No. 25-ICA-16

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**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,**

Defendants Below / Petitioners,

v.

**WESTLAKE CHEMICAL CORPORATION
and AXIALL CORPORATION,**

Plaintiffs Below / Respondents.

From the Circuit Court of Marshall County, West Virginia, Business Court Division
No. 19-C-59, the Honorable Judge Christopher Wilkes

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Corrosion" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusion.

2. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Faulty Workmanship" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusion.

3. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Contamination" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusions.

4. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-judgment Interest.

5. The Business Court erred in denying Petitioners' Motion for Setoff.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This is an appeal from the following Orders entered by the Business Court: (1) 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; (2) 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; (3) 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; (4) Order Granting Plaintiffs' Motion for Partial Summary Judgment Regarding Count I and

Count II and for Pre-judgment Interest and Final Judgment Order; and (5) Order Denying Defendants' Motion for Setoff (sometimes collectively the "Orders"). [JA011364-95; 000053-64; 012646-54].[1] Petitioners seek reversal with direction to the Business Court to enter summary judgment in their favor.

A. The Underlying Incident

On August 27, 2016, an old railroad tank car at Respondents' chlorine plant in Natrium, Marshall County, West Virginia ("Natrium Plant")[2] experienced a 42-inch-long crack in its tank shell, releasing approximately 178,400 pounds of liquified chlorine (the "Incident"). [JA009869]. The Incident prompted a temporary shutdown of the Natrium Plant, but all units returned to full operation a few days later, on September 2, 2016. [JA009913]. The Natrium Plant has continuously operated without notable interruption for over eight years on a 24/7/365 basis. [JA010081].

The Incident occurred minutes after the tank car was loaded for the first time after having been taken out of service for corrosion repairs and other maintenance. The repairs were made in the same location where the crack formed. [JA010081; 009881]. Following the Incident, the National Transportation Safety Board ("NTSB") investigated and issued a report noting that the "Probable Cause" of the rupture was "the presence of residual stresses associated with Rescar Companies' tank wall corrosion repairs and uncontrolled local post-weld heat treatment" during repairs. [JA009868].

B. The Lawsuits Against Third-Party Contractors

The Incident spawned two civil actions by Respondent Axiall Corporation[3] ("Axiall") against the same group of third-party contractors involved with the inspection, maintenance, and repair work performed on the railroad tank car. One case was filed in the Court of Common Pleas

[1] Petitioners' citations to the record herein refer to the page number designated in the bottom right corner of the Joint Appendix ("JA").
[2] The Natrium Plant began chlorine manufacturing operations in 1943.
[3] Respondent Westlake Chemical Corporation acquired Axiall Corporation through a hostile takeover on August 31, 2016—four days after the Incident—and is not a plaintiff in either of these lawsuits Axiall filed against these third-party contractors. [JA010376; 010465-68]. Axiall Corporation is a wholly-owned subsidiary of Respondent Westlake Chemical Corporation and the Business Court has found that Westlake Chemical Corporation is in privity with Axiall Corporation for purposes of these actions. [JA011625-26].

of Allegheny County, Pennsylvania, Civil Division No. GD-18-010944 ("Pennsylvania Action"), and the other was filed in the Circuit Court of Marshall County, West Virginia, Civil Action No. 18-C-203. [JA005611-25; 009947]. Both actions involved the same damages to the Natrium Plant that are being sought from Petitioners. In those actions, Axiall claimed the following negligent acts and omissions by the third-party contractors caused the Incident:

> a. In failing to use ordinary care in the fulfillment of their work on or in connection with the railroad tank car;
> b. In failing to comply with the standard of care in the industry in performing their work on or in connection with the railroad tank car;
> c. In the case of Rescar, in failing to perform repair work with the minimal level of care required in order to prevent the railroad tank car's shell rupturing upon first post-repair use;
> d. In the case of AllTranstek, in failing to employ the reasonable care required to recognize that Rescar's repairs were faulty, and that the railroad tank car was not fit for return to chlorine service; [and]
> e. In the case of Superheat, in failing to adhere to the standard of care required in monitoring heat treating during the course of the railroad tank car repairs.

[JA009953-54; 005622].

In pursuing these actions, Axiall alleged that faulty work of third parties in failing to properly conduct post-weld heat treatment, among other things, caused the Incident. [JA009955]. Axiall has also asserted that the alleged damage to the Natrium Plant was a "direct and proximate result of the [third parties'] negligent acts and omissions" and is comprised entirely of corrosion or the risk of future corrosion to equipment and other plant property. [JA009954; 009994-010007; 009934].

The Pennsylvania Action was tried to a jury and a verdict was reached on October 14, 2021, finding, *inter alia*, that the damage to the Natrium Plant and equipment totaled $5.9 million.[4] [JA012422]. The jury found that two of the third-party contractors, Rescar and AllTranstek, were negligent and that their negligence caused the damage to the Natrium Plant and equipment. [JA012418-21]. A judgment on the verdict was entered on August 10, 2022. [JA012411-15]. The judgment as to these issues was affirmed by the Superior Court of Pennsylvania on June 3, 2024.

[4] By Order of the Business Court dated March 3, 2022, Respondents are collaterally estopped from re-litigating the issue of damage to the Natrium Plant on the basis of the jury verdict in the Pennsylvania Action. [JA011627-28].

[JA012435-501]; *Axiall Corp. v. AllTranstek LLC*, 323 A.3d 180 (Pa. Super. Ct. 2024), *appeal denied*, No. 187 WAL 2024, 2024 WL 5244357 (Pa. Dec. 30, 2024).[5]

C. The Policy

Petitioners[6] collectively issued thirteen separate policies of commercial property insurance to Axiall for the 2015-2016 policy period which covered, subject to applicable terms and conditions, the Natrium Plant. Each Petitioner, in issuing the policies, subscribed to certain "quota-shares" of the insurance for the Natrium Plant. The policies (collectively "Policy") each contain identical exclusions relating to corrosion, faulty workmanship, and contamination[7] that exclude coverage for Respondents' claims. [JA000580].

The corrosion and faulty workmanship exclusions are contained in Sections B.3.C. and B.3.D. of the Policy, which provide, respectively:

> 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;
>
> 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[.]
>
> ***

[JA000599] (emphasis added).

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[5] The Superior Court of Pennsylvania affirmed the judgment with respect to the jury verdict, delay damages, and post-judgment interest amounts, but vacated the judgment as to the attorneys' fees award to the extent they related to first-party claims, which the court found were not recoverable, and remanded to the trial court to determine which portion of attorneys' fees, if any, directly related to the defense and settlement of third-party claims. *Id*. The Supreme Court of Pennsylvania denied further review of the Superior Court's decision. *See* No. 187 WAL 2024, 2024 WL 5244357 (Pa. Dec. 30, 2024).

[6] Petitioners are the following twelve insurance companies who are defendants in the Business Court action: 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. n/k/a Talbot Underwriting Services (US) Ltd.; and HDI-Gerling America Insurance Company n/k/a HDI Global Insurance Company.

[7] The National Union policy contains an additional contamination exclusion, Endorsement No. 19, noted below.

The Policy contains a contamination exclusion in Endorsement No. 1 ("Endorsement No. 1") which provides:

> **SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION**
>
> Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.
>
> Nevertheless if a peril not excluded from this Policy arises directly or indirectly from seepage and/or pollution and/or contamination any loss or damage insured under this Policy arising directly from that peril shall (subject to the terms, conditions and limitations of the Policy) be covered.
>
> 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.
>
> ***

[JA000618].

In addition, the National Union U.S. policy[8] includes a separate "**POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT**" ("Endorsement No. 19"). Endorsement No. 19 provides, in relevant part:

> 2. Pollution and Contamination Exclusion.
>
> 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.
>
> ***
>
> CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited

[8] Petitioner National Union issued two policies to Axiall for the 2015-2016 policy period. Policy no. 020786808 was issued out of the United States and Policy no. 27015349 was issued out of the United Kingdom. Policy no. 020786808 is the only policy that contains an additional contamination exclusion in Endorsement No. 19.

> to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> This exclusion shall not apply when loss or damage is directly caused by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm, hail, vandalism, malicious mischief. This exclusion shall also not apply when loss or damage is directly caused by leakage or accidental discharge from automatic fire protective systems.
>
> ***

[JA000643].

Respondent Westlake Chemical Corporation's ("Westlake") first act with respect to the Policy, after acquiring Axiall days after the Incident, was to immediately terminate the Policy effective midnight on August 30, 2016, and secure $2,349,669 from Petitioners in return premiums. [JA010082-83; 010470-71; 010335-40]. Per Westlake's instruction, the Policy was cancelled effective August 31, 2016. [JA010082; 010470-73].

D. Respondents' Insurance Claim

Respondents notified Petitioners of a potential claim and proceeded with making repairs necessary to restart the Natrium Plant. All units at the Natrium Plant were restarted on September 2, 2016, six days after the Incident, and on September 12, 2016, Respondents estimated the costs of the repairs to be approximately $1 million. [JA010332; 009913]. One year later, Westlake provided a list of those costs, which still totaled approximately $1 million—well below the Policy's $3.75 million property damage deductible. [JA004769-71].

On May 22, 2018, Westlake first submitted a claim purportedly above the Policy's property damage deductible, in the amount of $5,764,231. [JA010859-61]. This claim submission came four months after Petitioners issued a reservation of rights letter identifying, *inter alia*, the potential application of the corrosion, faulty workmanship, and contamination exclusions to preclude coverage for some or all of the damage claimed by Respondents. [JA006486-94]. In November 2018, after repeated requests by Petitioners over the course of two years for pre-Incident photographs of the Natrium Plant, Westlake finally provided more than 40,000 photographs, including thousands which showed extensive corrosion throughout the aged plant and equipment

prior to the Incident. [JA010095; 010591-93].

