FILED

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

AXIALL CORPORATION and WESTLAKE CHEMICAL CORPORATION,

JOSEPH M. RUCKI

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DEFENDANTS' "CORROSION" EXCLUSION DEFENSE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING ENFORCEMENT OF CORROSION EXCLUSION

This matter came before the Court this 19th day of November 2021, upon Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, 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 (referred to by the parties as the Natrium Plant) caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Pl's Mem., p. 2, 9; Def's Mem., p. 1-2. 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 Axiall purchased from the Insurers for substantial premiums. *See* Pl's Mem., p. 4. The Policies contain multiple endorsements. At issue in the instant motion is Section 3.C of the Policies, which reads as follows:

> C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, but not excluding resultant physical loss or damage from a covered peril.

Id. at 13.

3. In the instant motion, Westlake seeks partial summary judgment in its favor on the Insurers' "corrosion" exclusion defense, arguing the exclusion at issue in this motion is not absolute corrosion exclusion, but is part of a general wear-and-tear exclusion designed to exclude gradual deterioration. *Id.* at 4, 7. Specifically, Westlake argues that because the wear-and-tear

exclusion applies only to losses caused by non-fortuitous, gradually-operating types of wear-and-tear, such as rust, corrosion, erosion, etc., it has no application to Westlake's loss related to the tank car rupture, given that there is no dispute that the rupture was sudden, accidental, fortuitous, and unexpected. *Id.* at 3. Westlake argues corrosion is the type of property damage for which it seeks to recover, not the separate and distinct cause of that damage. *Id.*

4. On or about October 7, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense, arguing the motion should be denied because the Plaintiffs cannot avoid the policy's clear and broad corrosion exclusion, and that Plaintiffs improperly seek to modify and limit the application of the corrosion exclusion to only gradually occurring causes of loss because the exclusion excludes corrosion without any modifying or temporal limitation. *See* Defs' Resp., p. 2, 5. In fact, Defendants aver that the type of damage Plaintiffs are seeking coverage for are expenses associated with replacing corroded equipment, and if they constitute "expense caused by or resulting from" the action, process, or effect of corroding, then Defendants, and not Plaintiffs, are entitled to summary judgment[1]. *Id.* at 7.

5. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion Exclusion" Defense, arguing the Response failed to adequately rebut any of Westlake's arguments in the motion. *See* Reply, p. 4.

6. Meanwhile, on or about September 16, 2021, Defendants filed Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, arguing the Policy should not cover the replacement of certain equipment at the Natrium Plant that chlorine

[1] The Court notes Defendants have filed their own coverage motion for summary judgment on the issue of corrosion.

contamination has caused or will cause corrosion because corrosion is explicitly excluded from the Policies. *See* Def's Mem., p. 2.

7. On a prior day, Plaintiffs submitted Responses, and the Court notes it entered an Order granting leave for Plaintiffs to file amended responses to correct citations and references to the record. On or about October 21, 2021, Plaintiffs filed Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, requesting that Defendants' motion for summary judgment be denied, and reiterating its arguments from its own motion for partial summary judgment on the issue of corrosion. *See* Pl's Resp.

8. On or about October 21, 2021, Defendants filed their Defendants' Reply Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, reiterating its position that the corrosion referenced in Section 3.C was not modified by words indicating it is gradual. *See* Reply, p. 2-3, 4.

9. The Court also considered Statements of Material Facts submitted by both Plaintiffs and Defendants.

10. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment filed by Plaintiffs and a motion for summary judgment filed by Defendants. 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

In deciding both the motion for partial summary judgment filed by Plaintiffs and the motion for summary judgment filed by Defendants, the Court is tasked with deciding whether a

policy exclusion for corrosion contained in Section 3.C of the Policies applies to Plaintiffs' claimed damages.

