No. 24-

IN THE

Supreme Court of the United States

ECB USA, INC., ATLANTIC VENTURES CORP.,
AND G.I.E. C2B,

Petitioners,

v.

CHUBB INSURANCE COMPANY OF NEW JERSEY
AND EXECUTIVE RISK INDEMNITY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOEL S. MAGOLNICK
Counsel of Record
MARKO & MAGOLNICK, P.A.
3001 SW Third Avenue
Miami, FL 33129
(305) 285-2000
magolnick@mm-pa.com

Counsel for Petitioners

335684

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether under the mandate of *Erie v. Tompkins*, 304 U.S. 64 (1938), a federal court is permitted to apply federal common law rules of construction in lieu of well settled state law principles of contract interpretation as articulated by the New Jersey Supreme Court. In other words, are the rules of construction of a contract "quintessentially substantive," rather than procedural, thereby mandating the application of state contract law to decide interpretation questions?

2. Whether the U.S. Court of Appeals for the Eleventh Circuit erred in refusing to follow Third Circuit precedent construing a New Jersey contract under New Jersey law, thereby creating an untenable split of authority.

3. Whether the U.S. Court of Appeals for the Eleventh Circuit erred in factfinding that an insured was a sophisticated party when there is nothing in the record supporting such a finding and the issue was never raised, briefed, or argued below.

PARTIES TO THE PROCEEDING

Petitioners:

ECB USA, Inc., Atlantic Ventures Corp., and G.I.E. C2B were the plaintiffs before the district court and the appellants in the court of appeals.

Respondents:

Chubb Insurance Company of New Jersey and Executive Risk Indemnity, Inc. were the defendants before the district court and the appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners submit the following Corporate Disclosure Statement in compliance with Rule 29.6 of the Rules of the Supreme Court of the United States:

Petitioner ECB USA, Inc. is a Florida non-governmental corporation. SARL Ets. Claude Blandin & Fils, a French corporation, owns 100% of the stock of ECB USA, Inc.

Petitioner G.I.E. C2B is a French unincorporated, non-governmental entity. ECB USA, Inc. is a member of G.I.E. C2B.

Petitioner Atlantic Ventures Corp. is a Florida non-governmental corporation. ECB USA, Inc. owns 97% of the stock of Atlantic Ventures Corp. The owner of the remaining 3% of the stock of Atlantic Ventures Corp. is not a corporation.

None of the above-referenced entities are publicly held.

RULE 14.1(B)(III) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

1. *ECB USA, Inc., Atlantic Ventures Corp., and G.I.E. C2B v. Chubb Insurance Company Of New Jersey and Executive Risk Indemnity, Inc.*, Case No. 20-20569 (S.D. Fla) (judgment entered Feb. 25, 2022, ongoing following remand).

2. *ECB USA, Inc., Atlantic Ventures Corp., and G.I.E. C2B v. Chubb Insurance Company Of New Jersey and Executive Risk Indemnity, Inc.*, No. 22-10811 (11th Cir.) (original decision affirming lower court Aug. 1, 2024, op. replaced on reh'g, Aug. 29, 2024).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Constitutional Provisions

Statutes and Other Authorities

CITATIONS TO OPINION BELOW

Petitioners respectfully request issuance of a writ of *certiorari* to review the below cited opinion of the U.S. Court of Appeals for the Eleventh Circuit.

The opinion of the court of appeals (App. 1a-28a) is reported at 113 F.4th 1312 (11th Cir., Aug. 29, 2024).

The prior opinion of the court of appeals (App. 29a-57a) is reported at 109 F.4th 1367 (11th Cir., Aug. 1, 2024), opinion withdrawn and superseded on reh'g in part.

The underlying district court judgment from the Southern District of Florida (App. 58a-60a) is reported at 587 F.Supp.3d 1165 (S.D. Fla., Feb 25, 2022) and it is amended on reconsideration (App. 61a-84a) at 2022 WL 580442 (S.D. Fla., Feb. 25, 2022).

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The decision of the court of appeals was entered on August 1, 2024, and superseded after rehearing on August 29, 2024. Petitioners' subsequent motion for rehearing *en banc* was denied on October 23, 2024 (App. 85a-86a). This writ of *certiorari* is timely filed pursuant to Rule 13.2.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const. amend. X.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652.

STATEMENT OF THE CASE

This case is about a comma and federalism.

The matter was brought in the United States District Court for the Southern District of Florida, which had diversity jurisdiction under 28 U.S.C. § 1332, to resolve a dispute about the interpretation of a New Jersey insurance policy. The parties agreed and the district court found that New Jersey law governed. The district court, however, applied federal common law rules of construction and secondary sources to the policy, instead of New Jersey law.

The lower courts addressed the definition of "Management consulting services" in the policy, which is defined as:

> services directed toward expertise in banking finance, accounting, risk and systems analysis design and implementation, asset recovery and strategy planning ***for financial institutions***.

App. 4a. (emphasis added). Petitioners argued that the foregoing definition should be construed according to New Jersey's uniformly applied, *sui generis* last antecedent rule. Under New Jersey's rule, the phrase "for financial institutions" qualifies only the last antecedent, "asset recovery and strategy planning," and not the entire list of services. Respondents argued that the phrase "for financial institutions" was a series qualifier and modified the entire list of services.

Every New Jersey case that has addressed the grammatical construction at issue in this case has applied New Jersey's *sui generis* last antecedent rule. In its original opinion on August 1, 2024, the Eleventh Circuit relied upon a maverick, now vacated, New Jersey intermediate appellate court decision: *In re Proposed Constr. of Compressor Station*, 476 N.J. Super. 556, 302 A.3d 82, 89 (N.J. Super. Ct. App. Div. 2023) ("*Compressor Station I*") to apply a treatise-based standard of construction from A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). App. 50a. Five days after the Eleventh Circuit's original opinion, the New Jersey Supreme Court reversed *Compressor Station I* precisely on the rule of construction and rationale upon which the Eleventh Circuit relied in the instant case. *See Matter of Proposed Constr. of Compressor Station (CS327)*, 258 N.J. 312, 316, 318 A.3d 658, 661 (2024) ("*Compressor Station II*"). App. 12a.

In light of the holding in *Compressor Station II*, Petitioners moved for rehearing before the court of appeals. While the court of appeals granted rehearing, it did not change its ruling or rationale—it only removed all citations to *Compressor Station I* from its opinion, and somehow cited to *Compressor Station II* for the same proposition (even though *Compressor Station II* overruled *Compressor Station I*). In other words, the court of appeals continued to apply the Scalia & Garner, *supra*, series qualifier canon, even though it was rejected in *Compressor Station II*. App. 1a-29a (salient portion at 12a).

Petitioners moved for rehearing, *en banc*, which was denied. App. 86a.

If left to stand, the opinion of the court of appeals will leave two conflicting lines of New Jersey law on an important issue of contract law: one by the New Jersey Supreme Court and Third Circuit, and the other by the Eleventh Circuit. Such an approach undermines both the word and purpose of *Erie*.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT OPINION VIOLATES THE *ERIE* DOCTRINE

Eighty-six years ago, in *Erie*, this Court held:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general

> common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). In *Erie*, this Court concluded that "'[t]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'" *Id.* at 79, quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928). Thus, the authority to determine state law regarding the construction of contracts lies with state legislatures and state high courts.

The foregoing is not controversial. As stated by the Third Circuit:

> Issues of contract interpretation are considered "quintessentially substantive," rather than procedural, under *Erie*. *Id.*; *cf. Beazer E., Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994) (the "interpretation of a private contract is generally thought to be a question of state law," rather than federal common law). Therefore, as a general rule in diversity cases, courts should apply state contract law to decide interpretation questions.

Collins On behalf of herself v. Mary Kay, Inc., 874 F.3d 176, 182 (3d Cir. 2017).

If the Eleventh Circuit had wanted to follow the fundamental principles of federalism, it could have certified the question to the New Jersey Supreme Court for a decision. Instead, the Eleventh Circuit chose to replace New Jersey law as interpreted by the New Jersey Supreme Court with its own rules of construction.

Accordingly, Petitioners request that this Court accept jurisdiction and reverse the holding of the court of appeals or refer the matter to the New Jersey Supreme Court for a final opinion.

II. IN DIVERSITY, THE ELEVENTH CIRCUIT SHOULD HAVE APPLIED NEW JERSEY'S *SUI GENERIS* LAST ANTECEDENT RULE AND NOT ANY OTHER INTERPRETIVE CANON TO THE POLICY AT ISSUE

Every New Jersey case that has ever addressed the grammatical construction at issue has held that New Jersey's *sui generis*, last antecedent rule governs the language at issue in the instant case. Likewise, the Third Circuit has also recognized New Jersey's rule and has held that it must be applied to New Jersey contracts. *See National Surety Corp. v. Midland Bank*, 551 F. 2d 21 (3d Cir. 1977). The Third Circuit made clear that applying the New Jersey version of the last antecedent rule was mandatory over a federal common law understanding of the same grammatical rule. *Id.* at 33. In its decision, the Third Circuit relied on *New Jersey Underwriting Association v. Clifford*, 270 A.2d 723, (N.J. Super. 1970), to explain:

> We are satisfied that the cited phrase was intended to refer to its last antecedent, "such

> other classes of insurance as the commissioner may designate." ***Had the modifying phrase been intended to relate to more than its last antecedent, a comma could have been used to set off the modifier from the entire series.***

Id. at 727-28 (internal citations omitted) (emphasis added). The Third Circuit recognized that the New Jersey last antecedent rule is different from federal common law and that the New Jersey rule had to be followed when interpreting a New Jersey contract.

By contrast, faced with the same issue of interpreting a New Jersey contract, the Eleventh Circuit refused to recognize the New Jersey last antecedent rule for two reasons. ***First***, it held that the "parallel nature of the terms ['asset recovery and strategy planning'] links them together so that the postpositive modifier 'for financial institutions' can naturally apply to every item in the list, not just the last one or two stated" and therefore, "we are within the heartland of the series-qualifier canon." *ECB USA, Inc. v. Chubb Ins. Co. of New Jersey*, 109 F.4th 1367, 1379 (11th Cir. 2024), *opinion withdrawn and superseded on reh'g in part*, 113 F.4th 1312 (11th Cir. 2024). ***Second***, it stated that it was unable to "discern any meaning in the absence of a comma between 'asset recovery' and 'strategy planning,'" concluding that: "there's no reason to believe that New Jersey courts would import meaning into the absence of an Oxford comma in this sentence." *Id*. at *9.

To advance its own interpretation and canons, aided by secondary, extrinsic sources (*Reading Law)*, the Eleventh Circuit disregarded New Jersey's *sui generis* last antecedent rule and applied a series qualifier analysis

endorsed by the now reversed *Compressor Station I*. To leave no doubt that the Eleventh Circuit relied upon the disappearing ink of *Compressor Station I*, in its original opinion, the Eleventh Circuit explicitly applied the grammatical construction discussed in *Compressor Station I* to the language of the insurance policy at issue in this case:

> ***We note that the New Jersey courts have applied the series-qualifier canon when faced with a similar grammatical construction of a parallel list of nouns and a modifying word.*** The question was whether "routine" modified only "maintenance and operations" or other items in the list. *See id.* The New Jersey court applied the prepositive modifier "routine" to all terms in the list. *See id.* at 89. Here, we have a postpositive modifier, which has the same grammatical function but comes after instead of before the terms it modifies. ***It follows that the same principle should apply.***

ECB USA, 109 F.4th at 1379-80 (emphasis added). Both lines of reasoning advanced by the court of appeals below are contrary to New Jersey law as articulated by New Jersey's court of last resort, as detailed in subsections A and B, *infra.*

A. The Eleventh Circuit Departed from *Erie* in Refusing to Follow New Jersey's *Sui Generis* Last Antecedent Rule, Which Applies to Parallel Series of Nouns and Verbs Followed by a Modifying Phrase

The Eleventh Circuit's reasoning about New Jersey's *sui generis* last antecedent rule not being applicable to

parallel series of nouns and verbs is incorrect. The New Jersey last antecedent rule has been uniformly applied by New Jersey courts to "parallel series of nouns or verbs" in every single case addressing a parallel series of nouns or verbs followed by a modifier. For example, in *Clifford*, the case relied on by the Third Circuit, *see supra*, a New Jersey court applied the New Jersey last antecedent rule to a parallel series of nouns, "vandalism, malicious mischief, burglary or theft, or such other classes of insurance as the commissioner may designate in order to comply with Federal legislation and obtain Federal reinsurance" to hold that the phrase "in order to comply with Federal legislation and obtain Federal reinsurance" only modified the last antecedent phrase "such other classes of insurance as the commissioner may designate" and not the whole list of insurances before it. *Clifford*, 270 A.2d 723, 727.

Clifford is not alone. Every case addressing the application of the New Jersey last antecedent rule to a parallel list of nouns or verbs followed by a qualifier has found that the qualifier applies only to the last antecedent if it is not separated from the series by a comma. *See*, *e.g.*, *M.F. v. Jews Offering New Alternatives for Healing*, A-1076-19, 2021 WL 2795427, at *6 (N.J. Super. Ct. App. Div. July 6, 2021) ("***('Conversion Therapy'), or advertising, or promoting Conversion Therapy or Conversion Therapy-related")***; *Kamienski v. State, Dep't of Treasury*, 451 N.J. Super. 499, 518–19, 169 A.3d 493, 505 (App. Div. 2017) ("***income in the year prior to his incarceration or $20,000.00***"); *Alexander v. Bd. of Review*, 965 A.2d 167, 173 (App. Div. 2009) ("we necessarily engage the doctrine of the last antecedent" to a list of nouns comprised of "listed [] substances—"***narcotic, anesthetic, intoxicant, or other substance"—***qualified by "administered to that

person without his prior knowledge or consent*")*; *B.F. Goodrich Co. v. Oldmans Tp.*, 17 N.J. Tax 114, 126 (1997), *aff'd*, 323 N.J. Super. 550, 733 A.2d 1204 (App. Div. 1999) ("***pipe racks, and piping and electrical wiring***"); *State Dept. of Envtl. Prot. & Energy, Div. of Fish, Game & Wildlife v. Santomauro*, 261 N.J. Super. 339, 344–45, 618 A.2d 917, 920–21 (App. Div. 1993) ("***squirrel, wild rabbit, wild hare, or wild deer, or of a game bird or songbird belonging to a species or subspecies native to this State*** . . . It is a principle of statutory construction that where no contrary intention appears, 'referential and qualifying phrases refer solely to the last antecedent. . . .'"); *State in Interest of S. Z.*, 177 N.J. Super. 32, 35, 424 A.2d 855, 857 (App. Div. 1981) ("***in the employment of fire, explosives or other dangerous means listed in section 2C:17-2a")***; *State v. Congdon*, 76 N.J. Super. 493, 502, 185 A.2d 21, 26 (App. Div. 1962) ("***air raid warden, civilian protection worker, or other person who is duly authorized to perform any act or function")***; (emphasis added to all citations immediately above). There are no contrary cases. It is the universal rule in New Jersey.

In 2008, in *State v. Gelman*, 195 N.J. 475, 484, 950 A.2d 879, 884 (2008), the New Jersey Supreme Court made clear that it was applying the "doctrine of the last antecedent. . . ." *Id. Gelman* did not base its decision on *Reading Law*, but instead on *Sutherland Statutes and Statutory Construction* § 47.33, 2A Norman J. Singer & Shambie Singer (7th ed. 2007), which defines the last antecedent rule as follows:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the

> "last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. . . ."