On January 28, 2019, after Petitioners' technical consultants reviewed the pre-Incident photographs and completed their technical investigation, Petitioners denied the May 22, 2018 claim. Petitioners' denial was based in part on the corrosion and faulty workmanship exclusions, and the contamination exclusions found in Endorsement No. 1 and Endorsement No. 19. [JA006542-48]. In response, Respondents submitted an updated claim for $278,505,078 on March 20, 2019. [JA009941-45]. While the update substantially increased the amount of the claim, it nevertheless included the same type of excluded and "anticipated" damages as the claim submitted on May 22, 2018. The incurred costs remained nearly unchanged, but Westlake added more than $250 million in estimated costs to replace all instrumentation, electronics, and metal lagging and banding located downstream of the chlorine release point, as well as additional estimated contingency costs that **might** be incurred if and when any work is ever done. Petitioners denied the updated claim on April 9, 2019, on multiple grounds, including the corrosion, faulty workmanship, and contamination exclusions in the Policy, as well as the asbestos exclusion. [JA008633-40].

II. PROCEDURAL HISTORY

On April 9, 2019, Petitioners filed a lawsuit in Delaware state court seeking a declaratory judgment regarding the lack of coverage for Respondents' insurance claim. The next day, Respondents filed the underlying action in the Circuit Court of Marshall County, asserting five causes of action: (1) Declaratory Judgment; (2) Breach of Contract; (3) Bad Faith Under Georgia Law; (4) Bad Faith Under West Virginia Law; and (5) Statutory Bad Faith Under the West Virginia Unfair Trade Practices Act. [JA000235-53].

Respondents moved to dismiss the Delaware action filed by Petitioners. Petitioners, in turn, moved to dismiss or stay the Marshall County Circuit Court action in favor of the first-filed Delaware action. The Delaware court stayed Petitioners' action in favor of the Marshall County action, and the Marshall County Circuit Court denied Petitioners' motion to dismiss or stay. During oral argument on Petitioners' motion to dismiss or stay, the Circuit Court, *sua sponte*, dismissed

Count III of Respondents' Complaint—Bad Faith Claims Under Georgia Law—and held that West Virginia law applied to all of the bad faith claims. *See State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel*, 243 W. Va. 681, 683, 850 S.E.2d 680, 682 (2020). The Circuit Court then transferred the case to the Business Court Division.

On October 25, 2019, Petitioners filed a petition for writ of prohibition before the Supreme Court of West Virginia challenging, *inter alia*, the Circuit Court's *sua sponte* dismissal of Count III of the Complaint and its corresponding finding that West Virginia law applied to all of the bad faith claims. The Supreme Court granted the writ, *as moulded*, and vacated the Circuit Court's Order dismissing Count III of the Complaint and its finding that West Virginia law applied to the bad faith claims. The Supreme Court declined, however, to find that the Policy's Georgia choice-of-law provision governed the action. *Id.*

Upon remand to the Business Court, Petitioners moved for a declaration that Georgia law governed the dispute and to dismiss Respondents' claims under West Virginia law in Counts IV and V of the Complaint, as well as Respondents' request for damages pursuant to *Hayseeds v. State Farm Fire & Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). The Business Court granted Petitioners' motion and dismissed all claims and causes of action not based on Georgia law. [JA000034].

The parties proceeded to litigate the remaining causes of action in Counts I through III and engaged in substantial discovery. On September 16, 2021, the parties filed motions for summary judgment on coverage issues pertaining to the applicability of the corrosion, faulty workmanship, asbestos, and contamination exclusions. On November 19, 2021, the Business Court entered Orders granting Respondents' motions for partial summary judgment as to the corrosion, faulty workmanship, and contamination exclusions and denying Petitioners' motions as to those exclusions. [JA011364-74; 011375-84; 011385-95].[9]

[9] The Business Court granted summary judgment in favor of Petitioners as to the asbestos exclusions. The application of the asbestos exclusions is not at issue in this appeal.

On December 17, 2021, Petitioners filed a Notice of Appeal with the Supreme Court of West Virginia, Appeal No. 21-1016, challenging the Business Court's Orders granting Respondents' motions for summary judgment regarding the Policy exclusions.[10] [JA011542-614].

On March 3, 2022, following the verdict reached in the Pennsylvania Action on October 14, 2021, the Business Court entered an 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. The Business Court found, as a matter of law, that pursuant to the doctrine of collateral estoppel, Respondents' claim for damage to the Natrium Plant and equipment has been determined to be $5.9 million, prior to the application of the appropriate $3.75 million deductible. [JA000001-14]. The Business Court affirmed its ruling on January 24, 2023, when it entered an Order Denying Plaintiffs' Rule 59(e) Motion to Alter or Amend. [JA000015-25]. On January 25, 2024, the Supreme Court dismissed Petitioners' Appeal No. 21-1016, concluding that the Business Court's Orders were "not final orders subject to appeal at this stage of the proceedings." [JA012284; 012288]. The Supreme Court issued a Mandate on February 27, 2024, finding that the Order dismissing the appeal was final.

On May 8, 2024, the Business Court entered an Order Granting [Petitioners'] Motion for Summary Judgment Concerning Bad Faith Claims. [JA000027-52]. Thereafter, on August 14, 2024, the Business Court held a status conference regarding the proposed Final Judgment Orders it had instructed the parties to submit for consideration. [JA012399-401]. The Business Court directed Respondents to file a motion for summary judgment regarding the breach of contract claim and ordered Petitioners to file a motion briefing the issue of a potential setoff of the judgment in the Pennsylvania Action. *Id.*

[10] Subsequent to the filing of the Notice of Appeal, the Business Court entered an "Order Denying Defendants' Expedited Motion to Stay Proceedings." In this Order, the Business Court recognized that a reversal of the Orders on the exclusions could create a finding of no coverage and eliminate the bad faith claims. Though denying Petitioners' motion to stay, the Business Court subsequently entered a separate order on January 27, 2022, generally continuing the action until such time that the Business Court entered an Amended Scheduling Order.

On September 3, 2024, Respondents filed their Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-judgment Interest, and Petitioners filed their Motion for Setoff. [JA008597]. On December 10, 2024, the Business Court entered an Order denying Petitioners' Motion for Setoff with respect to the Pennsylvania damages Judgment but found that Petitioners are entitled to subrogate Respondents' rights against the Pennsylvania tortfeasors in the amount of negligence as determined by the jury (20% AllTranstek, 40% Rescar, and 40% Axiall). [JA012647; 012654].

On December 10, 2024, the Business Court also entered an Order Granting [Respondents'] Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-judgment Interest and Final Judgment Order. [JA000054-64]. The Order awarded Respondents breach of contract damages of $2,150,000 (calculated as the $5,900,000 property damage amount adopted by the Business Court's collateral estoppel ruling, minus the $3,750,000 deductible), with pre-judgment interest at the statutory rate from August 10, 2022 (date of judgment in the Pennsylvania Action) through the date of the Order. The Order also awarded post-judgment interest at the statutory rate. Petitioners filed their Notice of Appeal on January 9, 2025, alleging five errors by the Business Court, which are noted above under the "Assignments of Error." [JA012655-94].

SUMMARY OF ARGUMENT

The Business Court committed several errors in its rulings on the competing motions for summary judgment regarding the Policy's exclusions for corrosion, faulty workmanship, and contamination. It improperly limited the application of these unambiguous exclusions, and its rulings relied upon virtually no authority regarding the application of the exclusions. The Business Court further erred in considering extrinsic evidence despite no finding of ambiguity, and it made no affirmative finding that Respondents met their burden of demonstrating the application of exceptions to the exclusions. These errors require reversal of the Orders with a direction that the Business Court grant summary judgment in favor of Petitioners. Reversal of just one of the Orders

and entry of summary judgment in favor of Petitioners on the applicability of the subject exclusion will be sufficient to result in dismissal of Respondents' coverage claim under the Policy.

The Policy's corrosion exclusion is broad and unambiguous. Its application hinges on whether it excludes expenses associated with replacing allegedly corroded equipment. There is no dispute that all of Respondents' claimed damages are for the replacement (and alleged potential future replacement) of corroded equipment and property. Applying the plain language of the exclusion leads inescapably to the conclusion that the costs sought by Respondents are excluded from coverage. Courts routinely apply similar corrosion exclusions according to their plain wording, but the Business Court did not follow these cases. Instead, the Business Court improperly held that the exclusion did not preclude coverage and that the ensuing loss exception to the exclusion was triggered, thereby swallowing the corrosion exclusion.

The Business Court's ruling on the faulty workmanship exclusion is similarly in error. The faulty workmanship exclusion is unambiguous. The Business Court made no finding of ambiguity and yet impermissibly narrowed the scope of the exclusion in direct conflict with its plain wording. The Business Court also erroneously determined that the ensuing loss exception to the exclusion applied. The Business Court made this ruling by impermissibly considering extrinsic evidence and without finding that Respondents carried their burden of demonstrating the applicability of the exception to the exclusion.

The Business Court likewise erred in its ruling on the Policy's contamination exclusions by limiting the exclusions to apply solely to traditional environmental pollution, directly contradicting the exclusions' plain wording and binding Georgia cases holding that such exclusions, commonly referred to as "absolute" pollution exclusions, extend beyond the environmental context. The Business Court also improperly (i) applied an exception to the contamination exclusion in Endorsement No. 1, (ii) considered extrinsic evidence, and (iii) cited no supporting authority for its rulings.

The Business Court also erred by striking Petitioners' affirmative defenses related to the exclusions. That decision was erroneous because the exclusions apply to Respondents' entire

claim. Despite its rulings, the Business Court recognized that the corrosion exclusion may apply to portions of Respondents' claim. As a result, the decision to strike the affirmative defenses should be reversed.

