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IN THE SUPREME COURT OF THE STATE OF DELAWARE

XL INSURANCE AMERICA, INC., TALBOT UNDERWRITING SERVICES (US) LTD., FACTORY MUTUAL INSURANCE COMPANY, AXIS INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY SURPLUS INSURANCE CORPORATION, ACE AMERICAN INSURANCE CO., ASPEN INSURANCE UK LTD., STEADFAST INSURANCE COMPANY, AIG EUROPE LIMITED, SCOR UK COMPANY LIMITED, SWISS RE INTERNATIONAL S.E., AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Defendants-Below/ Appellants, v. NORANDA ALUMINUM HOLDING COMPANY, Plaintiff-Below/ Appellee.	No. 444, 2019 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. No. N17C-01-152 WCC (CCLD)

APPELLANTS' OPENING BRIEF

DATED: December 10, 2019

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NATURE OF PROCEEDINGS

This case arises from insurance claims submitted by Plaintiff-Below/Appellee Noranda Aluminum Holding Corporation ("Noranda," the "Company," or "Plaintiff") following two accidents at its aluminum smelter and casting plant in New Madrid, Missouri, in August 2015 and January 2016. At the time of those accidents, Noranda was already operating at significant losses and the Company was considering filing for bankruptcy protection.

Before this lawsuit, Defendants-Below/Appellants ("Defendants" or "Insurers") voluntarily paid Noranda approximately $38.5 million in property damage claims arising from the two accidents. Yet, under a damages theory that the trial court permitted over the Insurers' objections, the jury awarded Noranda, a financially-failing entity, over $30 million in additional funds to compensate it for business losses that did not exist, and that instead represented waived and prohibited claims for the hypothetical cost of rebuilding the damaged plant. This outcome was contrary to the language of the parties' insurance policy and the law.

In addition to allowing the Plaintiff to present damages that were not permitted by the policy, the trial court also improperly permitted Noranda to present expert testimony that was wildly unreliable and far from the basic standards for admissibility of expert testimony in Delaware courts.

The Insurers appeal from: (1) the October 17, 2019 Final Order and Judgment entered by the trial court following a jury verdict in favor of the Plaintiff (Exhibit 1); (2) certain pre-trial, trial, and post-trial rulings of the trial court as detailed herein; and (3) the trial court's October 22, 2019 Order relating to professional fees (Exhibit 2). The Insurers respectfully request that this Court reverse each of those orders and rulings.

SUMMARY OF ARGUMENT

1. The trial court improperly permitted the Plaintiff to present to the jury a claim for business interruption damages that was contrary to the "Measurement of Loss" formula dictated by the parties' policy.

2. The trial court improperly permitted the Plaintiff's damages expert to present testimony that was unreliable as a matter of law.

3. The trial court improperly permitted the Plaintiff's damages expert to claim, and present testimony on, damages that the Plaintiff had waived as part of a prior settlement of claims arising from the same incidents.

STATEMENT OF FACTS

In the midst of financial losses that were causing Noranda to discuss filing for bankruptcy, the Company had two accidents at its New Madrid aluminum caster and smelting plant that were covered by insurance policies issued by the Defendants. The accidents occurred on August 4, 2015 and January 7, 2016. The Insurers reached an agreement with Noranda to pay $38.5 million in claims for the property damage to the facility, and also paid Noranda $5,641,954 under Noranda's "time element" coverage for business interruption damages that were provided for and measured under the terms and conditions of the policy.

Noranda filed this action on January 6, 2017, seeking additional damages under its business interruption coverage. Prior to trial and during trial, the Insurers objected numerous times to the methodology by which Noranda sought to measure business interruption damages under the applicable insurance policy. The trial court, however, permitted the jury to consider Noranda's damages calculation. Using that formula, following a seven-day trial, the jury awarded Noranda $35,490,133 in business interruption damages on July 3, 2019, above and beyond the over $44 million already paid by the Insurers. The trial court reduced that verdict by over $7 million after post-trial motions, and entered a final judgment of over $33 million on October 17, 2019, that included interest and professional fees. This appeal followed.

A. Noranda Lost Money Year After Year Before the Two Accidents

Noranda produced aluminum products at its New Madrid facility. (A1438 – A1439, A1443.) Raw product (called alumina) was first turned into molten aluminum through heating in a series of pots called potlines. Then, the molten aluminum was turned into different shapes of aluminum in different portions of the plant, one of which was the casthouse. (A1439–A1440.)

Before the two accidents, Noranda was in dire financial condition. Noranda lost $47.6 million in 2013, lost $26.6 million in 2014, and lost $259 million in 2015 (over $100 million excluding non-cash write-offs). (A1720–A1721.) Noranda's Chief Financial Officer testified that even before the accidents, the Company was financially "under distress." (A1681.) The July 2015 estimate of Noranda's end-of-year liquidity was projected to be $100 million below the Company's target, a figure that the CFO agreed was "devastating." (A1737–A1739.) Noranda's board was informed in December 2015 that the Company was projected to be entirely out of cash by February 2016. (A1758–A1759.)

B. Two Accidents Occur at the New Madrid Facility

In the midst of Noranda's financial difficulties, two separate accidents occurred at the New Madrid plant in August 2015 and January 2016. First, on August 4, 2015, an explosion occurred at the casthouse. That explosion prevented

Noranda, for various periods of time, from making certain aluminum end products.[1] (A1255–A1257.) The second accident was an electrical breakdown on January 7, 2016, that caused a freeze in two of the plant's three potlines. (A1445.) With the potlines damaged, the plant could only convert alumina into molten aluminum on one of the three potlines. (A1500–A1501, A1658.)

Noranda never attempted to repair any of the pots that were damaged in January 2016 (A1260), and therefore incurred no labor expenses to restart the damaged pots. (A1265–A1266.) On February 8, 2016, Noranda filed for protection under the U.S. Bankruptcy Code (A0149 at ¶ 37), and on March 12, 2016, Noranda idled the entire New Madrid plant, including its still-functional potline. (A0149 at ¶ 36.) Noranda sold the New Madrid plant in November 2016 as part of its bankruptcy proceeding. (A0149 at ¶ 37.)

C. The Relevant Insurance Coverage for the New Madrid Plant

The Insurers provided insurance coverage to Noranda under written policies that are described in more detail below. Noranda filed insurance claims in connection with the two accidents for three categories of loss: (1) property damage;

[1]This section of the Appendix contains excerpts from the trial deposition of Chad Pinson. Highlighted portions of Mr. Pinson's deposition included in the Appendix were played for the jury at trial. The highlighting was done by the parties before trial as their method of designating testimony. The trial transcript itself does not contain Mr. Pinson's deposition testimony that was played for the jury.

