FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

JOSEPH M. RUCKI

AXIALL CORPORATION and WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

Civil Action No.: 19-C-59
Presiding Judge Wilkes
Resolution Judges Carl and Nines

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT TO ENFORCE THE PENNSYLVANIA JURY'S NATRIUM PLANT DAMAGES VERDICT AND APPLY NATRIUM PLANT PROPERTY DAMAGE DEDUCTIBLE

This matter came before the Court this 3rd day of March 2022. The Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company, by counsel, have filed Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, Travis L. Brannon, Esq., and Jeffrey V. Kessler, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich

American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter "Defendants" or "Insurers"), by counsel, James A. Varner, Sr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds an insurance coverage dispute involving Defendants' alleged failure to cover Plaintiff Westlake Chemical Corporation (hereinafter "Plaintiff" or "Westlake") for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Pls' Resp., p. 4. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling.

2. The thirteen insurance policies at issue in this matter (the "Policies") are all part of a commercial property insurance program that Plaintiffs, Axiall Corporation (hereinafter "Plaintiff" or "Axiall") purchased from the Insurers.

3. There also exists a civil action referred to by the parties as "the Pennsylvania action" or "the Pennsylvania matter", which is Axiall Corporation v. AllTranstek, LLC, et al., Civil Division No. GD-18-010944, in the Court of Common Pleas of Allegheny County Pennsylvania. *See* Defs' Mot., p. 2; *see also* Pls' Resp., p. 4. On October 14, 2021, the jury in

the Pennsylvania action reached a verdict, and the verdict slip in that action directed the jury to state amount Axiall suffered in damages to the Natrium plant and equipment. *See* Defs' Mot., p. 2; *see also* Defs' Mot., Ex. A. The jury rendered the following verdict:

Damage to Natrium plant and equipment: <u>$5,900,000.00</u>.

See Id.

4. On or about November 23, 2021, Defendants filed the instant Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible, arguing because there is no dispute the damages Plaintiffs seek in the instant matter for alleged "physical loss or damage to insured property at the Natrium Plant", are the same damages Axiall sought in the Pennsylvania action, the verdict should be enforced here, and Plaintiffs' claim for damage to the Natrium plant and equipment should be determined to be $5.9 million as a matter of law, prior to the application of the appropriate deductible, under the elements of Pennsylvania law for collateral estoppel. *See* Defs' Mot., 2-4. Further, Defendants argue they are entitled to judgment as a matter of law that the applicable deductible is $3.75 million pursuant to the terms of the Policy. *Id.* at 4.

5. On a prior day, Plaintiffs filed their Plaintiffs' Brief in Opposition to Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, arguing the Court should deny the Defendants' request for collateral estoppel on the Pennsylvania jury verdict on Natrium plant damages because Defendants did not establish that the issue the Pennsylvania jury decided is identical to what the West Virginia jury would decide in this case. *See* Pls' Resp., p. 3. Further, Plaintiffs indicated in the Response that they did not contest the applicability of the $3,750,000.00 deductible to its coverage claim. *Id.*

6. On or about January 18, 2022, Defendants filed their Reply in Support of Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible, averring the Response's "suggestion that the damages issue decided in the Pennsylvania action is significantly different from the damages issue in this case...has no basis in fact and is wrong". *See* Defs' Reply, p. 4.

7. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the

evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

The parties agree that under *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 513 S.E.2d 692 (W. Va. 1998) and *Cortez v. Murray*, No. 17-0662, 2018 WL 2447285 (W. Va. May 31, 2018), Pennsylvania law should be utilized to determine if collateral estoppel applies because the applicable jury verdict was entered in Pennsylvania. *See* Defs' Mot., p. 5; *see also* Pls' Resp., p. 6-7. In *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 513 S.E.2d 692 (W. Va. 1998), the West Virginia Supreme Court of Appeals considered the effect of a prior judgment from a New York court and which state's law to apply with respect to collateral estoppel. The court determined that "the full faith and credit clause [of the United States Constitution] generally requires the courts of this State to give the New York judgment at least the res judicata effect which it would be accorded by New York courts." *Jordache Enters., Inc.*, 513 S.E.2d at 703. As a result, the court applied New York law concerning the elements of collateral estoppel. *Id.*; *see also Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 357 (3d Cir. 1999) (applying Pennsylvania law)(to determine preclusive effect of prior state court action, courts "look to the law of the adjudicating state").