In addition to the coverage rulings, the Business Court erred in granting Respondents' Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-judgment Interest. Because the Business Court erred in finding that the above exclusions do not apply, it also erred in finding that Petitioners breached the contract because Petitioners denied coverage, in part, on the basis of those exclusions. Because one or more exclusions ***do*** bar coverage, Respondents are not entitled to declaratory relief. Respondents also failed to satisfy conditions precedent to coverage under the Policy by failing to provide pertinent documents requested by Petitioners, so no coverage obligation was triggered and no breach occurred. Because there was no breach, pre-judgment interest cannot be awarded as a matter of law.

Finally, the Business Court erred in denying Petitioners' Motion for Setoff because Georgia law precludes double recovery, as recognized by the Business Court, and because its reliance on subrogation principles was erroneous under the facts presented.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a). Petitioners respectfully request that this case be set for Rule 19 argument because this appeal involves assignments of error in the application of settled law from Georgia and other jurisdictions.

STANDARD OF REVIEW

This appeal is before the Court for review of the Business Court's Orders granting and denying various motions for summary judgment. This Court reviews *de novo* the granting or denial of a motion for summary judgment. *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015). This Court's *de novo* review applies the same standard that the Business Court applied in

examining the summary judgment motions. *Nicholas Loan & Mortg., Inc. v. W.Va. Coal Co-Op, Inc.*, 209 W. Va. 296, 547 S.E.2d 234 (2001).

ARGUMENT

The Business Court previously determined that Georgia substantive law applies to all claims in this matter. [JA000058; 011868]. Georgia law provides that the "[c]onstruction and interpretation of a contract are matters of law for the court." *ALEA London Ltd. v. Woodcock*, 649 S.E.2d 740, 744 (Ga. Ct. App. 2007) (quoting *Sewell v. Hull/Storey Dev., LLC*, 526 S.E.2d 878, 880 (Ga. Ct. App. 1999)). Georgia law further provides that "insurance is a matter of contract, 'and the parties to the contract of insurance are bound by its plain and unambiguous terms.'" *Club Libra, Inc. v. R.L. King Props., LLC*, 751 S.E.2d 418, 419 (Ga. Ct. App. 2013) (quoting *Michna v. Blue Cross & Blue Shield of Ga.*, 653 S.E.2d 377, 379 (Ga. Ct. App. 2007)). Ambiguity is not created simply because the parties disagree as to the meaning of a term. *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339 (N.D. Ga. 2004). When the insurance policy is clear and unambiguous, "the contract must be enforced as written." *Ryan v. State Farm Mut. Auto. Ins. Co.*, 413 S.E.2d 705, 707 (Ga. 1992). In such instances, "the court's job is simply to apply the terms of the contract as written, regardless of whether doing so benefits the carrier or the insured." *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 424 (Ga. 2016) (citations omitted). Further, unambiguous policy exclusions "must be given effect, even if beneficial to the insurer and detrimental to the insured." *Jefferson Ins. Co. of N.Y. v. Dunn*, 496 S.E.2d 696, 699 (Ga. 1998) (citation and quotations omitted). "[Georgia courts] will not strain to extend coverage where none was contracted or intended." *Id.*

If the insured relies on an exception to an exclusion, such as an ensuing loss provision, the insured bears the burden of establishing that the exception applies. *Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332 (S.D. Ga. 2016). When the undisputed facts demonstrate that the insured cannot prove an essential element of its claim, summary judgment should be entered in favor of the insurer. *See Nationwide Prop. & Cas. Ins. Co. v. Hurley*, No. 3:16-CV-88 (CDL), 2018 WL 2056559, at *1 (M.D. Ga. Feb. 23, 2018).

Application of these established principles to the Orders on appeal demonstrates that the Business Court's Orders are in error and must be reversed.

I. THE BUSINESS COURT ERRED IN RULING THAT THE CORROSION EXCLUSION DID NOT BAR RESPONDENTS' DAMAGE CLAIMS

Respondents' claim for damages is comprised of expenses for corrosion to property at the Natrium Plant. Despite recognizing that "there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment", [JA011380], the Business Court erroneously found that Petitioners had failed to demonstrate that the corrosion exclusion bars coverage for Respondents' claim. The Business Court compounded this error by finding that the exception to the corrosion exclusion applied and restored coverage for the unambiguously excluded damages. As set forth below, the Order on the corrosion exclusion is contrary to law and should be reversed.

A. The Undisputed Facts Establish that Respondents' Claim Falls Within the Unambiguous Corrosion Exclusion

The exclusion found at Section B.3.C. of the Policy (hereafter the "Corrosion Exclusion"), provides:

> 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[.]

[JA011380; 000598-99]. The Corrosion Exclusion is broad and unambiguous. *See Ramaco Res., LLC v. Fed. Ins. Co*., 545 F. Supp. 3d 344, 356-57 (S.D. W. Va. 2021) (citations omitted); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co*., 255 F. Supp. 3d 443, 446, 462 (S.D.N.Y. 2015) (considering an "excluded peril" in an all-risk policy providing that insurer "will not pay for loss or damage resulting from . . . corrosion" and finding the exclusion unambiguous); *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 863 F. Supp. 1226, 1228, 1235-36 (D. Nev. 1994) (finding "corrosion" in exclusion for "loss, damage or expense caused by or resulting from . . . corrosion" unambiguous).

The Business Court found that "Defendants have not met their burden to show that the facts of this loss fall within the exclusion of Section B.3.C" [JA011382], but this is at odds with the Business Court's recognition that "[a]s Defendants aver, there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment." [JA011380]. The Business Court correctly recognized that Respondents' claim for the expenses incurred in replacing corroded equipment falls within the express terms of the Corrosion Exclusion's preclusion of coverage for "expense caused by or resulting from . . . corrosion . . . ." *Id*. Petitioners have therefore demonstrated, as a matter of undisputed fact, that the damages for which Respondents seek coverage are excluded by the Corrosion Exclusion.

Courts apply corrosion exclusions like the Policy's Corrosion Exclusion according to their plain wording. For example, in *Lantheus*, the U.S. District Court for the Southern District of New York applied an exclusion for "loss or damage resulting from . . . corrosion" to exclude damage to a reactor caused by corrosion. 255 F. Supp. 3d at 443, 446-47, 465. The court found that corrosion damage to the reactor fell "squarely within [the] corrosion exclusion" and rejected the insured's arguments that would "effectively read the corrosion exclusion out of the policy." *Id.* at 462, 465.

Courts have also applied similarly worded exclusions to exclude damage in the form of corrosion to metallic surfaces. *See, e.g., TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 714-15 (E.D. Va. 2010); *Gilbane Bldg. Co. v. Altman Co.*, No. 04AP–664, 2005 WL 534906, at *5 (Ohio Ct. App. Mar. 8, 2005). In *TRAVCO*, the court recognized the general rule that "[e]xclusions for damages caused by 'corrosion' precludes [sic] recovery for any damage caused to property because of contact with any corrosive agent." *TRAVCO*, 715 F. Supp. 2d at 714 (quoting 11 COUCH ON INSURANCE §153.80 (3d ed. 2024)). The court applied the exclusion for loss "caused by" corrosion to exclude all the insured's "claimed losses to the structural, mechanical, and plumbing components of [the insured's residence]" corroded due to gases emitted from drywall. *Id.* at 715 (noting insured's claim was for "damage to the corroded material itself"). Thus, the *TRAVCO* court barred coverage for the expenses associated with replacing corroded equipment, such as the expenses sought by Respondents in this case. Similarly, in *Gilbane*, the court determined that

corrosion damage to equipment and piping following exposure to a corrosive "acid vapor" was excluded by the policy's exclusion for "loss caused by or resulting from . . . corrosion." *Gilbane*, 2005 WL 534906, at *5. Both *TRAVCO* and *Gilbane* involve similar exclusionary language and similar types of alleged damage to those at issue here, and in both cases the court applied the exclusions according to their plain wording.

The Business Court's failure to apply the Corrosion Exclusion according to its plain meaning was in error. *See Ryan v. State Farm Mut. Auto. Ins. Co*., 413 S.E.2d 705, 707 (Ga. 1992). In making this error, the Business Court did not rely on any authority finding a similarly worded exclusion to be ambiguous.

B. The Corrosion Exclusion Does Not Distinguish Between "Cause of Loss" and "Type of Damage" and Courts Have Rejected Such a Distinction

The Business Court impermissibly construed the Corrosion Exclusion to adopt an artificial distinction between "cause of loss" and "type of damage" and held that the Corrosion Exclusion does not apply to corrosion damage caused by tank car rupture or chlorine release. This meaningless distinction is not supported by the wording of the exclusion or the substantial case law rejecting such a distinction. This distinction is also irrelevant because the Policy excludes "expense caused by or resulting from . . . corrosion." [JA000598-99]. Respondents have alleged that all the equipment in their claim was corroded as a result of the Incident.

Under Georgia law, words in an insurance contract must be given their usual and common meaning. *See Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 424 (Ga. 2016). The Merriam-Webster Dictionary defines "corrosion" as "the action, process, or effect of corroding."[11] Thus, the Policy excludes "expense caused by or resulting from" the action, process, or effect of corroding. The Business Court noted in its Order, "there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment." [JA011380]. The equipment in Respondents' claim could not have become corroded

[11] *See Corrosion*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/corrosion?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited March 10, 2025).

without the "action, process, or effect of corroding." Accordingly, even if the Business Court were correct in drawing a distinction between the "cause of loss" and "type of damage" in applying the Corrosion Exclusion, the undisputed facts demonstrate that corrosion is both the cause of the loss and the type of damage claimed by Respondents. Therefore, the Policy unambiguously excludes Respondents' claim and the Business Court's finding that the Policy's Corrosion Exclusion does not apply should be reversed.

