

## No. 25-ICA-16

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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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.*

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

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### PETITIONERS' REPLY BRIEF

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## **INTRODUCTION**

The coverage issues presented are straightforward: a railroad tank car was subjected to faulty workmanship which caused it to rupture and release approximately 90 tons of liquefied chlorine; Respondents allege that this released chlorine formed a plume or cloud that contaminated equipment at the Natrium Plant and that the equipment at the Natrium Plant suffered corrosion damage that Respondents claim is covered by the Policy. Corrosion damage is not covered by the Policy. The Policy excludes coverage for loss, damage, or expense caused by or resulting from faulty workmanship, contamination, and corrosion. A finding by this Court that any one of those exclusions applies to preclude coverage requires a remand to the Business Court for entry of an order awarding summary judgment to Petitioners dismissing Respondents' lawsuit entirely.

In their brief, Respondents rely on canons of construction and lengthy, irrelevant footnotes regarding drafting history and underwriting in an effort to distract this Court from the plain language of the Policy and the undisputed facts regarding the nature of Respondents' claim for coverage of corrosion damage to equipment at the Natrium Plant.<sup>1</sup> Respondents also re-name the Corrosion Exclusion that was the subject of the Business Court's Order as the "wear and tear" exclusion, apparently hoping that by rebranding the exclusion, they can shift the Court's focus away from the fact that the Policy unambiguously excludes corrosion damage. Nevertheless, corrosion damage comes from "the action, process, or effect of corroding."<sup>2</sup> The cause of Respondents' alleged loss is corrosion. The Policy unambiguously excludes loss, damage, or expense caused by or resulting from corrosion. The analysis is straightforward and results in the complete exclusion of Respondents' claim.

The Policy also excludes "loss, damage or expense caused by or resulting from . . . faulty materials, or workmanship." Respondents' allegations in the Pennsylvania Action, which resulted

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<sup>1</sup> Due to the page limitation on reply briefs, Petitioners address the main arguments in rebuttal to Respondents' brief, while reserving all rights with respect to their objections to all other arguments and assertions made in Respondents' brief.

<sup>2</sup> The Merriam-Webster Dictionary defines "corrosion" as "the action, process, or effect of corroding." *Corrosion*, MERRIAM-WEBSTER DICTIONARY, [https://www.merriam-webster.com/dictionary/corrosion?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/corrosion?utm_campaign=sd&utm_medium=serp&utm_source=jsonld) (last visited April 15, 2025).

in a jury verdict affirming that faulty repairs by third parties caused the damage sought by Respondents, confirm that Respondents consider faulty workmanship to be the cause of their alleged loss.

The Policy also excludes “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.” [JA000618] (emphasis added). Nonetheless, the Business Court concluded that the language of the relevant exclusion applies only to environmental pollution or contamination. [JA007471]. This is in violation of controlling Georgia precedent and is contrary to the plain meaning of the Policy.

For the reasons set forth herein and in Petitioners’ Brief, this Court should reverse the Orders that are the subject of this appeal and remand the matter to the Business Court with instructions to grant summary judgment in favor of Petitioners.

### **STATEMENT OF THE CASE**

#### **I. REPLY TO RESPONDENTS’ COUNTERSTATEMENT OF FACTS**

Respondents’ Brief devotes attention to irrelevant facts, inflammatory statements, and alleged misrepresentations. For example, in Section B of their Counterstatement of Facts, Respondents incorrectly contend that Petitioners misrepresented to this Court and the Business Court the conclusions set forth in the NTSB’s report of its investigation into the chlorine gas release from the tank car at the Natrium Plant, and baselessly assert that the Business Court “found [the purported misrepresentation] significant.” Resp’ts’ Br. 2-3 & n.5. To the contrary, the two footnotes referenced by Respondents in which the Business Court noted that the NTSB report had been “proffered” demonstrate that the Business Court reviewed the entirety of the paragraph in which the NTSB opined on the probable cause of the event, not a purported selective quotation by Petitioners. Petitioners’ statements concerning the NTSB report are contained in a single sentence that quotes from the “Probable Cause” section of the NTSB report. Pet’rs’ Br. 2.

Respondents also suggest the Business Court found the “actual conclusion” of the NTSB report important when deciding that the Faulty Workmanship Exclusion does not apply. This is

also incorrect. The Business Court found that even if the exclusion applied, the ensuing loss provision “preserve[d] coverage” for damage from perils that are not specifically excluded. [JA007450-451].<sup>3</sup> Moreover, the Business Court found the NTSB’s statement about the factors “contributing to the failure” of the tank car *did include* the faulty workmanship of the tank repair vendors, stating: “[t]he Court considers that Plaintiffs’ loss did not just consist of allegedly faulty workmanship on a tank car. *Id.* at 14. Rather, the allegedly faulty workmanship, combined with the filling of the tank car more than two months later with 90 tons of cold liquid chlorine resulted in the tank car’s sudden rupture.”<sup>4</sup> [JA007450].

## **II. PROCEDURAL HISTORY**

Respondents agree with Petitioners’ recitation of the procedural history.