Plaintiffs contend said policy exclusion for corrosion is actually an industry standard "wear-and-tear" exclusion that excludes coverage for non-fortuitous, non-sudden-and-accidental, "gradually-operating causes", including rust, corrosion, erosion, depletion, and gradual deterioration which does not apply to catastrophic, sudden, and accidental events like the tank car rupture at the heart of this litigation. *See* Pl's Mem., p. 2-3. Defendants, on the other hand, contend that the policy is clear and excludes corrosion without any modifying or temporal limitation. *See* Def's Resp., p. 5. Specifically, Defendants point out that the policy did not use the word "gradual" before it like it did before the word "deterioration" in Paragraph 3.C. *Id.* at 10.

Here, the Court examines the relevant section, Section 3 of the Policies. Section 3 of the Policies is a section titled "Perils Excluded". The relevant portion of Section 3, focusing on Section 3.C, contained in that section, reads as follows:

3. Perils Excluded

This policy does not insure against loss, damage or expense caused by or resulting from:

...

C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, *but not excluding resultant physical loss or damage from a covered peril.*

See Def's Mot., Ex. A (emphasis added).

As Defendants aver, there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment. *See* Def's Resp., p. 7. The cause of the corrosion damage to the equipment at the plant was the tank

car rupture and chlorine spill. *See* Pl's Mem., p. 3. As Plaintiffs point out, corrosion is the type of property damage for which Plaintiffs seek recovery, not the separate and distinct cause of that damage. *Id.*

The Defendants' Policies are "all risk" property policies, that cover "All Risks of Direct physical loss or damage," unless a risk – or "peril" – is specifically excluded. *Id.* at 4, 5. The Policies do not contain exclusions for either the peril of a tank car rupture or the peril of a chemical spill. *Id.* at 4. These causative events are therefore covered perils – i.e., covered causes of loss – and Plaintiffs are entitled to recover for the corrosion damage it sustained as a result of these covered causes of loss. *Id.* Section 3 lists specifically excluded perils. It is explicitly titled, "Perils Excluded". The Court finds and concludes that by the plain language of Section 3.C, which states that corrosion is a listed excluded peril, "but not excluding resultant physical loss or damage from a covered peril", the resultant corrosion damage from the covered chlorine release peril would not be excluded.

Further, each of the lettered paragraphs in Section 3 describes specific excluded causes of loss, and not types of excluded damage. *See* Pl's Mem., p. 6. The first sentence of the "Perils Excluded" section expressly uses the phrase "caused by or resulting from," making it clear that what follows in the lettered paragraphs are *causes of loss or damage*, and not types of damage resulting from another cause. *Id.* The Court notes that other types of specific loss excluded in Section 3 are war, hostile, or warlike action in time of peace or war (3.A), nuclear reaction, radiation or radioactive contamination (3.B), loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship (3.D), and mysterious disappearance loss or shortage disclosed on making inventory. *See* Def's Mot., Ex. A.

Whether or not Section 3.C constitutes an "absolute corrosion exclusion" (*See* Pl's Mem., p. 7, 14), or if gradual corrosion is to be treated differently, is a question that this Court need not answer at this time because the Court finds that Section 3.C does not exclude "resultant physical loss or damage from a covered peril", and the corrosion at issue has resulted from a covered peril (the chlorine release).

Under Georgia law[2], "[i]n construing an insurance contract, a court must consider it as a whole, give effect to each provision, and interpret each provision to harmonize with each other. The policy should be read as a layman would read it. Additionally, exclusions will be strictly construed against the insurer and in favor of coverage." *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 544 S.E.2d 156, 157 (Ga. 2001). Moreover, not only are exclusions strictly construed against insurers, but an insurer "[who] seeks to invoke an exclusion contained within its policy ... has the burden of showing that the facts came within the exclusion." *Nationwide Mut. Fire Ins. Co. v. Erwin*, 525 S.E.2d 393, 395 (Ga. App. Ct.1999) (internal punctuation and citation omitted).

Because the Court finds that Section 3.C does not exclude "resultant physical loss or damage from a covered peril", the Court concludes that Defendants have not met their burden of showing that the facts come within the exclusion. Since Section 3.C does not exclude "resultant physical loss or damage from a covered peril", and the tank car rupture/chlorine release was the subject covered peril which caused the resultant corrosion damage, Defendants have not met their burden to show that the facts of this loss fall within the exclusion of Section 3.C.