(2) "time element" (business interruption) losses;[2] and (3) claims preparation costs (professional fees). Coverage for all three categories of losses were found in different portions of the same policy. (A0156–A0240.) Property damage coverage compensated Noranda for the cost to repair or rebuild/replace the damaged facility. Time element business interruption coverage compensated Noranda for its loss of earnings resulting from the accidents during a defined period of liability. And claims preparation coverage compensated Noranda for reasonable professional fees incurred in producing information required by the Insurers during the claim process.

Noranda and the Insurers resolved the property damage components of the claims in accordance with the policy terms and conditions in a negotiated settlement that led the Insurers to pay Noranda approximately $38.5 million. The settlement document discharged the Insurers from any claims relating to the incidents except, in relevant part, for "any portion of the Claim relating to any replacement costs or non-property damages." (A2350.) The Insurers also paid Noranda $5,641,954 for claimed business interruption losses. The remainder of Noranda's business interruption claim, and all of its professional fees claim for fees associated with making its claim relating to the potline freeze, were denied by the Insurers because

[2] The business interruption coverage is referred to in the policies as "time element" coverage, but the parties use the terms "time element losses" and "business interruption losses" interchangeably. (A0255–A0256.) The term "business interruption" will be used in this brief.

the Insurers believed those claims fell outside the terms of the parties' insurance policy. (A1445–A1446.)

D. The Insurance Policy's Formula for Measuring Time Element (Business Interruption) Damages

All of the Insurers' insurance policies with Noranda had the same material terms, conditions, and exclusions. Factory Mutual Insurance Company ("FM Global") provided 50% of Noranda's coverage, and the parties agreed that the policy issued by FM Global would be the relevant policy for claim and litigation purposes (the "Policy"). (A1444.)

Noranda made its business interruption claim under the "Gross Earnings" option in the "Time Element" section of the Policy.[3] (A0145 at ¶ 26.) As discussed below in Argument I(B), the "Gross Earnings" clause of Noranda's Policy was a typical business interruption clause designed to protect any earnings Noranda would have enjoyed had the casthouse and potline incidents not occurred. William H. Danne, Jr., *Business Interruption Insurance*, 37 A.L.R. 5th 41, § 3[a] (1996 & Supp.) ("*Business Interruption Insurance*"). The Measurement of Damages in the parties' business interruption policy is "Actual Loss Sustained" during the "Period of Liability." Under the Gross Earnings option, the Policy first requires the

[3]The Policy permitted Noranda to make its claim under either a Gross Earnings or Gross Profit measure.

determination of a "Period of Liability," and then allows the insured to recover its "Actual Loss Sustained" during that Period of Liability. (A0205.) Both "Period of Liability" and "Actual Loss Sustained" are defined terms under the Policy, and the distinction between these defined terms is important to interpretation of the Policy and under the relevant case law.[4] (A0205.)

The "Period of Liability" under the Policy is, in relevant part, the time period "(a) starting from the time of physical loss or damage of the type insured; and (b) ending when with due diligence and dispatch the building and equipment could be (i) repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage[.]" (A0211–A0212.) In other words, the Period of Liability is designed to determine the period of time that it would take a diligent insured to return its damaged facility to operations after an accident. Business interruption damages can be awarded for that interval. The Insurers' experts testified that the Period of Liability for the

[4] Noranda described the Policy's coverage in almost identical terms in its earlier filings with the trial court: "In the case of the Policy, the Insurers promised to pay Noranda's lost 'Gross Earnings,' defined as its 'Actual Loss Sustained' (gross earnings less variable costs, with certain adjustments specified in the Policy), incurred during the 'Period of Liability' . . . ." (A0256.) This filing, along with some other previously-filed documents included in the Appendix, was originally filed with the Superior Court under seal. However, following the trial, the parties agreed that none of the previously-sealed documents cited in the Appendix need be filed under seal for this appeal.

casthouse incident ran until February, 2017 (A1827–A1828, A1863), and the Period of Liability for the potline incident ran until July, 2016 (the expert's testimony was "six months or less" from the date of the incident). (A1891–A1892.) Noranda's experts testified to longer Periods of Liability for both incidents.

The insured may recover the "Actual Loss Sustained" during that Period of Liability. The Policy provides a three-step formula to calculate an insured's Actual Loss Sustained using a Gross Earnings measure. Actual Loss Sustained is measured by taking the "net sales value" of production and subtracting the costs of raw stock, materials, supplies used in production, charges and expenses that do not continue, and ordinary payroll.[5] (A0205–A0207.) In short, the Policy's Actual Loss Sustained is net revenues minus variable costs.

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[5] The Gross Earnings provision states, in part:

> "Measurement of Loss:
>
> 1) The recoverable GROSS EARNINGS loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:
>
> a) Gross Earnings;
>
> b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;
>
> c) less ordinary payroll; and
>
> d) plus all other earnings derived from the operation of the business.
>
> e) Ordinary Payroll . . . ."

(A0205–A0206.)

The Insurers' damages expert, Peter Karutz, initially calculated Noranda's business interruption losses using this formula. He calculated those losses with respect to the casthouse incident as $5,489,873, and those losses with respect to the potline incident at zero dollars. (A0733–A0735.) This conclusion was not surprising: Noranda was losing money just prior to the incidents, so it made sense that a calculation of the earnings that Noranda would have enjoyed absent the incidents would yield a limited result. Mr. Karutz's business interruption calculation for the casthouse explosion was over $5 million because Noranda lost the ability to produce some of its more profitable end products, but experienced limited labor savings since all three potlines at the plant were still running until the time of the potline incident.[6]

Mr. Karutz stated in his expert report that the primary difference between his calculations and those of Noranda's damages expert, Christopher Hess, was that Mr. Hess assumed virtually no labor savings after the accidents in making his calculations, even though two thirds of the plant's production capacity was eliminated by the potline incident. (A0742–A0743.) It would later become clear, when Noranda was required to explain Mr. Hess's methodology in response to a

[6] The trial court declined to enter summary judgment for the Defendants based on Mr. Karutz's expert report, not because it disagreed with his damages model but because it determined that he had deducted too much in ordinary payroll by including the ordinary payroll for all three potlines. (A0439.)