Id. In other words, the limitations on the application of the last antecedent canon as discussed in *Reading Law* were never part of New Jersey's jurisprudence, which developed its own rule of the last antecedent. As such, the court of appeals application of any rule of construction deviating from New Jersey's substantive law violates *Erie.*

B. Under *Erie*, the Eleventh Circuit Should Have Deferred to New Jersey Rules of Construction and Given Significance to the Absence of a Comma in the Policy Definition as Mandated by *Compressor Station II*

The Eleventh Circuit's argument that the absence of a comma could not be particularly meaningful in this context is also incorrect. The New Jersey Supreme Court rejected the informal treatment of punctuation and commas, stating:

> The punctuation used here is instructive. We generally "presume that the Legislature intended to follow accepted rules of grammar." Here, ***the Legislature mindfully placed 'routine' immediately before two conjoined activities and separated those activities with a comma. If the Legislature intended 'routine' to modify each activity, it could have written the statute as an uninterrupted series.*** It did not, and we cannot rewrite a statute or "presume that the Legislature intended

> something other than that expressed by way of the plain language."

Compressor Station II at 330-331 (emphasis added). The point is that the absence of a comma in New Jersey is not simply an oversight—it is outcome-determinative.

This emphasis on punctuation and commas is not new. New Jersey courts uniformly hold that the absence of a comma between a qualifier and the last item of a series establishes that the qualifier is designed to modify only the last antecedent. *See*, *e.g.*, *C.R. v. M.T.*, 221 A.3d 154, at 159 (N.J. Supr. 2019) *rev'd on other grounds*, 259 A.3d 830 (2021) ("we may confidently conclude the Legislature's omission of a comma after 'other substance' was intended to invoke the doctrine of the last antecedent in the construction. Such a comma is absent here."); *Alexander v. Bd. Of Review*, 965 A.2d 167, 173 (N.J. Super. 2009) ("If the modifier is intended to relate to more than the last antecedent, a comma is used to set off the modifier from the entire series."); *New Jersey Underwriting Association v. Clifford*, 270 A.2d 723, 727-28 (N.J. Super. 1970) ("Had the modifying phrase been intended to relate to more than its last antecedent, a comma could have been used to set off the modifier from the entire series."); *Raybestos-Manhattan, Inc. v. Glaser*, 365 A.2d 1, at 11 (N.J. Super. 1976) ("Had the modifying phrase been intended to relate to more than its last antecedent, a comma could have been used to set off the modifier from the entire series."); *Kamienski v. State, Dep't of Treasury*, 169 A.3d 493, 505 (N.J. Super. 2017) ("Because the Legislature did not separate the qualifying phrase "for each year of incarceration" from $20,000 with a comma, the doctrine of last antecedent provides support for the interpretation

that "for each year of incarceration" applies only to $20,000."); *Nat'l Sur. Corp. v. Midland Bank*, 551 F.2d 21, 34 (3d Cir. 1977) ("Had the modifying phrase been intended to relate to more than its last antecedent, a comma could have been used to set off the modifier from the entire series."). There is no contrary case to any of the foregoing New Jersey last antecedent rule cases.

In sum, the Eleventh Circuit has substituted its own reading of the absence of a comma, at the expense of New Jersey law, in derogation of the fundamental federal principles of *Erie*. This Court should grant this writ to defend the principle that Federal courts do not have the "power to declare substantive rules of common law applicable in a State." *Erie*, 304 U.S. at 78.

C. The Eleventh Circuit Disregarded the Holding and Reasoning of the New Jersey Supreme Court in *Compressor Station II*

To reach its erroneous conclusion, the court of appeals anchored its reasoning in *Compressor Station I*. As stated above, five days after the Eleventh Circuit's original opinion, the New Jersey Supreme Court reversed *Compressor Station I*, rejecting the two primary arguments relied on by the Eleventh Circuit. ***First***, the New Jersey Supreme Court overruled the application of the series-qualifier canon to the grammatical construction of a qualifier adjacent to two conjoined items separated from the rest of a series by a comma. *Compressor Station II*, at 331. The New Jersey Supreme Court's holding was explicit: "the series qualifier canon is unsuitable" and "the statute's sentence structure does not support such an interpretation." *Id*. ***Second***, the New Jersey Supreme

Court explicitly relied upon the importance of punctuation. *Id.* at 330–31. In sum, the New Jersey Supreme Court, faced with an identical interpretive issue as the court of appeals here, reached the exact opposite conclusion. Despite the clear holding of *Compressor Station II*, the court of appeals did not change its holding on rehearing, continuing to stray from the fundamental federal principle of *Erie*.

III. A COURT OF APPEALS CANNOT ACT IN A FACT-FINDING CAPACITY ON AN ISSUE THAT IS NOT IN THE RECORD AND WAS NEVER RAISED, BRIEFED, OR ARGUED

The Eleventh Circuit erroneously concluded, *sua sponte*, that, to the extent there was any ambiguity in the policy language, the insurance company and the insured under the policy at issue were "sophisticated commercial entities" (App. 27a.) and thereby declined to apply the New Jersey (and universal) principle of *contra proferentem* in favor of the insured. "The principles of insurance contract interpretation are well settled: . . . where an ambiguity exists, it must be resolved against the insurer. . . ." *Princeton Inv. Partners, Ltd. v. RLI Ins. Co.*, No. CV171120KMMAH, 2018 WL 846917, at *5 (D.N.J. Feb. 9, 2018) (citing *State Nat. Ins. Co. v. Cty. of Camden*, 10 F. Supp. 3d 568, 574–75 (D.N.J. 2014) (citing *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421 (N.J. Super. Ct. App. Div. 2004)).

The issue of sophistication between an insurance carrier and a small accounting firm was never raised, briefed, or argued at any level below. The court of appeals made its own findings of fact on this issue in derogation

of longstanding law, concluding, without any citation, that "[w]e have no doubt that Constantin—the accounting firm insured under this contract—is a sophisticated commercial entity that had many different options to purchase liability insurance." App. 28a.

The court of appeals should not have acted in a factfinding capacity. "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *Pullman-Standard v. Swint*, 456 U.S. 273, 291, (1982) (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.10 (1974)). This is yet another example of the court of appeals substituting its own rules of contract construction to the policy, instead of following New Jersey law.

IV. CONCLUSION

If the Eleventh Circuit were to have applied the mandate of *Erie*, there could only be one possible interpretation of the unambiguous language in the insurance policy at issue, the one mandated by the New Jersey Supreme Court, whereby coverage would have ensued. If the court of appeals still found the policy to be ambiguous, then it should have applied New Jersey's principle of *contra proferentem* and still found in favor of coverage.

The Eleventh Circuit's departure from *Erie* and from established precedent in the Third Circuit and New Jersey resulted in a decision in conflict with the decision of another United States court of appeals on the same

important matter and in conflict with a decision by a state court of last resort. The Eleventh Circuit's erroneous factfinding conclusions have also far departed from the accepted and usual course of judicial proceedings. In each case, the court of appeals' errors call for the exercise of this Court's supervisory power.

Respectfully submitted,

JOEL S. MAGOLNICK
Counsel of Record
MARKO & MAGOLNICK, P.A.
3001 SW Third Avenue
Miami, FL 33129
(305) 285-2000
magolnick@mm-pa.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 29, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10811

ECB USA, INC., A FLORIDA CORPORATION, ATLANTIC VENTURES CORP., A FLORIDA CORPORATION, G.I.E. C2B, A FRENCH BUSINESS ENTITY, AS ASSIGNEES OF CONSTANTIN ASSOCIATIONS LLP, A NEW YORK LIMITED LIABILITY PARTNERSHIP, CONSTANTIN ASSOCIATES LLP,

Plaintiffs-Counter Defendants-Appellants,

versus

CHUBB INSURANCE COMPANY OF NEW JERSEY, A NEW JERSEY INSURANCE COMPANY CORPORATION, EXECUTIVE RISK INDEMNITY, INC., A DELAWARE INSURANCE CORPORATION,

Defendants-Counter Claimants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-20569-RNS

Appendix A

Before JORDAN, BRASHER, and ABUDU, Circuit Judges.

BRASHER, Circuit Judge:

We grant the petition for rehearing in part, withdraw our previous opinion, and replace it with the following.

This case comes down to grammar and canons of construction. Chubb issued an insurance policy that covers claims against Constantin arising from "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning *for financial institutions*." Constantin performed an audit for a food services company; the audit went wrong and led to liability. Constantin transferred its rights under the policy to the ECB parties. The question for us is whether "for financial institutions" limits "accounting" such that there is no coverage under the policy for the audit of a food services company.

Chubb and its related parties argue that the phrase "for financial institutions" applies to everything in the list; ECB and its related parties argue that "for financial institutions" applies only to the last phrase in the series of covered services. We agree with Chubb. The series-qualifier canon of interpretation suggests that a postpositive modifier like "for financial institutions" modifies all the terms in a list of parallel items. Chubb's position is also supported by the surrounding language of the policy. Although ECB argues that the last-antecedent canon and *contra proferentem* support its position, those

canons are inapposite. Because the accounting at issue was not performed for a financial institution, the claim is not covered by the professional services insurance contract that Chubb issued. Therefore, we affirm the district court's grant of summary judgment to Chubb.

I.

Constantin is a sophisticated commercial entity that provides accounting services. In 2001, Constantin Control Associates LP acquired professional services insurance from Executive Risk Indemnity, Inc. ("ERI"), a subsidiary of Chubb Limited—the ultimate parent company. Constantin's application for insurance coverage stated that it wanted insurance for "management consulting for the financial community." Dist. Ct. Doc. 155-17 at 2. Constantin received professional liability insurance, which it renewed with ERI over the years. The last policy period with ERI ended in December 2017. In December 2017, Constantin renewed the policy for the 2017-18 policy period with Chubb Insurance Company of New Jersey, another subsidiary of Chubb Limited.

For the relevant contract years of 2016-17 and 2017-18, Constantin's contract included Constantin Associates LLP as an insured party either by express incorporation or through definitions involving their corporate relationship. Also in both years, Constantin's "Professional Services" liability insurance covered services Constantin performed for others for a fee that were listed in a specific cross-referenced list. The relevant cross-reference in the insurance policies insured Wrongful Acts—which the

contracts define—in the performance of (1) "Computer Consulting including computer system architecture and design"; (2) "Temporary Placement Agency Services"; and, critically, (3) "Management consulting services." Dist. Ct. Doc. 155-16 at 6 (2016-17 Policy); Dist. Ct. Doc. 155-37 at 23 (2017-18 Policy).

The contracts defined "[m]anagement consulting services [to] mean[] services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions." Dist. Ct. Doc. 155-16 at 6; Dist. Ct. Doc. 155-37 at 23.

Constantin performed an audit for Schratter Foods Incorporated. Schratter was a food company, not a financial institution; so the parties do not dispute that Constantin's provision of accounting services was not to a "financial institution." The audit allegedly did not go well. After the audit, the ECB parties—the plaintiffs here—sued Constantin for alleged wrongdoing in the professional audit of Schratter's financial statements in connection with the ECB parties' acquisition of Schratter. Constantin settled and assigned its rights against ERI and Chubb Insurance Company of New Jersey to the ECB parties.

In this case, the ECB parties sued to enforce Constantin's assigned contractual rights to the insurance contract, alleging a breach of contract based on a duty to defend or indemnify in the earlier, settled lawsuit. After arguing that New Jersey law applies, ECB argued in its summary judgment briefing that "for financial

institutions" did not apply to "accounting" because of the absence of a comma before "for financial institutions." This was explicitly an argument about how Chubb did not win under the series-qualifier canon.

Applying New Jersey law, the district court granted the Chubb parties summary judgment in an omnibus order. The district court decided that—contrary to Chubb's argument—the auditing of financial statements was a "service[] directed toward expertise in . . . accounting." This meant that auditing could be a type of covered activity under the professional services insurance contract. But the district court decided that Chubb nonetheless won at the summary judgment stage because the accounting services must be for a financial institution to be covered by the insurance contract. The district court also granted reformation of the 2017-18 contract to ECB so that it included Constantin as a named insured, among other decisions not challenged on appeal.

The Chubb parties moved to amend the order, and the ECB parties requested reconsideration. At reconsideration, ECB raised the last-antecedent and *contra proferentem* canons for the first time, albeit without calling it the *contra proferentem* canon.

The district court granted the Chubb parties' motion to amend the order but denied the ECB parties' motion for reconsideration, stating that ECB's new canon arguments had been waived by not being made before the motion for reconsideration and that, alternatively, they did not convince the district court that reconsideration was

warranted. The district court then entered an amended omnibus order on February 25, 2022, clarifying the judgment of reformation in favor of the ECB parties. Chubb does not challenge the reformation here, and the summary judgment decisions on appeal did not change in the amended omnibus order. The district court then entered its judgment.

The ECB parties appealed.

II.

Before we can assess the merits, we must resolve two preliminary issues: our standard of review and the district court's subject matter jurisdiction. We conclude that our review is *de novo* and that the district court had diversity jurisdiction over this dispute.

A.

We analyze *de novo* all the issues in this appeal. *See Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005) (diversity jurisdiction); *Showan v. Pressdee*, 922 F.3d 1211, 1223 (11th Cir. 2019) (state law legal questions); *Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) (summary judgment). Chubb argues that we should apply an abuse of discretion standard on two points, but we disagree.

First, we do not defer to the district court's conclusion that ECB purportedly waived its New Jersey law arguments when we are assessing waiver for appellate

purposes. Although we review for an abuse of discretion a district court's determination that a party waived an affirmative defense by not making it at the appropriate time or waived apportionment of damages by making an inconsistent argument, whether a party has waived an issue for purposes of appeal is a matter that we must assess *de novo*. *Compare Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1350 n.9 (11th Cir. 2007) (affirmative defense), *Smith v. R.J. Reynolds Tobacco Co.*, 880 F.3d 1272, 1280-82 (11th Cir. 2018) (apportionment of damages), and *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1359 (11th Cir. 2018) (apportionment of damages), *with United States v. Riggs*, 967 F.2d 561, 564-65 (11th Cir. 1992) (analyzing appellate waiver ourselves when the party failed to make an argument in the district court), and *Am. Builders Ins. Co. v. Southern-Owners Ins. Co.*, 71 F.4th 847, 856 n.1 (11th Cir. 2023) (same).

Second, the district court's denial of ECB's motion for reconsideration does not change the standard of review we apply to its decision to grant summary judgment. When we review a disposition after a denial of a motion for reconsideration, we review the original disposition itself under whatever standard of review we would normally use. *See Blackburn v. Shire US Inc.*, 18 F.4th 1310, 1317 (11th Cir. 2021) (using an abuse of discretion standard when reviewing a denial of leave to amend under Federal Rule of Civil Procedure 15(a)(2) because that is the Rule 15(a)(2) standard, without regard to the denial of the motion for reconsideration). To reverse a judgment, an appellant needs to establish an error in the judgment, not an error in the judgment *plus* an error in the district court's

denial of a motion to reconsider that judgment. Here, we address the challenged summary judgment order without regard to the unchallenged denial of the motion for reconsideration. *See Gulisano v. Burlington, Inc.*, 34 F.4th 935, 941-45 (11th Cir. 2022) (affirming an initial sanctions order despite separately deeming abandoned a challenge to the subsequent denial of a motion for reconsideration of that sanctions order).

B.

We have appellate jurisdiction over the district court's final judgment under 28 U.S.C. § 1291. But before addressing the merits, we must first satisfy ourselves that the district court had subject matter jurisdiction. We raised this issue *sua sponte*, the parties briefed the issue, and, ultimately, the plaintiffs amended the complaint. The parties argue that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a). We agree.

For diversity jurisdiction, the citizenship of all parties must be completely diverse, and the amount in controversy must exceed $75,000. *See Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1085 (11th Cir. 2010) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806); *Palmer v. Hosp. Auth. of Randolph Cnty.*, 22 F.3d 1559, 1564 (11th Cir. 1994); *Tardan v. Cal. Oil Co.*, 323 F.2d 717, 721-22 (5th Cir. 1963); 28 U.S.C. § 1332(a)). There is no meaningful question that the matter in controversy is over $75,000. But the face of the pleadings originally did not disclose the citizenship of all the parties.