The Court further finds and notes that the other itemized exclusions in Section 3 are all causative events, and not types of resulting damage (war, nuclear reaction, radiation or

[2] The parties agree that Georgia law governs policy interpretation issues in this case. *See* Pl's Mem., p. 12.

radioactive contamination, etc.). *See* Pl's Mem., p. 16-17. Upon the Court's review of Section 3 as a whole, it is clear that each of the paragraphs (3.A, 3.B, 3.C, etc.) refers only to causes of loss and not to both causes of loss and types of damages resulting from other causes. *See* Pl's Resp., p. 4

Stated another way, "corrosion" describes the damage resulting from the tank car rupture and consequent chlorine release, which are perils that are not expressly excluded under the Policies and are therefore covered. *Id.* at 18.

For all of these reasons, the Court finds that summary judgment must be granted in Plaintiffs' favor, and against Defendants, on the Defendants' corrosion exclusion defense. The Court finds that Defendants' motion for summary judgment must be denied. Further, the Court finds that Plaintiffs' motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs' request for a declaration that Section 3.C of the "Perils Excluded" section of the Policies has no applicability to Westlake's claim for coverage at issue in this case. The Court notes that whether corrosion to equipment at the Natrium plant was pre-existing or a result of the August 2016 tank car rupture would be an entirely separate issue, and the Court's ruling is limited to the fact that corrosion damage caused by the August 2016 tank car rupture is not an excluded loss under Section 3.C of the Policies.

Further, the Court also grants Plaintiffs' request that the Court dismiss the Defendants' affirmative defense that cites the "corrosion" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, and finds said Seventeenth Defense shall be stricken.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' "corrosion" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, is hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion is hereby DENIED. 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

A Copy Teste:
Joseph M. Rucki, Clerk
By Jackie Gallo Deputy

FILED

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

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JOSEPH M. RUCK

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DEFENDANTS' "FAULTY WORKMANSHIP" EXCLUSION DEFENSE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING ENFORCEMENT OF FAULTY WORKMANSHIP EXCLUSION

This matter came before the Court this 19th day of November 2021, upon Plaintiffs Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, 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 (referred to by the parties as the Natrium Plant) caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Pl's Mem., p. 1, 6; Def's Mem., p. 2-3. 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 Axiall purchased from the Insurers for substantial premiums. *See* Pl's Mem., p. 3. The Policies contain multiple endorsements. At issue in the instant motion is Section 3.D of the Policies, which reads as follows:

> D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship. This exclusion does not apply to resultant physical loss or damage not otherwise excluded.

Id. at 11; *see also* Defs' Resp., p. 4.

3. Section 3.D is referred to as the parties as the "Perils Excluded" section. *Id.*

4. In the instant motion, Westlake seeks partial summary judgment in its favor on the Insurers' "faulty workman" exclusion defense, arguing the faulty workmanship exclusion

that operates to bar coverage for all damage that results from faulty workmanship would not apply here even if the tank car rupture originated with negligent maintenance work that certain third parties, Rescar, Inc., AllTranstek, LLC and Superheat, FGH Services, Inc.[1] performed on the tank car because the exclusion includes an ensuing loss provision that affords coverage for damage caused by a covered peril that results from faulty workmanship. *Id.* at 1-2, 4.

5. On or about October 7, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense, arguing the motion should be denied because Plaintiffs' claim/position that the ensuing loss provision applies because faulty workmanship resulted in a covered peril is wrong legally and factually. *See* Defs' Resp., p. 2.

6. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense.