motion to bar his testimony, that the reason Mr. Hess was able to assume no payroll savings was that Mr. Hess had developed a new theory of business interruption damages—unprecedented, according to the Insurers' expert (A1996–A1997)—in which the simple formula outlined in the Policy was altered to produce a seven-figure damages claim for a business that was losing money.[7]

E. At Trial, Noranda's Expert Presented an Alternative to the Policy Language: a "Dual Hypothetical Worlds" Theory of Damages

Throughout the case, the Insurers argued that the plain language of the "Measurement of Loss" provision permitted damages only for the recoverable Gross Earnings that Noranda would have received had the accidents not happened. (A0444–A0480, A1271–A1303, A1633–A1635, A1677, A1805–A1807, A1952–A1953, A2216–A2217.) But Mr. Hess calculated the damages under a dramatically different theory, referred to here as the "dual hypothetical worlds." Mr. Hess described his testimony as "draw[ing] a comparison between the hypothetical world in which the accident did not happen and the hypothetical world in which repairs were made." (A1650.) He admitted that he was comparing "two things that didn't

[7] Noranda, citing a single statement by Mr. Karutz at trial, attempted to argue in its briefing of post-trial motions that Mr. Karutz agreed with Mr. Hess's method of calculating damages. (A2237–A2238.) But a review of Mr. Karutz's full testimony reveals that Mr. Karutz was testifying about calculations he had done in a supplemental report assuming Mr. Hess's model to be correct (A1966–A1978), and that he not only disagreed with Mr. Hess's model but had not seen it used in any other case in his 35 years of experience. (A1996–A1997.)

actually happen" and he claimed his method was "the only way" to calculate damages. (A1650.)

Mr. Hess's trial testimony demonstrated how his "dual hypothetical worlds" formula—unsupported by any language in the Policy itself—could generate a seven-figure damages claim for a claimant whose business was actually losing money at the time of the covered incidents:

First, the equation Mr. Hess invented allowed Noranda to drastically understate millions of dollars in saved monthly labor expenses for the idled potlines. Under the Policy, the Gross Earnings that may be recovered for a business interruption claim must be decreased by variable labor costs saved during the Period of Liability. That provision makes sense because, during the time the plant would be idle, Noranda would not only lose revenues, it would also avoid those variable labor costs.

Rather than apply that straightforward formula which ***subtracts*** variable labor costs from the potential claim, Mr. Hess instead ***added*** labor costs supposedly required for Noranda, hypothetically, to have rebuilt its plant. But the labor costs required to rebuild the plant are ***not*** recoverable under this business interruption claim.

This error led to a massive overstatement in Noranda's business interruption claim. Using May of 2016 as an example, Mr. Hess assumed that Noranda's total monthly labor cost if the potline freeze had not occurred would have been $4,599,648. (A2385–A2387.) Under the plain language of the Policy, the portion of that monthly labor costs saved by idling two-out-of-three potlines should have been deducted from Gross Earnings in order to arrive at Actual Loss Sustained.[8] But under Mr. Hess's new formula, he ***added*** back an estimated $4,126,787 in hypothetical labor costs that would have been expended if the plant had been rebuilt (after ostensibly adjusting for money already paid in the property claim settlement). The result was just $472,862 in saved labor for May 2016—a difference of up to 90% in saved labor. Mr. Hess replicated this labor savings calculation trick for each month, with the result of inflating Noranda's business interruption claim by millions of dollars over what the plain language of the Policy would allow.

Second, even if Noranda could recover for the labor costs required to rebuild the facility (which it could not), Mr. Hess's model employed extraordinary and unreliable assumptions to inflate the labor costs involved in hypothetically rebuilding the plant. For example, as to June 2016—when only part of one of the

[8] The amount deducted under a proper application of the Policy may not have been the full $4,599,648 in labor costs because this figure represented Noranda's total cost of labor and only two of the three potlines were affected by the accident.

damaged potlines would have been operational under Mr. Hess's hypothetical rebuild—he assumed that the facility would not only employ every single person who had been working on all three potlines before the potline incident, but he assumed the facility would *also* employ dozens of *additional* employees. (A2369.) Under the formula dictated by the Policy, such extraordinary labor assumptions are not permitted. Rather, the Policy uses the self-limiting term "ordinary payroll."

In direct contravention of the relevant Policy terms, Mr. Hess's "dual hypothetical worlds" formula allowed for sweeping assumptions that could be easily manipulated. Indeed, after his initial opinions were challenged, Mr. Hess decided to "look at that labor in a different way, maybe a more conservative way" (A1660), and unilaterally reduced his estimate of damages by approximately $3.5 million by doing nothing other than changing his assumptions about hypothetical labor needs. (A1664.)

The Insurers repeatedly moved before and during trial for the trial court to exclude Mr. Hess's "dual hypothetical worlds" damages testimony because it was inconsistent with the Policy's language. Initially, after hearing the Insurers' criticism of the "dual hypothetical worlds" model, the trial court appeared to agree with the Insurers:

> THE COURT: When an insurance company is to compensate you for the time that you're down, no longer having a facility, why should the cost of repairing it have

> anything to do with it? I mean, it's simply that you had X number of employees that you had to have to run the pots or use that as an example. After the accident, you didn't need that many. You only needed a handful of them to keep it running. That's what you [Noranda] argued to me. I actually accepted your argument. To say now, well, I need more people to do repairs, what's repairs have to do with anything? That's not part of the insurance coverage.

(A1284–A1285.)

Notwithstanding these concerns, the trial court (1) ultimately allowed Mr. Hess's testimony using the "dual hypothetical worlds" model, (2) prevented the Insurers' expert from testifying in a manner inconsistent with the "dual hypothetical worlds" model, (A2058–A2059) and (3) instructed the jury in a way that allowed for consideration of a "dual hypothetical worlds" model. (A2155–A2157.) The trial court commented during a sidebar that if the Insurers' expert did testify based upon the Measurement of Loss clause of the Policy, it would be "absolutely devastating" to Noranda's case. (A2112–A2113.)

