damage. Instead, Northern simply relies on the arguments of its counsel that the Underlying Action involved

a single occurrence that “had to have begun” prior to the date the policy incepted. Resp. Br. at 45.

While the burden is on Northern to prove the exclusion applies to bar coverage for the damages alleged in the Underlying Action, it is clear from the evidence submitted by Underwriters that separate and distinct property damage occurred at different times through different defects. CP 148, 150, 154-155. Because the alleged property damage occurred at different times in different locations, there are genuine issues of material fact as to whether all of the property damage was continuous and whether all of the property damage occurred prior to inception of the policy on June 1, 2001 such that the trial court erred in granting Northern’s motion for summary judgment.

7. **The Trial Court Erred in Considering the Supplemental Declaration of Jacquelyn Beatty and Exhibits Thereto.**

Valiant and Northern counsel’s supplemental declaration submitted with their reply to Underwriters’ opposition to their motion for summary judgment raised new arguments and provided new evidence that was not “in strict reply” to the opposition as required by LCR 7(b)(4)(G) and should not have been considered by the trial court.

Ms. Beatty’s supplemental declaration and exhibits thereto referenced Valiant’s policy deductible and discussions between Ms.

Beatty and Stratford's personal counsel, Greg Harper, regarding waiver of the deductible. CP 179, 188, 190-200. Through this evidence, Valiant and Northern attempt to equate the number of policy deductibles to the number of occurrences. Valiant and Northern's evidence and arguments regarding policy deductibles is irrelevant because the number of applicable deductibles that were charged by the insurers is not an issue in this action and is not proof of whether the property damage alleged in the Underlying Action involved one single continuous occurrence or separate occurrences. Moreover, Valiant, Northern and Underwriters agreed to waive all of their respective policy deductibles as part of the settlement of the Underlying Action. CP 229, 231-240.

Also included in Ms. Beatty's supplemental declaration and exhibits is Underwriters' reservation of rights letter to Stratford and correspondence from Stratford's counsel to Valiant and Northern's claims adjustor which Valiant and Northern attempt to use as support for their argument that the Underlying Action involved one single continuous occurrence. CP 202-211, Resp. Br. at 48. However, the purported evidence does not support Valiant and Northern's argument.

First, Underwriters' letter to Stratford merely informs the insured of the "Continuing or Ongoing Loss" exclusion contained in Underwriters' policies and that the exclusion precludes coverage for

damage that manifested or commenced prior to the inception of the policies. CP 205. The letter does not state that the alleged property damage in the Underlying Action involved one single continuous occurrence.

Second, Stratford's counsel's letter to Valiant and Northern's claims adjuster also does not support their argument. In the letter, Stratford's counsel advises Valiant and Northern that damage occurred in all three of their policy years but does not admit there was a single continuous occurrence nor does it even address the issue of the number of occurrences. CP 209-211.

The "evidence" provided by Valiant and Northern in the supplemental declaration is collateral at best. The documents are not an admission and have no probative value as to whether the property damage in the Underlying Action involved one single continuous occurrence or separate occurrences during Valiant and Northern's successive policy years. Therefore, the trial court erred in considering the supplemental declaration of Ms. Beatty and exhibits thereto.

### **C. CONCLUSION**

In considering all of the facts and the reasonable inferences from those facts in the light most favorable to Underwriters, it is clear that the trial court erred in granting summary judgment in favor of Valiant and

Northern. Genuine issues of material fact exist regarding whether the property damage in the Underlying Action involved the “same continuous occurrence” or “separate occurrences” during Valiant and Northern’s successive policy years which should have precluded summary judgment.

Notwithstanding the foregoing, the Court should find the anti-stacking provision unenforceable in light of conflicting policy language, Washington’s adoption of the continuous injury trigger, and public policy considerations.

Based on the above, Underwriters respectfully requests this Court reverse the trial court’s May 22, 2009 Order granting summary judgment in favor of Valiant and Northern and remand the case to the trial court.

DATED: December 3, 2009

Respectfully submitted,

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subscribing to policy nos. A02BF387  
and CJ352084

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be filed a copy of the documents listed below with the Court of Appeals of the State of Washington in this action:

**DOCUMENT DESCRIPTION:**

Reply Brief of Appellant, Certain Underwriters at Lloyd's London.

I caused to be served the foregoing document(s) on the parties in this action addressed as follows:

Jacquelyn A. Beatty  
Walter Eugene Barton  
**Karr Tuttle Campbell**  
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(BY UPS OVERNIGHT) I am readily familiar with the practice of Robertson • Clark, LLP for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by UPS for overnight delivery.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 3rd day of December, 2009.

Executed at San Diego, California.

By: Jamie McGraw  
Jamie L. McGraw

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