Appendix A

A corporation is a citizen of its state or foreign country of incorporation and principal place of business. *See* 28 U.S.C. § 1332(c)(1). But we determine diversity jurisdiction for partnerships and nearly all other non-corporate entities based on the members' citizenships. *Underwriters at Lloyd's, London*, 613 F.3d at 1086 (citing *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480, 53 S. Ct. 447, 77 L. Ed. 903 (1933)); *see also Schiavone Constr. Co. v. City of New York*, 99 F.3d 546, 548 (2d Cir. 1996) (joint ventures); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004) (LLCs).

We begin with the plaintiffs. Atlantic Ventures Corp. and ECB USA, Inc. are Florida corporations with their principal places of business in Florida. G.I.E. C2B ("C2B") is a Groupement d'Interet Economique under French law, which resembles a joint venture (a type of partnership). *See Union Carbide Corp. v. Exxon Corp.*, 77 F.3d 677, 679 (2d Cir. 1996); *Phillips v. Kaplus*, 764 F.2d 807, 810 (11th Cir. 1985) ("joint venture partnership"). C2B has twenty-nine shareholders: three are Florida corporations with their principal places of business in Florida, nineteen are French corporations with their principal places of business in France, and seven are French LLCs (which are entirely made up of French citizen individuals or French corporations with a principal place of business in France). In sum, C2B's members are citizens of France and Florida. Thus, the plaintiffs are citizens of France and Florida.[1]

1. Constantin Associates, LLP was substituted and eliminated as a party to the Fourth Amended Complaint under Federal Rule of Civil Procedure 17(a)(3). We construe the Fifth Amended Complaint—amended at our order—to contain the same party

Defendant Chubb Insurance Company of New Jersey is a New Jersey corporation with its principal place of business in New Jersey, so it is a citizen of New Jersey. Defendant ERI is a Delaware corporation with its principal place of business in New Jersey, so it is a citizen of Delaware and New Jersey. Thus, the defendants are citizens of New Jersey and Delaware.

Because the plaintiffs are citizens of France and Florida, and the defendants are citizens of Delaware and New Jersey, there is complete diversity. Therefore, we agree with the parties that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a).

III.

Having resolved the standard of review and jurisdiction, we now turn to the merits. Chubb insured Constantin against liability arising from "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions." Constantin performed an allegedly negligent audit for a food service company—not a financial institution. Whether the policy provides coverage turns on whether the phrase "for financial institutions" modifies "accounting."

---

substitutions. Rule 17(a)(3) provides that "[a]fter . . . substitution, the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). Therefore, we ignore Constantin's citizenship in our complete diversity analysis.

The parties agree that New Jersey law governs our interpretation of the policy, but there is nothing unusual or idiosyncratic about New Jersey law as it pertains to principles of contract interpretation. Like most state courts, the Supreme Court of New Jersey has held that "[i]n attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 948 A.2d 1285, 1289 (N.J. 2008) (citing *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 775 A.2d 1262, 1264 (N.J. 2001)). "If the language is clear, that is the end of the inquiry. Indeed, in the absence of an ambiguity, a court should not 'engage in a strained construction to support the imposition of liability' or write a better policy for the insured than the one purchased." *Id.* (citation omitted) (quoting *Progressive Cas. Ins. Co. v. Hurley*, 166 N.J. 260, 765 A.2d 195, 202 (N.J. 2001)).

The New Jersey courts have also recognized that linguistic canons of construction may help a court determine the plain meaning of a text. *See, e.g., Gudgeon v. Ocean Cnty.*, 135 N.J. Super. 13, 342 A.2d 553, 555 (N.J. Super. Ct. App. Div. 1975) (describing grammar analysis using the syntactic canons as merely "consideration of principles of grammatical construction"). The Supreme Court of New Jersey has long applied the last-antecedent canon as it is commonly understood. *See State v. Gelman*, 195 N.J. 475, 950 A.2d 879, 884 (N.J. 2008) ("[T]he doctrine of the last antecedent . . . holds that, unless a contrary intention otherwise appears, a qualifying phrase within a statute refers to the last antecedent phrase." (citing 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes*

and Statutory Construction § 47.33 (7th ed. 2007))). And recently, the Supreme Court of New Jersey recognized that the series-qualifier canon applies "when there is a modifying word or phrase that appears at the beginning [or end] of an uninterrupted list." *See In re Proposed Constr. of Compressor Station (CS327)*, No. 088744, ___ A.3d ___, 2024 N.J. LEXIS 792, 2024 WL 3659132, at *9 (N.J. Aug. 6, 2024) (citing *Lockhart v. United States*, 577 U.S. 347, 364, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016) (Kagan, J., dissenting) (quoting Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012))).

Finally, New Jersey courts recognize *contra proferentem*. This substantive canon provides that courts should read an ambiguous contract to have the meaning that favors the non-drafting party, which is generally the insured party with an insurance contract. *See Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co.*, 229 N.J. 196, 160 A.3d 1263, 1270 (N.J. 2017) ("Ordinarily, our courts construe insurance contract ambiguities in favor of the insured via the doctrine of *contra proferentem*." (citing *Progressive Cas. Ins. Co.*, 765 A.2d at 201-02)). Effectively, *contra proferentem* gives weight to one party's interpretation if there is a true ambiguity.

Chubb argues that ECB cannot rely on the last-antecedent or *contra proferentem* canons on appeal because it first raised these canons in its motion for reconsideration under Federal Rule of Civil Procedure 59—which the district court denied in part because the

canons had not previously been raised—and because ECB did not challenge the district court's denial of its motion for reconsideration on appeal. We disagree. As we have already explained, we are reviewing the district court's earlier summary judgment decision, not its decision on ECB's motion for reconsideration. In denying ECB's motion for reconsideration, the district court properly noted that a Rule 59 motion is usually not a proper vehicle to raise new arguments that could have been raised prior to the entry of judgment. *See Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). But the district court's ruling on ECB's Rule 59 motion does not control what arguments ECB may make on appeal.

For purposes of appeal, ECB may raise the canons to support its construction of the policy. Litigants can waive or forfeit positions or issues through their litigation conduct in the district court but not authorities or arguments. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000); *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1194 (11th Cir. 2018); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016). So a party cannot usually argue that a legal text should be read to mean something different on appeal than what it argued for below (a new position) or raise a new legal ground as the reason it should win (a new issue). But a party on appeal can always cite a new authority—such as the canons of construction—in favor of reading a legal text to mean what the party advocated for below. Here, of course, ECB has consistently argued that the policy language covers "accounting" consulting

for businesses in any industry, notwithstanding the phrase "for financial institutions." The canons merely provide additional authority to support that position.

Although our caselaw has sometimes muddied the line between an issue (which can be waived or forfeited) and an argument (which cannot be), we are nowhere close to the line here. A party may always rely on a canon of construction to support the same interpretation of a legal document that the party advanced in the district court. A party can no more waive or forfeit the canons for appellate purposes than it can waive or forfeit the existence of a precedent or the words of a statute. *See United States v. Dawson*, 64 F.4th 1227, 1239 (11th Cir. 2023) ("Indeed, a party cannot waive lenity any more than it can waive the plain meaning of a word or the canon of *noscitur a sociis*."). So even if ECB missed its chance to cite these canons to the district court, ECB did not waive or forfeit anything for purposes of appeal.

Against this backdrop, ECB argues that the policy covers all accounting services, and Chubb argues that the policy covers only accounting services for financial institutions. Chubb contends that its position is supported by the series-qualifier canon and the surrounding language in the agreement. ECB says that its position is supported by the last-antecedent canon. To the extent the language is ambiguous, ECB says that the principle of *contra proferentem* means we must resolve any ambiguities in its favor. We think Chubb has the better argument in all respects.

Appendix A

A.

We'll start with the plain language of the agreement. The object in contract interpretation is to identify the intent of the parties, and the best evidence of the intent is the language of the agreement itself. "The canons of construction often 'play a prominent role' in [interpreting a text] . . . , serving as 'useful tools' to discern th[e] ordinary meaning." *Heyman v. Cooper*, 31 F.4th 1315, 1319 (11th Cir. 2022) (quoting *Facebook, Inc. v. Duguid*, 592 U.S. 395, 410, 141 S. Ct. 1163, 209 L. Ed. 2d 272 (2021) (Alito, J., concurring in the judgment)). The parties here rely extensively—almost exclusively—on canons of interpretation as evidence of plain meaning. So that is where we will turn.

1.

When a "provision includes a list of nouns followed by a modifier," the parties usually invoke two canons: the last-antecedent canon and the series-qualifier canon. *Id.* And that is what Chubb and ECB have done here.

The rule of the last antecedent in its purest form provides that "[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." Scalia & Garner, *supra*, at 144. In grammar, an "antecedent" is "a substantive word, phrase, or clause whose denotation is referred to by a pronoun that typically follows the substantive [word] (such as John in 'Mary saw John and called to him')." *Antecedent*, Merriam-Webster, https://perma.cc/4896-M68J. "The last

antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." *Kamienski v. State, Dep't of Treasury*, 451 N.J. Super. 499, 169 A.3d 493, 505 n.11 (N.J. Super. Ct. App. Div. 2017) (internal quotation marks omitted) (quoting 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed., rev. 2014)). Unsurprisingly, ECB urges us to follow that canon here, treating "asset recovery and strategy planning" as the last antecedent—in a loose sense—of "for financial institutions."

The series-qualifier canon, on the other hand, provides that, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Scalia & Garner, *supra*, at 147. It reflects the unremarkable convention that "[w]hen several words are followed by a clause [that] [] is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 572 U.S. 434, 447, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014) (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 64 L. Ed. 944 (1920)). Unsurprisingly, Chubb urges us to apply the series-qualifier canon—treating "for financial institutions" as an adjective phrase that applies to each preceding noun in the series, including "accounting."

These two canons are sometimes referred to as "competing" because they can both apply to words and

phrases that come at the end of a sentence. *See Heyman*, 31 F.4th at 1319. But they are more accurately viewed as solving for different problems.

The series-qualifier canon helps us understand the meaning of items in a list with a parallel construction that are modified by an adjective, adverb, or qualifying phrase. The paradigmatic case for the series-qualifier canon is "[a] state statute allow[ing] medical professionals access to certain hospital records if they [are] 'requesting or seeking through discovery data, information, or records relating to their medical staff privileges." Scalia & Garner, *supra*, at 149 (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379 (Minn. 1999)). There are two ways to read "through discovery" in this statute. It either modifies both requesting and seeking or only seeking. The leading treatise on the canons—Scalia and Garner—explains that the Minnesota Supreme Court correctly determined that "through discovery" modifies both terms. *See id.* at 150 (citing *Amaral*, 598 N.W.2d at 388).

The last-antecedent canon, on the other hand, is generally used to help us understand to what a pronoun, relative pronoun, or demonstrative adjective is referring. These are all words or phrases that act as shorthand or substitutes for something else—such as "she," "that kind of activity," or "such person." *See Pronoun*, Merriam-Webster, https://perma.cc/AW4D-5692; Scalia & Garner, *supra*, at 145 (relative pronouns); *Demonstrative Adjectives*, The Mayfield Handbook of Technical & Scientific Writing, https://perma.cc/TR99-XBHH. The paradigmatic example of this canon is in Article II of the

U.S. Constitution. It states that "In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President." U.S. Const. art. II, § 1, cl. 6, *amended by* U.S. Const. amend. XXV. What is "the Same" that devolves onto the Vice President: "the Powers and Duties" of the President or the "Office" of President? The last-antecedent canon resolves this issue in favor of *office* being the nearest reasonable antecedent of *same*. *See* Scalia and Garner, *supra*, at 144.

To be clear, courts have gone further and applied the last-antecedent canon to other parts of speech when the text and context reinforce that reading. That is, some have recognized that, in addition to pronouns and the like, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2007) (collecting cases); *see also, e.g., Lockhart*, 577 U.S. at 350-52; *Morella v. Grand Union/N.J. Self-Insurers Guar. Ass'n*, 391 N.J. Super. 231, 917 A.2d 826, 831 (N.J. Super. Ct. App. Div. 2007), *aff'd sub nom. Morella v. Grand Union Co./N.J. Self-Insurers Guar. Ass'n*, 193 N.J. 350, 939 A.2d 226 (N.J. 2008). When applying this canon beyond pronouns and related words, "it is more accurate . . . to call it the nearest-reasonable-referent canon" because, "[s]trictly speaking, only pronouns have antecedents." Scalia & Ganer, *supra*, at 152 (emphasis omitted); *see also Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1111 (11th Cir. 2016). But the result is the same: this principle suggests that "adjectives, adverbs,

and adverbial or adjectival phrases" normally modify the closest reasonable noun or verb, "and it applies not just to words that precede the modifier, but also to words that follow it." Scalia & Garner, *supra*, at 152. But that presumption does not apply when the nouns or verbs are in a parallel series. *See id.* ("When the syntax involves something *other than a parallel series of nouns or verbs*, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." (emphasis added)).

Of course, all these canons—including the last-antecedent and nearest-reasonable-referent canons—can be defeated by other indicia of meaning because they are just one tool of textual analysis. *See Lockhart*, 577 U.S. at 352 ("Of course, as with any canon of statutory interpretation, the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning.'" (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003))); *Gelman*, 950 A.2d at 884 ("*[U]nless a contrary intention otherwise appears*, a qualifying phrase within a statute refers to the last antecedent phrase." (emphasis added)). Indeed, we have explained that "the canons are not rules of interpretation in any strict sense." *Heyman*, 31 F.4th at 1319 (internal quotation marks omitted) (quoting Scalia & Garner, *supra*, at 51). They are just rules of thumb that reflect common grammatical presumptions. *See id.*

2.

Having explained the applicable canons, we turn to the meat of the parties' dispute: Does "for financial

institutions" modify "accounting" in the phrase "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions"? ECB argues that we should apply the last-antecedent canon (or, more accurately, the nearest-reasonable-referent canon) and hold that "for financial institutions" modifies only "asset recovery and strategy planning." Chubb argues that we should apply the series-qualifier canon and construe "for financial institutions" to modify all the items in the list, including "accounting."

We believe that, as between the parties' two ways of understanding the text, the better reading is provided by the series-qualifier canon. The key to understanding any text—and to intelligently applying the canons—is "logic, linguistics, and common sense." *Id.* at 1322. Considering this phrase in context, the best reading of the policy language is that it covers "services directed toward expertise in . . . accounting . . . for financial institutions."

We believe this understanding is better for three reasons.

First, the relevant phrase here involves none of the parts of speech to which the last-antecedent canon is most clearly useful. The phrase "for financial institutions" isn't standing in for another phrase. It's not a pronoun like "she" or "it," a relative pronoun like "that" in certain sentences, or a demonstrative adjective like "such" or "these." The canons are useful because they reflect "presumptions about what an intelligently produced text conveys." *Id.*

at 1319 (quoting Scalia & Garner, *supra*, at 51). But we are outside the heartland of the last-antecedent canon's most fundamental presumption—that a pronoun or other stand-in refers back to the closest noun.

Of course, the last-antecedent principle goes beyond pronouns, but even this more robust version of the principle as reflected in the nearest-reasonable-referent canon doesn't do much work here. The closest referent to "for financial institutions" in the contract is "strategy planning"—"banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and *strategy planning for financial institutions*." But ECB concedes that, at the very least, the phrase "for financial institutions" applies to "asset recovery" too. That is, ECB concedes that the phrase applies to more than the nearest reasonable referent.

ECB's concession is well taken. By conceding that "for financial institutions" cannot apply to only "strategy planning," ECB recognizes that "asset recovery and strategy planning" are parallel terms. And no version of the last-antecedent canon or nearest-reasonable-referent canon applies when the syntax involves "a parallel series of nouns or verbs." Scalia & Garner, *supra*, at 152. In light of its concession, ECB is not really arguing that the last-antecedent canon or nearest-reasonable-referent canon solves the interpretive problem here. Instead, it is arguing that we should apply a limited version of the series-qualifier canon—viewing "asset recovery and strategy planning" as a series that is separate from the rest of the nouns in the phrase.