### **ARGUMENT**

#### **I. THE CORROSION EXCLUSION APPLIES**

Respondents unequivocally state that “corrosion damage . . . is the damage at issue here.” Resp’ts’ Br. 18. The Policy unambiguously excludes “loss, damage or expense caused by or resulting from . . . corrosion.” (“Corrosion Exclusion”) [JA000598-99]. Respondents further characterize the cause of their alleged damage as “chemical attack of chlorine-related acids upon certain types of materials at the Plant.”<sup>5</sup> Resp’ts’ Br. 6. The plain meaning of the Corrosion Exclusion should be applied here to exclude coverage for Respondents’ claim. *See Jefferson Ins.*

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<sup>3</sup> Moreover, the footnotes from the Business Court to which Respondents cite do not address what caused Respondents’ loss. Rather, the Business Court noted it was “proffered that an NTSB Report found that a preexisting crack of unknown origin caused the rupture . . .” [JA007449].

<sup>4</sup> For these reasons, Respondents’ statements concerning alleged “mischaracterizations” by Petitioners can be disregarded. Respondents’ statements in footnote 8 of Section C of the Counterstatement of Facts should also be disregarded because the coverage decision made with respect to a separate claim by a different policyholder under a different policy is irrelevant to the issues in this case. Similarly, Respondents’ statements in footnote 9 of Section D should be disregarded as inaccurate based on the facts set forth in Petitioners’ Statement of Facts. To be clear, given the page limitation on reply briefs, Petitioners will not address every factual or “counter-factual” allegation from Respondents, but Petitioners do object to any suggestion that Petitioners misrepresented or mischaracterized any facts to the Business Court or this Court.

<sup>5</sup> Respondents’ description of the cause of loss as “chemical attack of chlorine-related acids upon certain types of materials” is simply “corrosion” by another name.

*Co. of New York v. Dunn*, 496 S.E.2d 696, 699 (Ga. 1998) (holding that unambiguous policy exclusions “must be given effect, even if beneficial to the insurer and detrimental to the insured”).

Respondents’ arguments primarily hinge on two incorrect premises. First, Respondents’ proffered interpretation of the Corrosion Exclusion depends on the inapplicable doctrine of *noscitur a sociis*. Under Georgia law, canons of construction have no application where the policy language is unambiguous. *See Winders v. State Farm Fire & Cas. Co.*, 359 F. Supp. 3d 1274, 1278 (N.D. Ga. 2018). Further, numerous courts have specifically rejected the very same arguments regarding *noscitur a sociis* and corrosion advanced by Respondents. Second, the only case cited by Respondents that reaches its desired conclusion is a federal New Jersey opinion that has ***never been cited or relied upon*** outside of New Jersey. Meanwhile, the Supreme Court of Virginia specifically rejected a *noscitur a sociis*-based argument from a policyholder in a corrosion case in *TravCo Ins. Co. v. Ward*, 736 S.E.2d 321 (Va. 2012), which has been cited by state and federal courts across the country.

Also, Respondents’ suggestions regarding ambiguity and construing the Policy against Petitioners are not applicable. First, Respondents never argued that any Policy provision is ambiguous at the Business Court. That issue is undisputed as a matter of the record in this case. Second, taking aside Respondents’ failure to allege ambiguity below, no ambiguity is created by Respondents’ contradictory interpretation of the Policy proffered in their Brief. *See Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1254 (11th Cir. 2019) (applying Georgia law) (“[A]n insurance policy is not ambiguous simply because it is ***possible to construe it in more than one way***, or even because the policy presents a difficult question of construction.”) (emphasis added); *Greenberg Farrow Architecture, Inc. v. JMLS 1422, LLC*, 791 S.E.2d 635, 640 (Ga. Ct. App. 2016) (“[T]he fact that two parties disagree on a contract’s meaning does not by itself render the contract ambiguous . . .”).

Finally, Respondents make no attempt to justify the Business Court’s finding that Respondents’ claim is covered as an ensuing loss from corrosion. Respondents offer no justifiable

basis to uphold the Business Court’s erroneous ruling that the Policy’s Corrosion Exclusion does not bar coverage for Respondents’ claim.

**A. The Policy’s Corrosion Exclusion Must be Applied According to its Plain Terms**

Respondents’ argument is based on the incorrect assumption that *noscitur a sociis* must be applied. *Noscitur a sociis* does not apply in the absence of ambiguity. *See Brown v. Azar*, 497 F. Supp. 3d 1270, 1284-85 (N.D. Ga. 2020), *vacated on other grounds by Brown v. Sec’y, U.S. Dep’t of Health & Hum. Servs.*, 20 F.4th 1385 (11th Cir. 2021) (“[T]his rule is not applicable in the absence of ambiguity.”); *see also Russell Motor Car Co. v. U.S.*, 261 U.S. 514, 519 (1923) (discussing *noscitur a sociis* and holding that canons of construction “have no place . . . except in the domain of ambiguity” and may only “remove doubt” rather than “create” it); *Payne v. Middlesex Ins. Co.*, 578 S.E.2d 470 (Ga. Ct. App. 2003) (strained interpretations and canons of construction cannot be used to generate ambiguity). 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); *see also Brown*, 497 F. Supp. 3d at 1284-85 (noting that *noscitur a sociis* “is not applicable in the absence of ambiguity”). Because there is no ambiguity in the Policy language, canons of construction are inapplicable.

Corrosion has a plain meaning that has been applied by multiple courts. *See Pioneer Chlor. Alkali Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1226, 1236 (D. Nev. 1994) (“The Court finds that the term ‘corrosion’ is not ambiguous.”); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 255 F. Supp. 3d 443, 457-58 (S.D.N.Y. 2015) (finding the term “corrosion” unambiguous based on its common dictionary meaning). Applying the common meaning of “corrosion”—as Georgia law mandates—dictates that the Policy does not insure “loss, damage or expense caused by or resulting from . . . [the action, process, or effect of corroding].”<sup>6</sup> Respondents’ claim is indisputably for “loss, damage or expense caused by or resulting from” the action, process, or effect of corroding. It is not necessary or appropriate to modify or construe the

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<sup>6</sup> *See* footnote 2, *supra*.