Other courts have rejected the "cause of loss" and "type of damage" distinction in the context of a corrosion exclusion. *See TRAVCO Ins. Co. v. Ward*, 736 S.E.2d 321, 328 (Va. 2012) (explaining that arbitrarily distinguishing between damage "caused by" corrosion and corrosion itself "would render this and similar corrosion exclusions meaningless"); *Bishop v. Alfa Mut. Ins. Co*., 796 F. Supp. 2d 814, 822-23 (S.D. Miss. 2011) (applying corrosion exclusion despite insured's argument "that the corrosion exclusion is inapplicable since their loss is not 'caused by corrosion' but rather *is* the corrosion"); *In re Chinese Manufactured Drywall Prods. Liab. Litig*., 759 F. Supp. 2d 822, 846, 848 (E.D. La. 2010) (declining to "create a distinction between corrosion as a loss and corrosion as a cause of the loss for purposes of the corrosion exclusion"). These authorities reject any distinction between corrosion as a "cause of loss" or a "type of damage." Corrosion is excluded whether it is the initiating cause of a loss or the cause of the resulting damage (or both). *See TRAVCO*, 715 F. Supp. 2d at 714 (noting general rule that "[e]xclusions for damages caused by 'corrosion' precludes [sic] recovery for any damage caused to property because of contact with any corrosive agent").

C. Resultant Corrosion Damage Is Not a Covered Ensuing Loss Under the Exception to the Corrosion Exclusion

The Business Court's conclusion that corrosion damage is covered under the exception to the Corrosion Exclusion is erroneous. Ensuing loss provisions only apply ***after*** an exclusion is triggered. *See e.g., Erie Ins., Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 337, 801 S.E.2d 207, 215 (2017) ("**Where an uncovered event occurs**, an ensuing or resulting loss that is otherwise covered by the policy will remain covered, but the uncovered event itself is not covered.")

(emphasis added). The ensuing loss provision only applies to "resultant physical loss or damage from a covered peril" that ensues **from excluded corrosion**. [JA000599; 011376]. If the Corrosion Exclusion is not triggered to exclude coverage, there is no need to find an ensuing loss **from corrosion**. The Business Court held that the Corrosion Exclusion did not apply by improperly focusing its analysis on the cause of the tank car rupture but then contrastingly found that the ensuing loss exception ***did apply***. This constitutes reversible error. However, even if the Business Court had correctly found the Corrosion Exclusion applied, thereby necessitating an analysis of the Corrosion Exclusion's ensuing loss provision, the Business Court's erroneous interpretation of the ensuing loss provision must be rejected by this Court as contrary to law.

The Business Court's interpretation of the ensuing loss provision is contrary to Georgia law because it completely swallows the Policy's Corrosion Exclusion and renders it a nullity. The Business Court held that "the tank car rupture/chlorine release was the subject covered peril which caused the resultant corrosion damage" and that the Policy does not exclude "the peril of a tank car rupture or the peril of a chemical spill." [JA011381-82]. The Business Court's incorrect interpretation results in the Policy covering expenses associated with replacing allegedly corroded equipment despite unambiguously excluding "expense caused by or resulting from . . . corrosion." This interpretation violates the principle of Georgia law that all provisions of an insurance policy must be enforced without rendering any provision meaningless. *See Jefferson Ins. Co.*, 496 S.E.2d at 699. This case does not involve a situation where the "action, process, or effect of corroding" caused a fire, which could constitute a covered ensuing loss from corrosion. Respondents are seeking damages for the "action, process, or effect of corroding" which is unambiguously excluded by the Corrosion Exclusion.

The Supreme Court of West Virginia has explicitly recognized that ensuing loss provisions cannot restore coverage for excluded losses. *See Erie*, 239 W. Va. at 337 ("[A]n unambiguous ensuing or resulting loss clause of an exclusion contained in an insurance policy provides a narrow exception to the exclusion but does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy."); *see also Rountree v. Encompass Home & Auto Ins. Co*.,

501 F. Supp. 3d 1351, 1358-59 (S.D. Ga. 2020) (stating that "if an ensuing loss is otherwise excluded, it remains excluded"). Further, the Business Court made no finding that Respondents had satisfied their burden to demonstrate that a covered ensuing loss existed. The insured bears the burden of establishing an exception to an exclusion under Georgia law. *Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332, 1347 (S.D. Ga. 2016).

The case of *Bettigole v. American Employers Insurance Co*., 567 N.E.2d 1259, 1260-62 (Mass. Ct. App. 1991) is particularly instructive. There, corrosion occurred when "chloride ions . . . penetrated the concrete, filtered through the cracks, and attacked the steel." *Id.* at 1260. The insured claimed the corrosion exclusion was not implicated because "the primary or effective cause . . . was the release of chloride ions, which was not named as an excluded risk, with the corrosion following as a consequence." *Id*. at 1261. The court rejected the insured's argument and found that "chloride ions are not a covered risk distinct from and anterior to the corrosion . . . the chloride is the very agent of the corrosion." *Id*. Accordingly, the ensuing loss exception was not applicable, and the corrosion exclusion precluded coverage. The same analysis equally applies to this case.

Because the Corrosion Exclusion bars coverage for Respondents' claim, and because the ensuing loss provision does not apply, Respondents cannot prove an essential element of their claim. The Business Court's finding that the Policy's Corrosion Exclusion does not exclude Respondents' claim was in error and should be reversed.

II. THE BUSINESS COURT ERRED IN RULING THAT THE FAULTY WORKMANSHIP EXCLUSION DOES NOT BAR COVERAGE FOR RESPONDENTS' CLAIM

As it did with the Corrosion Exclusion, the Business Court erroneously found that the Respondents' claim was not excluded by the Policy's faulty workmanship exclusion. The Business Court also erroneously held that the "ensuing loss" exception to the exclusion restores coverage for the losses that are expressly barred from coverage by the exclusion itself. As set forth below, the Business Court's Order regarding the faulty workmanship exclusion is contrary to law and should be reversed.

A. The Undisputed Facts Demonstrate that Respondents' Claim Falls Within the Unambiguous Faulty Workmanship Exclusion

The exclusion found at Section B.3.D of the Policy (hereafter the "Faulty Workmanship Exclusion"), provides:

> 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[.]

[JA000598-99; 011390].

Georgia courts have recognized that the term "faulty workmanship" is unambiguous. *See Kroll Constr. Co. v. Great Am. Ins. Co.*, 594 F. Supp. 304, 307 (N.D. Ga. 1984) (declining to "strain to find [the] term ambiguous so as to justify a liberal construction in favor of . . . the insured" and holding that "'[f]aulty or defective workmanship,' . . . means the faulty or defective execution of making or doing something").

The Business Court's Order does not find the Faulty Workmanship Exclusion ambiguous. Nevertheless, the Business Court erroneously considered extrinsic evidence from a Rule 30(b)(7) deposition to reach an incorrect interpretation of the unambiguous Faulty Workmanship Exclusion. [JA011390-91] (citing testimony of AIG Underwriter "explain[ing] the meaning of an ensuing loss provision"). Georgia law is clear that unambiguous exclusions "require[] no construction, and [their] plain terms must be given full effect . . . ." *Auto-Owners Ins. Co. v. Reed*, 649 S.E.2d 843, 844 (Ga. Ct. App. 2007). The Business Court did not follow Georgia law in this regard, and erroneously failed to apply the Faulty Workmanship Exclusion according to its plain meaning.

B. Respondents' Claimed Loss, Damage, or Expense Resulted From Faulty Workmanship

There is no dispute that third parties performed faulty repairs to the subject tank car and that those repairs resulted in the Incident. The Business Court did not find otherwise, and the third-party actions initiated by Axiall conclusively establish this connection. [JA010059-61]. In its Pennsylvania Action, Axiall argued that "as a ***direct and proximate result*** of the defendants'

failure to provide safe and competent services, [the tank car] ruptured and chlorine was released causing damages to be suffered by Axiall." [JA009953] (emphasis added). Axiall alleged a direct and proximate link between faulty workmanship and its alleged damages. The jury in the Pennsylvania Action found that two of the third-party contractors, Rescar and AllTranstek, were negligent and that their negligence caused harm to Axiall, including damage to the Natrium Plant and equipment. [JA007530-34]. Accordingly, the expenses associated with replacing allegedly corroded equipment for which Respondents seek coverage constitute, based on Respondents' pleadings in the third-party contractor lawsuits and the jury's verdict, "expense caused by or resulting from . . . faulty materials, or workmanship." The Faulty Workmanship Exclusion therefore bars coverage for Respondents' claim.

Rather than recognizing that the tank car rupture occurred as the direct result of the faulty workmanship, the Business Court erroneously treated the tank car rupture as an independent, separate cause of loss. The Business Court's analysis has been rejected by the Sixth Circuit and numerous other courts, and should be rejected by this Court as well.

In *TMW Enterprises, Inc. v. Federal Insurance Co*., the Sixth Circuit broadly applied an exclusion for "loss or damage . . . caused by or resulting from . . . faulty . . . workmanship . . . [or] construction." 619 F.3d 574, 576 (6th Cir. 2010).[12] This language is strikingly similar to the Policy's Faulty Workmanship Exclusion because it includes the phrase "caused by or resulting from." The plaintiff in *TMW* sought coverage for repair costs incurred from water infiltration to a building. *Id*. at 575. The plaintiff spent $3.9 million making repairs and the insurance company denied coverage for those costs under the faulty workmanship exclusion. *Id*. The plaintiff argued that the water infiltration and resulting damages were a separate peril from faulty workmanship involved in the construction of the building (similar to Respondents' arguments that the tank car rupture and/or chlorine release are separate from faulty workmanship). *Id*. at 576. The Sixth Circuit rejected the plaintiff's argument and explained as follows:

[12] The ruling in *TMW* is consistent with Georgia law. *See Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332, 134-142 (S.D. Ga 2016) (citing *TMW* in support of its decision).