Second, as indicated by ECB's concession, we are within the heartland of the series-qualifier canon. To start, the parts of speech to which the series-qualifier canon applies are present here. "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *Id.* at 147. Here, we have a parallel construction in a series that is followed by a postpositive qualifier—"for financial institutions." The contract has a list of nouns separated only by commas, with no additional words like prepositions, articles, or conjunctions within the middle of the list; so these terms are in parallel. The parallel nature of the terms links them together so that the postpositive modifier "for financial institutions" can naturally apply to every item in the list, not just the last one or two.

For its part, ECB argues that "asset recovery and strategy planning" should be treated differently than the other items in the list because there is no comma between "asset recovery" and "and strategy planning" or between "strategy planning" and "for financial institutions." We aren't convinced.

Certainly, the presence of a comma before "for financial institutions" would establish with more certainty that it applies across every term in the list. *See, e.g., Facebook, Inc.*, 592 U.S. at 403-04 (recognizing that the presence of a comma suggests a phrase applies across all terms); *Gudgeon*, 342 A.2d at 555-56 ("Where a comma is used to set a modifying phrase off from previous phrases, the modifying phrase applies to all the previous phrases, not just the immediately preceding phrase."); *Morella*,

917 A.2d at 831 ("[T]he use of a 'comma' to separate a modifier from an antecedent phrase indicates an intent to apply the modifier to all previous antecedent phrases." (citations omitted)). But the absence of the comma doesn't necessarily mean that "for financial institutions" fails to apply to every term. Although "commas at the end of series can avoid ambiguity, . . . [the] use of such commas is discretionary." *United States v. Bass*, 404 U.S. 336, 340 n.6, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (citing Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 103 (1957); Margaret Nicholson, *A Dictionary of American-English Usage* 94 (1957); Roy H. Copperud, *A Dictionary of Usage and Style* 94-95 (1964); William Strunk & E.B. White, *The Elements of Style* 1-2 (1959)).

Likewise, we can't discern any meaning in the absence of a comma between "asset recovery" and "and strategy planning." The comma before "asset recovery" is simply a serial comma, like all the other commas in the phrase. The last serial comma that should go between "asset recovery" and "and strategy planning"—a so-called Oxford comma—is often dropped at the end of a list. There isn't any ambiguity about whether the "and" before "strategy planning" indicates that "strategy planning" closes the list—it does. So there's no reason to believe that New Jersey courts would import meaning into the absence of an Oxford comma in this sentence. *See Perez v. Zagami, LLC*, 218 N.J. 202, 94 A.3d 869, 874 (N.J. 2014) ("Although not to be entirely ignored, punctuation cannot be allowed to control the meaning of the words chosen to voice the intention." (quoting *Casriel v. King*, 2 N.J. 45, 65 A.2d 514, 516 (N.J. 1949))).

Third, in addition to these canons, Chubb's reading is more consistent with the surrounding language. Recall that the insurance policy covers liability arising out of "[m]anagement consulting services." Then, the contract defines "[m]anagement consulting services [to] mean[] services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions."

ECB's reading does violence to the overall text in two key respects. To begin, if "for financial institutions" doesn't apply to "accounting," then it doesn't really limit anything at all. All consulting about asset recovery or strategy planning would presumably reflect at least some "expertise in . . . accounting." Because any consulting service that would be provided to a business could reflect expertise in "accounting," ECB's reading would defeat the purpose of having a "financial institutions" limitation on any of the terms. Moreover, if "for financial institutions" didn't apply to the whole list, certain consulting services like "banking finance," "asset recovery . . . for financial institutions," and "strategy planning for financial institutions" would be bounded by a relationship to finance and banks—but other services like "accounting" would be completely unrelated to the industry of the firm's client. Conversely, applying "for financial institutions" to all the terms gives meaning to the "for financial institutions" limitation and makes sense when the phrases are viewed together as a group.

* * *

Chubb's view is far more likely to reflect the meeting of the minds. Because applying "for financial institutions" across all terms is consistent with the general rule of the series-qualifier canon—which grammatically applies best here—and makes far more sense in context, that is the plain meaning of the contract's language. "The two possible readings thus reduce to one . . . ." *Pulsifer v. United States*, 601 U.S. 124, 144 S. Ct. 718, 737, 218 L. Ed. 2d 77 (2024).

B.

In response to this reasoning, ECB argues that this contract is ambiguous and that it should, therefore, win under the *contra proferentem* canon. The *contra proferentem* canon provides that courts should read an ambiguous contract to have the meaning that favors the non-drafting party. *See Oxford Realty Grp. Cedar*, 160 A.3d at 1270. When an insurance company drafts an insurance contract, the *contra proferentem* canon requires resolving ambiguities in an insurance contract in favor of the insured. *See id.*

Although the *contra proferentem* canon is a well-established part of New Jersey law, it doesn't help ECB for two reasons.

First, this contract is not genuinely ambiguous. *See Pacifico v. Pacifico*, 190 N.J. 258, 920 A.2d 73, 78 (N.J. 2007). Under New Jersey law, "only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably

to the insured." *Progressive Cas. Ins. Co.*, 765 A.2d at 202 (citing *Am. White Cross Lab'ys, Inc. v. Cont'l Ins. Co.*, 202 N.J. Super. 372, 495 A.2d 152, 157 (N.J. Super. Ct. App. Div. 1985)). "A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" *Id.* (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 795 (N.J. 1979)). Some difficulty in determining the answer to a legal question does not equate to ambiguity. *See Kisor v. Wilkie*, 588 U.S. 558, 574-75, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019).

ECB argues, and it is true, that some New Jersey precedents say that "[i]f the terms of the contract are susceptible to at least two reasonable alternative interpretations, an ambiguity exists." *Chubb Custom Ins. Co.*, 948 A.2d at 1289 (citing *Nester v. O'Donnell*, 301 N.J. Super. 198, 693 A.2d 1214, 1220 (N.J. Super. Ct. App. Div. 1997)). But there are not two *reasonable* alternative interpretations of this contract language. As the Supreme Court of New Jersey has recognized, "[a]n insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants." *Oxford Realty Grp. Cedar*, 160 A.3d at 1270 (internal quotation marks omitted) (quoting *Fed. Ins. Co. v. Campbell Soup Co.*, 381 N.J. Super. 190, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005)). Instead, as we've explained, one reading of this contract is superior to the other.

In short, we do not jump straight to *contra proferentem* if we can determine the contract's meaning without it.

A court may apply that canon only "after a court has examined the terms of the contract, in light of the common usage and custom, and considered the circumstances surrounding its execution." *Pacifico*, 920 A.2d at 78. Only "[i]f, at that time, the court is unable to determine the meaning of the term, [may] *contra proferentem* [] be employed as a doctrine of last resort." *Id.* (emphasis added). Because we can readily interpret this contract in light of its text, there is no genuine interpretational difficulty, and we need not and cannot turn to *contra proferentem*.

Second, even if there were a genuine interpretational dispute such that the *contra proferentem* canon could apply to this contractual text, it would not apply to an insurance contract between these sophisticated commercial entities. The Supreme Court of New Jersey has held that "the rules tending to favor an insured that has entered into a contract of adhesion are inapplicable where, as here, both parties are sophisticated commercial entities with equal bargaining power." *Chubb Custom Ins. Co.*, 948 A.2d at 1294 (citing *Pacifico*, 920 A.2d at 78-79) (stating that New Jersey case law "requir[es] unequal bargaining power for application of *contra proferentem*" (citing *Pacifico*, 920 A.2d at 78-79)); *see also Oxford Realty Grp. Cedar*, 160 A.3d at 1270 ("Sophisticated commercial insureds, however, do not receive the benefit of having contractual ambiguities construed against the insurer." (citing *Chubb Custom Ins. Co.*, 948 A.2d at 1294; *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 548 A.2d 188, 192 (N.J. 1988))).

We have no doubt that Constantin—the accounting firm insured under this contract—is a sophisticated commercial entity that had many different options to purchase liability insurance. It may be, as ECB argues, that the former New Jersey branch of Constantin was a relatively small office with few employees, but size does not necessarily equate to a lack of commercial sophistication. Even that smaller office was composed of accounting professionals, and those professionals specifically asked for an insurance policy that would cover risks arising from "management consulting for the financial community." Because Constantin was offering its services and expertise to help its clients manage risk, it stands to reason that it was sophisticated enough to manage its own.

IV.

We **AFFIRM** the district court's grant of summary judgment.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 1, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10811

ECB USA, INC., A FLORIDA CORPORATION, ATLANTIC VENTURES CORP., A FLORIDA CORPORATION, G.I.E. C2B, A FRENCH BUSINESS ENTITY, AS ASSIGNEES OF CONSTANTIN ASSOCIATIONS LLP, A NEW YORK LIMITED LIABILITY PARTNERSHIP, CONSTANTIN ASSOCIATES LLP,

Plaintiffs-Counter Defendants-Appellants,

versus

CHUBB INSURANCE COMPANY OF NEW JERSEY, A NEW JERSEY INSURANCE COMPANY CORPORATION, EXECUTIVE RISK INDEMNITY, INC., A DELAWARE INSURANCE CORPORATION,

Defendants-Counter Claimants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-20569-RNS

Appendix B

Before JORDAN, BRASHER, and ABUDU, Circuit Judges.

BRASHER, Circuit Judge:

This case comes down to grammar and canons of construction. Chubb issued an insurance policy that covers claims against Constantin arising from "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning *for financial institutions*." Constantin performed an audit for a food services company; the audit went wrong and led to liability. Constantin transferred its rights under the policy to the ECB parties. The question for us is whether "for financial institutions" limits "accounting" such that there is no coverage under the policy for the audit of a food services company.

Chubb and its related parties argue that the phrase "for financial institutions" applies to everything in the list; ECB and its related parties argue that "for financial institutions" applies only to the last phrase in the series of covered services. We agree with Chubb. The series-qualifier canon of interpretation suggests that a postpositive modifier like "for financial institutions" modifies all the terms in a list of parallel items. Chubb's position is also supported by the surrounding language of the policy. Although ECB argues that the last-antecedent canon and *contra proferentem* support its position, those canons are inapposite. Because the accounting at issue was not performed for a financial institution, the claim is not covered by the professional services insurance contract

that Chubb issued. Therefore, we affirm the district court's grant of summary judgment to Chubb.

I.

Constantin is a sophisticated commercial entity that provides accounting services. In 2001, Constantin Control Associates LP acquired professional services insurance from Executive Risk Indemnity, Inc. ("ERI"), a subsidiary of Chubb Limited—the ultimate parent company. Constantin's application for insurance coverage stated that it wanted insurance for "management consulting for the financial community." Dist. Ct. Doc. 155-17 at 2. Constantin received professional liability insurance, which it renewed with ERI over the years. The last policy period with ERI ended in December 2017. In December 2017, Constantin renewed the policy for the 2017-18 policy period with Chubb Insurance Company of New Jersey, another subsidiary of Chubb Limited.

For the relevant contract years of 2016-17 and 2017-18, Constantin's contract included Constantin Associates LLP as an insured party either by express incorporation or through definitions involving their corporate relationship. Also in both years, Constantin's "Professional Services" liability insurance covered services Constantin performed for others for a fee that were listed in a specific cross-referenced list. The relevant cross-reference in the insurance policies insured Wrongful Acts—which the contracts define—in the performance of (1) "Computer Consulting including computer system architecture and design"; (2) "Temporary Placement Agency Services";

and, critically, (3) "Management consulting services." Dist. Ct. Doc. 155-16 at 6 (2016-17 Policy); Dist. Ct. Doc. 155-37 at 23 (2017-18 Policy).

The contracts defined "[m]anagement consulting services [to] mean[] services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions." Dist. Ct. Doc. 155-16 at 6; Dist. Ct. Doc. 155-37 at 23.

Constantin performed an audit for Schratter Foods Incorporated. Schratter was a food company, not a financial institution; so the parties do not dispute that Constantin's provision of accounting services was not to a "financial institution." The audit allegedly did not go well. After the audit, the ECB parties—the plaintiffs here—sued Constantin for alleged wrongdoing in the professional audit of Schratter's financial statements in connection with the ECB parties' acquisition of Schratter. Constantin settled and assigned its rights against ERI and Chubb Insurance Company of New Jersey to the ECB parties.

In this case, the ECB parties sued to enforce Constantin's assigned contractual rights to the insurance contract, alleging a breach of contract based on a duty to defend or indemnify in the earlier, settled lawsuit. After arguing that New Jersey law applies, ECB argued in its summary judgment briefing that "for financial institutions" did not apply to "accounting" because of the absence of a comma before "for financial institutions." This was explicitly an argument about how Chubb did not win under the series-qualifier canon.

Appendix B

Applying New Jersey law, the district court granted the Chubb parties summary judgment in an omnibus order. The district court decided that—contrary to Chubb's argument—the auditing of financial statements was a "service[] directed toward expertise in . . . accounting." This meant that auditing could be a type of covered activity under the professional services insurance contract. But the district court decided that Chubb nonetheless won at the summary judgment stage because the accounting services must be for a financial institution to be covered by the insurance contract. The district court also granted reformation of the 2017-18 contract to ECB so that it included Constantin as a named insured, among other decisions not challenged on appeal.

The Chubb parties moved to amend the order, and the ECB parties requested reconsideration. At reconsideration, ECB raised the last-antecedent and *contra proferentem* canons for the first time, albeit without calling it the *contra proferentem* canon.

The district court granted the Chubb parties' motion to amend the order but denied the ECB parties' motion for reconsideration, stating that ECB's new canon arguments had been waived by not being made before the motion for reconsideration and that, alternatively, they did not convince the district court that reconsideration was warranted. The district court then entered an amended omnibus order on February 25, 2022, clarifying the judgment of reformation in favor of the ECB parties. Chubb does not challenge the reformation here, and the summary judgment decisions on appeal did not change

in the amended omnibus order. The district court then entered its judgment.

The ECB parties appealed.

II.

Before we can assess the merits, we must resolve two preliminary issues: our standard of review and the district court's subject matter jurisdiction. We conclude that our review is *de novo* and that the district court had diversity jurisdiction over this dispute.

A.

We analyze *de novo* all the issues in this appeal. *See Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005) (diversity jurisdiction); *Showan v. Pressdee*, 922 F.3d 1211, 1223 (11th Cir. 2019) (state law legal questions); *Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) (summary judgment). Chubb argues that we should apply an abuse of discretion standard on two points, but we disagree.

First, we do not defer to the district court's conclusion that ECB purportedly waived its New Jersey law arguments when we are assessing waiver for appellate purposes. Although we review for an abuse of discretion a district court's determination that a party waived an affirmative defense by not making it at the appropriate time or waived apportionment of damages by making an inconsistent argument, whether a party has waived

an issue for purposes of appeal is a matter that we must assess *de novo*. *Compare Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1350 n.9 (11th Cir. 2007) (affirmative defense), *Smith v. R.J. Reynolds Tobacco Co.*, 880 F.3d 1272, 1280-82 (11th Cir. 2018) (apportionment of damages), and *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1359 (11th Cir. 2018) (apportionment of damages), *with United States v. Riggs*, 967 F.2d 561, 564-65 (11th Cir. 1992) (analyzing appellate waiver ourselves when the party failed to make an argument in the district court), and *Am. Builders Ins. Co. v. Southern-Owners Ins. Co.*, 71 F.4th 847, 856 n.1 (11th Cir. 2023) (same).

Second, the district court's denial of ECB's motion for reconsideration does not change the standard of review we apply to its decision to grant summary judgment. When we review a disposition after a denial of a motion for reconsideration, we review the original disposition itself under whatever standard of review we would normally use. *See Blackburn v. Shire US Inc.*, 18 F.4th 1310, 1317 (11th Cir. 2021) (using an abuse of discretion standard when reviewing a denial of leave to amend under Federal Rule of Civil Procedure 15(a)(2) because that is the Rule 15(a)(2) standard, without regard to the denial of the motion for reconsideration). To reverse a judgment, an appellant needs to establish an error in the judgment, not an error in the judgment *plus* an error in the district court's denial of a motion to reconsider that judgment. Here, we address the challenged summary judgment order without regard to the unchallenged denial of the motion for reconsideration. *See Gulisano v. Burlington, Inc.*, 34 F.4th 935, 941-45 (11th Cir. 2022) (affirming an initial sanctions

order despite separately deeming abandoned a challenge to the subsequent denial of a motion for reconsideration of that sanctions order).