Corrosion Exclusion by giving primacy to the term “wear and tear” and diminishing the plain meaning of the term “corrosion”. See *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1293 (N.D. Ga. 2020) (citations and quotations omitted) (“Unambiguous terms must be given effect even if beneficial to the insurer and detrimental to the insured, and Georgia courts will not strain to extend coverage where none was contracted or intended.”).

Respondents rely heavily on *Rountree v. Encompass Home and Auto Ins. Co.*, 501 F. Supp. 3d 1351, 1354 (S.D. Ga. 2020) to support their “common theme” argument, but *Rountree* does not support Respondents’ position.<sup>7</sup> The court in *Rountree* applied the doctrine of *noscitur a sociis* in deciding whether water damage fell within the meaning of “deterioration” in a homeowner policy’s exclusion for “wear and tear, aging, marring, scratching, or deterioration.” The court considered the dictionary definition of deterioration (“the action or process of becoming impaired or inferior in quality, functioning, or condition”) and noted that applying the dictionary definition would “in effect **exclude any conceivable loss from coverage** . . . [because] by the dictionary definition a fire, flood, earthquake, or even bomb would cause deterioration . . . [and that] cannot be the meaning of the exclusion.” *Id.* at 1359-60 (emphasis added). Unlike in *Rountree*, here the common meaning of corrosion (“the action, process, or effect of corroding”) would not bar coverage for any conceivable loss. On the contrary, it is undisputed that Petitioners paid \$11 million for a separate covered loss at the **same facility** (Natrium Plant) during the **same policy period** (2015-2016) under a different loss scenario, and approximately \$14 million in the preceding year.<sup>8</sup> [JA011100].

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<sup>7</sup> Respondents also cite *Anderson v. Se. Fid. Ins. Co.*, 307 S.E.2d 499 (Ga. 1983) to support their invocation of *noscitur a sociis*. In *Anderson*, the Supreme Court of Georgia was asked to decide whether an automobile insurance policy that did not provide coverage for automobiles “used or operated in any racing event, speed contest or exhibition” provided coverage for an accident during an impromptu drag race on a public road. *Id.* at 500. *Anderson* is factually dissimilar and involved public policy concerns about how its result might impact “practically every automobile collision.” *Id.* These issues are not present in this case.

<sup>8</sup> This completely dispels Respondents’ suggestions that Petitioners’ interpretation of the subject Policy exclusions would render the coverage provided by the Policy illusory. See *G&A Fam. Enters., LLC v. Am. Fam. Ins. Co.*, No. 1:20-CV-03192-JPB, 2021 WL 1947180, at \*6 (N.D. Ga. May 13, 2021) (“[A]n insurance policy is only illusory when it results in a complete lack of any policy coverage.”).

Multiple courts have rejected similar *noscitur a sociis*-based arguments from insureds in the context of corrosion exclusions. See *TravCo*, 736 S.E.2d at 326 (“This Court does not apply canons of construction to create ambiguity where there is none, and [the insured’s] reliance upon the doctrine of *noscitur a sociis* is unfounded.”); *Lantheus*, 255 F. Supp. 3d at 460 (rejecting insured’s *noscitur a sociis* arguments); *Ramaco Res., LLC v. Fed. Ins. Co.*, 545 F. Supp. 3d 344, 356-57 (S.D. W. Va. 2021) (declining to invoke *noscitur a sociis* to interpret exclusion for corrosion). Respondents’ *noscitur a sociis* argument is a desperate attempt to avoid the plain meaning of the Policy’s exclusion for “loss, damage or expense caused by or resulting from . . . corrosion” and is designed to complicate and confuse a simple analysis. Respondents’ claim is for expenses to replace allegedly corroded equipment that Respondents allege has a reduced useful life as a result of corrosion. The claim is therefore excluded as “loss, damage or expense caused by or resulting from . . . corrosion” under the Corrosion Exclusion.

**B. Respondents’ Distinction Between Corrosion as “Cause of Loss” and “Type of Damage” Is Unnecessary and Unavailing**

Respondents argue that the Policy excludes corrosion as a “cause of loss” but not as a “type of damage.” The Supreme Court of Virginia rejected this precise argument in *TravCo*. There, the insured homeowner sought coverage for corrosion damage to surfaces in a home due to off-gassing of contaminated dry wall. 736 S.E.2d at 327-29. The insurer denied coverage based on an exclusion for “loss . . . caused by . . . rust or other corrosion.” *Id.* at 328. The insured argued the exclusion should not apply because, *inter alia*, the damage “was not *caused by* corrosion, but was the corrosion itself.” *Id.* at 327. The court found this argument without merit because “[s]uch a construction would render this and similar corrosion exclusions meaningless[.]” *Id.* at 328; see also *Bishop v. Alfa Mut. Ins. Co.*, 796 F. Supp. 2d 814, 822 (S.D. Miss. 2011) (applying corrosion exclusion despite argument “that the corrosion exclusion is inapplicable since their loss is not ‘caused by corrosion’ but rather *is* the corrosion”) (emphasis in original). The same is true here—there is no dispute that Respondents are seeking coverage for alleged corrosion damage and the Policy’s Corrosion Exclusion is clear and unambiguous. The Court need only determine whether



Respondents' claim for corrosion damage constitutes "loss, damage or expense caused by or resulting from . . . corrosion." The answer is *yes* and the result is that Respondents' claim is excluded.