> As an "all-risk" policy, this insurance policy basically covers everything unless specifically excluded. That means the number of possibilities for last-in-time "but for" causes of damage are limited only by the imagination of the reader. . . . What if a poorly constructed ceiling beam falls, smashing the floor below? But for the force of gravity, no damage to the floor would have occurred. Yet the contract does not exclude damages caused by "gravity." Coverage? As in [this example], so too here: The very risk raised by the flawed construction of a building came to pass. . . . It is exceedingly strange to "think that a single phenomenon that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified as water damage."

Id. at 576-77 (citations and quotations omitted). The Sixth Circuit's reasoning is directly on point here. The Business Court found the Policy's failure to specifically exclude "tank car rupture" or "chlorine release" meant that both are automatically covered [JA011393]—but this would require the parties to predict and account for every possible consequence of faulty workmanship. Here, the very risk of performing faulty repair work to the tank car was that the tank car may rupture. *See id.* ("[I]f . . . the damage came naturally and continuously from the faulty workmanship, unbroken by any new, independent cause, the exclusion applies and the ensuing loss provision does not.") (quotations and citations omitted); *see also Nat'l R.R. Passenger Corp. v. Arch Specialty Ins. Co.*, 124 F. Supp. 3d 264 (S.D.N.Y. 2015), *aff'd in part, rev'd in part sub nom. Nat'l R.R. Passenger Corp. v. Aspen Specialty Ins. Co.*, 661 F. App'x 10 (2d Cir. 2016) (relying on *TMW* in holding that "chloride attack" resulting from brackish flood water was not ensuing loss from flood: "A reasonable insured would expect that, if flood waters are left to sit on covered property, the damage that results is damage from flood, not 'ensuing loss'"). The relevant inquiry is therefore **not** whether the Policy expressly excludes "tank car rupture" or "chlorine release", but rather whether the "tank car rupture" and "chlorine release" were **caused by or resulted from** faulty workmanship.

The Business Court's holding is also contrary to cases in other jurisdictions that broadly applied faulty workmanship exclusions to damage resulting from faulty workmanship. *See, e.g., Taja Invs., LLC v. Peerless Ins. Co.*, 196 F. Supp. 3d 587 (E.D. Va. 2016); *HP Hood LLC v. Allianz Global Risks U.S. Ins. Co.*, 39 N.E.3d 769 (Mass. App. Ct. 2015). In *Taja*, the policy stated that "defects, errors, and omissions relating to . . . workmanship are not covered, but if loss by another

covered peril results, [the insurer] will pay for the resulting loss." *Taja*, 196 F. Supp. 3d at 590. The loss involved a wall collapse and resulting damages to a building. *Id*. The plaintiff, similar to Respondents, argued the faulty workmanship exclusion should only apply to repairing the faulty work itself, but that the resulting damage to the building caused by the collapse should be covered as an ensuing loss from faulty workmanship. *Id*. at 594. The court declined to recognize such a distinction and explained:

> [S]uch a distinction is unavailing because Plaintiff merely attempts to separate cause and effect. By saying the collapse is a covered peril that caused the loss in question, Plaintiff wishes to either ignore or separate the cause of the collapse, which is Plaintiff's conduct expressly excluded in the Workmanship exclusion.

Id. The court ruled that the faulty workmanship exclusion barred coverage for all damages caused by faulty workmanship—including the damage to the building caused by the collapse. *Id*.; *see also HP Hood*, 39 N.E.3d at 774-75.

Here, the Business Court's ruling is contrary to the plain language of the Faulty Workmanship Exclusion and the cited authorities because it impermissibly ignores the phrase "caused by or resulting from." This violates Georgia law concerning contract interpretation. *See Jefferson Ins. Co. of N.Y. v. Dunn*, 496 S.E.2d 696, 699 (Ga. 1998).

C. The Business Court Erred in Determining That the Tank Car Rupture / Chlorine Release Was a Covered Peril and That the Ensuing Loss Exception to the Faulty Workmanship Exclusion Preserved Coverage

The Business Court's failure to apply the unambiguous language of the Faulty Workmanship Exclusion led to the erroneous finding of coverage pursuant to the ensuing loss exception. The ensuing loss exception states: "This exclusion does not apply to resultant physical loss or damage not otherwise excluded." [JA000599; 011390]. This exception does not apply.

First, the Business Court erred by failing to determine whether Respondents carried their burden to demonstrate the claim fell within the ensuing loss exception. *See Mock*, 158 F. Supp. 3d at 1347 ("[T]he . . . burden of proving an exception to an exclusion lies with the insured."). The Business Court's failure to acknowledge this burden or find the burden had been met is clear error. Second, to the extent any loss "ensued" from faulty workmanship, such loss consisted of corrosion

and/or contamination—both of which are expressly excluded. No covered ensuing loss occurred. Finally, Axiall's contention that "Tank Car Rupture" or "Chlorine Release" are "perils" that broke the chain of causation from faulty workmanship and constitute a covered ensuing loss is in ***direct contravention*** to its allegations in the Pennsylvania Action. [JA009953].

Courts have declined to find coverage pursuant to ensuing loss exceptions under facts very similar to those in this case. In *Peek v. American Integrity Insurance Co. of Florida*, the insured suffered damage to metal appliance components and electronic parts when sulfur released from Chinese drywall was exposed to the atmosphere and subsequently caused corrosion. 181 So. 3d 508 (Fla. Dist. Ct. App. 2015). The policy included exclusions for latent defects, corrosion, pollutants, and faulty, inadequate, or defective construction materials. *Peek*, 181 So. 3d at 509. Based on testimony that the claimed damages were caused by sulfur (a contaminant) and a latent defect, the court found the insurer satisfied its initial burden that the claimed loss was excluded. *Id*. at 511. The insured argued an ensuing loss exception applied because it suffered "subsequent damage to metals and electronics separate from any defective materials, pollutants, or corrosion." *Id.* at 512. The court noted that "[e]xclusions must be read in conjunction with other policy provisions, and ensuing loss exceptions are not applicable if the ensuing loss was directly related to the original excluded risk." *Id*. at 513. The court found that "the damage to the Peeks' home and consequently the odors and corrosion of metals and electronics were directly related to the defective Chinese drywall and thus directly stemmed from an excluded risk." *Id.* Accordingly, the insured failed to meet its burden to bring its claimed loss within the ensuing loss exception. *Id*. "[T]o hold otherwise would be to allow the ensuing loss provision to completely eviscerate and consume the . . . exclusion." *Id*. (quoting *Swire Pac. Holdings, Inc. v. Zurich Ins. Co*., 845 So. 2d 161, 167 (Fla. 2003)); *see also Erie*, 239 W. Va. at 337. The direct, foreseeable consequence of faulty workmanship cannot be recast as a separate event to avoid the application of the Faulty Workmanship Exclusion. The Business Court's Order effectively allows the exception to consume the Faulty Workmanship Exclusion despite clear language excluding "loss, damage or expense caused by or resulting from . . . faulty . . . workmanship." [JA011390-92]; *see Rocky Mountain*

Prestress, LLC v. Liberty Mut., 960 F.3d 1255, 1261 (10th Cir. 2020) ("Regardless of how broadly courts interpret 'resulting' losses under such exceptions, however, they are all in agreement on one overarching principle: the exception cannot be allowed to swallow the exclusion.").

Because the Faulty Workmanship Exclusion bars coverage for Respondents' claim, and because the ensuing loss provision does not apply, Respondents cannot prove an essential element of their claim. The Order should therefore be reversed and judgment should be entered in favor of Petitioners.

III. THE BUSINESS COURT ERRED IN FINDING THAT THE CONTAMINATION EXCLUSIONS DO NOT PRECLUDE COVERAGE

The Business Court's ruling on the contamination exclusions in Endorsement No. 1 and Endorsement No. 19 (collectively the "Contamination Exclusions") contains the same errors as its holdings on the Corrosion and Faulty Workmanship Exclusions. First, the Business Court erred by construing the provisions of the Contamination Exclusions and in considering extrinsic evidence, as opposed to applying their plain language, which resulted in the Contamination Exclusions being improperly limited to environmental impairment. This was in error because the Business Court did not find these exclusions ambiguous. Second, this error was compounded by the Business Court's determination that coverage existed under an exception to the exclusion in Endorsement No. 1, despite the lack of any finding that Respondents carried their burden of demonstrating the exception applies and despite the clear language of the exception not being satisfied.

A. The Contamination Exclusions Are Unambiguous

The Business Court made no finding that the Contamination Exclusions were ambiguous. Indeed, the Business Court used the language "clearly and unambiguously" in addressing Endorsement No. 1.[13] [JA011370]. Accordingly, the Business Court was required to apply the Contamination Exclusions as written. Contrary to Georgia law, the Business Court construed the exclusions and limited their application despite clear and unambiguous language.

[13] Moreover, Respondents conceded in discovery that they were not contending any of the terms or provisions of the Policy were ambiguous or unclear. [JA009924].

B. Georgia Courts Enforce Contamination Exclusions According to Their Absolute and Unambiguous Terms

The Contamination Exclusions are clear and apply to all types of pollution and/or contamination. Endorsement No. 1 provides that the "Policy does not insure against loss, damage, costs or expenses in connection with **any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever**." (emphasis added) [JA000618].[14] Likewise, Endorsement No. 19 provides that the 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." [JA000643].[15]

Georgia courts have applied exclusions similar to the Contamination Exclusions as absolute pollution/contamination exclusions. The Georgia Supreme Court has held that similar exclusions are **not limited to the environmental context** absent specific policy language creating such a limitation. In *Georgia Farm Bureau Mutual Insurance Co. v. Smith*, 784 S.E.2d 422, 423 (Ga. 2016), the Georgia Supreme Court considered a policy that excluded "'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' . . . ." *Id*. The court found that "lead present in paint unambiguously qualifies as a pollutant and . . . the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage." *Id*. at 426. The court further noted that "Georgia courts have repeatedly applied these clauses outside the context of traditional environmental pollution." *Id*. at 425.