B.

We have appellate jurisdiction over the district court's final judgment under 28 U.S.C. § 1291. But before addressing the merits, we must first satisfy ourselves that the district court had subject matter jurisdiction. We raised this issue *sua sponte*, the parties briefed the issue, and, ultimately, the plaintiffs amended the complaint. The parties argue that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a). We agree.

For diversity jurisdiction, the citizenship of all parties must be completely diverse, and the amount in controversy must exceed $75,000. *See Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1085 (11th Cir. 2010) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806); *Palmer v. Hosp. Auth. of Randolph Cnty.*, 22 F.3d 1559, 1564 (11th Cir. 1994); *Tardan v. Cal. Oil Co.*, 323 F.2d 717, 721-22 (5th Cir. 1963); 28 U.S.C. § 1332(a)). There is no meaningful question that the matter in controversy is over $75,000. But the face of the pleadings originally did not disclose the citizenship of all the parties.

A corporation is a citizen of its state or foreign country of incorporation and principal place of business. *See* 28 U.S.C. § 1332(c)(1). But we determine diversity jurisdiction for partnerships and nearly all other non-corporate

entities based on the members' citizenships. *Underwriters at Lloyd's, London*, 613 F.3d at 1086 (citing *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480, 53 S. Ct. 447, 77 L. Ed. 903 (1933)); *see also Schiavone Constr. Co. v. City of New York*, 99 F.3d 546, 548 (2d Cir. 1996) (joint ventures); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004) (LLCs).

We begin with the plaintiffs. Atlantic Ventures Corp. and ECB USA, Inc. are Florida corporations with their principal places of business in Florida. G.I.E. C2B ("C2B") is a Groupement d'Interet Economique under French law, which resembles a joint venture (a type of partnership). *See Union Carbide Corp. v. Exxon Corp.*, 77 F.3d 677, 679 (2d Cir. 1996); *Phillips v. Kaplus*, 764 F.2d 807, 810 (11th Cir. 1985) ("joint venture partnership"). C2B has twenty-nine shareholders: three are Florida corporations with their principal places of business in Florida, nineteen are French corporations with their principal places of business in France, and seven are French LLCs (which are entirely made up of French citizen individuals or French corporations with a principal place of business in France). In sum, C2B's members are citizens of France and Florida. Thus, the plaintiffs are citizens of France and Florida.[1]

1. Constantin Associates, LLP was substituted and eliminated as a party to the Fourth Amended Complaint under Federal Rule of Civil Procedure 17(a)(3). We construe the Fifth Amended Complaint—amended at our order—to contain the same party substitutions. Rule 17(a)(3) provides that "[a]fter . . . substitution, the action proceeds as if it had been originally commenced by the real party in interest." Fed. R. Civ. P. 17(a)(3). Therefore, we ignore Constantin's citizenship in our complete diversity analysis.

Defendant Chubb Insurance Company of New Jersey is a New Jersey corporation with its principal place of business in New Jersey, so it is a citizen of New Jersey. Defendant ERI is a Delaware corporation with its principal place of business in New Jersey, so it is a citizen of Delaware and New Jersey. Thus, the defendants are citizens of New Jersey and Delaware.

Because the plaintiffs are citizens of France and Florida, and the defendants are citizens of Delaware and New Jersey, there is complete diversity. Therefore, we agree with the parties that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a).

III.

Having resolved the standard of review and jurisdiction, we now turn to the merits. Chubb insured Constantin against liability arising from "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions." Constantin performed an allegedly negligent audit for a food service company—not a financial institution. Whether the policy provides coverage turns on whether the phrase "for financial institutions" modifies "accounting."

The parties agree that New Jersey law governs our interpretation of the policy, but there is nothing unusual or idiosyncratic about New Jersey law as it pertains to principles of contract interpretation. Like most state courts, the Supreme Court of New Jersey has held that

"[i]n attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 948 A.2d 1285, 1289 (N.J. 2008) (citing *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 775 A.2d 1262, 1264 (N.J. 2001)). "If the language is clear, that is the end of the inquiry. Indeed, in the absence of an ambiguity, a court should not 'engage in a strained construction to support the imposition of liability' or write a better policy for the insured than the one purchased." *Id.* (citation omitted) (quoting *Progressive Cas. Ins. Co. v. Hurley*, 166 N.J. 260, 765 A.2d 195, 202 (N.J. 2001)).

The New Jersey courts have also recognized that linguistic canons of construction may help a court determine the plain meaning of a text. *See, e.g., Gudgeon v. Ocean Cnty.*, 135 N.J. Super. 13, 342 A.2d 553, 555 (N.J. Super. Ct. App. Div. 1975) (describing grammar analysis using the syntactic canons as merely "consideration of principles of grammatical construction"). The Supreme Court of New Jersey has long applied the last-antecedent canon as it is commonly understood. *See State v. Gelman*, 195 N.J. 475, 950 A.2d 879, 884 (N.J. 2008) ("[T]he doctrine of the last antecedent . . . holds that, unless a contrary intention otherwise appears, a qualifying phrase within a statute refers to the last antecedent phrase." (citing 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2007))). And, although the Supreme Court of New Jersey has not itself discussed the series-qualifier canon, other New Jersey appellate courts have relied on that canon. *See In re Proposed Constr. of Compressor Station (CS327)*, 476 N.J.

Super. 556, 302 A.3d 82, 89 n.10 (N.J. Super. Ct. App. Div. 2023) (quoting Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-48 (2012)); *see also id.* at 89-90.

Finally, New Jersey courts recognize *contra proferentem*. This substantive canon provides that courts should read an ambiguous contract to have the meaning that favors the non-drafting party, which is generally the insured party with an insurance contract. *See Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co.*, 229 N.J. 196, 160 A.3d 1263, 1270 (N.J. 2017) ("Ordinarily, our courts construe insurance contract ambiguities in favor of the insured via the doctrine of *contra proferentem*." (citing *Progressive Cas. Ins. Co.*, 765 A.2d at 201-02)). Effectively, *contra proferentem* gives weight to one party's interpretation if there is a true ambiguity.

Chubb argues that ECB cannot rely on the last-antecedent or *contra proferentem* canons on appeal because it first raised these canons in its motion for reconsideration under Federal Rule of Civil Procedure 59—which the district court denied in part because the canons had not previously been raised—and because ECB did not challenge the district court's denial of its motion for reconsideration on appeal. We disagree. As we have already explained, we are reviewing the district court's earlier summary judgment decision, not its decision on ECB's motion for reconsideration. In denying ECB's motion for reconsideration, the district court properly noted that a Rule 59 motion is usually not a proper vehicle

to raise new arguments that could have been raised prior to the entry of judgment. *See Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). But the district court's ruling on ECB's Rule 59 motion does not control what arguments ECB may make on appeal.

For purposes of appeal, ECB may raise the canons to support its construction of the policy. Litigants can waive or forfeit positions or issues through their litigation conduct in the district court but not authorities or arguments. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000); *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1194 (11th Cir. 2018); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016). So a party cannot usually argue that a legal text should be read to mean something different on appeal than what it argued for below (a new position) or raise a new legal ground as the reason it should win (a new issue). But a party on appeal can always cite a new authority—such as the canons of construction—in favor of reading a legal text to mean what the party advocated for below. Here, of course, ECB has consistently argued that the policy language covers "accounting" consulting for businesses in any industry, notwithstanding the phrase "for financial institutions." The canons merely provide additional authority to support that position.

Although our caselaw has sometimes muddied the line between an issue (which can be waived or forfeited) and an argument (which cannot be), we are nowhere close to the line here. A party may always rely on a canon of

construction to support the same interpretation of a legal document that the party advanced in the district court. A party can no more waive or forfeit the canons for appellate purposes than it can waive or forfeit the existence of a precedent or the words of a statute. *See United States v. Dawson*, 64 F.4th 1227, 1239 (11th Cir. 2023) ("Indeed, a party cannot waive lenity any more than it can waive the plain meaning of a word or the canon of *noscitur a sociis*."). So even if ECB missed its chance to cite these canons to the district court, ECB did not waive or forfeit anything for purposes of appeal.

Against this backdrop, ECB argues that the policy covers all accounting services, and Chubb argues that the policy covers only accounting services for financial institutions. Chubb contends that its position is supported by the series-qualifier canon and the surrounding language in the agreement. ECB says that its position is supported by the last-antecedent canon. To the extent the language is ambiguous, ECB says that the principle of *contra proferentem* means we must resolve any ambiguities in its favor. We think Chubb has the better argument in all respects.

A.

We'll start with the plain language of the agreement. The object in contract interpretation is to identify the intent of the parties, and the best evidence of the intent is the language of the agreement itself. "The canons of construction often 'play a prominent role' in [interpreting a text] . . . , serving as 'useful tools' to discern th[e]

ordinary meaning." *Heyman v. Cooper*, 31 F.4th 1315, 1319 (11th Cir. 2022) (quoting *Facebook, Inc. v. Duguid*, 592 U.S. 395, 410, 141 S. Ct. 1163, 209 L. Ed. 2d 272 (2021) (Alito, J., concurring in the judgment)). The parties here rely extensively—almost exclusively—on canons of interpretation as evidence of plain meaning. So that is where we will turn.

1.

When a "provision includes a list of nouns followed by a modifier," the parties usually invoke two canons: the last-antecedent canon and the series-qualifier canon. *Id.* And that is what Chubb and ECB have done here.

The rule of the last antecedent in its purest form provides that "[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." Scalia & Garner, *supra*, at 144. In grammar, an "antecedent" is "a substantive word, phrase, or clause whose denotation is referred to by a pronoun that typically follows the substantive [word] (such as John in 'Mary saw John and called to him')." *Antecedent*, Merriam-Webster, https://perma.cc/4896-M68J. "The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." *Kamienski v. State, Dep't of Treasury*, 451 N.J. Super. 499, 169 A.3d 493, 505 n.11 (N.J. Super. Ct. App. Div. 2017) (internal quotation marks omitted) (quoting 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed., rev. 2014)). Unsurprisingly, ECB urges us to follow that canon

here, treating "asset recovery and strategy planning" as the last antecedent—in a loose sense—of "for financial institutions."

The series-qualifier canon, on the other hand, provides that, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Scalia & Garner, *supra*, at 147. It reflects the unremarkable convention that "[w]hen several words are followed by a clause [that] [] is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 572 U.S. 434, 447, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014) (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 64 L. Ed. 944 (1920)). Unsurprisingly, Chubb urges us to apply the series-qualifier canon—treating "for financial institutions" as an adjective phrase that applies to each preceding noun in the series, including "accounting."

These two canons are sometimes referred to as "competing" because they can both apply to words and phrases that come at the end of a sentence. *See Heyman*, 31 F.4th at 1319. But they are more accurately viewed as solving for different problems.

The series-qualifier canon helps us understand the meaning of items in a list with a parallel construction that are modified by an adjective, adverb, or qualifying phrase. The paradigmatic case for the series-qualifier canon is

"[a] state statute allow[ing] medical professionals access to certain hospital records if they [are] 'requesting or seeking through discovery data, information, or records relating to their medical staff privileges." Scalia & Garner, *supra*, at 149 (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379 (Minn. 1999)). There are two ways to read "through discovery" in this statute. It either modifies both requesting and seeking or only seeking. The leading treatise on the canons—Scalia and Garner—explains that the Minnesota Supreme Court correctly determined that "through discovery" modifies both terms. *See id.* at 150 (citing *Amaral*, 598 N.W.2d at 388).

The last-antecedent canon, on the other hand, is generally used to help us understand to what a pronoun, relative pronoun, or demonstrative adjective is referring. These are all words or phrases that act as shorthand or substitutes for something else—such as "she," "that kind of activity," or "such person." *See Pronoun*, Merriam-Webster, https://perma.cc/AW4D-5692; Scalia & Garner, *supra*, at 145 (relative pronouns); *Demonstrative Adjectives*, The Mayfield Handbook of Technical & Scientific Writing, https://perma.cc/TR99-XBHH. The paradigmatic example of this canon is in Article II of the U.S. Constitution. It states that "In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President." U.S. Const. art. II, § 1, cl. 6, *amended by* U.S. Const. amend. XXV. What is "the Same" that devolves onto the Vice President: "the Powers and Duties" of the President or the "Office" of President? The last-antecedent canon resolves

this issue in favor of *office* being the nearest reasonable antecedent of *same. See* Scalia and Garner, *supra*, at 144.

To be clear, courts have gone further and applied the last-antecedent canon to other parts of speech when the text and context reinforce that reading. That is, some have recognized that, in addition to pronouns and the like, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2007) (collecting cases); *see also, e.g., Lockhart v. United States*, 577 U.S. 347, 350-52, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016); *Morella v. Grand Union/N.J. Self-Insurers Guar. Ass'n*, 391 N.J. Super. 231, 917 A.2d 826, 831 (N.J. Super. Ct. App. Div. 2007), *aff'd sub nom. Morella v. Grand Union Co./N.J. Self-Insurers Guar. Ass'n*, 193 N.J. 350, 939 A.2d 226 (N.J. 2008). When applying this canon beyond pronouns and related words, "it is more accurate . . . to call it the nearest-reasonable-referent canon" because, "[s]trictly speaking, only pronouns have antecedents." Scalia & Ganer, *supra*, at 152 (emphasis omitted); *see also Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1111 (11th Cir. 2016). But the result is the same: this principle suggests that "adjectives, adverbs, and adverbial or adjectival phrases" normally modify the closest reasonable noun or verb, "and it applies not just to words that precede the modifier, but also to words that follow it." Scalia & Garner, *supra*, at 152. But that presumption does not apply when the nouns or verbs are in a parallel series. *See id.* ("When the syntax involves something *other than a parallel series of nouns or verbs*, a

prepositive or postpositive modifier normally applies only to the nearest reasonable referent." (emphasis added)).

Of course, all these canons—including the last-antecedent and nearest-reasonable-referent canons—can be defeated by other indicia of meaning because they are just one tool of textual analysis. *See Lockhart*, 577 U.S. at 352 ("Of course, as with any canon of statutory interpretation, the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning.'" (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003))); *Gelman*, 950 A.2d at 884 ("*[U]nless a contrary intention otherwise appears*, a qualifying phrase within a statute refers to the last antecedent phrase." (emphasis added)). Indeed, we have explained that "the canons are not rules of interpretation in any strict sense." *Heyman*, 31 F.4th at 1319 (internal quotation marks omitted) (quoting Scalia & Garner, *supra*, at 51). They are just rules of thumb that reflect common grammatical presumptions. *See id.*

2.

Having explained the applicable canons, we turn to the meat of the parties' dispute: Does "for financial institutions" modify "accounting" in the phrase "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions"? ECB argues that we should apply the last-antecedent canon (or, more accurately, the nearest-reasonable-referent canon) and hold that "for financial

institutions" modifies only "asset recovery and strategy planning." Chubb argues that we should apply the series-qualifier canon and construe "for financial institutions" to modify all the items in the list, including "accounting."

We believe that, as between the parties' two ways of understanding the text, the better reading is provided by the series-qualifier canon. The key to understanding any text—and to intelligently applying the canons—is "logic, linguistics, and common sense." *Id.* at 1322. Considering this phrase in context, the best reading of the policy language is that it covers "services directed toward expertise in . . . accounting . . . for financial institutions."

We believe this understanding is better for three reasons.

First, the relevant phrase here involves none of the parts of speech to which the last-antecedent canon is most clearly useful. The phrase "for financial institutions" isn't standing in for another phrase. It's not a pronoun like "she" or "it," a relative pronoun like "that" in certain sentences, or a demonstrative adjective like "such" or "these." The canons are useful because they reflect "presumptions about what an intelligently produced text conveys." *Id.* at 1319 (quoting Scalia & Garner, *supra*, at 51). But we are outside the heartland of the last-antecedent canon's most fundamental pre-sumption—that a pronoun or other stand-in refers back to the closest noun.