**C. Respondents' Strained Attempts to Distinguish the Body of Cases that Support Petitioners' Position Are Unavailing**

Respondents' attempts to distinguish the numerous cases cited in Petitioners' Brief that support applying the Policy's Corrosion Exclusion according to its plain meaning are unavailing, especially when considered against the lack of relevant authorities Respondents cite to support their own positions.<sup>9</sup>

In *TravCo*, discussed *supra*, the Supreme Court of Virginia construed an exclusion for "loss caused by . . . corrosion" in the context of a claim for corrosion damage to metallic surfaces in the insured's home. The court declined to recognize a distinction between corrosion as a cause of loss or type of damage and further held that "the logical, common understanding of the term 'corrosion' do[es] not draw a distinction between 'naturally occurring' and other corrosion." 736 S.E.2d at 328. Respondents attempt to distinguish this case by citing a single, unreported case from New Jersey that declined to follow *TravCo*. See *Nat'l Mfg. Co. v. Citizens Ins. Co. of Am.*, No. 13-314, 2016 WL 7491805 (D.N.J. Dec. 30, 2016).

*National Manufacturing* has not been cited or followed in any reported decision regarding a corrosion exclusion. In fact, in the almost ten years since *National Manufacturing* was decided, it has never been cited or relied upon outside of New Jersey *for any proposition*. Respondents also make the conclusory allegation that New Jersey law regarding insurance policy interpretation is "identical to Georgia principles of insurance law." Resp'ts' Br. 19. This statement is based on a few cherry-picked principles of contract interpretation and implies that Georgia law is more similar

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<sup>9</sup> Respondents argue that several of the corrosion exclusions in these cases are "significantly different" from the Corrosion Exclusion. Respondents' measuring stick for the "similarity" of a given corrosion exclusion appears to be whether the exclusion also includes "wear-and-tear" in the same sentence. This is an arbitrary and irrelevant framework. See *Ins. Co. of Pa. v. APAC-Southeast, Inc.*, 677 S.E.2d 734, 739 (Ga. Ct. App. 2009) (declining to invoke *noscitur a sociis* and holding "[i]t is a cardinal rule of construction that a contract should be construed in a manner that gives effect to all of the contractual terms" and that "the parties would not have used two different terms in short sequence within the same paragraph to mean the exact same thing") (citations omitted).

to New Jersey law than Virginia law. There is no support for this conclusory allegation. Virginia courts apply principles of contract construction similar to those cited by Respondents in New Jersey and Georgia. *See, e.g., PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 712-13 (Va. 2012) (reciting principles of contract interpretation similar to those under Georgia law). Further, a federal district court in Georgia recently declined to follow a decision from the federal district court in New Jersey regarding a similarly worded policy exclusion. *See Winders v. State Farm Fire & Cas. Co.*, 359 F. Supp. 3d 1274, 1280 (N.D. Ga. 2018) (declining to follow the federal district court in New Jersey’s interpretation of policy language). Georgia courts have also cited and agreed with multiple Virginia cases despite Respondents’ assessment that Virginia law is “fundamentally inconsistent” with Georgia law. *See Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 789 S.E.2d 310, 316 (Ga. Ct. App. 2016) (holding that the plaintiff “failed to carry its burden to show that Virginia law is materially different from, much less in conflict with, that of Georgia on the legal points raised” in a breach of contract case); *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.*, 746 S.E.2d 587, 593-94 (Ga. 2013) (referring to Virginia as a “sister state[]” and citing a Virginia decision in support of its analysis of an insurance coverage issue); *Haulers Ins. Co. v. Davenport*, 810 S.E.2d 617, 620-21 (Ga. Ct. App. 2018) (finding the reasoning of the Virginia Supreme Court “persuas[ive]” in a decision regarding the interpretation of an insurance exclusion). Respondents’ desperation owes to their entreaty that this Court be the first anywhere in the United States outside of New Jersey to rely on *National Manufacturing*. The Court should instead follow the weight of authority cited in and stemming from *TravCo*—which goes beyond the borders of a single state.

*Lantheus Medical Imaging, Inc. v. Zurich American Insurance Co.*, 255 F. Supp. 3d 443 (S.D.N.Y. 2015) and *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 863 F. Supp 1226 (D. Nev. 1994), discussed in Petitioners’ Brief, are additional examples of courts applying corrosion exclusions according to their plain meaning and rejecting arguments by insureds to limit or restrict the meaning of corrosion. Regardless of the amount of time that it took for the alleged corrosion damage to occur, the plain meaning of the Policy’s Corrosion Exclusion

bars coverage for “loss, damage or expense caused by or resulting from . . . corrosion”, which is defined as “the action, process, or effect of corroding”, without incorporating a temporal element. *See Lantheus*, 255 F. Supp. 3d at 459 (finding no basis in the meaning of corrosion to narrow its scope “to that which occurs ‘inevitably’”); *Pioneer*, 863 F. Supp at 1236 (noting that “[o]ne solution may corrode steel much more quickly than another solution . . . [but a] chemist would not say that the chemical reaction involving the first solution was not corrosion because it occurred more quickly than the chemical reaction involving the second solution”). Respondents’ attempt to rewrite the Policy by inserting additional criteria for the term “corrosion” is contrary to well-established principles of policy construction under Georgia law, and should be rejected.