F. Noranda's Damages Expert Assumed That No Plant Layoffs Would Occur After Two Thirds of the Plant's Production Capacity Was Lost in an Accident

As noted above, the trial court permitted Mr. Hess to assume how much labor would be needed to repair and restart the potlines in order to estimate the labor costs of hypothetically restarting the plant (*i.e.*, one of the two hypothetical worlds). Mr. Hess assumed that every single one of Noranda's employees who had been working on the two potlines at the time they were damaged would need to be retained by the

plant while the potlines were being rebuilt. (A1563–A1566.) Mr. Hess attributed this assumption to a conversation with former plant manager Chad Pinson, and initially claimed that he had independently evaluated it. But on cross-examination, Mr. Hess admitted that he had done no analysis to assess how many employees Noranda needed for its operation given the damaged potlines. (A1608–A1609.) He later attempted again to distance himself from Mr. Pinson's supposed estimate:

> Q: Are you telling me, as a technical matter, in order to run one-and-a-half potlines, you need three potlines worth of employees?
>
> A: I'm not telling you anything. I'm not an engineer. But I'm telling you what I've seen in the other claims very similar to this.
>
> THE COURT: And it's what the plant manager told you. Correct?
>
> THE WITNESS: It is what the plant manager told me as well, yes.

(A1632.)

G. Noranda Claimed Business Interruption Damages That Were Already Reimbursed Under Its Property Damage Settlement

Mr. Hess's "dual hypothetical worlds" damages model also included hypothetical labor costs required to restart the plant that had already been paid under the parties' settlement of Noranda's property damage claim. (A1322–A1326.)

As an initial matter, the Insurers argued that Mr. Hess' calculations were superfluous because Noranda had waived any right to claim any hypothetical labor costs involved with repairing the facility when it accepted the property damage settlement. (A1310–A1312.) The trial court rejected the Insurers' argument that Noranda had waived its right to seek additional restart costs by entering the property damage settlement, and it permitted Mr. Hess to testify about which hypothetical labor costs had and had not been reimbursed.

Even if such costs were permitted, Mr. Hess was unable to calculate reliably, on a monthly basis, the labor costs for which Noranda had already been reimbursed in the parties' property settlement. Mr. Hess testified that there would have been three types of labor involved in repairing the New Madrid potlines: "reline" labor (reconstructing the damaged pots), "physical restart" labor, and a new, third category identified by Noranda's witnesses as "operational" labor or "babysitting" labor. According to Mr. Hess, the "babysitting" labor would be required once the pots were restarted due to their "coming up from being idle" in order to "maintain the pots from getting out of control." (A1566–A1568.) Mr. Hess claimed that only the "reline" and "restart" labor were included in the property settlement (A1573), and offered testimony that purported to separate those payments from the babysitting labor that he claimed Noranda could still seek as business interruption damages. (A1574.)

The trial court characterized Mr. Hess' monthly classification of labor in his testimony as confusing (A1589), not making sense (A1589), and illogical. (A1595.) Mr. Hess ultimately admitted that he could not identify, for any given month in his projections, how the Insurers or the jurors were supposed to know how many of the added laborers were reliners, how many of them were restarters, and how many were operators. (A1609–A1610.) The trial court was incredulous when Mr. Hess made this admission: "I'm sorry. Say it again. I just thought I saw a chart that had numbers attached to reliners, restart, are – so what are you – why do you say you don't know what these numbers represent as far as those people?" (A1610.)

Aside from their pre-trial motion to bar Mr. Hess's testimony (A0443), the Insurers moved to preclude Mr. Hess's testimony after he was questioned on voir dire, (A1633–A1635) moved to strike his testimony after he testified before the jury (A1677), and moved for judgment as a matter of law following the plaintiff's case based in part on the impropriety of Mr. Hess's testimony. (A1805–A1808.) The trial court deferred ruling on all four motions (A1646, A1678, A1808), and ultimately permitted the jury to consider Mr. Hess' testimony on this subject and on the hypothetical labor needs for rebuilding the plant.

H. The Jury Returns a Verdict Based on the Dual Hypothetical Worlds Theory

As the trial drew to a close, the Insurers tried yet again to persuade the trial court to prevent the jury from calculating damages based upon a contractually prohibited formula. In asking for a revision to the trial court's planned jury instructions, the Insurers asked the court to "make abundantly clear that there is no need to engage in this exercise of imaging [sic] a hypothetical actual scenario. The only thing that is hypothetical as we posit is the period of liability itself . . . ." (A1952–A1953.) But the trial court declined to change its instruction. After denying the Insurers' motion for a directed verdict that it had deferred (A2137–A2139), the trial court instructed the jury in a way that placed no restrictions on the "dual hypothetical worlds" model presented by Noranda, and effectively invited the jury to use Noranda's model by telling the jury "There has been conflicting testimony as to the number of workers that would be needed as the potlines were brought back on line and the extent those workers were covered in the property damage settlement in this case. It will be your prerogative to consider the evidence of the witnesses and experts, and determine which testimony you believe is most credible and consistent with the other evidence in the case." (A2155–A2157.)

The jury entered a verdict in favor of Noranda that totaled over $35 million before interest, fees, and costs, and made notations on the verdict form that suggested that it had used Mr. Hess' damages model as the basis for its calculations. (A2196–

A2197.) The trial court later reduced the verdict on the ground that more than $7 million in damages were not permitted by the Policy, for reasons other than those upon which this appeal is based. (Ex. 5.)

ARGUMENT

I. THE TRIAL COURT IMPROPERLY PERMITTED NORANDA TO PRESENT A DAMAGES MODEL THAT WAS CONTRARY TO THE "MEASUREMENT OF LOSS" FORMULA DICTATED BY THE PARTIES' POLICY

A. Question Presented

Did the trial court err in allowing Noranda to present a business interruption damages theory that was inconsistent with the Policy's formula because Noranda's model allowed the jury to reimburse Noranda for the cost of labor associated with a hypothetical plant rebuild that did not occur, rather than using the Measure of Damages formula enumerated in the Policy? (Preserved at A444–A480, A1271–A1303, A1633–A1635, A1677, A1952–A1953, A2137–A2139, A2216–A2217.)

B. Standard And Scope of Review

This Court reviews a trial court's interpretation of an insurance policy de novo. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). The standard of review is whether the trial court erred in formulating or applying legal precepts. *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

C. Merits of Argument

It was error for the trial court to allow the jury to reimburse Noranda for additional labor associated with a plant rebuild. Mr. Hess's "dual hypothetical worlds" model was contrary to the unambiguous "Measurement of Loss" language in the business interruption section of the Policy, and was contrary to other Policy provisions.

