No. 25-ICA-17

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

WESTLAKE CHEMICAL CORPORATION and AXIALL CORPORATION,

Plaintiffs Below / Petitioners,

v.

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 / Respondents.

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

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Respondents respectfully submit this brief in support of the Business Court's ruling that Petitioners are collaterally estopped from relitigating the issue of the amount of damage to the subject plant and equipment. The Business Court's ruling is correct as a matter of law, and should be affirmed. Similarly, the Business Court's ruling that Respondents did not engage in bad faith in their handling of Petitioners' insurance claim is supported by the undisputed facts and correct under Georgia law, which is applicable to the bad faith claim allegations. Finally, the undisputed facts demonstrate that Petitioners are not entitled to pre-judgment interest at all, let alone as of the date on which they contend Respondents breached their contact. Accordingly, the Business Court's rulings on collateral estoppel and bad faith should be affirmed in their entirety, and Petitioners' claim to pre-judgment interest should be rejected.

I. STATEMENT OF FACTS

A. The Underlying Incident

On August 27, 2016, an old railroad tank car at Petitioners'[1] 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 location where the crack formed. [JA010081; 009881]. Following the Incident, the National Transportation Safety Board ("NTSB") issued a report noting that the "Probable Cause" of the

[1] Petitioner Axiall Corporation ("Axiall") is a wholly-owned subsidiary of Petitioner Westlake Chemical Corporation ("Westlake"), which acquired Axiall on August 31, 2016. For ease of reference, and consistent with Petitioners' Brief, Axiall and Westlake are sometimes hereafter collectively referred to as "Westlake". Pet. Br. 1 n.1.

[2] The Natrium Plant began chlorine manufacturing operations in 1943.

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, filed on August 24, 2018, by Axiall[3] against the same group of third-party contractors involved with the inspection, maintenance, and repair work performed on the tank car. One case was filed in the Court of Common Pleas 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 involved the same damages to the Natrium Plant that are being sought from Respondents. In those actions, Axiall claimed the negligent acts and omissions by the third-party contractors caused the alleged damage at issue in this matter. [JA009953-54; 005622].

On October 14, 2021, the jury in the Pennsylvania Action reached a verdict after more than a month of trial. [JA012422]. The verdict slip directed the jury to find the amount Axiall suffered in damage to the Natrium Plant and equipment. [JA007534]. In response to Question 14(a) of the verdict slip, the jury rendered the following verdict: "Damage to Natrium plant and equipment: $5,900,000.00." *Id.*[4] 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. [JA007530-34]. 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. [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]

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[3] Westlake acquired Axiall 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]. The Business Court has found that Westlake is in privity with Axiall for purposes of these actions. [JA011625-26].

[4] By Order of the Business Court dated March 3, 2022, Petitioners 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].

[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. The Superior Court remanded to the trial court to determine which portion of attorneys' fees, if any, directly related to the defense and

C. The Policy

Respondents (hereafter "Insurers") 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 Insurer, in issuing the policies, subscribed to certain "quota-shares" of the insurance for the Natrium Plant. The policies (collectively "Policy") each contain the same relevant terms, conditions, and exclusions, with one notable exception being that the National Union Policy, No. 020786808, contains an additional endorsement, Endorsement No. 19 – "Pollution, Contamination, Debris Removal Exclusion Endorsement." [JA000580; 000643].

Westlake's first act with respect to the Policy after its acquisition of Axiall and following the Incident was to immediately terminate it effective midnight on August 30, 2016, and secure $2,349,669 from Insurers in return premiums. [JA010082-83; 010470-71; 010335-40]. The Policy was cancelled effective August 31, 2016. [JA010082; 010470-73].

D. Adjustment and Investigation During 2016

The Policy, per the selection of Axiall, named Jon Carnahan ("Carnahan") of Cunningham Lindsey as the adjuster in the event of any reported loss. [JA000611]. Axiall's broker, Willis of New York, Inc., notified Carnahan of the Incident and Carnahan attempted to contact Axiall shortly thereafter. [JA010309-09; 010479-80].

After notifying the adjuster of the Incident, Axiall proceeded with making repairs 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, Westlake estimated the costs of the repairs to be approximately $1 million. [JA010332; 009913].

Carnahan suggested Insurers retain Engineering Design & Testing ("ED&T") to provide technical assistance during the investigation of the loss and an assessment of potential damage. [JA010479-80; JA010597]. ED&T conducted site visits on September 14, 2016 and September

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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).

20-21, 2016. During the first inspection, ED&T's Tom Traubert ("Traubert") verbally requested photographs and information regarding the condition of the Natrium Plant before the Incident from the Natrium Plant Manager, Jerry Mullens ("Mullens"), and other Axiall personnel. He was told they did not exist. [JA010647-49]. ED&T performed a visual inspection of equipment in the various operating departments and relied on the statements of Natrium Plant personnel to identify the as-reported changes in the equipment which they attributed to the Incident. *Id*.; [JA010640-41; 007380-82].

Through the end of 2016, Carnahan and ED&T continued to request information regarding Westlake's intentions for the potential claim, how Westlake was approaching the damage assessment, and followed up on their outstanding requests for information. They specifically inquired into the existence of any inspection reports for the Natrium Plant to help establish the pre-Incident condition of equipment. [JA010588-90; 011727-48; 010315-31].

Despite repeated requests for such information, no pre-Incident inspection reports were provided during the investigation, and pre-Incident photographs were not produced until November 2018, in excess of two years following the Incident. [JA011769-70]. In addition, Westlake failed to disclose during the investigation that it engaged metallurgists from Exponent, Inc. ("Exponent") in the fall of 2016 to investigate the root cause of the Incident and the extent of any impact to equipment at the Natrium Plant. [JA011743-44; 011772-75]. In fact, on November 3, 2016, Traubert reached out to Westlake for its plans for assessing the effects of the Incident and was told that it was "assessing any failures to determine if there [was] a corrosion impact or other impact that was caused by the release. Otherwise, [Westlake was] still looking for a methodology to assess long term impacts." [JA010321]. Westlake did not advise Traubert that metallurgists had been, and were still in the process of, testing and assessing the impacts of the Incident at that very time. [JA011776-77].

E. Exponent's Undisclosed 2016 Damage Assessment

On August 28, 2016, the day after the Incident, Axiall retained Exponent to evaluate the cause of the Incident and conduct a damage assessment of the Natrium Plant. [JA010663-66;

JA011781-83]. Despite specific requests from the adjustment team shortly after the Incident, it was not until 2021 that Insurers learned that in the months following the Incident, Exponent conducted extensive testing as part of its assessment of damage to the Natrium Plant and another plant downstream owned by Covestro, LLC ("Covestro"). [JA010671-74; 011795-96]. The results of Exponent's extensive testing in the fall of 2016—that there was no corrosion initiating or propagating following the release—are summarized in a 122-page PowerPoint Presentation. [JA010675-796].

Neither Axiall nor Westlake disclosed the results of Exponent's comprehensive 2016 analysis at any point during the adjustment of the Incident or before they filed suit. Insurers learned of this information in July 2021, when Westlake produced some of the information after Insurers filed a motion to compel withheld and redacted portions of Exponent's files. Indeed, neither the fact that Exponent was carrying out a damage assessment at the Natrium Plant nor, more importantly, the results of the testing, were shared with the adjuster or any of the technical consultants during the entirety of the investigation of this Incident. [JA011773-75; 011751-53].

F. Adjustment and Investigation During 2017

As noted, within weeks of the Incident and through the end of 2016, the adjuster was making repeated requests to Axiall and Westlake risk managers for information regarding their intentions with respect to the claim and whether a call could be scheduled. [JA010315-29]. These emails went substantively unanswered, until January 31, 2017, when Dan Brown, Axiall's in-house Risk Manager and attorney, emailed the adjuster explaining that the delays in responding were due to "litigation impacts" and the process of getting their claims preparer, Alice Edwards ("Edwards") of PricewaterhouseCoopers ("PwC"), "on board", and that a call could be scheduled to give a preview of "what we're thinking and where we're headed…." [JA010330-31].

Edwards retained metallurgist Dr. Paul Eason. [JA010808-09]. Edwards neither recommended any of the Exponent metallurgists who had already conducted a detailed assessment and investigation of any alleged damage at the Natrium Plant nor disclosed the existence or results of Exponent's comprehensive 2016 metallurgical testing. Dr. Eason was not informed of the

comprehensive 2016 Exponent testing when he was retained in February of 2017; rather, he first learned of this about a year after his initial retention, sometime in early 2018. [JA010840-42].

In September 2017, over one year after the Incident, Westlake provided, for the first time, an itemized list of expenses incurred after the Incident totaling $1.1M (well below the Policy's $3.75 million property damage deductible), which was approximately the same figure noted by Axiall's Risk Manager two weeks after the Incident. [JA004769-71]. This list, however, did not provide necessary details such as (i) the specific equipment that was repaired or replaced; (ii) why the equipment was repaired or replaced; or (iii) the location of the equipment within the Natrium Plant. [JA011809; 004769-71].

The adjuster reported to Insurers on September 13, 2017, advising that he and ED&T were working as quickly as possible to put estimated dollar figures on the rough order of magnitude of Westlake's potential claim for alleged damage. [JA004767]. The adjuster further informed Insurers that Westlake would solicit bids for the replacement of lagging and banding that covered piping throughout the Natrium Plant. *See id.*

On December 13, 2017, ED&T and the adjuster met with Westlake personnel at the Natrium Plant to discuss the proposals for lagging and banding replacement that Westlake had solicited from two different contractors (a third was received after the meeting), and to discuss the results of metallurgical testing conducted on various instruments, electrical components, and equipment samples. [JA006482-83; 011803-05; 010817-37].