Of course, the last-antecedent principle goes beyond pronouns, but even this more robust version of the

principle as reflected in the nearest-reasonable-referent canon doesn't do much work here. The closest referent to "for financial institutions" in the contract is "strategy planning"—"banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and *strategy planning for financial institutions*." But ECB concedes that, at the very least, the phrase "for financial institutions" applies to "asset recovery" too. That is, ECB concedes that the phrase applies to more than the nearest reasonable referent.

ECB's concession is well taken. By conceding that "for financial institutions" cannot apply to only "strategy planning," ECB recognizes that "asset recovery and strategy planning" are parallel terms. And no version of the last-antecedent canon or nearest-reasonable-referent canon applies when the syntax involves "a parallel series of nouns or verbs." Scalia & Garner, *supra*, at 152. In light of its concession, ECB is not really arguing that the last-antecedent canon or nearest-reasonable-referent canon solves the interpretive problem here. Instead, it is arguing that we should apply a limited version of the series-qualifier canon—viewing "asset recovery and strategy planning" as a series that is separate from the rest of the nouns in the phrase.

Second, as indicated by ECB's concession, we are within the heartland of the series-qualifier canon. To start, the parts of speech to which the series-qualifier canon applies are present here. "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally

applies to the entire series." *Id.* at 147. Here, we have a parallel construction in a series that is followed by a postpositive qualifier—"for financial institutions." The contract has a list of nouns separated only by commas, with no additional words like prepositions, articles, or conjunctions within the middle of the list; so these terms are in parallel. The parallel nature of the terms links them together so that the postpositive modifier "for financial institutions" can naturally apply to every item in the list, not just the last one or two.

We note that the New Jersey courts have applied the series-qualifier canon when faced with a similar grammatical construction of a parallel list of nouns and a modifying word. *See In re Proposed Constr. of Compressor Station (CS327)*, 302 A.3d at 89 n.10 (quoting Scalia & Garner, *supra*, at 147-48). In that case, the New Jersey court interpreted a statute that said "routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines . . . ." *See id.* at 88 (quoting N.J. Stat. Ann. § 13:20-28(a)(11)). The question was whether "routine" modified only "maintenance and operations" or other items in the list. *See id.* The New Jersey court applied the prepositive modifier "routine" to all terms in the list. *See id.* at 89. Here, we have a postpositive modifier, which has the same grammatical function but comes after instead of before the terms it modifies. It follows that the same principle should apply.

For its part, ECB argues that "asset recovery and strategy planning" should be treated differently than the

other items in the list because there is no comma between "asset recovery" and "and strategy planning" or between "strategy planning" and "for financial institutions." We aren't convinced.

Certainly, the presence of a comma before "for financial institutions" would establish with more certainty that it applies across every term in the list. *See, e.g.*, *Facebook, Inc.*, 592 U.S. at 403-04 (recognizing that the presence of a comma suggests a phrase applies across all terms); *Gudgeon*, 342 A.2d at 555-56 ("Where a comma is used to set a modifying phrase off from previous phrases, the modifying phrase applies to all the previous phrases, not just the immediately preceding phrase."); *Morella*, 917 A.2d at 831 ("[T]he use of a 'comma' to separate a modifier from an antecedent phrase indicates an intent to apply the modifier to all previous antecedent phrases." (citations omitted)). But the absence of the comma doesn't necessarily mean that "for financial institutions" fails to apply to every term. Although "commas at the end of series can avoid ambiguity, . . . [the] use of such commas is discretionary." *United States v. Bass*, 404 U.S. 336, 340 n.6, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (citing Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 103 (1957); Margaret Nicholson, *A Dictionary of American-English Usage* 94 (1957); Roy H. Copperud, *A Dictionary of Usage and Style* 94-95 (1964); William Strunk & E.B. White, *The Elements of Style* 1-2 (1959)).

Likewise, we can't discern any meaning in the absence of a comma between "asset recovery" and "and strategy

planning." The comma before "asset recovery" is simply a serial comma, like all the other commas in the phrase. The last serial comma that should go between "asset recovery" and "and strategy planning"—a so-called Oxford comma—is often dropped at the end of a list. There isn't any ambiguity about whether the "and" before "strategy planning" indicates that "strategy planning" closes the list—it does. So there's no reason to believe that New Jersey courts would import meaning into the absence of an Oxford comma in this sentence. *See Perez v. Zagami, LLC*, 218 N.J. 202, 94 A.3d 869, 874 (N.J. 2014) ("Although not to be entirely ignored, punctuation cannot be allowed to control the meaning of the words chosen to voice the intention." (quoting *Casriel v. King*, 2 N.J. 45, 65 A.2d 514, 516 (N.J. 1949))); *In re Proposed Constr. of Compressor Station (CS327)*, 302 A.3d at 89.

Third, in addition to these canons, Chubb's reading is more consistent with the surrounding language. Recall that the insurance policy covers liability arising out of "[m]anagement consulting services." Then, the contract defines "[m]anagement consulting services [to] mean[] services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions."

ECB's reading does violence to the overall text in two key respects. To begin, if "for financial institutions" doesn't apply to "accounting," then it doesn't really limit anything at all. All consulting about asset recovery or strategy planning would presumably reflect at least some

"expertise in . . . accounting." Because any consulting service that would be provided to a business could reflect expertise in "accounting," ECB's reading would defeat the purpose of having a "financial institutions" limitation on any of the terms. Moreover, if "for financial institutions" didn't apply to the whole list, certain consulting services like "banking finance," "asset recovery . . . for financial institutions," and "strategy planning for financial institutions" would be bounded by a relationship to finance and banks—but other services like "accounting" would be completely unrelated to the industry of the firm's client. Conversely, applying "for financial institutions" to all the terms gives meaning to the "for financial institutions" limitation and makes sense when the phrases are viewed together as a group.

* * *

Chubb's view is far more likely to reflect the meeting of the minds. Because applying "for financial institutions" across all terms is consistent with the general rule of the series-qualifier canon—which grammatically applies best here—and makes far more sense in context, that is the plain meaning of the contract's language. "The two possible readings thus reduce to one . . . ." *Pulsifer v. United States*, 601 U.S. 124, 144 S. Ct. 718, 737, 218 L. Ed. 2d 77 (2024).

B.

In response to this reasoning, ECB argues that this contract is ambiguous and that it should, therefore,

win under the *contra proferentem* canon. The *contra proferentem* canon provides that courts should read an ambiguous contract to have the meaning that favors the non-drafting party. *See Oxford Realty Grp. Cedar*, 160 A.3d at 1270. When an insurance company drafts an insurance contract, the *contra proferentem* canon requires resolving ambiguities in an insurance contract in favor of the insured. *See id.*

Although the *contra proferentem* canon is a well-established part of New Jersey law, it doesn't help ECB for two reasons.

First, this contract is not genuinely ambiguous. *See Pacifico v. Pacifico*, 190 N.J. 258, 920 A.2d 73, 78 (N.J. 2007). Under New Jersey law, "only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably to the insured." *Progressive Cas. Ins. Co.*, 765 A.2d at 202 (citing *Am. White Cross Lab'ys, Inc. v. Cont'l Ins. Co.*, 202 N.J. Super. 372, 495 A.2d 152, 157 (N.J. Super. Ct. App. Div. 1985)). "A 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" *Id.* (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 795 (N.J. 1979)). Some difficulty in determining the answer to a legal question does not equate to ambiguity. *See Kisor v. Wilkie*, 588 U.S. 558, 574-75, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019).

ECB argues, and it is true, that some New Jersey precedents say that "[i]f the terms of the contract

are susceptible to at least two reasonable alternative interpretations, an ambiguity exists." *Chubb Custom Ins. Co.*, 948 A.2d at 1289 (citing *Nester v. O'Donnell*, 301 N.J. Super. 198, 693 A.2d 1214, 1220 (N.J. Super. Ct. App. Div. 1997)). But there are not two *reasonable* alternative interpretations of this contract language. As the Supreme Court of New Jersey has recognized, "[a]n insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants." *Oxford Realty Grp. Cedar*, 160 A.3d at 1270 (internal quotation marks omitted) (quoting *Fed. Ins. Co. v. Campbell Soup Co.*, 381 N.J. Super. 190, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005)). Instead, as we've explained, one reading of this contract is superior to the other.

In short, we do not jump straight to *contra proferentem* if we can determine the contract's meaning without it. A court may apply that canon only "after a court has examined the terms of the contract, in light of the common usage and custom, and considered the circumstances surrounding its execution." *Pacifico*, 920 A.2d at 78. Only "[i]f, at that time, the court is unable to determine the meaning of the term, [may] *contra proferentem* [] be employed as a doctrine of last resort." *Id.* (emphasis added). Because we can readily interpret this contract in light of its text, there is no genuine interpretational difficulty, and we need not and cannot turn to *contra proferentem*.

Second, even if there were a genuine interpretational dispute such that the *contra proferentem* canon could apply

to this contractual text, it would not apply to an insurance contract between these sophisticated commercial entities. The Supreme Court of New Jersey has held that "the rules tending to favor an insured that has entered into a contract of adhesion are inapplicable where, as here, both parties are sophisticated commercial entities with equal bargaining power." *Chubb Custom Ins. Co.*, 948 A.2d at 1294 (citing *Pacifico*, 920 A.2d at 78-79) (stating that New Jersey case law "requir[es] unequal bargaining power for application of *contra proferentem*" (citing *Pacifico*, 920 A.2d at 78-79)); *see also Oxford Realty Grp. Cedar*, 160 A.3d at 1270 ("Sophisticated commercial insureds, however, do not receive the benefit of having contractual ambiguities construed against the insurer." (citing *Chubb Custom Ins. Co.*, 948 A.2d at 1294; *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 548 A.2d 188, 192 (N.J. 1988))).

We have no doubt that Constantin—the accounting firm insured under this contract—is a sophisticated commercial entity that had many different options to purchase liability insurance. It may be, as ECB argues, that the former New Jersey branch of Constantin was a relatively small office with few employees, but size does not necessarily equate to a lack of commercial sophistication. Even that smaller office was composed of accounting professionals, and those professionals specifically asked for an insurance policy that would cover risks arising from "management consulting for the financial community." Because Constantin was offering its services and expertise to help its clients manage risk, it stands to reason that it was sophisticated enough to manage its own.

IV.

We **AFFIRM** the district court's grant of summary judgment.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED FEBRUARY 25, 2022

UNITED STATED [sic] DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 20-20569-Civ-Scola

ECB USA, INC., AND OTHERS,

Plaintiffs,

v.

CHUBB INSURANCE COMPANY OF NEW JERSEY, AND EXECUTIVE RISK INDEMNITY, INC.,

Defendants.

Judgment in Civil Action

Pursuant to Fed. R. Civ. P. 58(a), judgment in this civil action is entered as follows with respect to each claim set forth in Plaintiffs ECB USA, Inc. ("ECB"), Atlantic Ventures Corp. ("Atlantic Ventures"), G.I.E. C2B ("C2B") and Constantin Associates, LLP ("Constantin") Fourth Amended Complaint against Defendants Chubb Insurance Company of New Jersey ("Chubb") and Executive Risk Indemnity, Inc. ("ERI") [ECF No. 79]:

As to **Count 1**: Judgment is entered in favor of Defendant Chubb and against Plaintiffs ECB, Atlantic

Ventures, and C2B. With respect to Count 1, Plaintiffs ECB, Atlantic Ventures, and C2B shall take nothing and Defendant Chubb shall go hence without day.

As to **Count 2**: Judgment is entered in favor of Defendant Chubb and against Plaintiffs ECB, Atlantic Ventures, and C2B. With respect to Count 2, Plaintiffs ECB, Atlantic Ventures, and C2B shall take nothing and Defendant Chubb shall go hence without day.

As to **Count 3**: Partial non-monetary judgment is entered in favor of Plaintiffs ECB, Atlantic Ventures, and C2B on the issue of whether Chubb Professional Portfolio Policy No. 8168-4190 issued by Chubb to Control Associates/Constantin Group LP D/B/A Constantin Control Associates LP for the period effective 12/12/2017 and ending 12/12/2018 (the "2017-18 Policy") was a renewal. The 2017-18 Policy is reformed to state that Constantin is an Insured. With respect to any claim contending that Chubb had a duty to defend and indemnify Constantin for the claims in *ECB USA, Inc., v. Constantin Associates LLP*, Case No. 2018-028627-CA-01 Miami-Dade Circuit Court (the "Constantin Lawsuit") and for Chubb to pay Plaintiffs ECB, Atlantic Ventures, and C2B compensatory and consequential damages on Count 3, judgment is entered in favor of Defendant Chubb and against Plaintiffs ECB, Atlantic Ventures, and C2B. With respect to any claim for monetary relief on Count 3, Plaintiffs ECB, Atlantic Ventures, and C2B shall take nothing and Defendant Chubb shall go hence without day.

As to **Count 4**: Judgment is entered in favor of Defendant ERI and against Plaintiffs ECB, Atlantic

Ventures, and C2B. With respect to Count 4, Plaintiffs ECB, Atlantic Ventures, and C2B shall take nothing and Defendant ERI shall go hence without day.

As to **Count 5**: Judgment is entered in favor of Defendants Chubb and ERI against Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin. With respect to Count 5, Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin shall take nothing and Defendants Chubb and ERI shall go hence without day.

As to **Count 6**: Judgment is entered in favor of Defendants Chubb and ERI against Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin. With respect to Count 6, Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin shall take nothing and Defendants Chubb and ERI shall go hence without day.

As to **Count 7**: Judgment is entered in favor of Defendants Chubb and ERI against Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin. With respect to Count 7, Plaintiffs ECB, Atlantic Ventures, C2B, and Constantin shall take nothing and Defendants Chubb and ERI shall go hence without day.

Done and ordered, in Miami, Florida, on February 25, 2022.

/s/ Robert N. Scola
Robert N. Scola, Jr.
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED FEBRUARY 25, 2022

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 20-20569-Civ-Scola

ECB USA, INC. AND OTHERS,

Plaintiffs,

v.

CHUBB INSURANCE COMPANY OF NEW JERSEY AND EXECUTIVE RISK INDEMNITY, INC.,

Defendants.

Amended[1] Omnibus Order

The Defendants—insurance providers—move for summary judgment on all claims asserted by the Plaintiffs—assignees of certain insurance-related claims.

1. This order has been amended to clarify the scope of the Court's disposition of the Plaintiffs' reformation claim (Count 3). The Defendants requested such clarification by a motion to amend (ECF No. 227), which was granted for the reasons set forth in an order that will be entered concurrently to this amended omnibus order.

(ECF No. 161.) The Plaintiffs also move for partial summary judgment on two specified issues. (ECF No. 154.) The parties filed oppositions in response to each motion (ECF Nos. 186, 187), and each filed a reply in support of their respective motions (ECF Nos. 193, 195). Resolution of these cross motions for summary judgment also entails review and consideration of the Defendants' motion to dismiss Count One (ECF No. 143) and the Plaintiffs' motion to substitute (ECF No. 215), both of which were fully briefed. After careful consideration of the briefing, the record, and the relevant legal authorities, the Court **grants in part and denies in part** the Defendants' motion for summary judgment (**ECF No. 161**) and **grants in part and denies in part** the Plaintiffs' motion for partial summary judgment (**ECF No. 154**). Moreover, the Court **denies** the Defendants' motion to dismiss (**ECF No. 143**) and **grants** the Plaintiffs' motion to substitute (**ECF No. 215**).

1. Background

As a general matter, insurance policies and insurance salesmen have long been the butt of jokes. The former are not known for beautiful prose nor the latter for exciting conversation. But insurance contracts can provide fodder for scores of attorneys, grammarians, and logophiles, where, as here, the meaning of one phrase and the placement (or omission) of one comma can make the difference between coverage and nothing.