7. Meanwhile, on or about September 16, 2021, Defendants filed Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion, arguing Plaintiffs claim that the Policy cover replacement of instrumentation, electronics, and metal lagging and banding in certain areas of the Natrium Plant because chlorine contamination has caused or will cause corrosion should be denied because all of the claimed damages result from faulty workmanship. *See* Def's Mem., p. 2. Specifically, Defendants argue the faulty inspection, maintenance and repair work of third-parties AllTranstek LLC, Rescar, Inc. t/d/b/a Rescar Companies, and Superheat FGH Services, Inc. performed on the tank car which ruptured

[1] The parties refer to these entities as maintenance vendors.

causes Section 3.D of the Policies to preclude coverage for all of the loss, damage, and expense caused by or resulting from those entities' faulty workmanship. *Id.* at 4, 9.

8. On a prior day, Plaintiffs submitted Responses, and the Court notes it entered an Order granting leave for Plaintiffs to file amended responses to correct citations and references to the record. On or about October 21, 2021, Plaintiffs filed Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion, requesting that Defendants' motion for summary judgment be denied, and reiterating its arguments from its own motion for partial summary judgment on the issue of faulty workmanship. *See* Pl's Resp.

9. On or about October 21, 2021, Defendants filed their Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion, reiterating its position that its motion should be granted and arguing that the ensuing loss exception to the faulty workmanship exclusion does not apply. *See* Reply, p. 5, 6.

10. The Court also considered Statements of Material Facts submitted by both Plaintiffs and Defendants.

11. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment filed by Plaintiffs and a motion for summary judgment filed by Defendants. 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

In deciding both the motion for partial summary judgment filed by Plaintiffs and the motion for summary judgment filed by Defendants, the Court is tasked with deciding whether a policy exclusion for faulty workmanship contained in Section 3.D of the Policies applies to Plaintiffs' claimed damages and precludes Plaintiffs' claims for damages.

Section 3 of the Policies includes the following language:

> This policy does not insure against loss, damage or expense caused by or resulting from:
>
> ***
>
> D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship. This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]

See Exhibit G to Defendants' Motion, at pp. 14-15 of 65.

Defendants aver that the fact that Axiall filed two different civil actions against the third-party maintenance vendors alleging their negligent acts and omissions in their work on the railroad car caused the rupture and chlorine release make clear that all the damages it seeks in this insurance coverage litigation which it has alleged are the direct and proximate result of the faulty workmanship are excluded. *See* Def's Mem., p. 4-5, 14-15.

Plaintiffs contend that even if the negligence was the first event in the chain of causation resulting in the tank car rupture and consequent damage to the Natrium Plant, that is even if the faulty workmanship exclusion had any application here, the exclusion would not operate to bar coverage because it includes an "ensuing loss" provision that affords coverage for damage caused by a covered peril that results from, or ensues from, faulty workmanship. *See* Pl's Mem., p. 1. The last sentence of Section 3.D, which states, "This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]", is what Plaintiffs refer to as the "ensuing loss" provision. *Id.* at 5, 11-12, 13-14.

Plaintiff proffered that Defendant AIG's 30(b)(7) representative on underwriting topics, David Oliver, explained the meaning of an ensuing loss provision as follows:

> Q What's an ensuing loss provision?

> A Ensuing loss is where coverage is provided for a subsequent -- for subsequent loss or damage caused by a peril that's not otherwise excluded. So if it's [sic] an excluded peril causes a primary event and there was a subsequent event to that, in other words, an ensuing peril that's not otherwise excluded, then we would provide coverage for the damage due to that ensuing peril only.

See Pls' Mem., p. 5-6.

AIG's underwriting manual declares that "[e]nsuing loss provisions in exclusions are common...." *Id.* at 6. Moreover, as evidenced by the Insurers' standard insuring forms (sometimes referred to as "specimen" forms), exclusions like Section 3.D typically – if not always – include ensuing loss provisions. *Id.*

Specifically, Plaintiffs contend that the maintenance vendors' negligent work on a tank car, their poorly executed weld repairs and post-weld treatment, weakened certain sections of the railcar's tank wall, making it more susceptible to cracking. *Id.* at 2. However, Plaintiffs contend that coverage is preserved when faulty workmanship itself gives rise to a covered cause of loss, and that covered cause of loss results in damage. *Id.* In this case, Plaintiffs contend the tank car rupture itself is a covered cause of loss. *Id.*