ED&T worked with Westlake to develop a preliminary rough order of magnitude of potential corrosion damage based on: (i) Westlake's representations of the condition of the equipment, instruments, and electrical components at the Natrium Plant prior to the Incident; (ii) preliminary review of data presented by Dr. Eason; and (iii) ED&T's visual inspection of various equipment, lagging and banding, instruments, and electrical components. [JA011764]. This preliminary estimate assumed replacement of all the lagging and banding, instrumentation, and electrical distribution equipment within the reported plume zone. *See id.*

As of December 2017, Westlake did not believe that all the lagging and banding,

instrumentation, and electrical distribution equipment in the Natrium Plant exposed to the chlorine from the Incident required replacement. Immediately after the December 13, 2017 meeting at the Natrium Plant, Plant Manager Mullens reported to his superiors "the crazy high dollar amounts the adjusters [were] throwing around as potentials." [JA010362]. The example used to represent the "crazy high dollar amounts" was the $190M for electrical, which "assume[d]" Westlake had to replace "every piece of electrical distribution in the impacted area from 6,900 volt down to 120 volt." *Id.* Mullens described the numbers as "not of much value," except for the prospect that Westlake would be "doing significant equipment replacement." *Id.*

G. Adjustment and Investigation During 2018

The rough order of magnitude estimate developed by ED&T and Westlake in December 2017 provided a potential range of alleged damage of $220-404M.[6] [JA006483-84]. Until December 2017, the adjuster had reported a rough order of magnitude estimate of $15M and the only incurred cost figure provided by Westlake totaled $1.1M. [JA004769-70]. Although Carnahan had reported that the $15M estimate was expected to increase, the exponential growth of the rough order of magnitude in the December 2017 estimate and the nearly $200M delta between the high and low range demonstrated that significant technical work was needed to refine and vet the actual extent of any alleged damage at the Natrium Plant attributable to the Incident. Insurers asked Shelby "Roe" Vaughn ("Vaughn"), a senior Sedgwick adjuster who had been the named adjuster on the Axiall (and its predecessors) account before Carnahan, to be the lead technical adjuster due to Vaughn's extensive experience as an adjuster and with this specific account. [JA011722]. Carnahan continued to work with Vaughn on the investigation and adjustment of the potential claim. [JA011749-50]. Westlake was aware of Vaughn's involvement in the claim and never complained about it. *Id.*

[6] Had ED&T and others had access to the Exponent report and the pre-Incident photographs of the Natrium Plant, it is unlikely that anyone would have arrived at anything close to the broad potential range provided to Insurers. That figure range *assumed* the replacement of all property exposed to the release and was based upon the information the adjuster and consultant had as of December 2017, such as Westlake's representations that the corrosion was not pre-existing.

Between December 2017 and January 2018, Insurers appointed additional technical consultants with appropriate expertise in order to properly analyze the impact, if any, of the Incident on the Natrium Plant and to assess the nature, type, and scope of any alleged damages. This undertaking required specialized knowledge regarding metallurgy, chemistry, sampling and testing of surface deposits, dispersion analysis, electronics, and contamination. [JA011723-24]. Insurers' technical consultants, including Failure Analysis & Prevention, Inc., Telcordia, Werlinger & Associates, and ED&T, made multiple visits to the Natrium Plant during 2018 to assess the nature, type, and scope of any alleged damages.

On January 18, 2018, Insurers, through the adjuster, issued a detailed and comprehensive reservation of rights letter to Westlake. This letter identified, among other things, various provisions of the Policy that were determined to likely impact coverage and how the Policy may respond to any claim eventually made under the Policy. [JA006486-94].

On January 26, 2018, the adjuster issued a Request for Information that included 46 separate line items of information needed from Westlake. This list included, *inter alia*, pre-Incident photographs of the Natrium Plant and the results of any tests conducted by Westlake's retained consultants regarding potential damage at the Natrium Plant. [JA010901-02].

In late February 2018, Westlake's Risk Manager, Jim Terry ("Terry"), contacted Dr. Eric Guyer of Exponent regarding his retention for technical services related to the Incident and the additional consultants engaged by Insurers in January of 2018. [JA010857]. During a meeting with the adjusters in February 2018, Westlake's claims preparer, Edwards, mentioned that Exponent did perform some testing onsite in 2016, even though the adjusters had previously been told Exponent was not actively involved. [JA010910]. At the adjusters' insistence, Exponent provided a report, which consisted of a selection of 21 slides from Exponent's 2016 122-page PowerPoint that only discussed the results of ten wipe samples that had been taken and analyzed for the presence of chlorides in 2016. [JA010910-33]. The other 101 slides from the 122-page PowerPoint describing the extensive metallurgical analysis, chamber testing, salt fog testing, etc., and the results and conclusions reached by Exponent in 2016 were not provided. Other than this limited

information, Westlake never advised the adjuster, ED&T, or Insurers of the entirety of Exponent's comprehensive 2016 damage assessment or the conclusions reached. [JA011751-53].

Prior to May 2018, Westlake could not provide documents to support replacement or repair costs in excess of the Policy's $3.75M property damage deductible. [JA010363-68]. On April 25, 2018, Westlake's Risk Manager reported to Westlake management that they (risk management and PwC) "have been trying for many months to obtain purchase order documentation from Natrium, concerning the replacement/repair costs to date, in order to file a Proof of Loss (POL) document with Axiall's legacy insurers. The amount of the claim has to exceed Axiall's property damage deductible of $3,750,000.00 before such a POL is justified." [JA010363-68]. Similarly, on May 2, 2018, Sue Stansbury (Westlake Senior Risk Analyst) expressed her opinion internally that the adjusters would "run us ragged with all kinds of tests and/or responses, but what we really need to focus our time on is getting items repaired or at least scheduled for repair, so we can get the claim value over our deductible. I would prioritize that over replying to these requests." [JA010369-70].

As of May 8, 2018, almost twenty-one months after the Incident and with the Natrium Plant running 24 hours a day, 7 days a week since September 2, 2016, Edwards reported to Westlake that their highest "[s]upported claim amount" (costs with either an invoice or purchase + internal labor) that could be submitted to Insurers totaled $2,946,297, which was more than $800,000 below the Policy's $3.75M property damage deductible. [JA010810-11].

Nevertheless, on May 14, 2018, Westlake sent a letter to the adjuster, noting "[c]osts incurred by Westlake since repairs were initiated *have exceeded, or will soon exceed, the $3,750,000 deductible* applicable to property damage loss under the [Insurers'] policies" and advising it would "continue to make additional submissions" as "additional amounts are incurred for repairs going forward." [JA010871-72] (emphasis added).

On May 18, 2018, Natrium Plant personnel released Westlake Purchase Order ("PO") No. 4400163845 to George V. Hamilton, an insulation contractor, in the amount of $2M, which consisted of: (i) replacement of metallic insulation coverings and all insulation and insulation

covering banding; (ii) support for corrosion under insulation inspections; (iii) installing labels onto lines during lagging and banding repairs; and (iv) repair and/or replacement of insulation that is damaged due to replacement of insulation coverings, banding, and corrosion under insulation findings and/or repairs. [JA010357-60]. This PO was issued to the contractor for future work. No work had been done, and no costs had been incurred, as of the date of the PO. [JA011786-91]. In fact, Hamilton's work pursuant to this PO ended up costing less than half of the estimated amount, approximately $700,000 to $800,000. [JA011789].

On May 22, 2018, Westlake for the first time submitted a claim purportedly above the Policy's property damage deductible, in the amount of $5,764,231 (totaling $2,014,231 after application of the Policy's $3.75M property damage deductible). [JA010859-61]. This claim was submitted four days after the issuance of the $2M purchase order, four months after Insurers 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 Westlake, and approximately twenty-one months after the Incident. [JA006486-94]. As presented, the claim consisted of costs to repair or replace property that was allegedly affected by exposure to chlorine following the Incident, including costs to store allegedly damaged parts, internal labor expenses, and engineering fees. Of the claimed costs, $4,976,204 were purchase orders, including the $2M Westlake PO No. 4400163845, for which there had been no expenditure by Westlake as of May 22, 2018. [JA011819].

In his May 22, 2018 letter transmitting the first partial proof of loss, Terry advised Insurers, "[a]s previously noted, as additional amounts are incurred for repairs going forward, Westlake will continue to make additional submissions." [JA010859]. Westlake made no additional submissions until March 20, 2019.

Two days later, on May 24, 2018, the adjuster, on behalf of Insurers, responded to the partial proof of loss, reiterating Insurers' reservation of rights and advising the information provided with the partial proof of loss was under review. Westlake was again advised of the coverage issues. [JA010863-70]. Insurers agreed to extend the Policy suit limitation period as

requested by Westlake in its May 14, 2018 letter to the adjuster. [JA010871-77].

On June 20, 2018, Insurers, through the adjuster, issued a letter to Westlake advising of the need for additional time to evaluate the Policy's response to this loss, investigate the root cause of the Incident, and to properly adjust and investigate the particular "committed costs" submitted by Westlake as part of the May 22 partial proof of loss. Insurers reminded Westlake of the coverage implications and potentially applicable exclusions noted in their January 18 reservation of rights letter and reiterated their invitation for Westlake to respond in kind regarding its position as to coverage. Insurers also raised questions regarding Westlake's actual expenditures (which did not exceed the $3.75M deductible) and the $2M PO No. 4400163845. [JA010878-81]. Insurers issued a similar letter on August 3, 2018. [JA010882-84].

On August 15, 2018, Terry issued a letter in response to the adjuster's May 24, June 20 and August 3, 2018 letters on behalf of Insurers. In response to the Policy provisions cited in Insurers' January 18, 2018 reservation of rights letter, Westlake expressed, for the first time, its view that none of the cited provisions applied to bar or limit coverage. [JA010885-89]. Insurers, through the adjuster, responded to Terry's August 15 letter on September 7, 2018, explaining that Westlake's coverage views relative to the ensuing loss exceptions of the faulty workmanship and corrosion exclusions failed to demonstrate the occurrence of a covered ensuing loss because any resulting corrosion and/or chlorine contamination resulting from the railroad tank car rupture and release would fall under Policy exclusions. [JA008493-96].