On December 17, 2019, ECB USA, Inc, Atlantic Ventures Corp., and G.I.E. C2B (the "Plaintiffs") sued Chubb Insurance Company of New Jersey ("Chubb")

in the Circuit Court of the Eleventh Judicial Circuit for various relief associated with Chubb's denial of insurance coverage in an earlier litigation. (ECF No. 1.) On February 7, 2020, Chubb removed the case to federal court on the basis of diversity jurisdiction. (*Id.*) On February 26, 2021, the Plaintiffs and Constantin Associates, LLP ("Constantin") filed the operative pleading, the Fourth Amended Complaint, which brings seven claims against Chubb and Executive Risk Indemnity, Inc. ("ERI"). (ECF No. 79.)

Before addressing the merits of each claim, the Court will briefly provide the relevant factual background. In an insurance dispute such as this, the Court will focus this discussion on: (1) the relevant actors, (2) the terms and negotiations of the relevant insurance policies, (3) the entities that are provided coverage under the relevant insurance policies, (4) the extent of coverage provided under the policies, and (5) the underlying lawsuit that is the subject of the alleged failure to defend and indemnify.

A. The Actors

Control Associates/Constantin Group L.P. ("Control Group") is a limited partnership registered in Delaware that provides professional and consulting services. (ECF No. 156 at ¶ 5; ECF No. 184 at ¶ 5; ECF No. 155-51.) Constantin, a New York limited liability partnership, provides accounting and auditing services. (ECF No. 155 at ¶ 106; ECF No. 156 at ¶ 6; ECF No. 184 at ¶ 6.)

ERI, a Delaware-based corporation, issues professional liability insurance policies in New Jersey. (ECF No. 156

at ¶ 1; ECF No. 184 at ¶ 1.) Chubb is a New Jersey-based entity that also provides professional liability insurance policies in New Jersey. (ECF No. 156 at ¶ 2; ECF No. 184 at ¶ 2.) Both Chubb and ERI are subsidiaries of Chubb Limited. (ECF No. 156 at ¶ 3; ECF No. 184 at ¶ 3.) Sometimes, Chubb and ERI share underwriters, claims staff, and policies and procedures for underwriting and claims processing. (ECF No. 156 at ¶ 4; ECF No. 184 at ¶ 4.) From 2002 to 2019, either Chubb or ERI issued professional liability insurance policies to Control Group. (ECF No. 156 at ¶ 7; ECF No. 184 at ¶ 7.)

B. The Policies

This dispute primarily centers around the terms and negotiations of one policy—the 2017-18 Policy. In 2017, Control Group obtained this professional liability insurance policy, number 8168-4190, from Chubb. (ECF No. 156 at ¶ 9; ECF No. 184 at ¶ 9; ECF No. 156-7.) The policy covered the period from December 12, 2017 to December 12, 2018. (ECF No. 156-7 at 5.)

The parties dispute whether the 2017-18 Policy was a renewal of the prior policy. Control Group had filed previous renewal applications, and the parties agree that the 2016-17 Policy was a renewal of the 2015-16 Policy. (ECF No. 156 at ¶¶ 23–24, 26; ECF No. 184 at ¶¶ 23–24, 26.) The 2017-18 Policy process began around September 2017 when Chubb sent Control Group, through a third party, a "non-renewal letter," indicating that Chubb did not yet have adequate information to underwrite Control Group's "upcoming renewal." (ECF No. 155-40; ECF No.

185 at ¶¶ 166–167; ECF No. 196 at ¶¶ 166–167.) In October 2017, Control Group, through a third party, requested a renewal application. (ECF No. 156-24; ECF No. 185 at ¶ 157; ECF No. 196 at ¶ 157.) One month later, Sean Murray, an underwriter for the Defendants, sent "the renewal app." (ECF No. 185 at ¶ 158; ECF No. 196 at ¶ 158; ECF No. 185-21.) And on December 6, 2017, Control Group submitted a "Professional Error and Omission Insurance Renewal Application." (ECF No. 196 at ¶ 159; ECF No. 196-5.) Indeed, the application form was labeled "Chubb Pro E&O Renewal Application," and, above the signature line, the application is referred to as the "Renewal Application." (ECF No. 196-5.) A week later, Chubb sent a binder letter for the 2017-18 Policy, stating "thank you again for the renewal business for [Control Group]." (ECF No. 185-24.)

C. The Insureds

Control Group's policies from 2003 to 2017 were all under the applicant name "[Control Group] and Subsidiaries." (ECF No. 155 at ¶ 76; ECF No. 185 at ¶ 76.) But the entities provided coverage under the policies (the Insureds) were not necessarily limited to Control Group's subsidiaries. For example, the 2016-17 Policy covered any Insured, which was defined, in relevant part, as "the person or entity stated in Item 1 of the Declarations." (ECF No. 155-16 at 9.) Item 1 of the Declarations was amended by an endorsement—Endorsement No. 5—within the 2016-17 Policy, which provided a list of additional "Named Insured[s]," including Constantin. (ECF No. 93-3; ECF No. 155 at ¶ 79; ECF No. 155-16 at 6, 22; ECF No. 185 at

¶ 79.) Control Group first added Constantin to the "Named Insured list" in the 2015-16 Policy. (ECF No. 155 at ¶ 78; ECF No. 155-15 at 6; ECF No. 155-39; ECF No. 185 at ¶ 78.)

The 2017-18 Policy did not include Endorsement No. 5. (ECF No. 155 at ¶¶ 92, 94; ECF No. 185 at ¶¶ 92, 94.) Nevertheless, Control Group states that it intended that Constantin remain an Insured. (ECF No. 156 at ¶ 35.) Indeed, on December 12, 2017, before the completed binder letter was sent, Control Group was asked to confirm the "list of named insured" for the 2017-18 Policy—the list as proposed included Constantin. (ECF No. 155-43; ECF No. 156-31.)

But the definition of an "Insured" was different in the 2017-18 Policy. To determine who was an Insured, one must wade through multiple definitions:

- "Insured" was defined as "any Organization and any Insured Person."[2]

- "Organization" was defined as the "Parent Organization and any Subsidiary." (ECF No. 155-43 at 13.)

- The Parent Organization was defined as Control Group. (ECF No. 185-1.)

2. "Insured Person," the definition of which is not relevant here, was defined as "any Executive or Employee of an Organization acting in his or her capacity as such." (ECF No. 155-43 at 22.)

- Subsidiary was defined, in relevant part, as an entity for which Control Group, directly or indirectly, owns or controls the majority of the "outstanding securities representing the present right to vote for election of or to appoint" management. (*Id.*)

While the definition of Insured changed from the 2016-17 Policy to the 2017-18 Policy, the parties dispute whether Control Group received adequate notice of this change. (ECF No. 156 at ¶ 36; ECF No. 184 at ¶ 36.) The Defendants did not explicitly communicate to Control Group that there was a different definition of Insured and Subsidiary. The Defendants point to an email dated December 4, 2017, in which Mr. Murray explained that the parties could "either keep [the 2017-18 Policy] on the current form or move it to the new form." (ECF No. 155-42.) Mr. Murray then explained that the "new form" had "a lot of enhancements to it"; Mr. Murray did not identify a change in the list of Insureds or a change in the definition of Insured. (*Id.*; ECF No. 185 at ¶ 85.) On January 9, 2018, Control Group was asked to review the 2017-18 Policy, and the Policy was on the "new form" that Mr. Murray had addressed earlier. (ECF No. 155-46.)

D. The Coverage

In relevant part, the 2017-18 Policy provided coverage for claims related to "Management consulting services," which are defined as "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy

planning for financial institutions." (ECF No. 155-37 at 23; ECF No. 185 at ¶ 1.) That definition remained the same from 2002 to 2017. (ECF No. 155 at ¶ 15; ECF No. 185 at ¶ 15.)

Beginning in 2001, when applying for coverage, Control Group identified that all of its revenues were derived from either "management consulting" or "consulting." (ECF No. 155 at ¶¶ 16–20; ECF No. 185 at ¶¶ 16–20.) It was not until 2016 and 2017 that Control Group also identified "accounting" as included in its services. (ECF No. 155 at ¶¶ 22–23; ECF No. 185 at ¶¶ 22–23.)

E. The Litigation

In 2018, the Plaintiffs sued Constantin in the Eleventh Judicial Circuit in Miami-Dade County for its alleged wrongdoing in connection with the provision of a professional audit (the "Underlying Litigation"). (ECF No. 156 at ¶ 40; ECF No. 184 at ¶ 40.) Constantin gave notice of the lawsuit to Chubb. (ECF No. 156 at ¶¶ 41–42; ECF No. 184 at ¶¶ 41–42.) But Chubb later issued two claim denial letters, denying coverage to Constantin for the sole reason that auditing services were not covered under the 2017-18 Policy. (ECF No. 156 at ¶¶ 43, 46; ECF No. 184 at ¶¶ 43, 46.) Chubb did not indicate in the claim denial letters that Constantin was not an Insured. (ECF No. 156 at ¶ 47; ECF No. 184 at ¶ 47.)

In November 2019, Constantin settled with the Plaintiffs, agreeing to judgment in favor of the Plaintiffs for $4,850,000 and agreeing to assign all rights against

Chubb and ERI to the Plaintiffs. (ECF No. 156 at ¶ 48; ECF No. 184 at ¶ 48; ECF No. 156-38.) This current action was initiated approximately one month later. (ECF No. 1.)

2. Legal Standard

Summary judgment is proper if, following discovery, the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259–60 (11th Cir. 2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories, and admissions on file and designate specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 323–24. The nonmovant's evidence must be significantly probative

to support the claims. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court will not weigh the evidence or make findings of fact. *See Anderson*, 477 U.S. at 249; *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the nonmoving party. *See id.*

3. Analysis

The Defendants move for summary judgment on all counts (ECF No. 161), while the Plaintiffs only seek summary judgment on two issues, namely, that auditing services are covered under the 2017-18 Policy and that Constantin is an Insured under the 2017-18 Policy (ECF No. 154). The Court will address each.

As a preliminary matter, the Plaintiffs argue that New Jersey law applies to all claims. (ECF No. 154 at 3.) The Defendants did not contest this, but rather argue that there is a "false conflict" between New Jersey law and Florida law and that the laws of those states are, in relevant part, the same. (ECF No. 161 at 6 n.3.)

As the parties largely do not dispute the applicable law, the Court will apply New Jersey law. As to the contractual claims, Florida applies the doctrine of *lex loci contractus*, which holds that the law of the jurisdiction where the contract was executed governs. *See State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160, 1163 (Fla. 2006). This occurred in New Jersey, so New Jersey law

applies. (ECF No. 156 at ¶¶ 2, 51; ECF No. 184 at ¶¶ 2, 51.) As to the tort claims, Florida applies the "most significant relationship" test. *See Trumpet Vine Invs., N.V. v. Union Cap. Partners I, Inc.*, 92 F.3d 1110, 1115 (11th Cir. 1996). For the reasons laid out by the Plaintiffs, the Court finds that New Jersey has the most significant relationship to the facts of this case. (ECF No. 154 at 3.)

A. Count 1: Breach of Contract

The Plaintiffs allege that Chubb breached the 2017-18 Policy by failing to defend and indemnify Constantin in the Underlying Litigation. An insurer has a duty to defend where a plaintiff "alleges facts that fairly and potentially bring the suit within policy coverage." *Rosario v. Haywood v. Haywood*, 799 A.2d 32, 40 (N.J. App. Div. 2002); *Evanston Ins. Co. v. Heeder*, 490 F. App'x 215, 216 (11th Cir. 2012) (citing *Jones v. Fla. Ins. Guar. Ass'n*, 908 So.2d 435, 442–43 (Fla. 2005)). Moreover, an insurer has a duty to indemnify where the party seeking indemnification is actually covered under the policy. *See Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 483 A.2d 402, 405 (N.J. 1984); *Regions Bank v. Commonwealth Land Title Ins. Co.*, 977 F. Supp. 2d 1237, 1261–62 (S.D. Fla. 2013) (Scola, J.). It is the insured's burden to establish the duty to defend and the duty to indemnify. *See State Nat. Ins. Co. v. Cnty. of Camden*, No. 08-5128(NLH)(AMD), 2012 WL 6652819, at *2 (D.N.J. Dec. 19, 2012). Insurance contracts must be interpreted liberally in favor of coverage "to the full extent that any fair interpretation will allow." *State Nat. Ins. Co.*, 2012 WL 6652819, at *2; *see also Colony Ins. Co. v. Ramon*, No. 08-21812-CIV, 2009 WL 10699122, at *3 (S.D. Fla. July 30, 2009) (Seitz, J.).

Appendix D

The 2017-18 Policy provided coverage for claims related to "Management consulting services," which are defined as "[1] services directed toward expertise [2] in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning [3] for financial institutions." (ECF No. 155-37 at 23; ECF No. 185 at ¶ 1.)

First, the parties argue whether the auditing of financial statements (the provision of which was the basis for the Underlying Lawsuit) constitutes "services directed toward expertise in . . . accounting[.]" The interpretation of an insurance contract is a question of law, and the Court must give the contract its plain and ordinary meaning. *See Princeton Inv. Partners, Ltd. v. RLI Ins. Co.*, CV171120KMMAH, 2018 WL 846917, at *5 (D.N.J. Feb. 9, 2018); *CPS MedManagement LLC v. Bergen Reg'l Med. Ctr., L.P.*, 940 F. Supp. 2d 141, 154 (D.N.J. 2013). An insurance contract is ambiguous if "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage," and courts may look to extrinsic evidence to determine whether an ambiguity exists and to resolve the ambiguity. *See Princeton Inv. Partners*, 2018 WL 846917, at *5 (quoting *State Nat. Ins.*, 10 F. Supp. 3d at 574–75); *CPS MedManagement*, 940 F. Supp. 3d at 154. However, courts must resolve any ambiguity in favor of coverage if a fair reading permits. *See Princeton Inv. Partners*, 2018 WL 846917, at *5 ("[I]f the controlling language of the policy will support two meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied.").

Appendix D

The parties have spilt much ink on the proper interpretation of the clause "services directed toward expertise in . . . accounting," filing multiple motions for judicial notice and devoting much of their respective briefs to these arguments. Notwithstanding these other sources, the Court will start with the definition provided in the Policy.

Doing so, the Court finds that the auditing of financial statements falls within the contractual term "services directed toward expertise in . . . accounting." This provision is hardly ambiguous—auditing of financial statements is a widely recognized accounting service. *See* N.J.S.A 2A:53A-25 ("'Professional accounting services' includes, but is not limited to, the . . . audit of . . . a financial statement[.]"); Fla. Stat. § 473.302(8)(a) (defining services that fall within "public accounting"). And conducting an audit requires expertise, as the materials to which the Defendants point explain. (*See* ECF No. 175 at 6 ("[F]orensic accounting services . . . involve the application of . . . special skills in accounting, auditing, finance, quantitative methods . . . and research[.]") (quoting Code of Professional Conduct, 1.295.140, Forensic Accounting).)

The Defendants disagree, arguing that the term "services directed toward expertise in . . . accounting" must be interpreted in light of the usage of the term that it is defining—"management consulting services." (ECF No. 161 at 5–6.) The Defendants point to, among other things, various business dictionaries, certain standards promulgated by the American Institute of Certified Public Accountants, professional standards for public

accountants, SEC guidance, as well as writings by the late Justice Scalia. (*Id.* at 6; ECF No. 195 at 4.) The Defendants argue that these extrinsic sources establish that "management consulting" does not include auditing, as consulting generally involves the analysis of management problems and the provision of recommendations, while auditing generally involves the attestation to financial statements. (ECF No. 161 at 6–8.)