1. The Policy's Unambiguous Language Did Not Permit Mr. Hess's "Dual Hypothetical Worlds" Damages Model to Be Presented to the Jury

Like other contracts, the clear and unambiguous language in an insurance policy should be given its ordinary, usual meaning. *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. Ct. 1973). Courts will not stretch the meaning of a policy's plain words to create an ambiguity, *In re Verizon Ins. Coverage Appeals*, — A.3d —, No. 558-2018, 2019 WL 5616263, at *5 (Del. Oct. 31, 2019), and context should be considered in interpreting the policy's meaning, *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

a. The Policy Provides an Unambiguous Formula for Calculating Business Interruption Damages That Does Not Permit Recovery for Labor Costs of a Hypothetical Rebuilding of the Plant

The unambiguous "Measurement of Loss" provision of Noranda's insurance contract (A0205–A0206) dictates a straightforward measure of damages for business interruption claims – one that Noranda's own counsel summarized for the trial court as "revenues minus variable costs." (A0350.) The trial court also accurately summarized the Policy formula in ruling on the parties' summary judgment motions (before later allowing Noranda's expert to testify in direct contravention of its summary judgment decision). (A0437–A0438 (explaining the Measurement of Loss formula and also noting that Noranda had not claimed damages for additional payroll).)

The Policy defines a Period of Liability during which business interruption damages are awarded and contains a three-step formula that dictates how much, if any, compensation is provided to the insured. First, the Measurement of Loss formula requires that the insured's "Gross Earnings" during the Period of Liability be established in a manner described in the Policy. Second, two categories of expenses are subtracted from the Gross Earnings: (i) charges and expenses that do not necessarily continue during the interruption of production, and (ii) ordinary payroll, which is the cost of labor normally needed to generate those Gross

Earnings.[9] Third, other earnings derived from the operation of business are added to the total.[10] The Policy, in other words, provides a clear "revenues minus variable costs" damages formula. The Policy's language required that the parties estimate Noranda's revenues and variable costs if the accident had not occurred.

Moreover, there is no language in the Policy that calls for calculating damages by reconstructing what hypothetical costs Noranda might have incurred if it had attempted to rebuild the plant. To the contrary, the Gross Earnings formula requires *subtracting* out *ordinary*, *variable* costs required to generate the Gross Earnings because presumably such variable costs are saved during the period of business interruption. Nowhere in this formula is there a provision to *add* into the claimed recovery the labor costs required for a hypothetical rebuild of the facility.

[9] Noranda described ordinary payroll for purpose of this case as "the labor costs saved because two of the three potlines were not operating . . . ." (A0308.)

[10] The Policy also allows for a separate category of "Ordinary Payroll" to be included in damages if it is actually incurred, but as noted by the trial court in its summary judgment opinion, Noranda made no claim under this provision of the coverage, which (a) is designed for retention of valued employees and (b) explicitly required that Noranda actually employ and retain such workers. (A0308–A0309.)

b. Noranda's "Dual Hypothetical Worlds" Damages Calculation Is Contrary To the Plain Language of the Policy

In addition to the Gross Earnings formula, other unambiguous language in the Policy is directly contrary to Noranda's theory of damages.

First, the Policy states: "In determining the indemnity payable as the Actual Loss Sustained, the Company will consider the continuation of only those normal charges and expenses that would have been earned had there been no interruption of production or suspension of business operations or services." (A0206.) Obviously, the extraordinary costs involved in completely rebuilding and restarting damaged plant equipment are not "normal charges and expenses that would have been earned had there been no interruption of production." Nor are they "continuation" costs. Therefore, Noranda's "dual hypothetical worlds" damages model, which requires a calculation of the cost of rebuilding the facility, is directly contrary to the plain language of the Policy.

Second, the Policy contains provisions that allow Noranda to include in its business interruption claim a request for costs involved in trying to repair the plant, but each of those provisions requires that the costs have actually been incurred. Noranda could not therefore recover for the *hypothetical* costs of repairs that were never performed. The "Gross Earnings" calculation dictated by the policy allows Noranda to claim "Ordinary Payroll" (which, as noted *supra* at n. 11, is a separate

coverage for retaining valued employees that should not be confused with the "ordinary payroll" that is subtracted from the business interruption claim) but "only to the extent such payroll continues following the loss and would have been earned had no such interruption occurred." (A0206.) Similarly, Noranda is permitted to make a claim for "Extra Expense" incurred during the Period of Liability for "extra expenses to temporarily continue as nearly normal as practicable the conduct of the Insured's business," but Extra Expense coverage is also limited to "reasonable and necessary extra costs incurred by the Insured." (A0209–A0210.) The Policy's repeated, express requirements that claims for out-of-pocket expenses be actually incurred in order to be part of a business interruption claim add to the overwhelming evidence that the Policy's unambiguous language bars a claim for "hypothetical" rebuilding costs.

c. When The Parties Intended To Use The Cost Of Hypothetical Rebuilding As A Factor, They Specifically Provided For That In Other Portions of the Policy

Another portion of Noranda's Policy demonstrates that, where the parties intended for a hypothetical repair of the plant to be a factor, they wrote appropriate language in the insurance contract indicating that was the case. In describing how the Period of Liability—the period of time for which Noranda could claim business interruption damages—should be measured, the Policy states that the period is:

> 1) For building and equipment, the period . . . (a) starting from the time of physical loss or damage of the type insured; and (b) ending when with due diligence and dispatch the building and equipment *could be*: (i) repaired or replaced; and (ii) made ready for operations[.]

(A0211–A0212 (emphasis added).)

The policy expressly considers a hypothetical rebuilding of the plant when calculating the length of the Period of Liability. Conversely, the parties made no such provision in the contract when agreeing upon the method of calculating damages during that Period of Liability. In combination with the other unambiguous language of the Policy's Measurement of Loss provision, this conscious choice of language by the parties makes even clearer that the hypothetical costs of rebuilding the facility have no place in the Policy's Measurement of Loss calculation. In other words, the policy used the *time* required to hypothetically rebuild the plant to establish the *duration* of the recovery period, but it did not allow for the *costs* of such a hypothetical rebuild to be recovered in this portion of the policy.

d. There Is No Logical Basis for Noranda's "Dual Hypothetical Worlds" Damages Formula

At trial, Mr. Hess articulated no basis for choosing to employ his "dual hypothetical worlds" damages. Mr. Hess's only explanation of the formula is that it is "the only way to do it." (A1650.) But that is no explanation. There is no reason why a mathematical formula requiring the actual business interruption loss (earnings

minus variable costs at the time of the business interruption) to be inflated by adding into the claim the costs of a labor-intensive reconstruction of the facility. That result bears no resemblance to the insured's losses from the interruption of its business; rather, it instead substitutes for some measure of the cost of repairing the facility itself—an element of coverage that was the subject of a $38.5 million prior settlement.