Insurers, through the adjuster, issued letters to Westlake on September 17, October 3 and November 1, 2018, noting the reasons additional time was needed to investigate Westlake's May 22, 2018 claim, including that certain information needed from Westlake remained outstanding. [JA010890-99].

Nearly ten months after Insurers identified the Policy's corrosion exclusion as potentially barring coverage for alleged damage caused by the Incident, Westlake expressed its view that the Policy "expressly cover[s] -- physical loss or damage in the form of corrosion." [JA011813]. Shortly after, in November 2018, after repeated requests by Insurers 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 chlorine plant and equipment prior to the Incident. [JA010095; 010591-93]. After reviewing the photographs, ED&T concluded that the corrosion that Westlake had reported as not having existed prior to the Incident actually did exist prior to the Incident. [JA011759-61; 011768].

On December 10, 2018, Westlake advised Insurers that it was in the process of preparing a supplement to the May 22, 2018 partial proof of loss, which it anticipated submitting in early 2019. According to Mullens, the Natrium Plant Manager, Westlake's legal team wanted to give the total estimate to Insurers at one time, but its Risk Management wanted to take "one component of the claim and attempt to force the insurers to either deny the claim and [sic] or enter negotiations." [JA010372]. Mullens further stated that "[t]here's definitely a chance the insurers may choose to deny the claim and we would then immediately file suit," even though the email notes that the technical reports supporting the claim estimate were not ready and would not even be ready in January of 2019. *Id.*

On December 19, 2018, Insurers' technical consultants presented Insurers with their preliminary observations and opinions based on the testing and analyses that had been performed in 2018. The consultants presented an update regarding their investigation into the cause of the Incident and confirmed that the alleged damage to the equipment, lagging, and banding was contamination (from chlorine and other contaminants, such as sulfates) and/or corrosion. [JA010553-87]. Insurers were also given a presentation regarding the pre-Incident plant photographs finally provided by Westlake in November of 2018 that demonstrated widespread corrosion and particulates within the Natrium Plant unrelated to the Incident and depicted equipment in similar condition both before and after the Incident. *Id.*

H. Adjustment During 2019

On January 28, 2019, after Insurers' technical consultants had completed their review of the photographs, as well as their investigation of the cause of the Incident, and the nature and extent of any alleged damage, the adjuster conveyed Insurers' denial of Westlake's May 22, 2018

claim based on the application of multiple Policy exclusions, including the Policy's corrosion exclusion, faulty workmanship exclusion, and pollution/contamination exclusions. [JA006542-48]. This letter invited Westlake to respond in writing and to provide any authorities in support of its position that the claimed costs should be covered under the Policy. *See id*.

Westlake did not provide a substantive response to Insurers' January 28, 2019 letter. Rather, Westlake submitted another sworn proof of loss on March 20, 2019, nearly thirty-one months after the Incident, for the same type of damages, but this time in the much larger amount of $278,505,078 gross of the Policy's $3.75M property damage deductible. [JA009941-45]. Westlake stated that the total claim was for damages and expenses incurred "as of March 20, 2019." [JA009941]. The incurred costs claimed by Westlake remained nearly unchanged from those listed in the May 22, 2018 partial proof of loss, but it added more than $250M in estimates, as well as additional estimated contingency costs that **might** be incurred if and when any work was ever done. [JA009941-45].

According to Westlake's corporate designee, Paul Linder, who also signed the second sworn proof of loss, substantially all of the damages claimed in the second sworn proof of loss submitted to Insurers are for corrosion damage to property. [JA011822-25].

On April 9, 2019, Insurers denied the updated claim on multiple grounds, including the corrosion, faulty workmanship, asbestos, and contamination exclusions in the Policy. [JA008633-40]. In addition to the coverage defenses, Insurers explained, in detail, that the documentation submitted in support of the March 20, 2019 Proof of Loss was inadequate and/or insufficient. *Id.*

II. PROCEDURAL HISTORY

On April 9, 2019, Insurers filed a lawsuit in Delaware state court seeking a declaratory judgment regarding the lack of coverage for Westlake's insurance claim.

The next day, Westlake 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].[7] Insurers subsequently moved for a declaration that Georgia law governed the dispute and to dismiss Westlake's claims under West Virginia law in Counts IV and V of the Complaint, as well as Westlake's 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 Insurers' 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 Westlake's motions for partial summary judgment as to the corrosion, faulty workmanship, and contamination exclusions and denying Insurers' motions as to those exclusions. [JA011364-74; 011375-84; 011385-95]. The Business Court granted summary judgment in favor of Insurers as to the asbestos exclusions. [JA007454-63].

On March 3, 2022, following the verdict reached in the Pennsylvania Action on October 14, 2021, the Business Court entered an Order Granting Insurers' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible ("Collateral Estoppel Order"). The Business Court found, as a matter of law, that pursuant to the doctrine of collateral estoppel, Westlake's 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 [Westlake's] Rule 59(e) Motion to Alter or Amend. [JA000015-25].

[7] The Delaware court stayed Insurers' action in favor of the Marshall County action, and the Marshall County Circuit Court denied Insurers' motion to dismiss or stay. The Circuit Court transferred the case to the Business Court Division.

On May 8, 2024, the Business Court entered an Order Granting [Insurers'] 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 ordered Westlake to file a motion for summary judgment regarding the breach of contract claim and ordered Insurers to file a motion briefing the issue of a potential setoff of the judgment in the Pennsylvania Action. *Id.*

On September 3, 2024, Westlake filed its Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-judgment Interest, and Insurers filed their Motion for Setoff. [JA008597]. On December 10, 2024, the Business Court entered an Order denying Insurers' Motion for Setoff. [JA012647; 012654].

On December 10, 2024, the Business Court also entered an Order Granting [Westlake's] 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 Westlake 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.

Westlake filed its Notice of Appeal on January 9, 2025, alleging the Business Court erred in granting Insurers' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict; erred in granting Insurers' Motion for Summary Judgment Concerning Bad Faith Claims (the "Bad Faith Order"); and erred in concluding that pre-judgment interest began to accrue from the date judgment was entered in the Pennsylvania Action (August 10, 2022), rather than thirty days after the issuance of the partial proof of loss for the insurance

claim at issue in this case (June 21, 2018).[8] [JA012769]. These alleged errors are without merit as set forth below.

SUMMARY OF THE ARGUMENT

I. The Business Court Properly Applied the Doctrine of Collateral Estoppel to Preclude Re-Litigation of the Amount of Damage to the Natrium Plant and Equipment

The collateral estoppel issues before this Court are simple: 1) whether the Pennsylvania jury decided the amount of damage to the Natrium Plant and equipment; and 2) whether Westlake had a full and fair opportunity to litigate this issue in the Pennsylvania Action. The answer to both questions is yes; thus, the Business Court's application of collateral estoppel and its corresponding order should be affirmed.

Westlake challenges the Business Court's conclusion that the Pennsylvania jury considered and determined the identical damage Westlake seeks for damage to the Natrium Plant and equipment in the instant matter. Westlake conceded in its Petitioners' Brief that the Business Court "is correct that the quantum of physical damage that the Tank Car Rupture caused at the Plant is the same regardless of any theory of liability." Pet. Br. 24. Thus, even under Westlake's assessment, if the Pennsylvania jury was "asked to determine the quantum of physical damage" to the Natrium Plant and equipment, the jury decided the identical damage Westlake seeks to the Natrium Plant and equipment in this matter. As set forth herein, the undisputed facts establish that the jury in the Pennsylvania Action was instructed to, and did in fact determine, the quantum of physical damage to the Natrium Plant and equipment. This is apparent from the court's instructions to the Pennsylvania jury, the clear wording of the verdict slip, acknowledgements in post-trial briefing in the Pennsylvania Action, and Westlake's description of the verdict in the Pennsylvania Action in its own fillings in this matter.

[8] Insurers filed their own Notice of Appeal on January 9, 2025, alleging the Business Court erred in granting Westlake's motions for partial summary judgment on the corrosion, faulty workmanship, and contamination exclusions; erred in granting Westlake's motion for partial summary judgment regarding Declaratory Judgment, Breach of Contract, and for Pre-judgment Interest; and erred in denying Insurers' Motion for Setoff. [JA012655-94]. If this Court grants Insurers' appeal on *any* one of the exclusions, the instant appeal regarding bad faith, collateral estoppel, and pre-judgment interest will be moot.

In addition, Westlake admitted numerous times throughout the progression of the litigation in the Business Court, including in sworn interrogatory responses, on-record statements from its counsel, and sworn deposition testimony, that the amount sought for alleged damage to the Natrium Plant and equipment in the Pennsylvania Action is the same amount sought in this action. These admissions leave no room for doubt that the Business Court properly determined that "the two matters involve identical alleged Natrium plant and equipment damages." [JA000010].

Westlake also challenges the Business Court's determination that it had a full and fair opportunity to litigate the damage to the Natrium Plant and equipment in the Pennsylvania Action. This is without merit. Westlake's assertion that it was denied a full and fair opportunity is based entirely on the Pennsylvania court's ruling on a motion in limine that **Axiall filed**. Axiall not only filed the motion, Axiall also drafted the order which it now uses to allege it was denied a full and fair opportunity. These facts alone defeat Westlake's argument with respect to the "full and fair opportunity" collateral estoppel element. Because Westlake concedes that the Pennsylvania court's ruling granting the motion in limine it filed prevented it from introducing certain specific evidence, and it never asserted this evidentiary ruling *in its favor* as a ground for appeal despite appealing other rulings in the Pennsylvania Action, there is no factual basis to support Westlake's argument that it was precluded from having an opportunity to introduce anything in the Pennsylvania Action.

Finally, the "full and fair opportunity" collateral estoppel element does not consider whether a party might have been able to present more or better evidence in a later proceeding; it considers whether the party had an opportunity to litigate the matter at issue in the earlier proceeding. Here, as the Business Court pointed out, Axiall had ample opportunity to litigate the amount of damage to the Natrium Plant and equipment for weeks during the Pennsylvania trial. For these reasons, and as set forth in more detail below, the Business Court's application of collateral estoppel was appropriate and should be affirmed in all respects.