However, the principles to which the Defendants point only apply where the contract is ambiguous. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, at 228 (2012) (noting that the principle that a definition is interpreted in light of the definiendum's context applies only where "a definition itself contains a term that is not clear"); *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a [text] includes an explicit definition, [a court] must follow that definition, even if it varies from that term's ordinary meaning."). As held above, the definition of "management consulting services" is not "so confusing[ly]" ambiguous to warrant extensive resort to extrinsic evidence. *See Princeton Inv. Partners*, 2018 WL 846917, at *5. If the parties wished to limit coverage to "consulting" services in a way that comported with certain trade usage, the parties could have done so. But the parties contracted to an expansive definition of "management consulting services," which must be interpreted in favor of coverage if a fair reading permits. *See State Nat. Ins. Co.*, 2012 WL 6652819, at *2. The Court must apply this plain meaning.[3]

3. As the Court holds that auditing is a covered service under the 2017-18 Policy, the Court need not address the Plaintiffs'

Second, however, the Underlying Lawsuit did not concern the provision of accounting services to a "financial institution." This is undisputed. (ECF No. 155 at ¶ 72; ECF No. 185 at ¶ 72.) The Plaintiffs' only argument in opposition comes down to a comma. (ECF No. 186 at 6.) Recall the clause at issue: "[1] services directed toward expertise [2] in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning [3] for financial institutions." (ECF No. 155-37 at 23; ECF No. 185 at ¶ 1.) The Defendants argue that covered accounting services must be provided to a financial institution, pointing to the series-qualifier canon, which holds that a modifier (here, "for financial institutions") at the end of a series of nouns or verbs "normally applies to the entire series." (ECF No. 161 at 13); *see Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021). The Plaintiffs argue that the series-qualifier canon only applies where there is a comma before the modifier—therefore, as there is no comma before "for financial institutions," the Plaintiffs argue that clause only qualifies the phrase immediately preceding it (namely, "asset recovery and strategy planning"). (ECF No. 186 at 6); *see Facebook*, 141 S. Ct. at 1170.

The Court finds that the phrase "for financial institutions" modifies the entire series, meaning that "management consulting services" is defined as the provision of "services directed towards expertise in . . . accounting . . . for financial institutions." *See United*

---

contention that the Defendants were estopped from arguing that auditing was not a covered service. (ECF No. 154 at 10.)

States v. Bass, 404 U.S. 336, 340 n.6 (1971) (noting that while "commas at the end of series can avoid ambiguity," the "use of such commas is discretionary").

In total, a plain reading of the 2017-18 Policy establishes that Chubb had no duty to defend or duty to indemnify in connection with the Underlying Litigation, as the services at issue in the Underlying Litigation were not provided to a financial institution, as required for coverage. Therefore, the Court **grants** summary judgment in favor of Chubb on Count One.[4]

B. Count 2: Breach of Contract

Count Two states a breach of contract for Chubb's alleged failure to defend and indemnify Constantin, on the theory that the 2017-18 Policy was a renewal of the 2016-17 Policy. However, the definition of "management consulting services" was the same in the 2016-17 Policy as it was in the 2017-18 Policy. (*See* ECF No. 155 at ¶ 15; ECF No. 185 at ¶ 15.) Therefore, the Court **grants** summary judgment on Count Two in favor of Chubb for the same reasons laid out above.

---

4. The Defendants represented that resolution of Count One in their favor would render their Counterclaim (ECF No. 93) moot. (*See* ECF No. 210 at 2 n.2.) Therefore, the Court dismisses the Defendants' Counterclaim as moot. The Defendants also argue that resolution of Count One in their favor would moot the remainder of the Plaintiffs' claims. (*Id.*) While the Plaintiffs do not appear to specifically address this contention, the Court will continue to address all of the Plaintiffs' claims.

C. Count 3: Reformation of Contract

The Plaintiffs seek to reform the 2017-18 Policy, arguing that the Defendants failed to apprise Control Group of any change in terms of the renewal policy—namely, the removal of Constantin as an Insured. As the Plaintiffs move for summary judgment on this issue of whether Constantin is an Insured under the 2017-18 Policy, the Court construes the Plaintiffs' motion to seek summary judgment on Count 3.

The Defendants move for summary judgment on this claim primarily under two theories: (1) the 2017-18 Policy was not a renewal policy subject to the strict requirements for notice of changes in terms and (2) in any event, the Defendants gave adequate notice of a change in terms. (ECF No. 161 at 18–20.)

First, the Court holds that the 2017-18 Policy was a renewal policy. From 2011 to 2017, the Defendants sent a "notice of non-renewal" to Control Group, which gave Control Group notice that action was needed to renew its policy. (ECF No. 184 at ¶ 55; ECF No. 192 at ¶ 55.) This notice does not, as the Defendants appear to argue, definitively resolve the issue of whether the 2017-18 Policy was a renewal. Rather, after the notice was sent in September 2017, Control Group, through a third party, requested a "renewal application" from Chubb. (ECF No. 156 at ¶ 28; ECF No. 184 at ¶ 28; ECF No. 156-24.) From that point, the parties consistently referred to the Policy as a renewal. In November 2017, Chubb forwarded "the renewal app." (ECF No. 156 at ¶ 29; ECF No. 184 at ¶ 29.)

Appendix D

In early December 2017, Control Group sent a signed "Renewal Application," which had a heading that read "Chubb Pro E&O Renewal Application." (ECF No. 196-5; ECF No. 185 at ¶ 159; ECF No. 196 at ¶ 159.) After the 2017-18 Policy was bound, the Defendant's underwriter thanked Control Group for "the renewal business." (ECF No. 185 at ¶ 161; ECF No. 196 at ¶ 161.)

To argue that the 2017-18 Policy was not a renewal, the Defendants maintain that the 2017-18 Policy was on a different form than the previous policy, and therefore it could not have been a simple renewal. (ECF No. 187 at 18.) Moreover, the Defendants explain that the term "renewal" was only used at the time of drafting in order to "accurately record progress [internally] toward underwriting goals." (*Id.*) But the Defendants do not argue that Control Group was aware of these internal underwriting goals or that Control Group was privy to the Defendants' internal understanding of the term "renewal."

The Defendants plainly referred to the 2017-18 Policy as a renewal at the time of drafting and binding. An undisclosed internal definition that departed from the common meaning of "renewal" has no bearing on whether the 2017-18 Policy was a renewal. And while the final 2017-18 Policy was on a different form than the previous policy, the parties still referred to it as a renewal. The mere presence of different terms or a different form alone does not change a renewal into something else. *See Am. Cas. Co. of Reading, Pa. v. Continisio*, 819 F. Supp. 385, 400 (D.N.J. 1993) (rejecting the proposition that a renewal policy cannot have a substantial change in terms).

Second, the Court holds that the Defendants did not give adequate notice of any change in the renewed Policy's definition of Insured. Under New Jersey law, "[a]bsent notification that there have been changes in the restrictions, conditions or limitations of [a renewed insurance] policy, the insured is justly entitled to assume that they remain the same." *Bauman v. Royal Indem. Co.*, 174 A.2d 585, 592 (N.J. 1961). If the insured is not "*specifically and clearly* informed of [a] change, the renewal will be ineffective." *See McClellan v. Feit*, 870 A.2d 644, 649 (N.J. App. Div. 2005) (emphasis added).

The Defendants never gave Control Group clear and specific notice of a change in the definition of Insured or of any change in what entities were provided coverage under the Policy. (ECF No. 156 at ¶¶ 37–39; ECF No. 184 at ¶¶ 36–39.) The Defendants primarily argue that adequate notice was given (1) when Mr. Murray listed some of the "enhancements" of the "new form" and (2) when the Defendants delivered the bound policy and asked Control Group to review it. (ECF No. 161 at 19.) Any suggestion that Control Group need only have read the 2017-18 Policy to learn of changes flies in the face of *Bauman*, which explicitly puts the burden on the insurer to give clear and specific notice of a change. *See Bauman*, 174 A.2d at 592. Moreover, while Mr. Murray noted some "enhancements" in the new form, he did not notify Control Group of any change in the definition of Insured or a change in the determination of what entities were covered. (ECF No. 155-42; ECF No. 185 at ¶ 85.)

As the 2017-18 Policy was a renewal and as the Defendants did not give Control Group adequate notice

of a change in the definition of Insured or what entities were covered under the Policy,[5] the Court **denies in part** the Defendants' motion for summary judgment on Count Three. As set forth above, the Court **grants in part** the Plaintiffs' motion, finding that the 2017-18 Policy should be reformed to state that Constantin is an Insured.[6] However,

---

5. The Defendants also argue that Count Three, as well as Counts Two through Seven, cannot be sustained under the theories of *in pari delicto* and unclean hands. (ECF No. 161 at 25.) The Defendants reason that Control Group falsely represented that Constantin was its subsidiary, thereby wrongfully obtaining coverage for Constantin prior to 2017. (*Id.*) The only example that the Defendants provide of Control Group representing that Constantin was its subsidiary was that the applicant on the 2016-17 Policy was named as "[Control Group] and Subsidiaries." (*Id.*) However, it is unclear whether this statement refers to Constantin at all. And it is undisputed that Constantin was insured under the 2016-17 Policy, not because it was a subsidiary but because it was listed by endorsement. (ECF No. 156 at ¶ 27; ECF No. 184 at ¶ 27.) While the Defendants refer to this as a "subsidiary list," there is no indication in the record that the entities covered by endorsement in the 2016-17 Policy had to be Control Group's subsidiaries. Rather, the 2016-17 Policy defined Insured as "the person or entity stated in Item 1 of the Declarations," and the endorsement amended Item 1 of the Declaration to add additional Insureds. (ECF No. 155-16.) Therefore, there is no undisputed record evidence permitting the Court to conclude that Control Group wrongfully represented that Constantin was its subsidiary in order to obtain coverage for Constantin.

6. As the Court holds that Control Group was not adequately notified of a change in terms concerning the Insureds in the 2017-18 Policy, the Court need not address the Plaintiffs' argument that the Defendants are estopped from arguing that Constantin was not an Insured. (ECF No. 186 at 20–21.) Moreover, as the Court

to the extent that the Plaintiffs argue that the Defendants had a duty to defend and indemnify Constantin under the *reformed* 2017-18 Policy, the Court holds that the Defendants had no duty here. The Court's interpretation, discussed above, of the "management consulting services" clause is the same under the reformed 2017-18 Policy, and the clause was not triggered, as Constantin did not provide covered services to a financial institution. Therefore, with respect to any duty to defend and indemnify and for Chubb to pay compensatory and consequential damages under Count 3, the Court **grants** summary judgment on Count 3 in favor of the Defendants for the same reasons laid out above.

D. Count 4: Breach of Contract

In Count Four, the Plaintiffs allege that ERI breached the 2017-18 Policy by failing to defend and indemnify Constantin in the Underlying Litigation. As the Court holds that there was no duty to defend or indemnify in connection with the Underlying Litigation, the Court **grants** summary judgment in ERI's favor on Count Four.

E. Counts 5–7

Before reaching the merits of Counts Five through Seven, the Court must determine what entity has brought these claims. Constantin previously pled these

---

holds that the Defendants did not satisfy the notice requirements set out in *Bauman*, the Court need not address whether the Defendants satisfied or were subject to the notice requirements set out in N.J.A.C. § 11:1-20.2.

claims, although the Court later held that Constantin had no standing to do so. (ECF No. 212.) The Plaintiffs subsequently brought a motion to substitute, seeking to substitute the Plaintiffs for Constantin as to Counts Five through Seven. (ECF No. 215.) Courts will generally permit substitution under Rule 17(a)(3) where (1) there was an honest or understandable mistake in determining the proper party to bring suit and (2) the substitution "will not alter the substance of the action." *Cifuentes v. Regions Bank*, No.11-23455-CIV, 2012 WL 2339317, at *7 (S.D. Fla. June 19, 2012) (Moreno, J.) (quoting *Park B. Smith v. CHF Indus., Inc.*, 811 F. Supp. 2d 766, 773–74 (S.D.N.Y. 2011)).

Here, the decision for Constantin to bring Counts Five through Seven was an honest and understandable mistake, and substitution will not alter this case. By their own admission, the Defendants undertook months of discovery to determine who could bring these claims (ECF No. 219 at 13), and the parties resorted to motions practice to determine whether Constantin had standing to bring these claims. Moreover, the relief sought will not change the nature of the claims—only the party bringing the claims. Therefore, substitution will not alter this action or cause prejudice to the Defendants. In all, the Court **grants** the Plaintiffs' motion to substitute (ECF No. 215) and finds that (1) there was an honest and understandable mistake in determining the appropriate party to bring Counts Five through Seven, (2) the substitution will not alter the substance of this action, (3) the motion to substitute was brought in a reasonable time after the Court issued its order on the Defendants' motion to dismiss, and (4) there is no prejudice to the Defendants, as they have been aware

of these claims for months and had ample opportunity to develop their legal strategy.

Nonetheless, Counts Five through Seven fail. In these Counts, the Plaintiffs allege that the Defendants made false representations concerning whether the 2017-18 Policy was a renewal. In particular, Count Five alleges fraud,[7] Count Six negligent misrepresentation, and Count Seven violation of the New Jersey Consumer Fraud Act. As the Plaintiffs explained, these theories are brought in the alternative—either the 2017-18 Policy truly is a renewal or the Defendants fraudulently misrepresented that it was a renewal. (ECF No. 154 at 6.) As the Court held that the 2017-18 Policy is a renewal and reformed it, the Court finds that Counts Five through Seven fail. Therefore, the Court will **grant** summary judgment in the Defendants' favor as to Counts Five through Seven.

4. Conclusion

In total, the Court **grants in part and denies in part** the Defendants' motion for summary judgment (**ECF No. 161**) and **grants in part and denies in part** the Plaintiffs' partial motion for summary judgment (**ECF No. 154**). In particular, the Court grants summary judgment in the Defendants' favor as to Counts 1, 2, 4, 5, 6, and 7. As for Count 3, the Court **grants** the Plaintiffs' motion for partial

7. In Count Five, the Plaintiffs also sought punitive damages, which the Defendants argued could not be obtained. As the Court grants summary judgment and dismisses Counts Five through Seven, the Court also dismisses the Plaintiffs' request for punitive damages.

summary judgment on the issue of whether the 2017-18 Policy was a renewal and reforms the 2017-18 Policy to state that Constantin is an Insured. But the Court finds that with respect to any duty to defend and indemnify Constantin for the claims in the Underlying Lawsuit and for Chubb to pay the Plaintiffs any compensatory and consequential damages on Count 3, the Court **grants** summary judgment on those aspects of Count 3 in favor of Chubb. As the Court reformed the 2017-18 Policy and found that Constantin is an Insured, the Court **denies** the Defendants' motion to dismiss Count 1.[8] (**ECF No. 143**.) Moreover, the Court **grants** the Plaintiffs' motion to substitute (**ECF No. 215**) for the reasons set out above. Last, the Court **denies** the parties' requests for oral argument.

As set out above, all claims and counterclaims have been adjudicated. Pursuant to Fed. R. Civ. P. 58(a), judgment will be entered by a separate document. The Court directs the Clerk to **close** this case. All remaining pending motions are **denied as moot**.

Done and ordered, in Miami, Florida, on February 25, 2022.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

8. On November 15, 2021, the Court construed the Defendants' motion to dismiss Count 1 as part of the Defendants' motion for summary judgment. (ECF No. 209.)

APPENDIX E — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 23, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 22-10811

ECB USA, INC., A FLORIDA CORPORATION, ATLANTIC VENTURES CORP., A FLORIDA CORPORATION, G.I.E. C2B, A FRENCH BUSINESS ENTITY, AS ASSIGNEES OF CONSTANTIN ASSOCIATIONS LLP, A NEW YORK LIMITED LIABILITY PARTNERSHIP, CONSTANTIN ASSOCIATES LLP,

Plaintiffs-Counter Defendants-Appellants,

versus

CHUBB INSURANCE COMPANY OF NEW JERSEY, A NEW JERSEY INSURANCE COMPANY CORPORATION, EXECUTIVE RISK INDEMNITY, INC., A DELAWARE INSURANCE CORPORATION,

Defendants-Counter Claimants-Appellees.

Filed October 23, 2024

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-20569-RNS

Appendix E

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE JORDAN, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.