2. Other Courts Have Interpreted Similar Business Interruption Policy Provisions to Disallow Noranda's "Dual Hypothetical Worlds" Damages Model

Business interruption is a common form of insurance. The Policy is typical of insurance of this type. State and federal courts therefore have interpreted similar loss-measurement provisions in insurance policies for decades. Courts consistently have found that "[a]ctual loss sustained . . . connote[s] the difference between the net profit the insured's business would have received absent the business interruption and the net profit actually received." *Business Interruption Insurance*, 37 A.L.R. 5th 41, § 2[a] (internal quotation marks omitted). Fundamentally, "business interruption insurance has [the] limited purpose [of] protect[ing] the earnings which the insured entity would have enjoyed had the event or occurrence insured against not intervened." *Id.* § 3[a].

As the Eighth Circuit noted in *Associated Photographers v. Aetna Casualty & Surety Co.*, courts interpreting the basic business interruption damages formula in Noranda's Policy have repeatedly found the language unambiguous. 677 F.2d 1251, 1256 (8th Cir. 1982). The policy at issue in that case was materially the same as the Policy here. The Court found that, under the policy, the insurer would compensate the insured only for "the actual loss sustained by the insured resulting directly from necessary interruption of business, but not exceeding the reduction in gross earnings less charges and expenses." *Id.* at 1253. Likewise, the Third Circuit treated application of a similar business interruption policy as straightforward:

> The first element of the formula is the reduction in earnings. . . . The second element of the formula is the phrase 'charges and expenses which do not necessarily continue during the interruption.'. . . Thus, the second element of the formula refers to expenses which could properly be discontinued during the interruption. The formula directs that the recovery may not exceed the first element less the second element.

E. Associated Coal Corp. v. Aetna Cas. & Sur. Co., 632 F.2d 1068, 1077-78 (3d Cir. 1980) (internal quotation marks omitted). This approach to handling of business interruption claims goes back decades. *See Nat'l Union Fire Ins. Co. v. Anderson-Prichard Oil Corp.*, 141 F.2d 443, 445 (10th Cir. 1944) (business interruption insurance "is designed to do for the insured in the event of business interruption caused by [an insured peril], just what the business itself would have done if no interruption had occurred – no more").

In contrast to this well-established understanding of business interruption damages, Noranda's dual hypothetical worlds calculation appears to be unprecedented. Noranda cited no case to the trial court, and the Insurers are aware of none, where business interruption damages have been calculated using the extraordinary "dual hypothetical worlds" model employed by Noranda's expert. Rather, the cases cited by Noranda to the trial court in support of its expert's approach were cases involving calculation of the Period of Liability. As discussed above, the Period of Liability is defined in the Policy (and in the cited cases applying similar provisions), to require an estimate of the time period required to repair the plant. But the Period of Liability is wholly distinct from the Measurement of Loss; the former is the time period during which damages will be paid, the latter is the amount of damages that will be paid over that time period. The amount of recoverable losses is limited to the estimated lost revenues minus variable costs – and does not include the cost of rebuilding the plant. Noranda incorrectly conflates these distinct concepts in the Policy and directly contravenes the Policy's three-step formula for measuring recoverable losses.

In Noranda's Opposition to Defendants' Motion in Limine to Preclude Noranda's Accounting Expert Christopher Hess (A1219, A1228), Noranda first explained its "dual hypothetical worlds" theory to the trial court, and cited two cases purportedly supporting its damages model. The first was *Duane Reade Inc. v. St.*

Paul Fire & Marine Insurance Co., 411 F.3d 384 (2d Cir. 2005), a case that was specifically about "the measure of *time* during which Duane Reade may recover for [business interruption] losses[.]" *Id.* at 387 (emphasis added). The case did not involve in any way the measure of damages during the period of liability. The second case was *Bard's Apparel Manufacturing, Inc. v. Bituminous Fire & Marine Insurance Co.*, 849 F.2d 245 (6th Cir. 1988). The dispute over business interruption insurance in that case was also strictly limited to the period of liability: "The parties obviated any need to compute the loss to Bard's of being shut down by stipulating pretrial that the monthly loss was $7,485, leaving only the *length of time* of the shut-down as an issue at trial." *Id.* at 251 (emphasis added). These cases had nothing to do with Noranda's "dual hypothetical worlds" model, despite being cited by Noranda as "settled law" supporting its damages model. Noranda's brief also incorporated by reference eight other cases from an earlier brief as further evidence of this "settled law," but in all eight of those cases the dispute involved the period of limitation, not the measure of loss.

In one case where an insured was permitted to claim business interruption damages for labor costs that were not actually incurred, it was pursuant to a specific provision in the relevant business interruption policy that does not exist in Noranda's Policy. In *DiLeo v. United States Fidelity & Guaranty Co.*, 248 N.E.2d 669 (Ill. Ct. App. 1969), the measure of damages clause with respect to business interruption

damages in the insurance policy stated: "Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss." *Id.* at 671. Citing this policy language, the court permitted the insured (a grocery store) to claim business interruption damages for the salaries of employees who "were mainly butchers who had been with the DiLeos for many years and had a substantial following of customers, and therefore they could not be dispensed with entirely." *Id*. at 675. Not only is Noranda's Policy devoid of the language that formed the basis for the *DiLeo* opinion but, as discussed in detail above, Noranda repeatedly told the trial court that it was not making a claim for retention of critical employees. Therefore, this case is inapposite for multiple reasons.

II. THE TRIAL COURT IMPROPERLY PERMITTED NORANDA'S EXPERT TO PRESENT TESTIMONY THAT WAS UNRELIABLE AS A MATTER OF LAW

A. Question Presented

Should the trial court have barred the testimony of Noranda's damages expert due to the unreliability of his factual assumptions regarding the facility's labor needs? (Preserved at A0443, A1635.)

B. Standard And Scope of Review

This Court reviews a trial court's decision to admit or exclude expert evidence for abuse of discretion. *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1268 (Del. 2013).

C. Merits of Argument

Noranda's damages expert, Christopher Hess, offered detailed testimony pursuant to his "dual hypothetical worlds" model on the costs that would be incurred by Noranda if it had repaired the damaged New Madrid facility. In order to perform his calculations, Mr. Hess made assumptions about how many employees Noranda would need to repair the facility and run it as repairs were made.