II. The Business Court Correctly Applied Georgia Law to Grant Insurers' Motion for Summary Judgment Regarding Bad Faith

Next, Westlake asserts that the Business Court erred by misapplying the standard for bad faith under Georgia law and "in concluding that there were no genuine disputes of fact relating to Insurers' mishandling of Westlake's claim." Pet. Br. 30-31. These assertions of error are without merit; the Business Court properly granted Insurers' Motion for Summary Judgment Concerning Westlake's Bad Faith Claims and its Order should be affirmed.

Westlake failed to meet its burden to prove that Insurers' denial of its claim was motivated by bad faith, as required under Georgia law. Under Georgia law, a finding of bad faith is not permissible where the insurer has *any reasonable ground* to contest the claim and where there is a disputed question of fact as to liability under the policy. Georgia courts have long recognized that statutes such as O.C.G.A. § 33-4-6 that act as a penalty are disfavored as a matter of law. Westlake failed to satisfy its high burden under O.C.G.A. § 33-4-6.

As recognized by the Business Court, while the issue of whether an insurer acted in bad faith can go to the jury under some circumstances, when there is no evidence of unfounded refusal to pay, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties. Notably, this rule applies *even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith*.

While Westlake may disagree with the Business Court's conclusions, there is no evidence it misapplied Georgia law to Westlake's bad faith claim. The Business Court properly concluded that Insurers had legitimate, reasonable grounds to deny the claim based on the application of various exclusions after a good faith investigation, and granted Insurers' motion for summary judgment regarding the application of the asbestos exclusion. Moreover, the findings show that the issue of liability was heavily contested. Whether or not Insurers' invocation of the Policy

exclusions at issue in this appeal is ultimately upheld by this Court does not change this conclusion.

III. Westlake's Pre-Judgment Interest Arguments Are Without Merit

Finally, Insurers contend that pre-judgment interest should not be awarded. However, in the event pre-judgment interest is awarded, Westlake's chosen accrual date is much too early and unsupported in fact or law. Westlake acknowledges that if pre-judgment interest is awarded, it is from the date of the breach. Westlake seeks pre-judgment interest beginning June 21, 2018, thirty days after it submitted its first unsupported Partial Proof of Loss. That Proof of Loss is not referenced in the Complaint, as it was "supplemented," and, in fact, subsumed and replaced by the March 20, 2019 Proof of Loss. Westlake put forth no evidence of a breach of the Policy on June 21, 2018. Accordingly, if pre-judgment interest is warranted, the Business Court's ruling that it would commence as of the August 10, 2022 entry of judgment in the Pennsylvania Action should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Insurers agree with Petitioners that oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a).

STANDARD OF REVIEW

This appeal is before the Court for review of the Business Court's Orders granting 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). Application of this standard in this matter should result in an order affirming the Business Court's Collateral Estoppel Order and Bad Faith Order. *See Dosch v. Dunn*, No. 20-0803, 2022 WL 1556118, at *4 (W. Va. May 17, 2022) (affirming circuit court's grant of summary judgment where court properly applied collateral estoppel to require petitioner to "abide by the

very facts they themselves established in the earlier litigation . . . ."); *Upton v. Liberty Mut. Grp., Inc.*, No. 16-0354, 2017 WL 1423164, at *7 (W. Va. Apr. 21, 2017) (affirming circuit court's grant of summary judgment in favor of insurer on bad faith claim).

ARGUMENT

I. THE BUSINESS COURT'S ORDER GRANTING INSURERS' MOTION FOR SUMMARY JUDGMENT REGARDING COLLATERAL ESTOPPEL WAS PROPER AND SHOULD BE AFFIRMED

A. The Two Collateral Estoppel Elements at Issue in Westlake's Appeal[9]

The parties agree that the effect of the jury verdict in the Pennsylvania Action in the instant matter is governed by Pennsylvania law. *See Jordache Enters., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 513 S.E.2d 692 (1998) (applying New York law to determine whether collateral estoppel applied to New York judgment from prior action); *see also* Pet. Br. 21-22. Pennsylvania courts generally consider four necessary elements when determining whether collateral estoppel precludes litigation of a matter decided in prior litigation. *Ream v. Commonwealth Dep't of Pub. Welfare*, 500 A.2d 1274, 1276 (Pa. Commw. Ct. 1985). These elements include: 1) whether an issue decided in a prior action is identical to one presented in a later action; 2) whether the prior action resulted in a judgment on the merits; 3) whether the party against whom collateral estoppel is asserted, or one in privity therewith, was a party to the prior action, or is in privity with a party to a prior action; and 4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Id.*; *see also Pucci v. Workers' Comp. Appeal Bd.*, 707 A.2d 646, 648 (Pa. Commw. Ct. 1998).[10]

The Business Court thoroughly analyzed the elements, determined that all are met, and found "as a matter of law that pursuant to the doctrine of collateral estoppel, [Westlake's] claim for damage to the Natrium plant and equipment has been determined to be $5.9 million as a matter

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[9] As previously stated, Westlake acquired Axiall four days after the Incident. *See supra*, n.3. Axiall is a wholly-owned subsidiary of Westlake. Petitioners refer to Westlake and Axiall collectively as "Westlake" and Petitioners do not dispute the third element of collateral estoppel regarding identity of the parties.

[10] Some Pennsylvania courts require a fifth element, whether the issue determined in the prior action was "essential" to the previous judgment. *See Pitney Rd. Partners, LLC v. Murray Assocs., Architects, P.C.*, No. 2253 MDA 2013, 2014 WL 10575406, at *4 (Pa. Super. Ct. Sept. 18, 2014).

of law, prior to the application of the appropriate $3.75 million deductible." [JA000013]. While Westlake initially briefed all the elements to some extent in response to the relevant partial motion for summary judgment, it presented only two of the factors for review to the Business Court in a Rule 59(e) motion and to this Court for review on appeal—elements one and four. [JA007572-88]; *see also* Pet. Br. 21-30.

The Business Court properly determined that the jury in the Pennsylvania Action considered and determined, as a matter of law, an issue identical to one presented in the instant matter—the monetary value of the damage the Incident caused to the Natrium Plant and equipment. The Business Court also properly determined that Westlake had a full and fair opportunity to litigate this issue, and did, in fact, extensively litigate the issue, during a lengthy trial that resulted in a multi-million-dollar judgment. The Order should therefore be affirmed.

B. The Verdict for Damage to the Natrium Plant and Equipment in the Pennsylvania Action Was for Damages Identical To Those Sought in the Instant Matter

1. Westlake's Admissions Reveal the Identical Nature of the Natrium Plant and Equipment Damage Sought in Both Actions.

Westlake erroneously contends on appeal that the verdict in the Pennsylvania Action for damage to the Natrium Plant and equipment did not decide an issue identical to any issue presented in this matter. Pet. Br. 23-28. This argument is belied by Westlake's admissions throughout this lawsuit that the amount sought for alleged damage to the Natrium Plant and equipment in the Pennsylvania Action and in this action is the same.

While Westlake undertook to undo its admissions after Insurers moved for partial summary judgment to enforce the Pennsylvania jury's Natrium Plant damages verdict, it cannot counter or undo the following statements from its pleadings, sworn interrogatory responses, on-record statements from its counsel, and sworn deposition testimony, which leave no doubt that the amount sought for alleged damage to the Natrium Plant and equipment in the Pennsylvania Action is the same amount sought in this action:

- Westlake pleaded in its Complaint in this matter that "the Incident caused or resulted

in physical loss or ***damage to insured property at the Natrium Plant*** . . . and for which Westlake is seeking payment from Defendants." [JA000243] (emphasis added).

- The jury in the Pennsylvania Action, in a verdict slip Westlake submitted to the court, returned a verdict of $5,900,000.00 for "Damage to Natrium plant and equipment." [JA007534].

- In response to Interrogatory No. 5 in this lawsuit, which asked Westlake to identify other lawsuits filed for alleged damage resulting from the chlorine release and to identify the amount claimed, Westlake identified the Pennsylvania Action and stated, in relevant part, as follows concerning the damages claimed in the Pennsylvania Action:

  > Amount Claimed: $305,012,821. ***This amount is comprised of the $278,505,078 amount set forth in Plaintiffs' March 20, 2019 proof of loss to the insurer Defendants in this case***, plus amounts not claimed in this action, including: (a) $3,540,278 in lost production at the Natrium facility, (b) $19,781,257 in damages claimed by Covestro, which owns the facility downwind from the Natrium Plant, and $3,186,208 paid by Plaintiffs in connection with various third-party claims arising out of the tank car rupture and chlorine release. [JA011432-33] (emphasis added).

- On August 31, 2021, during an on-record hearing before Judge Clawges (who served as Discovery Commissioner), Westlake's counsel stated as follows when attempting to explain how Westlake has supported its damages claim in the instant action:

  > It's not as though, right, our only information here are the lists of damaged equipment. ***I believe your Honor knows that there's an action – it's, sort of, dual-track in Pennsylvania*** but also in front of Judge Wilkes in West Virginia, where Axiall has sued Rescar, AllTranstek, and Superheat, the railcar vendors who worked on the car before it cracked open. That case involves not all the same damages but roughly the same damages. ***Certainly***, ***all the damages to the plant***. [JA011416] (emphasis added).

- Westlake's Rule 30(b)(7) designee testified, under oath, as follows concerning Westlake's claimed damages in the instant matter and in the Pennsylvania Action:

  > Q. So when you have had vendors like Mr. Haag helping with claim preparation, for lack of a better word, assisting in figuring out the estimates to put in the claim, is their work being used solely for this case or is it being worked in a – used in other matters as well, to your knowledge?
  >
  > A. There – the – that effort that the – engineering time that we've charged to the claim is associated with the engineering effort to replace the equipment that's been damaged and also put together the claim. The two are – kind of go hand-in-hand because putting together the information that we

> need to refresh the claim is a part of – you know, that same effort is a part of, you know, working towards getting the equipment replaced.
>
> Q. Well, so maybe my question wasn't clear. So I understand how it's – how it's being used in this case, but there's another case; correct? Is it being used in the other case against the – ***I guess the case that went to trial, that's in trial right now in Pennsylvania?***
>
> ***
>
> A. Yes. ***So the original estimate that we had put together for the total claim in March of 2019 and the revision that was for July where we made those couple of corrections, the – you know, I know that those are being used as a part of the damages claim in the other case.***

[JA011664-67] (emphasis added).