Finally, Respondents attempt to distinguish *Bettigole v. American Employers Insurance Co.*, 567 N.E.2d 1259 (Mass. Ct. App. 1991) based on the argument that the corrosion at the Natrium Plant was caused by “tank car rupture.” Respondents’ causation argument under the Corrosion Exclusion is contrary to the argument that they assert regarding the Faulty Workmanship Exclusion, where Respondents state their “claimed damage is not the mis-repaired tank car, but rather the damage to equipment at the Natrium Plant that resulted from multiple additional . . . causes of loss.” Resp’ts’ Br. 23 n.29. Depending on which exclusion Respondents are attempting to escape, the alleged cause of loss changes. The Policy does not operate in the convoluted manner suggested by Respondents. Regardless of the chain of events that allegedly culminated in corrosion to equipment at the Natrium Plant, the Policy excludes, *inter alia*, “expense caused by or resulting from” corrosion (“the action, process, or effect of corroding”). Whether or not the corrosion was caused by “tank car rupture”, Respondents’ **actual claim** is for alleged corrosion damage, which the Policy excludes from coverage.

For these reasons, Respondents’ strained attempts to distinguish the large body of cases cited by Petitioners are unavailing and the Business Court’s ruling on the Corrosion Exclusion should be reversed.

## II. THE FAULTY WORKMANSHIP EXCLUSION APPLIES

### A. Respondents' Pleadings Demonstrate the Claim Comes Within the Faulty Workmanship Exclusion

Respondents claim Petitioners' only evidentiary support for the contention that the subject claim falls within the Faulty Workmanship Exclusion is an NTSB report. That is false. Petitioners' Brief pointed the Court to Respondents' lawsuits against the third-party contractors and their allegations that the negligent work of those third parties directly caused the damage they seek to recover in the action below and in their third-party lawsuits. Pet'rs' Br. 2-3. Respondents' own allegations concerning the faulty repairs leave no doubt that Respondents' claim is for "loss, damage [and] expense caused by or resulting from . . . faulty . . . workmanship." [JA000598-599]. However, to avoid the consequence of their own allegations, Respondents abandon their "cause of loss" versus "type of damage" argument as it relates to faulty workmanship and suggest that any losses *caused by* faulty workmanship are instead covered ensuing losses.<sup>10</sup>

### B. The Ensuing Loss Exception Does Not Restore Coverage

Despite this undisputed evidence of faulty workmanship,<sup>11</sup> the Business Court concluded that an exception to the exclusion restores coverage even if the Faulty Workmanship Exclusion initially applied. That exception states: "[t]his exclusion does not apply to resultant physical loss or damage not otherwise excluded." [JA000599]. The Business Court determined that the exception applies because the Policy "do[es] not expressly exclude Tank Car ruptures or releases of liquids or chemicals or chemical attacks of acid upon metal equipment." [JA007449-450]. Respondents similarly argue that the property damage they claim in this matter is "wholly

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<sup>10</sup> Respondents argue extensively that every Policy exclusion "can only reasonably be interpreted to refer to causes of loss." Resp'ts' Br. 16. However, Respondents also argue that "tank car ruptures, chlorine spills, chlorine vapor clouds, or chemical attacks . . . [are] covered perils *resulting from the Maintenance Vendors' negligent work*." *Id.* at 23. For the Corrosion Exclusion, Respondents argue that the corrosion itself is covered and that only losses caused by corrosion are excluded. In the context of faulty workmanship, Respondents argue that faulty workmanship itself is excluded and that any losses caused by faulty workmanship are covered ensuing losses. This inherent contradiction demonstrates that Respondents' proffered interpretation of the Policy is not reasonable and should be rejected.

<sup>11</sup> The Business Court noted that "it is undisputed that the maintenance vendors had performed certain weld repair work on the tank car prior to the tank car rupture, and it is undisputed that Plaintiffs allege that the work they performed was negligent." [JA007448].

separate” from damage caused by the faulty workmanship of the third parties. Resp’ts’ Br. 29. Both the Business Court’s determination and Respondents’ argument are misplaced for multiple reasons.

First, the Business Court’s decision and Respondents’ argument are contrary to authority from numerous jurisdictions concluding that ensuing loss exceptions do not restore coverage when the alleged covered ensuing loss is directly related to the excluded peril.<sup>12</sup> The Fifth Circuit analyzed the mechanics of an ensuing loss clause in *Balfour Beatty Construction v. Liberty Mutual Fire Insurance Co.*, 968 F.3d 504, 512 (5th Cir. 2020). In that case, the insured argued falling slag that damaged windows during defective welding fell within the policy’s ensuing loss provision. *Id.* at 506-12. The Fifth Circuit found that the ensuing loss provision did not apply, and explained:

[A]n ensuing loss provision like the one presented here is only triggered when one (excluded) peril results in a distinct (covered) peril, meaning there must be two separate events for the Exception to trigger . . . . The welding operation is inseparable from the falling slag; they are not two separate events.

*Id.* at 511-12.<sup>13</sup> As a result, the court held the insured’s “claim is not covered because it falls within the Exclusion.” *Id.* at 512.