The West Virginia Supreme Court of Appeals applied a similar analysis in *Cortez v. Murray*, No. 17-0662, 2018 WL 2447285 (W. Va. May 31, 2018). In that case, the Supreme Court cited *Jordache Enterprises* for the proposition that a prior judgment on the merits from another state is entitled to deference. *See Cortez*, 2018 WL 2447285, at *7. The court went on to apply Texas law concerning the preclusive effect of a prior judgment in subsequent proceedings in another state. *Id.* at *7-8.

The Court finds that based on the decisions in *Jordache Enterprises* and *Cortez*, since the prior verdict at issue in the instant motion was entered in Pennsylvania, this Court applies Pennsylvania law to determine if collateral estoppel applies.

Pennsylvania courts generally apply the following elements when considering whether collateral estoppel applies to preclude relitigation of a matter decided in prior litigation: 1) an issue decided in a prior action is identical to one presented in a later action; 2) the prior action resulted in a judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *See Ream v. Commonwealth Dep't of Pub. Welfare*, 500 A.2d 1274, 1276 (Pa. Commw. Ct. 1985). Some Pennsylvania courts also require a fifth element—whether the issue determined in the prior action was "essential" to the previous judgment. *See Pitney Road Partners, LLC v. Murray Assocs., Architects, P.C.*, No. 2253 MDA 2013, 2014 WL 10575406, at *4 (Pa. Super. Ct. Sept. 18, 2014).

The first collateral estoppel element is whether an issue decided in a prior action is identical to an issue presented in a later action. *See Mason v. Progressive Direct Ins. Co.*, No.

1650 EDA 2014, 2015 WL 7013630, at *2 (Pa. Super. Ct. June 5, 2015) (quoting *Safeguard Mut. Ins. Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975)).

Here, Plaintiffs argue the first element is not satisfied because the damages issue in the Pennsylvania case is "significantly different" from the damages issue in this case. *See* Pls' Resp., p. 8. Plaintiffs argue this is because although the cases "involve similar and to some extent (but not entirely) overlapping property damage estimates, analysis, and support, since both are related to the August 2016 Tank Car Rupture", the two cases "cannot possibly be" identical because the Pennsylvania action was concerned with a maintenance services contract and Pennsylvania tort law not at issue in this civil action and this case concerns insurance coverage and Georgia insurance contracts not at issue in the Pennsylvania action. *Id.* at 9.

The Court does not find Plaintiffs' argument that "the liability and damages flowing from the Maintenance Vendors' breaches of their Pennsylvania contract – and their negligence under Pennsylvania law – are not in any way related to the Insurers' liability under their policy provisions that are governed by Georgia law" to be convincing. *See* Pls' Resp., p. 10-11.

The Court considers Pennsylvania action's jury verdict slip asked the jurors to specifically determine the damage to the plant and equipment. *See* Defs' Mot., Ex. A. Plaintiffs argued the same damages in that case as they have during the course of this litigation. *See, infra*. The Court agrees with Defendants that the record shows the amount claimed in this case and in the Pennsylvania case was the same. *See* Reply, p. 4; *see also, infra*. Further, the amount the jury found was contained in their insurance claim documentation submitted to Defendants in this matter. *Id.* at 5. Specifically, Plaintiffs' March 20, 2019 claim submission to Defendants included a spreadsheet titled "Westlake Estimate Workbook – 3.20.2018 [sic] Natrium Chlorine Leak Insurance Claim", and this spreadsheet contains a column designated "Incurred Cost