As an initial matter, it is undisputed that the maintenance vendors had performed certain weld repair work on the tank car prior to the tank car rupture, and it is undisputed that Plaintiffs allege that the work they performed was negligent[2]. *See* Pl's Mem., p. 1; *see also* Def's Resp., p. 2. It is also not in dispute that the August 27, 2016 holding of the tank car was its first loading since returning from the custody of the maintenance vendors. *See* Pl's Mem., p. 6; *see also* Defs' Mot., p. 3. Plaintiffs acknowledge that Axiall has sued the maintenance vendors both in

[2] The Court considers it has also been proffered that an NTSB Report found that a preexisting crack of unknown origin caused the tank car rupture, not the faulty workmanship of the maintenance vendors, which the NTSB considered to be, at most, a contributing factor. *See* Pl's Reply, p. 3; *see also* Def's Resp., p. 2-5.

this Court and in the Court of Common Pleas of Allegheny County, Pennsylvania for, *inter alia*, negligence related to the tank car rupture. *See* Pl's Mem., p. 1.

With regard to Section 3.D, the Court examines the Policy language, including the last sentence, "This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]".

A federal court applying Georgia law to a faulty workmanship exclusion with an "ensuing loss" provision, such policy provisions are "routine in the industry" and are:

> applied in a situation where an excluded cause of loss, e.g., an earthquake, may both independently cause damage and result in a fire, an occurrence that is a covered cause of loss. In that situation the direct earthquake damage would not be insured but the ensuing fire damage would be insured.

Mock v. Central Mut. Ins. Co., 158 F. Supp. 3d 1332, 1341 (S.D. Ga. 2016) (internal punctuation and citation omitted).

In this case, even if it was the maintenance vendors' allegedly negligent maintenance or repair work which caused a defective condition in the tank car wall by weakening it and making it more susceptible to stress[3], Section 3.D would bar Plaintiffs from recovering for this defective condition, the cost that Plaintiffs would have incurred to remedy the negligent repair work and render the tank car safe for continued use, but would not bar Plaintiffs from recovering in the subsequently resulting additional covered loss. *See* Pl's Mem., p. 12-13. This subsequently resulting additional covered loss was the tank car's sudden rupture after it was loaded at the Natrium Plant with 90 tons of liquid chlorine, and the consequent escape of that chlorine into the Natrium Plant where it combined with water to form acids that caused damage to equipment and property at the Natrium Plant. *Id.* at 13. The Policies do not expressly exclude Tank Car

[3] Again, the Court notes it was proffered that an NTSB Report found that a preexisting crack of unknown origin caused the tank car rupture, not the faulty workmanship of the maintenance vendors, which the NTSB considered to be, at most, a contributing factor. *See* Pl's Reply, p. 3.

ruptures or releases of liquids or chemicals or chemical attacks of acid upon metal equipment. Therefore, those causes of loss are covered.

The Policies are "All Risk" first-party property policies, and each contains an "Insuring Agreement" that provides as follows:

> Subject to the terms, conditions and exclusions herein contained, this Policy insures, within the limits of liability set forth herein, the property and interest as hereinafter set forth and defined against All Risks of Direct physical loss or damage occurring anywhere during the period of this Policy and including whilst in transit by any means within the territorial limits herein, except as hereinafter excluded.

See Pls' Mem., p. 4.

As is clear from this language – and as the Insurers' witnesses have confirmed – the Policies provide broad coverage for all risks, except for those risks, or "perils" that are expressly excluded. *Id.* Plaintiffs have proffered that multiple Defendant Insurer witnesses have admitted that tank car ruptures and liquid spills are not excluded perils – or causes of loss. *Id.* at 13.