In *Evanston Insurance Co. v. Sandersville R.R. Co*., No. 5:15-CV-247, 2016 WL 5662040, at *4 (M.D. Ga. Sept. 29, 2016), the court analyzed a pollution exclusion that "exclude[d] coverage

[14] Endorsement No. 1 is previously quoted above in its entirety. *See supra*, p. 5. [JA000618].
[15] Endorsement No. 19 is previously quoted above in its entirety. *See supra*, pp. 5-6. [JA000643]. Endorsement No. 19 broadly defines "CONTAMINANTS or POLLUTANTS" to include "any solid, liquid, gaseous or thermal irritant or contaminant . . . including, but not limited to, . . . hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, [etc.] . . . or as designated by the U.S. Environmental Protection Agency." *Id.* This definition clearly encompasses chlorine.

for injuries arising out of the . . . discharge, dispersal, seepage, migration, release or escape of pollutants." (internal quotation marks omitted). In applying the exclusion, the court reasoned that the Georgia Supreme Court's decision in *Georgia Farm Bureau* ended any debate over the scope of pollution exclusions under Georgia law and that such exclusions are "absolute" and applicable to all pollution. *Id*. at *5.

Likewise, in *Nationwide Property & Casualty Insurance Co. v. Hampton Court, L.P.*, the U.S. District Court for the Northern District of Georgia recently cited with approval the *Georgia Farm Bureau* opinion: "[I]n Georgia, pollutants in a Pollution Exclusion need not be limited to 'traditional environmental pollution,' nor does the Pollution Exclusion require that the pollutant be 'explicitly named in the [P]olicy.'" No. 1:23-CV-4726-TWT, 2024 WL 4520943, at *5 (N.D. Ga. Oct. 17, 2024) (quoting *Ga. Farm Bureau*, 784 S.E.2d at 423-25). The court also noted that "courts applying Georgia law have 'broadly' interpreted the terms 'irritant or contaminant' within the 'pollutant' definition." *Hampton Ct*., 2024 WL 4520943, at *5 (citation omitted) (further noting "it is plainly apparent that the Decedent's injuries must have arisen from the 'dispersal,' 'seepage,' 'migration,' or 'release' of mold at or from Hampton Court's apartment building, as required by the Pollution Exclusion").

Prior to *Georgia Farm Bureau*, federal courts in Georgia made similar rulings. In *Owners Insurance Co. v. Farmer*, the court ruled that personal injury and property damage caused by exposure to diesel fumes sprayed to kill termites were excluded by a pollution exclusion. 173 F. Supp. 2d 1330 (N.D. Ga. 2001). The court refused to limit the exclusion to the environmental context and stated it was "satisfied that the unambiguous language of the policy excludes *all* pollutants and does not exclude pollutants based on their source or location." *Id*. at 1334-35 (emphasis in original).

There is no question that the released chlorine is a pollutant/contaminant, and the Business Court's Order never determined or suggested otherwise. Moreover, several cases demonstrate that the rupture and release of chlorine are excluded. In *United States Fidelity & Guaranty Co. v. Jones Chemicals, Inc*., the Sixth Circuit found that injury following a liquid chlorine release from a tank

fell within a pollution exclusion. No. 98-4018, 1999 WL 801589, 194 F.3d 1315 (6th Cir. Sept. 27, 1999) (Table). The court explained:

> Jones's first argument would require us to interpret and construe the already plain meaning of the contract to limit the pollution exclusion to lawsuits involving environmental harm. The second argument, that . . . the chlorine was not a pollutant, is remarkably far-fetched. There is no question that chlorine *is* a pollutant within the meaning of the policy . . . .

Id. at *2.

Similarly, in *Atlantic Casualty Insurance Co. v. Zymblosky*, the court found that a pollution exclusion applied to injury caused by exposure to a cloud of chlorine gas. No. 1167 MDA 2016, 2017 WL 3017728, at *1-4 (Pa. Super. Ct. July 17, 2017). The appellate court agreed with the trial court's application of the exclusion and its finding that federal statutes define chlorine gas as a pollutant, and noted the trial court's statement that "it is undisputed that chlorine gas is a dangerous and potentially deadly chemical." *Id*. at *4; *see also Gulf Ins. Co. v. City of Holland*, No. 1:98-CV-774, 2000 WL 33679413, at *2-6 (W.D. Mich. April 3, 2000).

Contrary to the plain language of the Contamination Exclusions and authority from Georgia and other jurisdictions, the Business Court erroneously limited application of the exclusions to the environmental context. [JA011369-71]. To support this erroneous limitation, the Business Court improperly (i) construed the plain language of the exclusions, (ii) impermissibly considered extrinsic evidence, and (iii) referenced language in a *separate* exclusion contained in Endorsement No. 1 – the Authorities Exclusion.[16] [JA011370-72]. These actions constitute error.

It was improper for the Business Court to refer to unrelated provisions of the Policy when the language at issue is clear and unambiguous. The term "environmental impairment," while contained within the separate Authorities Exclusion,[17] is *not* included in the Seepage and/or Pollution and/or Contamination Exclusion in Endorsement No. 1. "Georgia courts . . . instruct . . .

[16] Endorsement No. 1 is titled "SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION; DEBRIS REMOVAL AND COST OF CLEAN UP EXTENSION; AUTHORITIES EXCLUSION" and contains three separate exclusions under their respective headings. [JA000618-19].

[17] The Authorities Exclusion provides in part: "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." [JA000619].

that exclusions in insurance policies **are to be read independently of one another** such that no exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another." *Hampton Ct.*, 2024 WL 4520943, at *6 (emphasis added) (citations and quotations omitted). The Authorities Exclusion is separate and distinct, and its terms should not be borrowed or inserted into other exclusions. The clear wording of the Contamination Exclusions applies to all types of contamination and excludes Respondents' claims for damage caused by chlorine gas. Finally, the Business Court's consideration of extrinsic evidence violates the basic rule that courts must apply unambiguous terms as written. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 413 S.E.2d 705 (Ga. 1992). The Business Court improperly considered self-serving testimony from Axiall's broker despite no finding of ambiguity. [JA011372].

C. The Exception to the Contamination Exclusion in Endorsement No. 1 is Inapplicable

The Business Court also found that even if it were to find that the chlorine cloud constituted "seepage and/or pollution and/or contamination", an exception to the Contamination Exclusion in Endorsement No. 1 applied. [JA011370-71]. The language in Endorsement No. 1 upon which this finding was based is as follows:

> 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.

[JA000618]. The Business Court reasoned,

> 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.

[JA011371].

Respondents bear the burden of establishing that an exception to the exclusion applies. *Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332 (S.D. Ga. 2016). The Business Court did not

find that Respondents satisfied their burden. Moreover, they could not do so, because the exception applies only to "insured property [that] is the subject of direct physical loss or damage for which [Petitioners have] paid or agreed to pay." [JA000618; 011369]. As set forth above, Petitioners have not paid or agreed to pay for the loss or damage claimed by Respondents, because the Policy exclusions bar coverage for that loss or damage. Accordingly, because Respondents cannot prove that the exception applies, they cannot prove an essential element of their claim. The Order should therefore be reversed, and summary judgment should be entered in favor of Petitioners.

IV. THE BUSINESS COURT ERRED IN STRIKING PETITIONERS' AFFIRMATIVE DEFENSES RELATED TO THE EXCLUSIONS BECAUSE ISSUES TO WHICH THE EXCLUSIONS APPLY REMAIN OUTSTANDING

In its Orders granting Respondents' motions for partial summary judgment regarding the above exclusions, the Business Court struck portions of Petitioners' Seventeenth Affirmative Defense which cited the exclusions as defenses. [JA011394; 011383; 011373]. The Seventeenth Affirmative Defense provides:

> **SEVENTEENTH DEFENSE**
>
> Plaintiffs' claims are barred or limited by the terms, conditions, deductibles, limits, sublimits, provisions, exclusions, and/or endorsements of the Policy, including the following, all of which are incorporated herein by reference:
>
> a) Section A - Declarations, paragraph 5;
> b) Section B - Real and Personal Property and Time Element, paragraphs 1, 3(C), 3(D), 4(A)(l)-(5);
> c) Section C - General Conditions, paragraphs 7, 10, 11, 19;
> d) Endorsement No. 1;
> e) Endorsement No. 5;
> f) Endorsement No. 19 (National Union Policy No. 020786808);
> g) Any other Policy provision raised by Plaintiffs or that may become applicable as discovery in this action progresses.

[JA007370].

The Business Court erred in striking portions of the Seventeenth Affirmative Defense for multiple reasons. First, for the reasons set forth above, the Corrosion, Faulty Workmanship, and Contamination Exclusions apply to Respondents' claim. Second, the Business Court recognized that there were outstanding issues related to the Corrosion and Faulty Workmanship Exclusions. For example, in the Order addressing the Corrosion Exclusion, the Business Court stated:

> 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 [B.]3.C of the Policies.

[JA011383]. Despite recognizing that pre-existing corrosion was not addressed by the Order, the Business Court nonetheless struck the Corrosion Exclusion affirmative defense in its entirety. This was clearly erroneous.

Similarly, the Business Court struck the Faulty Workmanship Exclusion affirmative defense despite recognizing that the exclusion may apply to the costs of the defective repair work. [JA011392-94]. The Business Court should have allowed Petitioners to maintain their affirmative defense based on the Faulty Workmanship exclusion so that a jury would be allowed to determine the causal relationship between the faulty workmanship and Axiall's claimed damages.