Mr. Hess's assumptions about the labor required following the accidents were extraordinary and facially implausible. Mr. Hess assumed that every single employee who worked on the potlines before the accident would need to remain on the job going forward to begin repairs, even though after the accident two of the

three potlines were rendered inoperable and could only be brought back into operation "gradually." (A1558.) When asked at trial for the basis for this assumption, Mr. Hess testified that former plant manager Chad Pinson told him that the Company would "probably" have kept all of its employees on the rolls after the potline accident. (A1608–A1609.) Notably, he did not say whether Mr. Pinson said they would be retained because they were all needed to repair the potlines or for some other reason. Mr. Hess's trial testimony was the first time that Mr. Pinson's specific estimate had been presented to the trial court as the source for Mr. Hess's extraordinary labor assumptions.

After first telling the trial court that he had independently evaluated whether Mr. Pinson's statement was a reasonable one, Mr. Hess later admitted that he did not perform any independent analysis of whether that number of people was actually required to repair and restart the plant. (A1608–A1610.) Moreover, after making this initial assumption that every one of the potline employees would need to remain employed, Mr. Hess expanded the labor count by assuming that, at some point, Noranda would have to further increase its number of potline employees in order to have people to "babysit" the repaired potlines, which allegedly would have required additional attention after they were repaired. (A2369.)

1. As a Gatekeeper, the Trial Court Was Responsible for Ensuring That Mr. Hess's Expert Testimony Was Reliable

Delaware trial courts are required to act as gatekeepers for expert testimony, ensuring that proffered expert testimony is both relevant and reliable. *Tumlinson*, 81 A.3d at 1269 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). "The trial judge must determine that the expert's methodology and ultimate conclusion are reliable based on the methods and procedures of science, rather than subjective belief or speculation." *Rivera v. State*, 7 A.3d 961, 971-72 (Del. 2010) (internal quotation marks omitted). The objective of the *Daubert* requirement is to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire, Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (cited with approval in *Goodridge v. Hyster Co.*, 845 A.2d 498, 504 n.20 (Del. 2004)). Here, the reliability requirement applies to Mr. Hess's testimony in two related ways. First, if the foundational data underlying Mr. Hess's opinions was unreliable, he could not base an opinion on that data. *Tumlinson*, 81 A.3d at 1269-70. Second, the trial court was responsible for assuring that Mr. Hess was exercising an acceptable level of intellectual rigor in handling the data that he was using to perform his expert analysis.

At trial, an expert may rely upon inadmissible facts or data only "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." D.R.E. 703. This requirement serves as "a guard against the use of unreliable hearsay." *Norman v. All About Women, P.A.*, 193 A.3d 726, 731 (Del. 2018). "[T]he proponent of the proffered expert testimony bears the burden of establishing the relevance, reliability, and admissibility by a preponderance of the evidence." *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. Ct. 2000).

An expert witness may not simply rely upon guesswork. If the rule were otherwise, experts would serve as a vector for a party's speculative damages estimate to be transmitted to a jury. In *Gannett Co. v. Kanaga*, this Court held that an accountant-expert's damages testimony was unreliable where his income loss projections "assumed that [the plaintiff-physician's medical] practice would never recover from the effect of the libel [at issue]." 750 A.2d 1174, 1188 (Del. 2000). The Court found it problematic that the expert had assumed that the medical practice would never recover and that the expert had relied on earnings data that were not admitted into evidence. *Id.* at 1185-88. The accountant-expert had disclaimed any direct knowledge of the plaintiff's earnings history and had also relied upon a fact witness that, among other things, had simply collected net income figures provided by the plaintiff's husband. *Id.*

This Court has critically analyzed whether the information provided to the expert is reliable and whether other experts in the field would reasonably rely upon it. For example, the Court in *Rivera* affirmed the exclusion of an expert's opinion about a defendant's medical condition that was based on "[the defendant's] own statements and statements from third parties, none of whom were qualified medical experts." 7 A.3d at 972. The Court found that the proponent of the expert's opinion had not shown that such statements were reasonably relied upon by others in that expert's field under Rule 703. *Id.* The outcome can be different, of course, when the expert "arrive[d] at his opinions by applying his training and experience to the facts of this case." *Norman*, 193 A.3d at 731 (medical expert relied upon medical records and sworn testimony). Mr. Hess's admission that he blindly relied on Mr. Pinson's out-of-court labor estimate does not satisfy these standards.

2. Mr. Hess's Assumption That Noranda's Plant Would Have Remained at Full Employment Even When Two Thirds of Its Production Capacity Had Been Eliminated Was Not Reliable

Mr. Hess's analysis depended on the facially absurd assumption that every single Noranda employee employed the day before the potline accident would be needed to begin a gradual rebuilding process. Indeed, even Mr. Hess apparently retreated from that assumption once the trial court asked him to break out his labor assumptions on a month-to-month basis. (A2329–A2331.) When pressed at trial whether he was testifying that three potlines worth of employees were required to

operate one and a half potlines, Mr. Hess disclaimed any responsibility for the figures, stating "I'm not telling you anything. I'm not an engineer." (A1632.) And when asked about whether he had conducted any independent analysis of the amount of labor that would be required for a hypothetical rebuild, he admitted that he had not. (A1608–A1609.)

Mr. Hess's assumptions regarding the continued employment of Noranda employees were pivotal to his calculation of damages. As discussed above, Noranda was able to produce a business interruption damages calculation in the tens of millions of dollars for the jury by using a formula that allowed it to claim (rather than subtract) labor costs. Mr. Hess dramatically increased the damage calculation produced by Noranda's formula by making these extraordinary assumptions about Noranda's retention and addition of employees.

Cross-examination can, in some cases, address disputes involving the reliability of experts. *Porter v. Turner*, 954 A.2d 308, 314 (Del. 2008). But if this Court's requirement that trial judges act as gatekeepers on issues of expert reliability and rigor is to have meaning, then there must be some expert opinions whose foundation and/or application cannot simply be passed along to a jury. This situation, where an expert relied entirely upon factual assumptions that were facially absurd, attributed them to an absent witness, partially retreated from them at trial, and admitted that he had applied no independent analysis to them, is the

quintessential case where the trial court should have acted as a gatekeeper. It was an abuse of discretion for the trial court to have declined to do so, and by allowing the Plaintiff to improperly exaggerate the amount of its business interruption claim, the trial court affected a substantial right of the Insurers and denied them a fair trial by permitting the jury to consider legally inadmissible testimony that dramatically affected the amount of the Plaintiff's claim.[11]

[11] D.R.E. 103. *See Mercedes-Benz of North America, Inc. v. Norman Gershman's Things to Wear, Inc*., 596 A.2d 1358, 1365 (Del. 1991) (discussing substantial prejudice standard for reversal of trial court based on improper evidentiary ruling).

III. THE TRIAL COURT IMPROPERLY PERMITTED NORANDA'S DAMAGES EXPERT TO CLAIM DAMAGES THAT NORANDA HAD WAIVED AS PART OF A PRIOR SETTLEMENT ARISING FROM THE SAME INCIDENTS

A. Question Presented

Should the trial court have permitted Noranda to seek any damages based upon alleged labor costs to hypothetically rebuild the New Madrid facility, given the release of claims it executed in connection with its $38.5 million property damage settlement with the Insurers and the unreliability of its expert's testimony relating to the release? (Preserved at A0465–A0469, A1635–A1636.)

B. Standard And Scope of Review

With respect to the admissibility of the classification by Noranda's expert of different labor costs as being included or excluded in the prior property damage settlement, the Court reviews a trial court's decision to admit or exclude expert evidence for abuse of discretion. *Tumlinson*, 81 A.3d at 1268. With respect to the interpretation of the release, the Court's review is de novo. *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of Argument

All parties agreed before trial that it would be improper for Noranda to "double count" its damages by claiming identical hypothetical labor costs under both the property damage and business interruption provisions of the Policy. (A1295, A1309.) This is consistent with case law interpreting similar policies. *See*, *e.g.*, *J&R Elecs. Inc. v. One Beacon Ins. Co.*, 825 N.Y.S.2d 462, 463 (N.Y. App. Div., 1st Dep't 2006). However, the trial court permitted Noranda to do precisely that, first by allowing Noranda to ignore the broad waiver of claims it made as part of its property damage settlement, and second by allowing Mr. Hess to offer expert testimony that the trial court itself recognized was unreliable to purportedly differentiate the losses covered by the settlement waiver. The admission of this testimony affected the Insurers' substantial rights by allowing Noranda to claim damages for which it had already been fully compensated through its property damage settlement.

1. In Settling Its Property Damage Claim, Noranda Waived Its Right to Make Any Claim for Labor Involved in Repairing and Restarting the Damaged Plant

In February 2016, Noranda formally settled its property damage claim against the Insurers, under the separate section of the Policy dedicated to reimbursing Noranda for its repair or rebuilding/replacement costs arising from the accidents. The sweeping settlement document discharged the Defendants from any claims relating to the incidents except, in relevant part, for "any portion of the Claim relating to any replacement costs or non-property damages." (A2406.) The settlement was for the actual cash value of Noranda's losses. The Policy defined "actual cash value" as "the amount it would cost to repair or replace insured property, on the date of loss, with material or like kind and quality, with property deduction for obsolescence and physical depreciation." (A0235.) Moreover, Noranda had the opportunity to request the Replacement Cost Value of a greater amount if it submitted proof of incurred capital expenditures by January 7, 2018. (A2405–A2406.)

Noranda's settlement with the insurers, read in conjunction with the Policy, expressly barred Noranda from claiming any further monies to repair the New Madrid plant. Rather than honor this prohibition, Noranda sought to create a new category of hypothetical restart costs that would allow it to sidestep the language of the release and the Policy. Noranda referred to this new category of costs as

"babysitting" repaired pots for some period of time after they were restarted. (A1567–A1569.) But no "babysitting" carve-out exists in the property damage portion of Noranda's Policy; the Policy requires payment by the Insurers for, in relevant part, the lesser of "The cost to repair" or "The cost to rebuild or replace on the same site with new materials of like size, kind, and quality." (A0181–A0182.) To the extent that Noranda incurred necessary, temporary additional costs in monitoring repaired equipment once that equipment went back online, such costs were included in the plain language of the property damage provisions of the Policy. For that reason, those restart costs were part of the settlement of the property damage claim and could not as a matter of law be separately pursued through business interruption coverage, even if they were renamed as "babysitting" expenses.

2. Noranda's Expert Could Not Reliably Distinguish Labor Costs for Which Noranda Admitted It Was Compensated from Those That Noranda Claimed to Be Excluded from the Property Settlement

Even if Noranda's "dual hypothetical worlds" damages model were permissible, and even if Noranda were permitted to parse out its property damages settlement such that it could claim labor costs that were supposedly not covered by the settlement, the jury should not have been permitted to consider Mr. Hess's estimates of such labor costs because these estimates were facially unreliable.

As detailed *supra* at Statement of Facts, G, Mr. Hess's testimony at trial vacillated between presentation of charts where he purported to separate out hypothetical labor costs that were and were not covered by the parties' property settlement, and candid admissions under cross examination that he could not provide any explanation for how he had made his calculations. Not only was Mr. Hess's overall estimate of the labor necessary to restart the plant subject to the *Daubert* infirmities discussed above, but his effort to subdivide those hypothetical costs into recoverable and non-recoverable costs was confused and patently unreliable. In fact, as noted above, the trial court criticized Mr. Hess's efforts to distinguish the waived from the non-waived losses. Mr. Hess himself admitted that his effort to parse these costs was purely speculative:

> Q: Okay. Did you actually do any kind of analysis where you looked at how many number of people you need to reline, how many people you need to restart, how many people you need to operate in any of these given months?
>
> A: No.
>
> Q: For any given month, how are the insurers who are looking at this supposed to know how many of these people are reliners, how many of these people are restarters, and how many of these people are operators?
>
> A: It's a technical question. I wouldn't know the answer to that.

(A1609–A1610.)

As with Mr. Hess's broader testimony regarding the labor involved in a hypothetical rebuild of the New Madrid facility, the trial court had a responsibility to act as a gatekeeper to ensure that Mr. Hess's expert opinions about the subdivision of that labor had a sufficient level of reliability that they could be presented to a jury. In this instance, where the trial court could not understand and Mr. Hess could not defend his claims, Mr. Hess's estimates of which labor costs were not covered by the property damage settlement did not meet the minimal reliability and rigor standards demanded of expert testimony, and should have been barred by the trial court. The trial court's allowance of this testimony resulted in the jury being misled about the recoverable damages (if any were appropriate at all), and the jury's damages award was significantly higher as a result. The Insurers were denied a fair trial by the trial court's allowance of this testimony that even the court recognized as unreliable.

CONCLUSION

For the reasons stated above, the Insurers respectfully request that this Court reverse the October 17, 2019 Final Order and Judgment of the Superior Court and the Superior Court's October 22, 2019 Order relating to Professional Fees.

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