In light of these admissions that the Pennsylvania Action and the instant action involve the exact same claimed amount for alleged damage to the Natrium Plant and equipment, Westlake's suggestion that the damage issue determined in the Pennsylvania Action is somehow different from the damage issue in this case has no basis in fact and is wrong.

Moreover, in addition to Westlake's own admission, the record in the Pennsylvania Action shows the amount claimed for damage to the Natrium Plant and equipment in that case is the same as that claimed here. As noted above, in the instant action, Westlake's verified interrogatory response stated that its claimed damages in the Pennsylvania Action include approximately $278,000,000 *as set forth in its proof of loss to Insurers*, approximately $3,500,000 in lost profits, and additional amounts for claims by third parties. The jury verdict slip in the Pennsylvania Action is consistent with Westlake's interrogatory response, asking the jury to specify its damages award for three categories of damages, as Westlake did in its interrogatory response: "a. Damage to Natrium plant and equipment"; "b. Payments to third parties for property damage"; and "c. Lost profit[.]" [JA007534]. Moreover, in Westlake's closing argument, its counsel told the jury that the dollar figure for Westlake's claimed property damage was $278,000,000, the same number in the March 20, 2019 Proof of Loss submitted to Insurers, minus a deduction for corrections:

> This is the bottom line number ***for property damage***, and this is an Exhibit 7730.1. You will recall testimony that we went back before the trial and we re-evaluated ***our original March 2019 engineering estimate***. When we re-evaluated it, we made

> some corrections. We found some mistakes, and you remember what happened. We actually deducted $7 million, much more than what the Defendants contend we are entitled to recover. We deducted $7 million from the total. That totals [sic] is ***$271,475,170***.

[JA007914] (emphasis added).

The fact that the jury found that the actual amount of Westlake's damages was $5.9M is consistent with the evidence presented during the trial, which included Westlake's March 20, 2019 claim submission to Insurers. That submission included a spreadsheet entitled "Westlake Estimate Workbook – 3.20.2018 [sic] Natrium Chlorine Leak Insurance Claim." [JA011671-74]. The spreadsheet includes a column designated "Incurred Cost Additive." *Id*. The total amount in this column is $5,905,147—the amount of actual costs incurred by Westlake for alleged damage to the Natrium Plant and equipment when the claim was submitted. *Id*. The Pennsylvania jury's award of this amount shows that it relied on the information that Westlake submitted to Insurers regarding the actual costs that Westlake incurred for damage to the Natrium Plant and equipment. Westlake's contention that the issue of Natrium Plant and equipment damages in the two cases is not the same is contrary to the facts and Westlake's own admissions, and must be rejected.[11] The question of the amount Westlake may recover for damage to the Natrium Plant and equipment was presented to the Pennsylvania jury and that jury answered the question: $5,900,000.

2. The Jury in the Pennsylvania Action Determined the Amount of Physical Damage to the Natrium Plant.

Westlake incorrectly asserts that the jury in the Pennsylvania Action was not instructed to and did not determine the amount of physical damage to the Natrium Plant, stating:

> The trial court here is correct that the quantum of physical damage that the Tank Car Rupture caused at the Plant is the same regardless of any theory of liability. The trial court's conclusion, however, is incorrect for the simple reasons that the Pennsylvania jury was never asked to determine the quantum of physical damage and so never did.

[11] Westlake claims that Insurers' summary judgment motion "relegated the substantive discussion of the 'identical' element to a passing footnote." Pet. Br. 24 n.11. This is far from accurate. Insurers' summary judgment motion concerning the first collateral estoppel element cited argument from Westlake's counsel, Westlake's interrogatory responses, testimony from Westlake's Rule 30(b)(7) witness, and the clear language of the verdict slip in the Pennsylvania Action. [JA011402-06].

Pet. Br. 24.

The second sentence of the above-quoted passage is belied by the jury instructions quoted in Petitioners' Brief, the clear language of the verdict slip, acknowledgements in post-trial briefing in the Pennsylvania Action, and Westlake's description of the verdict in the Pennsylvania Action in its own filings in this matter.

The jury instructions quoted in Petitioners' Brief leave no room for doubt that the jury was instructed to determine the amount of damage to the Natrium Plant. The court instructed the jury that if it found in favor of Westlake, it "is entitled to be ***compensated for the harm done to its property*** and recover other incurred losses." [JA012077] (emphasis added).[12] Following the instructions, the verdict slip clearly directed the jury to determine the monetary amount of damage to the Natrium Plant and equipment. The monetary amount is in a line item in a proposed verdict slip Westlake itself submitted. [JA011915]. The Pennsylvania jury then determined the amount of damage to the Natrium Plant and equipment—Westlake's property at issue in the Pennsylvania Action—and filled in the blank with the number "$5,900,000.00." [JA007534]. Westlake acknowledged in post-trial briefing in the Pennsylvania Action that the "jury also awarded Axiall a portion of the damages it sought for ***damage to its own property***." [JA012101-02] (emphasis added).

While Westlake claims that the jury instructions in the Pennsylvania Action "make[] it abundantly clear that the Pennsylvania jury was not charged with making a determination of 'damage' at the Natrium Plant . . ." (Pet. Br. 26), it described the verdict as the "Pennsylvania ***verdict on Natrium Plant damage***" in its response to the collateral estoppel summary judgment motion. [JA007429] (emphasis added). The jury was clearly tasked with determining the monetary

[12] Westlake acknowledges the "damage" involved in the two cases "may be the same," but also argues that "damages" is a distinct concept the Pennsylvania jury did not address with respect to the Natrium Plant. Pet. Br. 26 n.13.Westlake's reliance on that purported distinction is unavailing, however, because the Pennsylvania court instructed the jury to "determine an amount of money *damages* that you find will adequately compensate Axiall for the *damage* that it sustained." [JA007703-08] (emphasis added). Thus, contrary to Westlake's contention, the jury did address the concept of the damages that Axiall should be awarded for the same damage to the Natrium Plant and equipment as is now the subject of the insurance coverage claim at issue in this lawsuit.

value of damage to the Natrium Plant as a result of the Incident. Westlake's argument to the contrary is inconsistent with the verdict slip, the jury instructions, and its own filings.

3. Collateral Estoppel Applies Despite Purported Differences in the Cause of Action or Theory of Liability at Issue.

Courts at every level of Pennsylvania jurisprudence recognize that the application of collateral estoppel is not defeated or otherwise diminished by alleged differences in causes of action or theories of liability between two cases. In *Balent v. Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995), the Supreme Court of Pennsylvania noted that "[c]ollateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated."[13] Intermediate appellate courts in Pennsylvania have reached the same conclusion. *See Eisbacher v. Maytag Corp.*, No. 1163 MDA 2015, 2017 WL 947606, at *5 (Pa. Super. Ct. Mar. 9, 2017); *Roman v. Jury Selection Comm'n of Lebanon Cnty.*, 780 A.2d 805, 809 n.3 (Pa. Commw. Ct. 2001).

Lower courts in Pennsylvania have recognized that a finding of damages in one case bars re-litigation of the same damages in a later action despite alleged differences in the theory of recovery in the later case. In *Hade v. Bell Helmets, Inc.*, 21 Phila. Co. Rptr. 80, 82 (Pa. Ct. Com. Pl. 1990), the court applied collateral estoppel to preclude re-litigation of damages following an arbitration award. The court stated "[e]ven though Plaintiffs claim a different theory of recovery in this case . . . the factual issues are basically the same." *Id.* The court went on to hold that the plaintiff was "collaterally estopped from attempting to re-litigate their damages . . . ." *Id.* at 83.

Westlake's position with respect to the "identical issue" collateral estoppel element attempts to circumvent this well-established Pennsylvania precedent. Its primary argument is that since the Pennsylvania Action involved tort and contract-based causes of action and theories of recovery against third parties whose actions and/or inactions precipitated the Incident, collateral

[13] Westlake criticizes the Business Court's reliance on *Balent* and characterizes the Pennsylvania appellate court's discussion of collateral estoppel in that case as dicta. Pet. Br. 23 n.10. That criticism is misplaced. Pennsylvania courts at all levels recognize the point of law for which the Business Court cited *Balent*, as is evident from the cases cited herein.

estoppel cannot apply in this action, which seeks recovery from Insurers under the Policy. Westlake does not cite any authority in which a court holds that different causes of action and/or theories of liability in "dual track" cases preclude the application of collateral estoppel. To the contrary, Pennsylvania cases recognize that when a litigant chooses to pursue "dual track" litigation, it runs the risk that collateral estoppel will be applied. *See Barron v. Caterpillar, Inc*., No. 95-5149, 1996 WL 368335, at *5 (E.D. Pa. June 26, 1996) (noting that party "accepted the risk of preclusion when they filed their lawsuit in two different fora."); *Se. Pa. Transp. Auth. v. Am. Coastal Indus*., 682 F. Supp. 285, 287 (E.D. Pa. 1988) ("The parties, by deciding to pursue parallel actions, must accept the risk of preclusion.").

Westlake cites one case in which it contends the court held that collateral estoppel did not apply because the cases involved "different theories of liability." Pet. Br. 23-24 (citing *Grossman v. Rosen*, 623 A.2d 1 (Pa. Super. Ct. 1993)). *Grossman* does not support Westlake's position.