The Business Court's ruling striking these affirmative defenses was clearly in error and should be reversed.

V. THE BUSINESS COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING COUNT I (DECLARATORY JUDGMENT) AND COUNT II (BREACH OF CONTRACT) AND FOR PRE-JUDGMENT INTEREST

In granting Respondents' Motion, the Business Court held, "Because a valid and enforceable contract exists, . . . and because the rupture is a covered cause of loss to which no exclusions applied, that resulted in damages to Plaintiffs, all the elements of [sic] for breach of contract . . . under Georgia law have been established." [JA000060]. The Business Court further held, "Because Plaintiffs' Count I (Declaratory Judgment) seeks a declaration as to the Insurer's contractual obligations under the terms of the Policies, the Court concludes a finding in Plaintiffs' favor on Count II necessarily compels a finding in Plaintiffs' favor on Count I." [JA000060]. These holdings are erroneous as set forth below.

A. There Was No Breach of Contract Because Respondents' Claim is Excluded from Coverage

For the reasons explained above, the Business Court erred in finding that the Corrosion Exclusion, the Faulty Workmanship Exclusion, and the Contamination Exclusions do not apply to preclude coverage. Because one or more of these exclusions bar coverage for Respondents' claim, Petitioners' denial of Respondents' claim was consistent with, rather than a breach of, the Policy. Accordingly, the Business Court's finding of a breach of contract is erroneous, and should be reversed. *See Green v. Allstate Fire & Cas. Ins. Co.*, No. 2:15-CV-205-RWS, 2018 WL 2057356, at *5 (N.D. Ga. Mar. 27, 2018) (finding that because policy's exclusion for negligent construction applied to plaintiffs' claim, plaintiffs were not entitled to coverage, "and as a result, Plaintiffs' claims for breach of contract must fail"); *see also Grife v. Allstate Floridian Ins. Co.*, 512 F.3d 1302, 1304 (11th Cir. 2008) (affirming judgment on the pleadings in favor of insurer as to insured's breach of contract claim, where policy exclusion applied to preclude coverage).

Likewise, because there was no breach of contract, Respondents are not entitled to a declaratory judgment regarding Petitioners' alleged breach of contractual obligations.[18] *See HM Peachtree Corners I, LLC v. Panolam Indus. Int'l, Inc.*, No. 1:17-CV-1000-WSD, 2017 WL 3700304, at *3 (N.D. Ga. Aug. 28, 2017) (denying plaintiff's motion to amend complaint to include claim for declaratory judgment; "Plaintiff's declaratory judgment is redundant of its breach of contract claim, and thus futile"); *see also Aria Dental Grp., LLC v. Farmers Ins. Exch.*, 528 F. Supp. 3d 1359, 1363-64 (M.D. Ga. 2021). The lack of a breach of contract also vitiates Respondents' claim for pre-judgment interest on the alleged damages for breach of contract. The Business Court's Order granting summary judgment to Respondents on Counts I and II of their complaint must therefore be reversed.

[18] The Business Court held, "Because Plaintiffs' Count I (Declaratory Judgment) seeks a declaration as to the Insurer's contractual obligations under the terms of the Policies, the Court concludes a finding in Plaintiffs' favor on Count II necessarily compels a finding in Plaintiffs' favor on Count I." [JA000060].

B. Respondents Failed to Satisfy Conditions Precedent to Coverage Under the Policy

The Business Court's holding is also erroneous because Respondents failed to satisfy conditions precedent to coverage under the Policy, so no coverage obligation was triggered, and no breach could or did occur.

Georgia law is clear that "'the conditions set out in the policy contract are an essential part of the consideration for the insurer assuming the risk and the insured becomes bound by those conditions by his acceptance of the policy contract.'" *Hill v. Safeco Ins. Co. of Am.*, 93 F. Supp. 2d 1375, 1384 (M.D. Ga. 1999) (quoting *Buffalo Ins. Co. v. Star Photo Finishing Co.*, 172 S.E.2d 159, 167 (Ga. Ct. App. 1969)). Georgia courts have held that "'[a]n insurer is entitled to require its insured to abide by the policy terms, and the insured is required to cooperate with the insurer in investigation and resolution of the claim.'" *Chavez v. Encompass Ins. Co.*, No. 1:08-cv-2965-TCB, 2010 WL 11468409, at *2 (N.D. Ga. Jan. 13, 2010) (quoting *Diamonds & Denims, Inc. v. First of Ga. Ins. Co.*, 417 S.E.2d 440, 441 (Ga. Ct. App. 1992)); *see also S. Realty Mgmt., Inc. v. Aspen Specialty Inc. Co.*, No. CIV.A1:08CV0572JOF, 2009 WL 1174661, at *3 (N.D. Ga. Apr. 28, 2009) (plaintiffs "barred from recovering on their claim" due to failure to provide requested documentation because "[a] policy requirement that requested documentation be provided is a condition precedent to an insured filing an action against its insurer, and such conditions precedent are binding . . .").

These Georgia law principles apply here. The Policy includes a "Proof of Loss" General Condition that provides in pertinent part as follows:

> It shall be necessary for the Assured to render a signed and sworn statement stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, the value thereof and the amount of loss or damage hereon. . . . *Upon this company's request the Assured shall* exhibit the damaged property to this company, and submit to examination under oath by anyone designated by this company, subscribe the same and *produce for this company's examination all pertinent records and sale invoices*, certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable time and places as this company shall designate.[19]

[19] *See* Policy at p. 28 of 65 [JA000612] (emphasis added). The Policy's "Service of Suit" General Condition further provides that "[n]o suit or action on this Policy for the recovery of any claim shall be sustainable in

Courts have described a similar condition requiring the production of requested "pertinent records" as a "cooperation clause." *See*, *e.g.*, *Am. Elec. Power Co. v. Affiliated FM Ins. Co*., No. 02-1133-D-M2, 2005 WL 8155214, at *3 n.8 (M.D. La. July 13, 2005). The Proof of Loss General Condition, consistent with Georgia law, obligated Respondents to fulfill their duty to fully cooperate in the investigation of the claim by providing all relevant documentation requested.

On January 26, 2018, Petitioners requested, through the adjuster, that Respondents produce: (i) "inspection reports and test results for all . . . equipment/components that are claimed to be potentially affected by the [I]ncident conducted on and/or after the incident date by . . . outside consultants or testing/diagnostic companies;" and (ii) "[a]ny and all photographs of the plant taken prior to the [I]ncident."[20] These requests necessarily included their expert's damage assessment information Respondents improperly withheld from Petitioners until the Business Court compelled production.

In its Order Granting Defendants' Motion for Summary Judgment Concerning Bad Faith Claims, the Business Court noted numerous examples of Respondents' improper withholding and delayed production of their expert's damage assessment. [JA000029; 000047-48]. In addition to these findings, both the Discovery Commissioner and the Business Court concluded that Respondents failed to provide adequate information in support of their claimed damages and that Respondents' evasiveness made it impossible for Petitioners to fully evaluate the alleged damages.[21] The undisputed facts thus establish that Respondents breached their duty to cooperate under the Proof of Loss General Condition in the Policy.

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any court of law or equity *unless the Assured has fully complied with all the requirements of this Policy*." *See id.*, at p. 31 of 65 [JA000615] (emphasis added).

[20] [JA012570-571].

[21] Discovery Commissioner Clawges' Order Granting Defendants' Motion for Relief Under Rule 37 summarized these findings as follows:

> [T]he Court previously determined that Plaintiffs' failure to fully respond to Interrogatory No. 15 prejudices Defendants. The prior Order made clear that . . . "Defendants are plainly entitled to have a detailed analysis of damage claims, sufficient to allow them an opportunity to evaluate the loss." . . .
>
> Plaintiffs' failure to obey Judge Wilkes' Order continues to make it impossible for Defendants to evaluate the amount of damages . . . . [JA012838].

Numerous Georgia courts have found that such breaches of the duty to cooperate preclude a policyholder from obtaining coverage. *See, e.g., Hill v. Safeco*, 93 F. Supp. 2d 1375, 1377 (M.D. Ga. 1999) (finding that insured breached the "Duties After Loss" condition and other obligations under the contract and granted summary judgment for the insurer, noting "extreme change" in damage estimate and insured's failure to provide adequate documentation to support its claim); *Halcome v. Cincinnati Ins. Co.*, 334 S.E.2d 155, 156-57 (Ga. 1985) (finding that insureds breached the "Duties After Loss" condition by failing to produce requested financial records); *Love v. State Farm Fla. Ins. Co.*, 629 F. Supp. 3d 1310, 1321-22 (N.D. Ga. 2022) (collecting similar cases and concluding "[I]t is undisputed that Plaintiff has failed to provide material information required by Section 8(d) of the Policy. Therefore, as a matter of law, Plaintiff is not entitled to recovery for the Claim pursuant to the Policy."); *see also Lissa-Marie, Inc. v. Mass. Bay Ins. Co.*, No. 1:06-cv-0641-TCB, 2007 WL 9697776, at *6 (N.D. Ga. Sept. 17, 2007) (insured "preclud[ed] from obtaining coverage" where, among other things, insured's "own public adjusters . . . agreed that the loss could not be substantiated without the inventories and other documents requested by" insurer). Respondents' breach of the duty to cooperate therefore bars them from recovering under the Policy, as a matter of law, and there can be no breach of contract by Petitioners.

Despite the governing Georgia authority, the Business Court erroneously found Petitioners' argument that Respondents "failed to cooperate and therefore forfeited coverage under the Policies is unsupported." [JA000061]. The Business Court also erroneously found that Petitioners' argument was "untimely" because it supposedly "was not pled in the Defendants' Affirmative Defenses and was not brought in either the 'coverage' round or 'non-coverage' round of summary judgment motions before this Court in 2021." [JA000061]. In fact, however, Petitioners did plead this Policy condition in their Sixteenth and Seventeenth Affirmative Defenses. [JA007370]. Moreover, there was no requirement that Petitioners file a motion for summary judgment to further preserve the defense already asserted as an affirmative defense. Accordingly, the Business Court's Order rejecting Petitioners' argument and finding that they breached the contract with Respondents is erroneous as a matter of law and should be reversed.