Here, every aspect of the Incident from the rupture of the tank car (faulty workmanship), the release and dispersion of chlorine (contamination), and the alleged damage to Natrium Plant equipment (corrosion) are all subject to unambiguous Policy exclusions.<sup>14</sup> Moreover, Respondents’ argument that the two-month gap between the faulty workmanship and the rupture

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<sup>12</sup> Respondents contend the Business Court “Correctly Disregarded the Insurers’ Non-Georgia Faulty Workmanship Cases.” Resp’ts’ Br. 26. Respondents’ suggestion that “non-Georgia cases” should be disregarded ignores that no party cited a controlling Georgia case addressing a faulty workmanship exclusion with an ensuing loss exception. It has long been the law in Georgia that while decisions from other jurisdictions are not binding, such decisions “will be considered . . . as persuasive authority, in the absence of a controlling precedent by either [the Georgia Court of Appeals] or the Supreme Court of [Georgia].” *Jones v. Milner*, 185 S.E. 586, 587 (Ga. 1936).

<sup>13</sup> The ensuing loss provision at issue in *Balfour Beatty Construction* stated: “if an act, defect, error, or omission as described above resulted in a covered peril, ‘we’ do cover the loss or damage caused by that covered peril.” *Id.* at 511.

<sup>14</sup> Respondents’ allegation that there is “no dispute that multiple, non-excluded causes of loss” ensued is patently false. Resp’ts’ Br. 7. Petitioners dispute that any covered loss occurred.

make it “apparent” that there was no “singular, continuous cause of loss” is unavailing and is belied by their own allegations against the third parties discussed in Petitioners’ Brief.

*Lantheus* supports the proposition that there is no coverage when the alleged ensuing loss is directly related to the exclusion. 255 F. Supp. 3d at 465. There, the Southern District of New York rejected the insured’s argument that it was entitled to coverage under the ensuing loss exception “because it has not raised a genuine issue of material fact that ‘a separate, subsequent event . . . occurred due to the [excluded peril].’” *Id.* The court held that “interpreting the insurance policy as Plaintiff proposes would contravene the corrosion exclusion’s purpose, as expressed in unambiguous language, which is to preclude coverage for damages caused by corrosion.” *Id.* (citation and quotations omitted). “[C]ourts have sought to assure the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk.” *Id.* at 463 (citation omitted); *see also Rapid Park Indus. v. Great N. Ins. Co.*, 502 F. App’x 40, 41-42 (2d Cir. 2012) (rejecting contention that water damage following deterioration was covered ensuing loss and finding such damage “was directly related to the original excluded risk”). If the alleged ensuing loss directly relates to the exclusion, there is no coverage.

These cases recognize that ensuing loss provisions do not apply where the alleged ensuing loss is not separate and distinct, but is instead directly related to the excluded risk. Here, in Respondents’ words, the third parties who performed work on the subject railroad tank car “breached their duty of care” by, among other things: “failing to use ordinary care in the fulfillment of their work” and “failing to comply with the standard of care in the industry in performing their work[.]” [JA005622; JA009954]. Again, in Respondents’ own words, it “has been damaged ***as a direct and proximate result of the [third parties’] negligent acts and omissions.***” *Id.* (emphasis added). Respondents cannot simultaneously maintain that faulty work by third parties is the “direct and proximate” cause of their alleged damage in one lawsuit, and then turn around in this coverage suit seeking the same damages and argue that a new cause intervened and broke the chain of causation from the faulty work.

Second, the Business Court’s finding (and Respondents’ corresponding argument) that the ensuing loss exception is implicated because the Policy does not predict all the various ways in which faulty workmanship could manifest in a loss has been rejected.<sup>15</sup> The New Hampshire Supreme Court addressed a similar issue in the context of an ensuing loss exception to a faulty workmanship exclusion in *Russell v. NGM Ins. Co.*, 176 A.3d 196 (N.H. 2017). There, faulty construction led to water intrusion, which led to moisture, which led to mold. *Id.* at 205-07. The insured argued that since “hidden and unknown accumulated moisture [was] not specifically excluded from the policy,” the ensuing loss exception applied. *Id.* at 206. The court rejected that argument and found that since it should have come as no surprise to the insured that faulty construction would permit water to enter a structure and eventually cause mold damage, a finding that the ensuing loss exception applied “essentially undoes the faulty workmanship exclusion.” *Id.*

The relevant inquiry is not whether the Policy expressly excludes “tank car rupture”, but rather whether the “tank car rupture” was caused by or resulted from faulty workmanship. As explained herein, there is no dispute that the railroad tank car ruptured as a result of faulty workmanship and no covered ensuing loss occurred. The Business Court’s ruling to the contrary was therefore in error.

### **III. THE CONTAMINATION EXCLUSIONS APPLY**

#### **A. The Contamination Exclusion in Endorsement No. 1 Applies to “Any Kind” of Pollution and/or Contamination**

Respondents, without any supporting caselaw, contend the court’s decision is supported by “well-established Georgia principles of contract interpretation.” Resp’ts’ Br. 30. However, when considering an insurance policy, “courts **look first** to the text of the policy itself.” *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 424 (Ga. 2016) (emphasis added). In doing so, courts cannot add words to the text. *See Nat’l Life & Accident Ins. Co. v. Wilson*, 127 S.E.2d 306, 308

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<sup>15</sup> Respondents argue that “chlorine spills” are not expressly excluded so they are always covered. Thus, according to Respondents, chlorine spills caused by “war” or “nuclear reaction” or “faulty workmanship” or “corrosion” are automatically covered. This is incorrect. A chlorine spill caused by fire would be covered, because fire is not excluded. A chlorine spill caused by faulty workmanship or corrosion is excluded. Whether or not the Policy explicitly identifies “chlorine spill” is a red herring.

(Ga. Ct. App. 1962) (citation and quotations omitted) (“It is the function of the Court to construe a contract of insurance as it is written, and the Court by construction cannot create a liability not assumed by the insurer[.]”).