Additive" that has a total amount of $5,905,147.00 – the amount of actual costs incurred by Plaintiffs for alleged damage to the plant and equipment when the claim was submitted. *Id.* The Court considers the fact that the jury was presented with evidence that plant damage and equipment was $278,000,000.00 minus a deduction for corrections in both cases[1], and awarded this amount of $5,905,147.00 as evidenced by actual costs incurred for damage to plant and equipment and finds it supports the contention that the issue of plant and equipment damages in the two cases are the same.

Plaintiffs seek in the instant matter alleged "physical loss or damage to insured property at the Natrium Plant". *See* Defs' Mot., p. 2; *see also* Compl., ¶10. This is the same damages Axiall sought in the Pennsylvania action, and the question of the amount of those damages was answered by the Pennsylvania jury. The Natrium plant and equipment was damaged as a result of the August 2016 chlorine rupture. Whether the context is the entity who caused of the damage, or a dispute regarding the insurance carriers' paying for the damage, the amount of damage that occurred that day does not change.

The Court finds Plaintiffs' best argument is that Pennsylvania jury was instructed to consider "reduction in market value" of damaged property in rendering its damages verdict – a factor that is not at issue in this case because it is not contained in the Basis of Recovery provision of the Insurers' Policies, which provide for replacement cost coverage. *See* Pls' Resp., p. 13. The Court considers that as referenced above, the $5.9 million amount that was previously claimed by Plaintiffs in the "Incurred Cost Additive" column of the spreadsheet titled "Westlake

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[1] *See* section on full and fair opportunity to litigate element, *infra*. Defendants proffered that the number Axiall presented to the jury in the Pennsylvania action for claimed property damage was $278,000,000.00, the same number in the March 19, 2019 proof of loss submitted to the Defendants at issue in this case, minus a deduction for corrections. *See* Defs' Reply, p. 4. Defendants proffered and cited the transcript of the closing argument in the Pennsylvania jury trial where counsel for Axiall argued and explained this. *Id.*

Estimate Workbook – 3.20.2018 [sic] Natrium Chlorine Leak Insurance Claim". Axiall presented argument to that jury for the additional amount, the same amount sought in this case, as detailed below, and the jury chose not to award a figure above the $5.9 million.

Pennsylvania courts have held that collateral estoppel considers whether an issue decided in one case is identical to an issue presented in a subsequent case, regardless of whether the second case is based on the same cause of action. *See Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) ("Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated."). The issue presented for collateral estoppel consideration by this Court is Plaintiffs' claim for plant and equipment damages that are identical to the same damages decided by the Pennsylvania jury. Further, the Court considers that in both matters, counsel for Axiall has stated that damages in the two actions are the same. In an August 31, 2021 hearing before Discovery Commissioner Judge Clawges, regarding Plaintiffs' alleged failure to comply with this Court's order that they provide detailed damages documentation for each piece of equipment allegedly damaged, Plaintiffs' counsel touted their production of all damages information from the Pennsylvania case and conceded that "certainly, all the damages to the plant" were the same in both cases. *See* Reply, p. 8; *see also* Exhibit C to Defendants' Motion, at p. 37.

Additionally, the Court considers that written discovery interrogatory responses were proffered, wherein in this case Defendants posed an interrogatory asking Plaintiffs to: Identify all Persons (including any other insurers not included as defendants in this action) against whom Axiall and/or Westlake filed a lawsuit, made a demand, or made a claim for payment relating to any alleged damage resulting from the Release, and for each such Person identify the lawsuit or

claim number, the nature of the asserted claim(s), the amount claimed, and any payments received by Plaintiffs from such lawsuits, claims, or demands. *See* Defs' Mot., p. 8. Plaintiffs' answer identified the Pennsylvania matter and included a sub-section for "Amount Claimed." *Id.* at 9. The Amount Claimed sub-section of Plaintiffs' answer states that Plaintiffs' claimed damages in the Pennsylvania matter are $305,012,821 and that "[t]his amount is comprised of the $278,505,078 amount set forth in Plaintiffs' March 20, 2019 proof of loss to the insurer Defendants in this case." *Id.* This Court finds this response acknowledges that the two matters involve identical alleged Natrium plant and equipment damages.