The Court considers that Plaintiffs' loss did not just consist of allegedly faulty workmanship on a tank car. *Id.* at 14. Rather, the allegedly faulty workmanship, combined with the filling of the tank car more than two months later with 90 tons of cold liquid chlorine resulted in the tank car's sudden rupture. *Id.* The rupture then caused the 90 tons of liquefied chlorine to spill out. *Id.* When it came in contact with the air, Plaintiffs proffered this resulted in vaporization of the chlorine, which formed a cloud or plume, which traveled through the Natrium Plant, then elsewhere. *Id.* The chlorine plume damaged equipment at the Natrium Plant. *Id.*

Because the tank car rupture/chlorine release is not an excluded peril from the Policies, and because the tank car rupture/chlorine release is therefore a covered peril that ensued, or resulted, from any alleged faulty workmanship on the part of the maintenance vendors, the Court finds Section 3.D of the Policies preserves coverage for all the damages these covered perils

caused. The Court finds Section 3.D does not bar coverage for Plaintiff's loss as a matter of law. Therefore, the Court finds that Plaintiffs' motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs' request for a declaration that Section 3.D of the Policies applies to Plaintiffs' claim for coverage, such that the faulty workmanship exclusionary language does not preclude coverage for Plaintiffs' claim.

Further, the Court also grants Plaintiffs' request that the Court dismiss the Defendants' affirmative defense that cites the "faulty workmanship" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, and finds said Seventeenth Defense shall be stricken.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' "faulty workmanship" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, is hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion is hereby DENIED. 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

A Copy Teste:
Joseph M. Rucki, Clerk
By Jackie Hall Deputy

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JOSEPH M. RUCKI

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

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DEFENDANTS' "CONTAMINATION" EXCLUSION DEFENSE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING ENFORCEMENT OF ENDORSEMENT NO. 1 AND NATIONAL UNION ENDORSEMENT NO. 19

This matter came before the Court this 19th day of November 2021, upon Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, 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 (referred to by the parties as the Natrium Plant) caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Pl's Mem., p. 1-2, 9; Defs' Resp., p. 1-2. 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 Axiall purchased from the Insurers for substantial premiums. *See* Pl's Mem., p. 1. The Policies contain multiple endorsements. At issue in the instant motion are Endorsement No. 1 regarding a "seepage and/or pollution and/or contamination" exclusion and Endorsement No. 19[1] regarding a "pollution, contamination, debris removal" exclusion. *Id.*

3. Insurers notified Plaintiffs that various exclusions, including the "contamination" exclusions at Endorsement Nos. 1 and 19, "may exclude or limit coverage" for Westlake's claim. *Id.* at 2. In the instant motion for partial summary judgment filed by Westlake, Westlake seeks a

[1] This exclusion utilized by Defendant AIG. *Id.* at 2.

declaration that neither of these exclusions – referred to by the parties as "contamination" exclusions – apply to Westlake's insurance claim because the exclusions are intended to address environmental pollution, and not damage to equipment caused by an industrial accident, arguing the endorsements do not apply to the type of event at issue in the case at bar, "a chlorine chemical attack resulting from a sudden and accidental event like the Tank Car Rupture". *Id.* at 1, 3-4, 10, 13.

4. On or about October 7, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense, arguing that Plaintiffs are incorrect that the two policy endorsements at issue in this motion precluding coverage for contaminants or pollutants apply only to environmental harm. *See* Defs' Resp., p. 2.

5. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense.

6. Meanwhile, on or about September 16, 2021, Defendants filed Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19, arguing Plaintiffs' claims fall squarely within the exclusionary language of Endorsement No. 1 and National Union Endorsement No. 19, and requesting judgment as a matter of law that Plaintiffs' claim is excluded from coverage under those endorsements. *See* Def's Mot., p. 3.

7. On a prior day, Plaintiffs submitted Responses, and the Court notes it entered an Order granting leave for Plaintiffs to file amended responses to correct citations and references to the record. On or about October 21, 2021, Plaintiffs filed Plaintiffs' Amended Brief in

Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19, requesting that Defendants' motion for summary judgment be denied, and reiterating its arguments from its own motion for partial summary judgment on the issue of contamination. *See* Pl's Resp.

8. On or about October 21, 2021, Defendants filed Defendants Reply Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19.

9. The Court also considered Statements of Material Facts submitted by both Plaintiffs and Defendants.

10. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment filed by Plaintiffs and a motion for summary judgment filed by Defendants. 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

In deciding both the motion for partial summary judgment filed by Plaintiffs and the motion for summary judgment filed by Defendants, the Court is tasked with deciding whether a policy exclusion for "seepage and/or pollution and/or contamination" found at Endorsement No. 1 and a policy exclusion for "pollution, contamination, debris removal" exclusion found only in Endorsement No. 19 of National Union/Defendant AIG's Policy[2].

The "contamination" exclusion in Endorsement No. 1 provides:

> Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses

[2] The Court notes it has been proffered that the "Policies" are the thirteen All Risk commercial property insurance policies issued by the Insurers to Axiall for the November 19, 2015 to November 19, 2016 policy period, with limits of liability totaling $650 million, and which divided into quota shares among the policies and total 100%. There are thirteen Policies but only twelve Defendant Insurers because Defendant National Union Fire Insurance Company of Pittsburgh, Pa., an AIG insurer ("AIG") issued two policies, one out of its U.S. underwriting arm (the "AIG-US Policy"), and one out of its U.K. underwriting arm (the "AIG-UK Policy"). See Pls' Mem., p. 1.

> in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.
>
> ...
>
> However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

See Pls' Mem., p. 3, 4, 6; *see also* Def's Resp., Ex. A.

Endorsement No. 19 of AIG-US Policy No. 020786808 states in pertinent part: This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy. *See* Pls' Mem., p. 8; *see also* Def's Resp., Ex. A.

Plaintiffs argue that the exclusionary language contained in Endorsement No. 1 containing the phrase "seepage and/or pollution and/or contamination" refers to types of environmental impairment, not to physical loss or damage to operating equipment or other insured property from a sudden and accidental event like the tank car rupture. *See* Pls' Mem., p. 3. Defendants aver this position is wrong that the clause should be applied outside the context of traditional environmental pollution. *See* Def's Resp., p. 2. Further, Defendants argue the Policies do "not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination . . . .", and that means the Policies exclude contamination and pollution regardless of the type, regardless of whether such contamination or pollution is characterized as "environmental impairment." *Id.*

The Court agrees with Plaintiffs and finds the exclusion set forth in Endorsement No. 1 clearly and unambiguously does not apply to Westlake's claim. The Court finds that instead the language was clearly designed to address environmental pollution or contamination, which is not at issue here. *See* Pl's Mem., p. 5. Plaintiffs have proffered to the Court that the phrase "seepage and/or pollution and/or contamination" is found only in Endorsement No. 1 of the Policies, and is not defined anywhere in the Policies. *See* Pls' Mem., p. 6. The Court considers the fact that Endorsement No. 1 includes a section titled "Pollutant Cleanup and Removal (Land & Water). *See* Def's Resp., Ex. A. Further Endorsement No. 1 contains "Authorities Exclusion" provision (which provides that fines imposed by a governmental authority are not covered) indicates that "seepage, "pollution," and "contamination" are all deemed to be forms of "environmental impairment":

> This Policy does not cover expenses, fines, penalties or court costs, incurred or sustained by the Insured or imposed on the Insured at the order of any government agency, court or other authority, in connection with any kind or description of environmental impairment, including seepage or pollution or contamination from any cause.

As such, the Court finds "seepage, pollution or contamination" refers to impairment of land, air or bodies of water, and not operating equipment or other property at the Natrium Plant.

However, even if the Court found that that the chlorine cloud that was released by the tank car rupture was deemed to constitute "seepage and/or pollution and/or contamination" the exclusion at Endorsement No. 1 contains the following sentence:

> However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

See Def's Resp., Ex. A.

In this case, the tank car at issue was owned by Axiall and constituted insured property under the Policies. Likewise, the chlorine product contained within the tank car at the time of the rupture was insured property under the Policies. The tank car and the released chlorine were indisputably the subject of direct physical loss or damage when the tank car suddenly ruptured. The sudden and accidental rupture of the tank car is a peril that is not excluded – and thus is covered – under the Insurers' All Risk Policies. Accordingly, even if the rupture of the tank car on August 27, 2016 resulted in "seepage and/or pollution and/or contamination," within the meaning of Endorsement No. 1, which the Court did not find, any physical loss or damage caused thereby is not excluded – but rather is expressly covered – under the unambiguous, plain language of this exception to the exclusion in Endorsement No. 1.

The Court next addresses Endorsement No. 19. Viewed in its entirety, Endorsement No. 19, titled "Pollution, Contamination, Debris Removal Exclusion Endorsement" also is clearly designed to address environmental pollution or contamination, which is not at issue here.

Endorsement No. 19 states in pertinent part: This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy. *See* Pls' Mem., p. 8; *see also* Def's Resp., Ex. A.

Like Endorsement No. 5, the Court finds this provision is clearly designed to address environmental pollution or contamination. As an initial matter, Endorsement No. 19 does not state that it deletes and replaces or supersedes the coverage provided seepage, pollution and contamination in the two exceptions to the exclusion in Endorsement No. 1. *See* Pl's Mem., p. 8. The express language in the last sentence of Endorsement No. 19 provides that "[a]ll other terms,

conditions, and exclusions of this policy remain unchanged." *Id.* at 8-9. The broker for the AIG-US Policy, Michael Perron of Willis, testified that Endorsement No. 19 does not operate to exclude any contamination-related loss or damage beyond that which is excluded in Endorsement No. 1, or any other part of the policy, because the last sentence of Endorsement No. 19 expressly preserves coverage otherwise provided or not excluded in the policy. *Id.* at 9. Further, AIG's corporate representative testified that there is nothing from Westlake's claim that is excluded under Endorsement No. 19 that is beyond what is excluded under Endorsement No. 1 in the Insurers' view. *Id.*

Like Endorsement No. 1, Endorsement No. 19 contains sections which reference debris removal, governmental pollution laws, and land and water. Specifically, Endorsement No. 19 contains a "Debris Removal Exclusion" section, which provides, *inter alia*, that AIG "will not pay the expense to: a) Extract contaminants or pollutants from the debris; or b) Extract contaminants or pollutants from land or water; or c) Remove, restore or replace contaminated or polluted land or water; ...." *Id.* at 19. Further, like Endorsement No. 1, Endorsement No. 19 contains an "Authorities Exclusion," which excludes coverage for fines, penalties or other costs imposed on the Insured by order of a government agency. *Id.*

Thus, upon the Court's review of Endorsement No. 19, when read in its entirety, the unambiguous language of Endorsement No. 19 makes it clear that it is intended to apply to loss or damage in the form of environmental impairment to land, air or bodies of water – not to a sudden tank rupture leading to damage to property and equipment in the manner that occurred in the case at bar.

Finally, the Court notes there is argument in Plaintiffs' motion regarding whether Endorsement No. 19 was properly bound to Axiall's Policies. *See* Pls' Mem., p. 8. Because the

Court finds that the contamination exception contained in Endorsement No. 19 would not exclude Plaintiffs' claims, this Court does not need to address the issue of whether or not Endorsement No. 19 was properly added to Axiall's Policies.

For all of these reasons, the Court finds that summary judgment must be granted in Plaintiffs' favor, and against Defendants, on the Defendants' corrosion exclusion defense. The Court finds that Defendants' motion for summary judgment must be denied. Further, the Court finds that Plaintiffs' motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs' request for a declaration that Endorsement No. 1 of the Policies and Endorsement No. 19 of the AIG-US Policy have no applicability to Westlake's claim for coverage at issue in this case.

Further, the Court also grants Plaintiffs' request that the Court dismiss the Defendants' affirmative defenses based on Endorsement Nos. 1 and 19, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, and finds said Seventeenth Defense shall be stricken.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' affirmative defenses based on Endorsement Nos. 1 and 19, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, are hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No.

19 is hereby DENIED. 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

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By Jackie Hall Deputy