The text of the Contamination Exclusion in Endorsement No. 1 provides that “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.” [JA000618] (emphasis added).<sup>16</sup> The exclusion applies to **any kind** of pollution and/or contamination and is not limited to the environmental context. The Business Court’s decision to the contrary improperly added words to the Policy.<sup>17</sup>

Finally, Respondents’ attempts to distinguish the cases cited by Petitioners involving the application of pollution exclusions to damage caused by exposure to chlorine are unavailing. For example, Respondents suggest that *Gulf Ins. Co. v. City of Holland*, No. 1:98-CV-774, 2000 WL 33679413 (W.D. Mich. April 3, 2000) is “inapposite” because the subject policy included an “express definition[.]” of “pollutant.” Resp’ts’ Br. 33-34 n.40. There is no question that chlorine is a pollutant or contaminant, so this distinction is meaningless. In *City of Holland*, the Court applied a pollution exclusion to an insured’s claim for property damage following a release of chlorine gas. 2000 WL 33679413 at \*4-6. The result should be the same here.

## **B. The Business Court Failed to Consider Controlling Georgia Authority**

The Business Court determined that the Contamination Exclusions are designed to only address environmental impairment. In doing so, the Business Court failed to acknowledge or

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<sup>16</sup> As noted in Petitioners’ Brief, there are two endorsements that include an exclusion precluding coverage for contamination and/or pollution. Endorsement No. 1 is in all policies. Endorsement No. 19 is only in the policy issued by National Union. Endorsement No. 19 does not include the “of any kind” phrase. Nonetheless, it also does not contain any language limiting it to the environmental context. Petitioners discussed both endorsements in their opening brief. Due to space limitation, this Reply Brief focuses on Endorsement No. 1, since it is in every policy at issue.

<sup>17</sup> Endorsement No. 1 includes several separate and distinct provisions that are clearly delineated by separate headings and names. [JA000618]. The Contamination Exclusion in Endorsement No. 1 does not mention environmental impairment. Further, the Debris Removal and Cost of Cleanup Extension in Endorsement No. 1 would be completely unnecessary if the Contamination Exclusion was limited only to environmental impairment. Finally, the Pollutant Cleanup and Removal (Land and Water) Extension in Endorsement No. 1 directly addresses the concept of land and water impairment and sets forth the limited circumstance in which coverage would be extended.



distinguish Georgia caselaw expressly rejecting the proposition that similar exclusions are limited to the environmental context.

The Georgia Supreme Court has “[e]xpressly reject[ed] the notion that a pollution exclusion clause is limited to industrial and/or environmental harm, [and] Georgia courts have repeatedly applied these clauses outside the context of traditional environmental pollution.” *See Ga. Farm Bureau*, 784 S.E.2d at 425.

While Respondents attempt to minimize the *Ga. Farm Bureau* decision by pointing out that the case involves a liability policy, the Georgia Supreme Court did not limit its holding to liability policies. The Georgia Supreme Court noted that Georgia courts have repeatedly applied “a pollution exclusion clause” outside the context of environmental pollution. For example, in *Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp.*, 378 S.E.2d 407, 409 (Ga. Ct. App. 1989), the Court of Appeals of Georgia upheld a ruling that bodily injuries sustained in an automobile accident were excluded by a pollution exclusion because the automobile accident was caused by the discharge of smoke from a fire. Georgia courts routinely apply pollution exclusions outside of environmental damage.<sup>18</sup> Thus, the Business Court erred by concluding that the Contamination Exclusions are limited to environmental impairment.

### **C. No Exception Applies**

The Contamination Exclusion in Endorsement No. 1 includes an exception that restores coverage in the event “insured property is the subject of direct physical loss or damage for which this company<sup>19</sup> has paid or agreed to pay . . . .” [JA000268]. The Business Court determined that even if the exclusion applied, this exception would restore coverage because the railroad tank car and chlorine at issue were owned by Respondents and suffered direct physical loss or damage.

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<sup>18</sup> Respondents’ reliance on *Recytech USA, Inc. v. Grane Ins. Co.*, No. 1:23-CV-05589-SEG, 2024 WL 5162408 (N.D. Ga. Sept. 30, 2024) is misplaced. In *Recytech*, the relevant policy provision excludes losses arising out of a “[r]equest, demand, order or statutory or regulatory requirement” that insureds test for pollutants, and the provision specifically excepted “damages because of ‘property damage’ that insured would have in the absence of” such request. *Id.* at \*9. Further, the damages at issue in *Recytech* concerned an EPA Demand Notice. *Id.* *Recytech* is distinguishable and totally inapplicable.

<sup>19</sup> “[T]his company” refers to the individual insurer who issued each respective policy.

[JA007471-472]. However, in making this ruling, the Business Court did not address the requirement that insured property must be the subject of direct physical loss for which the insurer “has paid or agreed to pay.” Petitioners have not paid or agreed to pay anything in this matter because Respondents’ claim is excluded.

Respondents argue the Business Court properly applied the exception by finding that “the language of the exception referring to insured property ‘for which this company has paid or agreed to pay’ as referring to property that the Insurers had agreed to cover under the terms and conditions of their Policies in connection with a covered peril.” Resp’ts’ Br. 35. The Business Court’s Order did not include this reasoning and, as discussed above, the exception is not triggered because Petitioners never agreed to pay for an excluded loss.

#### **IV. THE BUSINESS COURT ERRED IN GRANTING RESPONDENTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING BREACH OF CONTRACT AND DECLARATORY JUDGMENT AND FOR PREJUDGMENT INTEREST**

For the reasons stated herein and in Petitioners’ Brief, because one or more of the exclusions discussed above applies to bar coverage for Respondents’ claim, there was no breach of the Policy. Likewise, because there was no breach of contract, Respondents are not entitled to a declaratory judgment regarding Petitioners’ alleged breach of contract. Accordingly, the Business Court’s finding of a breach of contract is erroneous and should be reversed.

##### **A. Respondents Failed to Satisfy Conditions Precedent to Coverage Under the Policy**

The Business Court erroneously found that Petitioners’ argument that Respondents failed to comply with certain Policy conditions was “untimely” because it supposedly “was not pled in the Defendants’ Affirmative Defenses” and was not raised in a summary judgment motion. [JA000061]. Respondents do not contest Petitioners’ statement that they adequately pled the Policy Condition in their Sixteenth and Seventeenth Affirmative Defenses, but Respondents argue that “neither of those Defenses references or discusses any purported ‘duty to cooperate.’” Resp’ts’ Br. 36.

The Policy condition at issue, General Condition, Section C. 10 “Proof of Loss”, was properly and adequately pled in Petitioners’ Sixteenth and Seventeenth Affirmative Defenses.<sup>20</sup> [JA000612]. Specifically, Petitioners’ Seventeenth Affirmative Defense states, in part: “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: . . . Section C - General Conditions, paragraphs 7, 10, 11, 19 . . . .” *Id.* 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 timely providing all relevant documentation requested (including production of their expert’s damage assessment), which Respondents failed to do.

Regarding Petitioners’ Seventeenth Affirmative Defense, 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 Respondents’ duty to cooperate is evident from the plain language of the Policy provision and courts’ interpretation of similar provisions. Accordingly, Petitioners’ Seventeenth Affirmative Defense was timely and properly asserted, and the Business Court’s Order should be reversed.

#### **B. The Business Court Erred in Awarding Prejudgment Interest**

Respondents argue that West Virginia courts “**usually** apply an abuse of discretion standard” when reviewing an award of prejudgment interest. Resp’ts’ Br. 37 (quoting *Hensley v. W. Va. Dep’t of Health & Hum. Res.*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (W. Va. 1998)) (emphasis added). Respondents claim that Petitioners “have identified no clear error in the trial court’s judgment with respect to pre-judgment interest.” Resp’ts’ Br. 37.

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<sup>20</sup> Petitioners’ Sixteenth Affirmative Defense states: “Defendants plead and assert all of the terms, conditions, deductibles, limits, sublimits, provisions, exclusions, endorsements, and waiting periods of the Policy, all of which are incorporated herein by reference.” [JA000612].

Even under the abuse of discretion standard, the Business Court's award of prejudgment interest should be reversed. Because the Business Court erred in finding that Petitioners breached the Policy, since one or more of the exclusions apply to bar Respondents' claim, it was clear error and an abuse of discretion for the Business Court to award prejudgment interest.

However, even if Petitioners did breach the Policy (which Petitioners deny), the Business Court erred in awarding prejudgment interest in this case. Liability and damages have been strongly contested, as evidenced by the competing liability and damages summary judgment motions filed, two of which were granted in Petitioners' favor (regarding bad faith claims and the application of the asbestos exclusions). The case Respondents cite, *Delta Air Lines, Inc. v. Swissport USA, Inc.*, No. 11 CIV. 1544 NRB, 2012 WL 6763569, at \*1 (S.D.N.Y. Dec. 27, 2012), in which they claim the court rejected arguments similar to Petitioners', is inapposite. In *Delta* (which is not an insurance case), the defendant conceded liability for the subject claims and did not contest the claims arose out of its own nonperformance under a Master Agreement. In contrast here, Petitioners have not conceded liability and do contest Respondents' claim for coverage. Accordingly, the Business Court abused its discretion in awarding prejudgment interest and its Order should be reversed.

## **V. THE BUSINESS COURT ERRED IN DENYING PETITIONERS' MOTION FOR SETOFF**

### **A. Georgia Law Precludes Double Recovery**

Respondents fail to address or recognize 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)). Instead, Respondents continue to hinge their argument regarding setoff on a "mutuality" requirement in a Georgia statute, O.G.C.A. § 13-7-4, which is inapplicable.

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. Respondents mistakenly attempt to impose a mutuality requirement under O.G.C.A. § 9-13-75, where none exists. Resp'ts' Br. 39.

Notwithstanding the statutes, "[c]ourts possess inherent authority to set one judgment off against another[.]" and "such setoff rests in the discretion of the court." 50 C.J.S. Judgments § 880. The Business Court erred in failing to exercise such discretion in order to prevent a double recovery for the same damages.

**B. The Business Court Erred in Relying on Subrogation Principles**

"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). Respondents' attempt to distinguish *Masenheimer* by stating that it contained a policy provision regarding setoff does not change the fact that these concepts are completely different.

Subrogation is not applicable here, where 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 setoff by pursuing subrogation rights is incorrect as a matter of law and should be reversed.

**CONCLUSION**

For the reasons set forth above and in Petitioners' Brief, this Court should reverse the Business Court orders discussed herein and in Petitioners' Brief and remand the matter with instructions to grant summary judgment in favor of Petitioners.

Respectfully submitted the 24th day of April, 2025.

**DEFENDANTS BELOW / PETITIONERS,  
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## **CERTIFICATE OF SERVICE**

Service of the foregoing ***PETITIONERS' REPLY 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 24th day of April, 2025, as follows:

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