Finally, the Court considers that Westlake Rule 30(b)(7) witness Paul Linder, who was designated to address damages to the Natrium plant, testified at his deposition that the damages claim made to Defendants in this matter in March 2019 and a subsequent revision "are being used as part of the damages claim in the other case", referring to the Pennsylvania action. *See* Defs' Mot., p. 9; *see also* Defs' Mot., Ex. E. Specifically, Mr. Linder testified that the same damage estimates were used in both cases. *Id.* Further, he testified the vendor fees for preparing the estimates used in both cases were charged solely to the insurance claim. *Id.* Finally, he testified that Exponent[2] was used in both cases to provide expert opinions concerning the alleged damages. *Id.*

For all of these reasons, and considering all of the aforementioned evidence on the record, the Court finds the first element has been met.

The Court next addresses the second element, that the prior action resulted in a judgment on the merits. *See Ream,* at 1276. While the second element generally applies when a final

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[2] The Court notes Exponent, Inc. was a company utilized in the fall of 2016 to investigate the root cause of the chlorine rupture and extent of any impact to the equipment at the Natrium Plant from the release. *See* Defs' Mot. for Summ. J. Concerning Bad Faith Claims, p. 5.

judgment has been entered in the prior action, the Pennsylvania Supreme Court has recognized that "final judgment" encompasses "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *See Shaffer v. Smith*, 673 A.2d 872, 875 (Pa. 1996) (quoting Restatement (Second) of Judgments § 13 (1980)). As a result, multiple courts applying Pennsylvania law have held that a state court jury verdict on damages is considered a "final judgment" when analyzing collateral estoppel. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 358-59 (3d Cir. 1999) (applying Pennsylvania law); *Allstate Ins. Co. v. Boyles*, No. 05-1778, 2007 WL 2011492, at *3 (W.D. Pa. July 5, 2007) (applying Pennsylvania law) ("Relitigating an issue upon which a jury has already returned a verdict would be 'unnecessarily duplicative and a waste of valuable judicial resources – the precise evils that issue preclusion is designed to combat.'")(internal citation omitted).

While there were pending post-trial motions in the Pennsylvania action when the instant motion and Plaintiffs' response were filed, as of the date of the entry of this Order, the verdict in the Pennsylvania has been ruled a final judgment, as pending post-trial motions have now been ruled upon by that court, as evidenced by the Orders entered in the Pennsylvania action that were submitted to the undersigned on or about February 16, 2022. Considering the holding in *Allstate v. Boyles* that a prior jury verdict is sufficiently final in the context of identical issues, the fact that the Court, *supra*, found the issues here were identical, and considering the fact that the Pennsylvania action's post-trial motions have now been disposed of, the Court finds the second factor regarding finality is met.

The Court next addresses the third element, that the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action. *See Ream,* at 1276. It is undisputed that Axiall is a wholly-owned subsidiary of Westlake. *See*

Pls' Resp., p. 16. Axiall was the sole plaintiff in the Pennsylvania action. *See* Defs' Mot., p. 3. However, this action involves both Westlake and Axiall as plaintiffs, as Westlake acquired Axiall after the expiration of the policy at issue in this case. *Id.* at 4. The Court finds these facts establish that Axiall is in sufficient privity with Westlake. The Court does not find Plaintiffs' Response argument that "the Insurers have not carried their burden to prove why a verdict against Axiall's Maintenance Vendors should somehow inure to the benefit of 12 property insurance companies that were not parties to the prior action..." to be convincing. *See* Pls' Resp., p. 17. The Response does not convince the Court that Westlake's relationship with Axiall, as Axiall is a wholly-owned subsidiary of Westlake, does not meet the requirement that the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action. The Court finds the requisite privity exists. The Court finds Axiall's relationship with Westlake satisfies the third factor.