C. The Business Court Erred in Awarding Pre-judgment Interest

For the reasons discussed above, Petitioners did not breach the Policy. Accordingly, there can be no award of pre-judgment interest. However, even if Petitioners did breach the Policy (which Petitioners deny), the Business Court erred in awarding pre-judgment interest in this case.

An award of pre-judgment interest under O.G.C.A. § 13-6-13 is discretionary. *See* O.G.C.A. § 13-6-13 ("In all cases where an amount ascertained would be the damages at the time of the breach, it *may* be increased by the addition of legal interest from that time until recovery.") (emphasis added); *see also Copeland v. Home Grown Music, Inc*., 856 S.E.2d 325, 334 (Ga. Ct. App. 2021) (finding trial court acted within sole discretion in declining to award pre-judgment interest). The Business Court stated that it "exercise[d] its discretion under Georgia Code §13-6-13 to award Plaintiffs[] pre-judgment interest from August 10, 2022, the date that the damages were determined and known to Defendants through the date of the entry of this Order [December 10, 2024]." [JA000062].

In *Electrolux Home Products, Inc. v. Mid-South Electronics, Inc*., the arbitrator denied a request for pre-judgment interest under similar facts.[22] No. 1:11-cv-03377, 2011 WL 7139107, at *9 (Arbitration Award) (N.D. Ga. Oct. 4, 2011). The arbitrator denied pre-judgment interest because "both the issues of liability and issues of damages were strongly contested" and the length of the insurers' loss adjustment "dragged on for a substantial period of time due to delays in responding to requests" by the insured. *Id*. As a result, the arbitrator concluded that the insured should not be awarded pre-judgment interest for a period of time that was substantially lengthened through no fault of the insurers. *Id*.

The same is true here. Liability and damages have been strongly contested, as evidenced by the competing liability and damages summary judgment motions filed. Under these circumstances, and because Petitioners did not breach the Policy for all the reasons discussed herein, the Business Court did not properly exercise its discretion when it decided to award pre-

[22] [JA012618-20].

judgment interest to Respondents. The Business Court's Order awarding Respondents pre-judgment interest was improper and should therefore be reversed.

VI. THE BUSINESS COURT ERRED IN DENYING PETITIONERS' MOTION FOR SETOFF

On December 10, 2024, the Business Court entered an Order denying Defendants' Motion for Setoff with respect to the Pennsylvania damages Judgment, but found that Petitioners are entitled to subrogate Respondents' rights against Pennsylvania tortfeasors in the amount of negligence as determined by the jury (20% AllTranstek, 40% Rescar, and 40% Axiall). [JA012419; 012653]. The Business Court's decision was erroneous for the reasons set forth below.

A. Georgia Law Precludes Double Recovery

In its Order, the Business Court recognized that "Georgia, as part of the common law and public policy, has always prohibited a plaintiff from a double recovery of damages; the plaintiff is entitled to only one recovery and satisfaction of damages, because such recovery and satisfaction is deemed to make the plaintiff whole." [JA012651] (citing *Candler Hosp., Inc. v. Dent*, 491 S.E.2d 868, 869 (Ga. Ct. App. 1997)). The Business Court further acknowledged that "under black letter law, a double recovery would not be permitted." [JA012653]. Nevertheless, the Business Court refused to implement these principles of Georgia law, and instead denied Petitioners' Motion for Setoff of any amounts that would have resulted in a double recovery for Respondents. [JA012647-54].

The Business Court erroneously relied on Georgia statutes addressing set-off in the context of *debts* owed between the same plaintiff and defendant, as distinct from the procedural setting of this lawsuit, which involves the set-off of a *judgment* recovered by the plaintiff from a different defendant in a separate lawsuit. Citing O.G.C.A. §§ 13-7-4 – 13-7-5, the Business Court found that "in order for setoff to apply, the claims must be between the same parties and in each of those party's own right" and "any of such mutual demands [must be] existing at the time of the commencement of the suit[.]" [JA012651] (quoting *In re Palmieri*, 31 B.R. 111,112 (N.D. Ga. Bankr. 1983)).

While mutuality of obligation may be required for a valid setoff under O.G.C.A. § 13-7-4 and § 13-7-5, Petitioners did not seek relief under those statutes and such statutes are not applicable here, where the amount to be set off is from what Respondents will receive from the defendants in the Pennsylvania Action, not a debt that the Respondents otherwise would owe to Petitioners under their insurance contract. *See*, *e.g.*, *Gouldstone v. Life Invs. Ins. Co. of Am.*, 514 S.E.2d 54, 58 (Ga. Ct. App. 1999) (addressing setoff under O.G.C.A. § 13-7-5 in an action alleging defendants defaulted on promissory note, stating "this type of setoff 'does not operate as a denial of the plaintiff's claim; rather it allows the defendant to set off a *debt* owed him by the plaintiff against the claim of the plaintiff.' . . . As such, it must be asserted as a counterclaim rather than a defense") (emphasis added). As stated in *Gouldstone*, these statutes describe a "**type of setoff**" and are not the **sole basis** for setoff under Georgia law. *Gouldstone*, 514 S.E.2d at 58 (emphasis added). Rather, the prohibition against double recovery is part of Georgia's "common law and public policy." *Candler Hosp., Inc.*, 491 S.E.2d at 869.

For example, O.G.C.A. § 9-13-75 provides courts with authority to order a setoff in a situation, like the instant case, in which one of the parties has obtained a judgment from a non-party arising from the same underlying event. *See* O.G.C.A. § 9-13-75 ("One judgment may be set off against another, on motion, whether in the hands of an original party or an assignee. The balance on the larger is collectable under execution."). Under O.G.C.A. § 9-13-75, the judgment that Respondents obtained in the Pennsylvania Action may, and should, be set off against any amount that Petitioners are found to owe Respondents, especially in view of the prohibition against double recovery that is part of Georgia's "common law and public policy." *Candler Hosp., Inc.*, 491 S.E.2d at 869.

The undisputed facts demonstrate that Respondents would receive a prohibited double recovery if the Pennsylvania Judgment is not set off against any amount that Petitioners are found to owe Respondents. The Business Court held that the damages awarded by the jury in the Pennsylvania Action for damage to the Natrium Plant and equipment are the *same damages being*

claimed by Respondents in this action.[23] It is undisputed that the Pennsylvania Action was filed first; Axiall filed suit against third-party contractors in Pennsylvania on August 24, 2018 (well before the instant action), regarding the same Incident, seeking the same damages to the Natrium Plant and equipment, claiming such third parties caused and/or contributed to the Incident. [JA009947-57]. Respondents also cannot dispute that the court in the Pennsylvania Action entered a verdict on October 14, 2021 (and judgment on August 10, 2022) for the same damages to the Natrium Plant.[24]

The Business Court should have exercised its discretion and ordered that the judgment in the Pennsylvania Action be set off against any judgment in the Business Court to prevent Respondents from receiving an impermissible double recovery. The Business Court's Order denying Petitioners' Motion for Setoff should therefore be reversed.

B. The Business Court's Reliance on Subrogation Principles was Erroneous Under the Facts of this Lawsuit

In denying the Motion for Setoff, the Business Court further found "subrogation to be the more appropriate mechanism for the relief Defendants seek." [JA012653]. "The Court agrees under black letter law, a double recovery would not be permitted. However, here, the Policies contain subrogation provisions that govern situations like these where a covered loss may be recoverable from a third party." *Id*.

In so ruling, the Business Court mistakenly imported the notion of an insurer's right to subrogation against a third party that was responsible for all or a portion of the loss that the insurer paid on behalf of its policyholder into a lawsuit in which the policyholder itself had already prosecuted claims against third parties for that liability and obtained damages for itself. "Subrogation and setoff are two conceptually distinct rights." *Masenheimer v. Disselkamp*, No. CA2002-08-200, 2003 WL 435785, at *2 (Ohio Ct. App. Feb. 24, 2003). The right of subrogation involves the policyholder's assignment of a claim or right to its insurer to pursue, in consideration of the insurer's payment to the policyholder. *Id*. By contrast, the concept of set-off permits the

[23] [JA011627].
[24] [JA012411; 012418-22].

policyholder to pursue its own rights as the injured party and keep the money it obtains, while adjusting the amount that its insurer could be obligated to pay in order to prevent a double recovery. *Id.* "The right of setoff is not subject to the particular rule of subrogation which prohibits an insurer from recovering payments it made until its insured is fully compensated for his injuries." *Id.*

The concept of subrogation is inapposite to the facts of this case. Petitioners are not seeking a "recovery" from a third-party. Rather, they are seeking a setoff of the judgment from the first-filed Pennsylvania Action once it is satisfied, thereby reducing the amount of any judgment in this action for the same damages. The Business Court's ruling that Petitioners could obtain set-off by pursuing subrogation rights is incorrect as a matter of law and should be reversed.

CONCLUSION

For the reasons set forth above, Petitioners pray that this Court reverse the Business Court's Orders and remand this matter to the Business Court with direction to grant summary judgment in favor of Petitioners dismissing this lawsuit in its entirety, together with such other and further relief as the Court may deem proper.

Respectfully submitted the 10th day of March, 2025.

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CERTIFICATE OF SERVICE

Service of the foregoing ***PETITIONERS' BRIEF*** was had upon the parties via (1) electronic service notification by File & ServeXpress; and/or (2) by mailing a true copy hereof, by United States Mail, postage prepaid, the 10th day of March, 2025, as follows:

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