In *Grossman*, the court determined collateral estoppel did not apply because "the parties are not identical to the ones in the prior federal litigation." 623 A.2d at 2. The court noted that in one action, the defendant was an accountant in an accounting firm whose lawyer sent actionable letters on behalf of the accounting firm, while in the second action, the defendant was the attorney who wrote the letters. *Id*. at 2-3. While the court noted that because of the relationship between the accountant and the attorney, issues pertaining to liability would be different in the actions, that comment was made in connection with the finding that *res judicata* did not apply. The court stated in a footnote that *res judicata* "bars an action based on the same claim or cause of action asserted in a prior action." *Id*. at 2 n.1. Since, unlike collateral estoppel, the doctrine of *res judicata* requires that the cause of action be the same in the two cases, the court's comment concerning different issues pertaining to liability made in the context of assessing *res judicata* does not apply here.

Several other Pennsylvania decisions have recognized that while *res judicata* requires identical causes of action, collateral estoppel does not. *See Ke v. Drexel Univ.*, No. 95 EDA 2018, 2018 WL 6167474, at *7 (Pa. Super. Ct. Nov. 26, 2018) (contrasting *res judicata* and collateral estoppel and stating: "Notably, the doctrine of collateral estoppel does not require either 'identity

of causes of action or parties.'") (internal citations omitted); *Wells Fargo Bank, N.A. v. Doughty*, No. 1169 EDA 2018, 2018 WL 4907630, at *3 n.4 (Pa. Super. Ct. Oct. 10, 2018) ("Collateral estoppel . . . is closely related to *res judicata*, but possesses certain distinctions. The doctrine of *res judicata* bars any future suit on the same cause of action between the same parties. . . . [C]ollateral estoppel does not require identity of causes of action or parties."); *Bonnie Heights Homes, Inc. v. Carstetter*, 69 Pa. D. & C.2d 504, 505-06 (Pa. Ct. Com. Pl. 1975) ("Applied to the present case, it is apparent that *res judicata* is inapplicable due to the difference in the causes of action. However, as this restriction does not apply to collateral estoppel, the necessary elements are present . . . .").

The Business Court properly applied collateral estoppel and recognized that alleged differences in the causes of action between the Pennsylvania Action and this insurance coverage lawsuit do not preclude doing so. This Court should affirm the Business Court's ruling.

C. Westlake Was Not Deprived of a Full and Fair Opportunity to Litigate Alleged Damages in the Pennsylvania Action—the Court in the Pennsylvania Action Precluded Insurance-Related Evidence at Westlake's Request

Westlake did not properly raise this issue in response to Insurers' summary judgment motion.[14] Despite failing to properly raise this issue below, Westlake alleges the Business Court erred in concluding that the fourth collateral estoppel element—whether the party against whom

[14] Westlake's original response to Insurers' motion for summary judgment concerning collateral estoppel did not claim the Pennsylvania court's granting of the motion in limine deprived it of a full and fair opportunity to litigate the amount of claimed damage to the Natrium Plant and equipment. Westlake's argument concerning the fourth collateral estoppel element contained in its summary judgment response was only two paragraphs. [JA007431-32]. Those two paragraphs attempted to distinguish authority, but did not mention a ruling or other action by the Pennsylvania court that allegedly deprived Axiall of an opportunity to litigate anything. *Id*. Westlake first made the argument that the Pennsylvania court's motion in limine ruling deprived it of a full and fair opportunity in its Rule 59(e) motion challenging the Collateral Estoppel Order. [JA007585-87]. As a result, this Court has no obligation to consider Westlake's argument that an evidentiary ruling in the Pennsylvania Action deprived it of a full and fair opportunity to litigate any portion of its alleged damage. *See Oakley v. Coast Pro., Inc.*, No. 1:21-00021, 2023 WL 7171467, at *13 n. 8 (S.D. W. Va. Oct. 31, 2023) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment."); *Wells Fargo Bank, N.A. v. Taggart*, No. 1384 EDA 2018, 2019 WL 3500516, at *5 n. 3 (Pa. Super. Ct. Aug. 1, 2019) ("We have held that a party cannot raise argument not raised in opposition for summary judgment to challenge the grant of a summary judgment for the first time in a motion for reconsideration.").

the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action—was met. Pet. Br. 28-30. Westlake's argument is based exclusively on the Pennsylvania Court's ruling that "any evidence regarding any parties' insurance coverage" was inadmissible. *Id*. at p. 29-30.

Westlake fails to mention that the ruling was the result of a motion in limine Westlake filed in the Pennsylvania Action. Westlake conceded in its Brief in Support of Plaintiffs' Rule 59(e) Motion challenging the Business Court's Collateral Estoppel Order: "[t]he vehicle for Judge Ward's Order was a motion in limine that *Axiall filed* and which all parties agreed with, and *the parties jointly drafted the Order* that Judge Ward then signed." [JA007585] (emphasis added). In other words, Westlake filed the motion that resulted in the order it contends deprived it of the ability to fully and fairly litigate the amount of damage to the Natrium Plant and equipment. Westlake did not merely file a motion that resulted in the order; it also drafted the order.

Under these circumstances, where a party had an opportunity to litigate an issue in a prior action, but chose not to, the fourth collateral estoppel element is met. *See In re Freeman*, 446 B.R. 625, 630 (Bankr. S.D. Ga. 2010) ("[A] full and fair opportunity to litigate requires nothing more than notice and an opportunity to be heard. . . . A party cannot fail to prosecute his own interest and then decry a judgment against him.") (internal quotations and citations omitted); *Cofrancesco Chiropractic & Healing Arts v. Maciewjewski*, No. CV136042888S, 2014 WL 5099200, at *4 (Conn. Super. Ct. Sept. 4, 2014) ("[T]he plaintiff had a full and fair opportunity to litigate the issues raised in the previous motion . . . but chose not to do so. As a result, the [full and fair opportunity] prong of the test of collateral estoppel is met."); *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989); *Commonwealth v. Martinelli*, 563 A.2d 973, 976-77 (Pa. Commw. Ct. 1989) ("[C]ollateral estoppel only requires that a party be given a full and fair chance to litigate the issue.").

Westlake made a strategic decision to file a motion in limine in the Pennsylvania Action concerning insurance-coverage related evidence and present the court with a joint/unopposed order. Now it seeks to run from the consequences of this decision in the instant matter. This gamesmanship should not be rewarded.

Even if Westlake had not filed the motion and drafted the order it alleges deprived it of a full and fair opportunity to litigate damage quantum in the Pennsylvania Action, the fourth collateral estoppel element is still satisfied. The crux of Westlake's argument concerning the full and fair opportunity element is that an evidentiary ruling by the Pennsylvania court precluded a certain amount of evidence that it alleges could have benefitted its damages case in that action. Pet. Br. 28-30. That argument does nothing to change the fact that Westlake had a full and fair opportunity to litigate its damages case in the Pennsylvania Action.

Pennsylvania courts have also emphasized that the full and fair opportunity element does not take into consideration whether the party arguing against collateral estoppel could have introduced better or more evidence at a later proceeding. For instance, in *Martinelli*, 563 A.2d at 976-77, the plaintiff asserted that collateral estoppel should not have been applied because, *inter alia*, "given a second chance to litigate th[e] issue it can present more conclusive evidence establishing the 1948 taking." The appellate court rejected that contention and held:

> The doctrine of collateral estoppel only requires that a party be given a full and fair chance to litigate the issue. The fact that more conclusive evidence might be presented at a subsequent hearing *is neither sufficient nor relevant* grounds for disallowing the application of the doctrine in this Commonwealth.

Id. at 976-77 (emphasis added); *see also Blanda v. Somerset Cnty. Bd. of Assessment Appeals*, 313 A.3d 345, 354 (Pa. Commw. Ct. 2024) ("The fact that more conclusive evidence might be presented at a subsequent hearing is neither sufficient nor relevant grounds for disallowing the application of the [collateral estoppel] doctrine."). Pursuant to these Pennsylvania authorities, Westlake's contention that it could have presented certain evidence in the Pennsylvania Action in the absence of the in limine order it requested and helped draft is neither relevant nor sufficient grounds to disallow application of collateral estoppel.

Further, it is telling that while Petitioners' Brief includes five bullet points of specific evidence it claims it was precluded from introducing as a result of the Pennsylvania court's exclusion of "any evidence regarding any parties' insurance coverage," Westlake does not explain

how that generic language in an order it requested excluded such evidence. Pet. Br. 29. The "Order of Court" granting "Axiall Corporation's Motion in Limine to Exclude Evidence Regarding Insurance Coverage" precludes any party from introducing "any evidence regarding any parties' insurance coverage for the damages alleged by Axiall in the Complaint . . . ." [JA007536].[15] Four of the five items that Westlake complains about not having been able to introduce in the Pennsylvania Action do not involve insurance coverage, however; instead, they are findings from technical consultants. Pet. Br. 29. Westlake does not explain how it attempted to introduce any evidence related to these consultants' findings or point to any portion of the transcript or other proceedings in the Pennsylvania Action where this specific evidence was disallowed. Westlake surely could have attempted to introduce evidence related to these consultants' findings without referencing insurance coverage. It apparently made a strategic decision not to. Westlake cannot now be heard to complain that as a result of its own litigation decisions, it did not have a full and fair opportunity to litigate the damage issue in the Pennsylvania Action.

Westlake's contention that it was not provided a full and fair opportunity to litigate the amount of damage to the Natrium Plant in the Pennsylvania Action is also belied by the manner in which the Pennsylvania Action was litigated. The trial of that action commenced with opening statements on September 10, 2021; the jury returned its verdict after more than a month of trial, on October 14, 2021. [JA011535-38; 007534]. Westlake cannot dispute that its case-in-chief lasted from September 13-30, 2021. Westlake called twenty-three live witnesses and one witness by video deposition. Based on these facts alone, the Business Court correctly found: "Regarding this specific issue of damage to the plant property and equipment, the Court finds Axiall had ample opportunity to litigate this at the weeks-long trial in the Pennsylvania action." [JA000012]; *see also In re Bohrer*, 19 B.R. 958, 960 (Bankr. E. D. Pa. 1982) ("In the instant case, the notes of

[15] Westlake quotes this language in its Petitioners' Brief, citing to the Joint Appendix at JA00748. That page in the Joint Appendix is an argument from the motion in limine hearing, but does not include any ruling or other substantive commentary from the judge.

testimony . . . show the case to have been vigorously litigated. The Court, therefore, will properly apply collateral estoppel to bar further litigation on the issue . . . .").

Finally, as the Business Court correctly noted in its Order, during the weeks-long trial in the Pennsylvania Action (and as detailed in the preceding sub-section), the amount of damages Westlake sought is the same amount as contained in a proof of loss submitted to Insurers in the instant matter. [JA000012]. This underscores the fact that Westlake had a full and fair opportunity to litigate, and did in fact litigate, the question of the amount of damage to the Natrium Plant and equipment in the Pennsylvania Action. The Business Court's conclusion that the fourth element of collateral estoppel was met is correct.

For the reasons set forth above, Westlake's contentions that the Business Court erred by applying collateral estoppel are without merit. The Business Court's order granting Insurers' motion for partial summary judgment and its subsequent order denying Westlake's Rule 59(e) motion should be affirmed.[16]

In addition to the above-stated reasons, this Court should consider the fact that Westlake opted to pursue what it has described as "dual-track" litigation. [JA007634]. Any time a litigant chooses to pursue common litigation in separate cases, it runs the risk of facing preclusion issues. *See Barron v. Caterpillar, Inc*., No. 95-5149, 1996 WL 368335, at *5 (E.D. Pa. June 26, 1996) (noting that party "accepted the risk of preclusion when they filed their lawsuit in two different fora."); *Se. Pa. Transp. Auth. v. Am. Coastal Indus*., 682 F. Supp. 285, 287 (E.D. Pa. 1988) ("The parties, by deciding to pursue parallel actions, must accept the risk of preclusion.").

II. THE BUSINESS COURT'S ORDER GRANTING INSURERS' MOTION FOR SUMMARY JUDGMENT REGARDING BAD FAITH WAS PROPER AND SHOULD BE AFFIRMED

[16] In the alternative, the Business Court correctly recognized that Insurers' November 23, 2021 Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages and Incorporated Memorandum of Law was filed in the alternative to, and rendered moot by the Business Court's granting of, Insurers' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible. However, if this Court reverses the Business Court's Collateral Estoppel Order, then it must also remand the issue of the Petitioners' damages to the Business Court and instruct the Business Court to rule on the merits of Insurers' November 23, 2021 Motion for Summary Judgment Concerning Plaintiffs' Alleged Damages and Incorporated Memorandum of Law.

On May 8, 2024, the Business Court properly granted Insurers' Motion for Summary Judgment Concerning Westlake's Bad Faith Claims and its Order should be affirmed. [JA000026-52]. Westlake's assertions that the Business Court erred by misapplying the Georgia bad-faith summary judgment standard and in "concluding that there were no genuine disputes of fact relating to the Insurers' mishandling of Westlake's claim" are without merit. Pet. Br. 30-31.

A. The Business Court Correctly Applied the Standard for Bad Faith Under Georgia Law

Westlake alleged a claim for bad faith under Georgia Code § 33-4-6, which provides:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was in bad faith, the insurer shall be liable to pay such holder, in addition to the loss, not more than 50 percent of the liability of the insurer for the loss or $5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action against the insurer.

O.C.G.A. § 33-4-6 (West). Georgia courts have consistently stated that in order to prevail on a claim under this statute, the "insured must prove: 1) that the claim is covered under the policy; 2) that a demand for payment was made against the insurer within 60 days prior to filing suit; and 3) that the insurer's failure to pay was motivated by bad faith." *Lavoi Corp., Inc. v. Nat'l Fire Ins. of Hartford*, 666 S.E.2d 387, 391 (Ga. Ct. App. 2008); *Am. Reliable Ins. Co. v. Lancaster*, 849 S.E.2d 697, 702 (Ga. Ct. App. 2020); *Johnston v. Companion Prop. & Cas. Ins. Co.*, 318 F. App'x 861, 868 (11th Cir. 2009) (applying Georgia law). Because the statute is penal in nature, "its requirements are strictly construed." *Id.*

Westlake's appeal only addresses the third requirement to prevail on a claim under O.C.G.A. § 33-4-6: "that the insurer's failure to pay was motivated by bad faith." *Lavoi Corp.*, 666 S.E.2d at 391; *Lancaster*, 849 S.E.2d at 702; *see also* Pet. Br. 31 n.15 ("Because the trial court's Bad Faith Order depends entirely on the third prong of this test, Westlake only addresses that issue here.").

Under Georgia law, "[t]he insured bears the burden of proving bad faith, which is defined as any frivolous and unfounded refusal in law or in fact to comply with the demand of the policyholder to pay according to the terms of the policy." *Johnston*, 318 F. App'x at 868 (quoting *Ga. Farm Bureau Mut. Ins. Co. v. Williams*, 597 S.E.2d 430, 432 (Ga. Ct. App. 2004)). A finding of bad faith is "not authorized where the insurance company has ***any reasonable ground*** to contest the claim and where there is a disputed question of fact [on the question of liability under the policy]." *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App. 2021), *reconsideration denied* (July 13, 2021) (brackets in original) (emphasis added) (internal citation omitted); *see also Johnston*, 318 F. App'x at 868.

The Business Court correctly set forth the well-established Georgia precedent that is applicable to this case, explaining that:

> Georgia courts have long recognized that statutes such as O.C.G.A. § 33-4-6 that act as a penalty are disfavored as a matter of law. *See Fortson v. Cotton States Mut. Ins. Co*., 308 S.E.2d 382, 385 (Ga. Ct. App. 1983) (discussing 33-4-6 and stating: "As this provision is a penalty, which is not favored at law, the right to recovery must be clearly shown."). "[D]ue to the high standard to prove an insurer's conduct violated O.C.G.A. § 33-4-6", Georgia law, as compared to other jurisdictions, "makes it relatively difficult for insureds to state a claim for bad faith in first-party claims." J. Stephen Berry, Ga. Prop. & Liab. Ins. Law § 12:1 (Aug. 2021 Update).
>
> Under Georgia law, while the issue of whether an insurer acted in bad faith can go to the jury under some circumstances, "when there is no evidence of unfounded reason for the nonpayment, *or* if the issue of liability is close, the court should disallow imposition of bad faith penalties." [citing cases] . . . .
>
> "This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith." *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017).

[JA000035-37].

While Westlake agrees that the Business Court correctly stated the above standards, Pet. Br. 31, Westlake claims that the Business Court "misapplied" such standards by supposedly making a finding that because there is a dispute about the length of the Insurers' investigation,

"there is no evidence of unfounded reason for the nonpayment" by Insurers, and therefore no grounds for a bad faith finding. Pet. Br. 33 (citing Bad Faith Order at 8-10, [JA000034-36] (quoting *Montgomery*, 859 S.E.2d at 135). Westlake misconstrues and misstates the Business Court's Order, however, because the pages of the Order cited by Westlake only set forth a summary of the parties' positions and a statement of Georgia law, which Westlake has conceded is correct. [JA000034-36]. The Business Court's subsequent analysis of the parties' positions under the applicable principles of Georgia law, discussed *infra*, correctly determined that there was no basis for a bad faith finding against Insurers.

B. Westlake Did Not And Cannot Satisfy Its Burden to Prove that Insurers' Coverage Denial Was Motivated By Bad Faith

Westlake bears the burden of proving that Insurers' denial of its claim was motivated by bad faith. *Ga. Farm Bureau Mut. Ins. Co. v. Williams*, 597 S.E.2d 430, 432 (Ga. Ct. App. 2004). A finding of bad faith is "not authorized where the insurance company has ***any reasonable ground*** to contest the claim and where there is a disputed question of fact [on the question of liability under the policy]." *Montgomery*, 859 S.E.2d at 135 (brackets in original) (emphasis added) (internal citation omitted); *see also Johnston*, 318 F. App'x at 868 (finding that insured failed to prove the third element of his bad faith claim where insurer had "a legitimate, although ultimately unsuccessful, challenge to Johnston's claim"; insurer's "reason for denying coverage was not so unbelievable as to sink below the minimal threshold of *any* reasonable ground to contest the claim"). The Business Court recognized, "Importantly, '[t]his rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith.'" [JA000045] (quoting *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017)). Further, even if an insurer's interpretation of a policy provision is erroneous, that does not mean it is necessarily unreasonable. *King v. Pub. Sav. Life Ins. Co.*, 290 S.E.2d 134 (Ga. Ct. App. 1980).

1. The Business Court Properly Held That Insurers Had Reasonable Grounds to Deny Westlake's Claim.

The Business Court properly concluded that Insurers "had **legitimate, reasonable grounds to deny the claim in the application of various exclusions after a good faith investigation**. . . . Applying Georgia law, this Court must preclude the claim for bad faith given this Court's finding of Insurers having a (any) reasonable ground to deny the claim." [JA000048] (emphasis added). The Business Court noted, *inter alia*, the following findings in support of its holding:

- "Here, the event underlying this claim involved a large-scale incident and there was a lengthy claims adjustment and investigation process." [JA000046].

- "Further, the Court notes again that in November 2018, the pre-incident photos were produced. . . . The Court concludes that the investigation was ongoing, and **the Court finds evidence of reasonableness of this continued investigation, especially in light of uncovering evidence of pre-event damage to the Plant**." [JA000047] (emphasis added).

- "The Court considers, however, the evidence shows the condition of the Plant prior to the leak, and therefore would aid in [Insurers'] handling of the investigation of the claim to determine what amount of damages Axiall actually suffered versus what was pre-existing. Therefore, in the course of this investigation, **that creates a reasonable question as to [Insurers']liability in regard to coverage. 'This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith**.' *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017)." [JA000047-48] (emphasis added).

- "Given the fact that in September 2017, Plaintiffs provided an itemized list of expenses incurred after the incident totaling $1.1 million, a claim for damages in the amount of $278,505,078.00 gross of the Policy's $3,750,000.00 deductible would warrant further investigation. **This Court cannot conclude that it was unreasonable to continue investigating**. **This Court finds this <u>extreme variation</u> in the amount claimed made it reasonable for [Insurers] to continue their investigation**. . . . As detailed above, the investigation was lengthy, but a thorough investigation is evidence of a good faith investigation. . . ." [JA000048] (emphasis added).

- "The fact that this Court granted Insurers' motion for summary judgment concerning asbestos exclusions supports at least a reasonable basis to deny coverage for any sum relating to asbestos. **And while this Court denied [Insurers'] remaining motions for summary judgment regarding exclusions, that does not prevent the Court finding there was a reasonable basis to deny Plaintiffs' claim**. *See Schoen v. Atlanta Cas. Co.*, 200 Ga. App. 109, 407 S.E.2d 91 (1991). Additionally, **this Court's Order concerning the corrosion exclusion did not decide, as a matter of law, whether**

corrosion damage pre-existed the chlorine release. . . .” [JA000049] (emphasis added).

The above findings demonstrate that Insurers had reasonable grounds to deny Westlake’s claim. Moreover, the findings show that the issue of liability was close. Thus, the Business Court properly granted summary judgment in Insurers’ favor as to Westlake’s bad faith claim. *See Montgomery*, 859 S.E.2d at 135 (“A finding of bad faith is not authorized where the insurance company has ***any reasonable ground*** to contest the claim and where there is a disputed question of fact [on the question of liability under the policy].”) (internal quotation marks omitted).

2. There Was No “Unfounded Reason” for Insurers’ Denial of Coverage.

Westlake claims the Business Court erred by resolving material disputes of fact in Insurers’ favor with respect to two issues: “1. Material disputes of fact preclude a finding as to the Insurers’ motivation for delaying their investigation and denying coverage”; and “2. Material disputes of fact preclude a finding that the Insurers relied on the advice of their experts in denying Westlake’s claim.” Pet. Br. 33-37. These alleged errors are without merit. There is no evidence that the Business Court resolved any material disputes of fact in Insurers’ favor. Rather, this is merely Westlake’s assumption since the Business Court ruled in Insurers’ favor. *See* Pet. Br. 33 (“Granting summary judgment in favor of the Insurers on the question of bad faith necessarily involved the resolution of material disputes of fact in the Insurers’ favor.”).

a. There Was No Bad Faith Motivation for Insurers’ Denial of Coverage.

Westlake includes a bullet list of disputed “facts” that allegedly preclude summary judgment in Insurers’ favor. These alleged material facts were all addressed by the Business Court, and the court found no evidence of bad faith motivation.[17] [JA000046-49].

[17] With the exception noted below, these allegations of bad faith are also discredited by the facts in the record cited above in the “Statement of Facts” section, which sets forth in great detail Insurers’ good faith adjustment of the claim. *See supra*, pp. 3-13.

Westlake claims, “Despite refusing to provide coverage to Westlake for the Tank Car Rupture, one of the Insurers, HDI, actually paid the claim of a neighboring landowner resulting from the very same accident and for the very same type of damage and involving substantially similar policy language, without raising any coverage defenses.” Pet. Br. 34. HDI’s settlement of Covestro’s claim is irrelevant to the coverage determination of Westlake’s claim and has no bearing on whether Insurers had reasonable grounds to deny Westlake’s claim. Aside from the fact that the Covestro policy was an entirely separate policy and contained different corrosion, contamination, and faulty workmanship exclusions (the Axiall Policy’s

The Business Court recognized that "Ordinarily, the question of bad faith is one for the jury." [JA000046]. "However, given this general rule, it is also black letter law in Georgia that penalties against an insurer for bad faith denial of a claim under O.C.G.A. § 33-4-6 are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact [on the question of liability under the policy]." *Id*. (citing *Montgomery*, 859 S.E.2d at 135).

"**This rule applies even if genuine issues of fact exist with regard to whether the insurer's conduct in denying the claim, in part, may have been based upon bad faith**." *Lee v. Mercury Ins. Co. of Georgia*, 808 S.E.2d 116, 133 (Ga. Ct. App. 2017) (emphasis added); *see also Cable Broadband & Telecomms., LLC v. Depositors Ins. Co.*, No. 1:16-CV-04006-ELR, 2018 WL 10647207, at *22 (N.D. Ga. Feb. 28, 2018) (granting defendant's motion for summary judgment as to bad faith claim where no evidence in record to support contention insurer acted in bad faith during its investigation); *Fuller-Dorce v. State Farm Fire & Cas. Co.*, No. 1:15-CV-2197-TCB, 2016 WL 7887998, at *4 (N.D. Ga. Sept. 20, 2016) ("Courts grant summary judgment to insurers on bad faith claims where the issue of liability was close.") (citation omitted).

b. The Business Court Properly Considered Insurers' Reliance On Their Retained Consultants.

Westlake claims that "Material disputes of fact preclude a finding that the Insurers relied on the advice of their experts in denying Westlake's claim." Pet. Br. 35. Westlake further claims that Insurers' reliance on the advice of their retained consultants to deny the claim was pretextual.

Insurers' use of retained consultants was just one of the factors the Business Court considered as part of "[Insurers'] thorough investigation." [JA000049]. As noted by the Business

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exclusions are broader) and that the claims involved separate claims handlers (Nick Clancy for the Covestro claim, and Nick Lee and then Joe Kearney for the Axiall claim), the claims handler for Covestro testified that the Covestro claim "ultimately was a compromised claim . . . settled for commercial business reasons, and ***coverage was not a consideration***." [JA008519] (emphasis added).

Westlake also alleges that Insurers previously paid a claim involving a loss at Axiall's Lake Charles facility and did not deny coverage based on the corrosion exclusion, which Westlake claims is inconsistent with the instant claim. The prior claim has no relevance to the coverage issues or bad faith claim in this matter. That claim was ultimately settled, and the release specifically states that the payment was being made without respect to coverage and was not an admission of liability. [JA010108-09; JA010526-52].

Court, under Georgia law, "[t]he advice of an independent consultant may provide an insurer with a reasonable ground to contest an insured's claim under the policy, entitling the insurer to summary judgment on a claim for bad faith penalties." *Montgomery*, 859 S.E.2d at 135 [JA000049-50]. "As a matter of law, it is reasonable for an insurer to deny a claim based on such advice unless the advice is patently wrong and the error was timely brought to the insurer's attention, . . . or unless the advice is in the nature of mere pretext for an insurer's unwarranted prior decision to [deny the claim]." *Montgomery*, 859 S.E.2d at 135 (citation and quotation marks omitted); [JA000050].

The Business Court noted Insurers' retention of ED&T, Failure Analysis & Prevention, Inc., Telcordia, and Werlinger & Associates to provide technical assistance during the loss investigation and assessment of potential damage, and recognized the consultants' findings that the alleged damage to equipment was contamination and/or corrosion, most of which pre-existed the Incident. [JA000050].

The advice of these retained consultants provided Insurers with independent reasonable grounds to deny Westlake's claim. Westlake has failed to present any credible evidence that Insurers' consultants' advice was patently wrong or that it was used as a pretext. Accordingly, this allegation of error is without merit.[18]

III. WESTLAKE IS NOT ENTITLED TO PRE-JUDGMENT INTEREST; IN THE EVENT WESTLAKE IS ENTITLED TO PRE-JUDGMENT INTEREST, ITS CHOSEN ACCRUAL DATE IS INCORRECT AND UNSUPPORTED

Westlake very briefly argues that the Business Court erred in concluding its claim for pre-judgment interest began to run from the date of the final judgment in the Pennsylvania Action (August 10, 2022), rather than thirty days after Westlake submitted its first Partial Proof of Loss (June 21, 2018).

[18] Westlake argues in a footnote, "To the extent the Bad Faith Order also grants summary judgment in the Insurers' favor on the basis that no Georgia court previously interpreted the exact policy provisions on which the Insurers relied, such a decision too would be in error." Pet Br. 30 n.14. However, Westlake fails to cite to a Georgia case interpreting the exact policy provisions at issue. This alleged error is without merit.

As set forth in Insurers' Petitioners' Brief, Appeal No. 25-ICA-16, Insurers contend that they did not breach the Policy, and thus, there can be no award of pre-judgment interest. Insurers further contend that even if they did breach the Policy (which they deny), the Business Court erred in awarding pre-judgment interest.

While, for the reasons stated in Insurers' Petitioners' Brief, pre-judgment interest should not be awarded, in the event pre-judgment interest is awarded, Westlake's chosen accrual date is much too early. Westlake acknowledges that if pre-judgment interest is awarded, it is from the date of the breach. Pet. Br. 38; *see also Cent. Baptist Church of Albany Ga., Inc. v. Church Mut. Ins. Co.*, 1:16-CV-231 (LAG), 2020 WL 5496096, at *2 (M.D. Ga. Aug. 12, 2020). Westlake seeks pre-judgment interest beginning June 21, 2018, thirty days after the first unsupported Partial Proof of Loss was submitted to Insurers. That Proof of Loss is not referenced in the Complaint because it was "supplemented," and, in fact, subsumed and replaced by the March 20, 2019 Proof of Loss. If Westlake believes it is entitled to payment from a Partial Proof of Loss dated May 22, 2018, it would have at least referenced it in its Complaint. Accordingly, Westlake's chosen date of accrual is unsupported and without merit. To the extent that pre-judgment interest is warranted, which Insurers dispute, the date on which such an award should commence should not be any earlier than the date of entry of the jury verdict in the Pennsylvania Action.

CONCLUSION

For the reasons set forth above, Insurers pray that this Court affirm the Business Court's Orders granting summary judgment regarding bad faith and collateral estoppel in favor of Insurers, together with such other and further relief as the Court may deem proper. Further, to the extent that pre-judgment interest is warranted, which Insurers dispute, this Court should reject Westlake's chosen accrual date for pre-judgment interest.

Respectfully submitted the 9th day of April, 2025.

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CERTIFICATE OF SERVICE

Service of the foregoing ***RESPONDENTS' 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 9th day of April, 2025, as follows:

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