The Court next addresses the fourth element, that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *See Ream,* at 1276. Regarding this specific issue of damage to the plant property and equipment, the Court finds Axiall had ample opportunity to litigate this at the weeks-long trial in the Pennsylvania action. Throughout discovery and pretrial litigation, Plaintiff sought and claimed the same amount of damages in this case and the Pennsylvania action – Defendants proffered that the number Axiall presented to the jury in the Pennsylvania action for claimed property damage was $278,000,000.00, the same number in the March 19, 2019 proof of loss submitted to the Defendants at issue in this case, minus a deduction for corrections. *See* Defs' Reply, p. 4. Defendants proffered and cited the transcript of the closing argument in the Pennsylvania jury trial where counsel for Axiall argued and explained this. *Id.* This evidence is persuasive that

Axiall had a full and fair opportunity to, and did, argue the same damages to the Pennsylvania jury. Therefore, the Court finds the fourth element is met.

Finally, the Court next addresses the fifth element that some Pennsylvania courts require, whether the issue determined in the prior action was essential to the previous judgment. *See Pitney Road Partners, LLC v. Murray Assocs., Architects, P.C.*, No. 2253 MDA 2013, 2014 WL 10575406, at *4 (Pa. Super. Ct. Sept. 18, 2014). The Court has already found that the two cases meet the "identical" element of collateral estoppel. Further, with regard to this identical issue, the verdict slip in the Pennsylvania action was clear: The Pennsylvania action's jury verdict slip asked the jurors to specifically determine the damage to the plant and equipment as a specific enumerated question. *See* Defs' Mot., Ex. A. The jury was tasked with determining damages in a civil action that asked for a determination of damages. The Court considers this plainly essential to the verdict. The Court finds the fifth element is met.

Accordingly, all the elements being met, the Court finds summary judgment shall be awarded in favor of Defendants on this matter and the Court hereby finds as a matter of law that pursuant to the doctrine of collateral estoppel, Plaintiffs' claim for damage to the Natrium plant and equipment has been determined to be $5.9 million as a matter of law, prior to the application of the appropriate $3.75 million deductible.

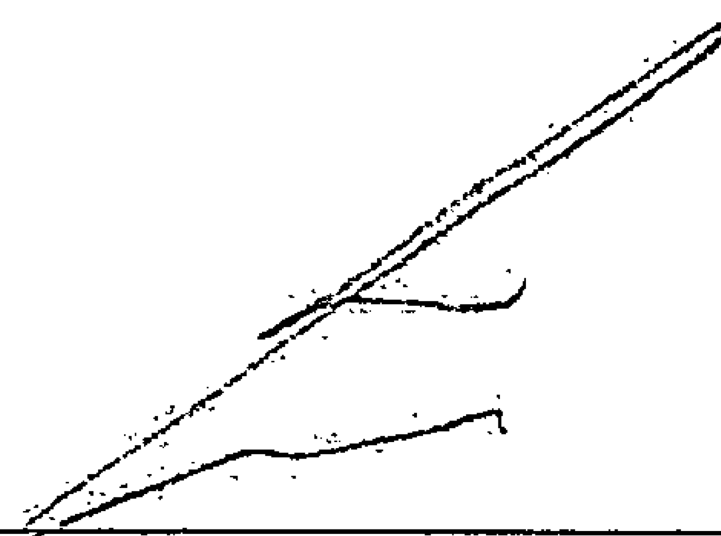
CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Plaintiffs' claim for damage to the Natrium plant and

equipment has been determined to be $5.9 million as a matter of law, prior to the application of the appropriate $3.75 million deductible.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION