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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORANDA ALUMINUM HOLDING CORPORATION, Plaintiff Below, Appellee/Cross-Appellant, v. 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/Cross-Appellees.	No. 444, 2019 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. No. N17C-01-152 WCC (CCLD)

APPELLEE/CROSS-APPELLANT NORANDA ALUMINUM HOLDING CORPORATION'S ANSWERING BRIEF ON APPEAL/ OPENING BRIEF ON CROSS-APPEAL

Dated: January 13, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. NATURE OF PROCEEDINGS

Plaintiff-Below/Appellee Noranda Aluminum Holding Corporation operated a smelter in Missouri that was responsible for 16% of U.S. aluminum production. Unfortunately, the smelter experienced two severe accidents, an explosion in its casthouse in August 2015 and a freeze of two of its three potlines in January 2016. As a result, the smelter was unable to remain in operation and shut down in March 2016.

After each accident, Noranda promptly submitted property damage and business interruption claims to its insurers, Defendants-Below/Appellants ("the Insurers"), which acknowledged coverage for the two accidents under their "all risks" insurance policies. Noranda and the Insurers resolved the property damage portions of the two claims for a total of approximately $38.5 million. However, of the roughly $40 million in business interruption losses that Noranda submitted, the Insurers declined to pay all but $5 million. Noranda then filed this insurance coverage action.

The Insurers' theory of the case on summary judgment, and at trial, was principally that an exclusion in their insurance policies for "idle periods" terminated Noranda's business interruption loss. In case that argument did not succeed, the Insurers also purported to calculate that loss. In their calculations, the Insurers correctly deducted from Noranda's real world business interruption loss

Noranda's presumed earnings, that is, the value of the aluminum production that Noranda would have achieved in the hypothetical world in which Noranda had kept the smelter in partial operation following the accidents and had repaired the damage. The Insurers also, however, deducted from that loss *all* of the labor that Noranda saved in the real world by shutting down the two damaged potlines. In other words, the Insurers took the position that they could subtract from Noranda's loss all of the revenues Noranda would receive from ramped up production as it rebuilt the potlines but could disregard the labor costs needed to achieve that ramped-up production.

When the Insurers moved for summary judgment on their theory of the case, the Superior Court, Hon. William C. Carpenter, denied their motion. Then, following an eight-day trial, the jury returned a verdict in favor of Noranda on all issues, finding that Noranda had established its business interruption losses for both accidents and that the "idle periods" exclusion did not bar coverage. The jury also largely agreed with Noranda's calculation of the business interruption losses, awarding $14,762,187 for the explosion at the casthouse and $20,727,946.50 for the potline freeze.

After losing before the jury, the Insurers moved for judgment as a matter of law or a new trial. The Superior Court denied the motion, finding that the Insurers' business interruption presentation at trial was "nearly incomprehensible and

confusing," and that they had relied upon an expert who "refused to respond to relevant common sense questions and whose independent judgment was clouded by his willingness to simply be the mouthpiece for the insurers." (Insurers' Br., Ex. 5 at 12-13.) However, the court subtracted from the jury verdict a substantial portion of the electrical costs that Noranda would have incurred had it repaired and restarted the damaged potlines, $7,461,117.

This appeal and cross-appeal followed. As is reflected in the Opening Brief and the discussion below, the Insurers' appeal does not challenge the Superior Court's rulings, or the jury's verdict, on the Insurers' principal theory of the case at trial, that the "idle periods" exclusion barred Noranda's business interruption claims. Instead, the Insurers have changed their focus entirely and contend only that the Superior Court should not have permitted Noranda's accounting expert to present his methodology for calculating Noranda's saved labor on the potline freeze claim. As discussed below, the methodology that Noranda's expert used—comparing the "but for" world in which no accident occurred with the world in which Noranda repaired the damage and restored production—is the same methodology that the Insurers' expert used at trial. Moreover, the calculations of Noranda's expert were consistent with the language of the insurance policies, logic and common sense. The Superior Court therefore did not abuse its discretion in allowing Noranda's expert to offer those calculations to the jury. However, this

Court should reverse the Superior Court's decision to subtract $7,461,117 in electrical costs from the judgment because the jury award on those costs was supported by substantial evidence.

II. SUMMARY OF ARGUMENT

(1) Insurers' First Argument: "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." (Insurers' Br. 3.)

Noranda's Response: Denied. The accounting experts for both Noranda and the Insurers used the same methodology. They presented opinions concerning the amount of lost "GROSS EARNINGS" that the Insurers owe based on a comparison between Noranda's "GROSS EARNINGS" in a world with no accidents and the "GROSS EARNINGS" that Noranda would have obtained during the Period of Liability (the repair period). Both experts testified that Noranda's lost "GROSS EARNINGS" must be reduced to reflect ramped-up production at the New Madrid smelter as repairs were made and accordingly must take into account the cost of achieving that production. This methodology was consistent with the insurance policy language requiring the insured to mitigate a loss. In any event, because the Insurers offered an opinion using this methodology, they cannot complain that Noranda also offered an opinion using the same methodology.

(2) Insurers' Second Argument: "The trial court improperly permitted the Plaintiff's damages expert to present testimony that was unreliable as a matter of law." (Insurers' Br. 3.)

Noranda's Response: Denied. The testimony of Noranda's expert was based on the record, consistent with the methodology that the Insurers' expert used, and accepted by the jury. It was well within the Superior Court's discretion to overrule the Insurers' objection to this testimony.

(3) Insurers' Third Argument: "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." (Insurers' Br. 3.)

Noranda's Response: Denied. The Superior Court gave the Insurers' proposed instruction on this issue, which directed the jury to consider whether Noranda's claim included amounts that Noranda had waived as part of a prior settlement. After hearing from three individuals who were involved in preparing the prior settlement (including the Insurers' own claims adjuster), all of whom supported the conclusion that the items in Noranda's claim were not part of the prior settlement, the jury found that Noranda's claim did not include amounts that were waived as part of the prior settlement. The Insurers offered no evidence to the contrary.

(4) Noranda's Cross-Appeal: The Superior Court improperly reduced the jury's verdict by $7,461,117 attributed to electrical inefficiency costs when ample evidence supported the jury's conclusion that Noranda needed to incur that amount as a cost of gradually increasing production at the New Madrid plant during the Period of Liability. (Insurers' Br., Ex. 5, at 9.)

(5) Casthouse Explosion Claim: The Insurers have not appealed the jury verdict for Noranda on the casthouse explosion claim. Accordingly, this Court should affirm that portion of the verdict.

III. COUNTER-STATEMENT OF FACTS

A party that appeals a jury trial loss—like the Insurers—has a duty to direct this Court to the evidence that supports the jury's factual findings so that the Court can assess whether the jury's verdict was correct. *See* Del. Sup. Ct. R. 14(b)(v) (the statement of facts must include "all facts which should be known in order to determine the points in controversy"); *see also Town of Cheswold v. Vann*, 9 A.3d 467, 473 (Del. 2010) (this Court "will not disturb a jury's factual findings so long as there is any competent evidence upon which the verdict could reasonably be based") (citation omitted). However, the Insurers do not tell this Court about much of the evidence adduced against them at trial on which the jury based its verdict. Noranda here presents a more complete Statement of Facts.

A. Noranda's Operations at the Smelter Before the Accidents

Noranda was a publicly-traded aluminum products manufacturer. (A1443; A0749-A0750.) Unlike most U.S. companies in the aluminum industry, Noranda's operations were integrated: Noranda mined and refined the raw materials needed to make aluminum, operated a smelter to make the aluminum, and maintained a downstream facility to manufacture and sell finished aluminum products. This integration gave Noranda a competitive advantage: when one part of the business was slow, another part of the business was typically thriving. (A1458-A1463; A1683.)

Noranda produced aluminum at its 143-acre smelter in New Madrid, Missouri ("the smelter" or "the plant"). (A1500.) Before the accidents that led to Noranda's insurance claims, the smelter was responsible for 16% of U.S. primary aluminum production (A1500) and was Noranda's largest asset. (A1695.)

An aluminum smelter typically consists of several rows, or potlines, each with more than one hundred huge reduction cells (or "pots") that are connected to an electricity source. Noranda's smelter had three potlines. (A1500-A1501.) The plant also included a facility called a casthouse, where Noranda could cast molten aluminum from the potlines into billet, a value-added product. (A1454-A1455.)

In August 2015, before it suffered the accidents underlying this dispute, the smelter was in financial distress, principally due to a decline in aluminum prices. (A1681; A1468-A1470.) Nonetheless, Noranda remained optimistic about the future. (A1691-A1692.) That was because aluminum prices are cyclical and Noranda's industry consultants were telling it that prices were likely to hit bottom in late 2015 and then rebound starting in the first quarter of 2016. (A1474-A1478.) Noranda's CEO at the time, Layle Smith, testified that Noranda based its business plans on the assumption that aluminum prices would rebound from their "trough." (B0094.) The forecasts proved true, as prices began to rise in the first quarter of 2016 (B0103-B0104) and then "rallied considerably" from 2016 to 2017, exceeding even the more generous forecasts. (A1478-A1482.)

Before the accidents described below, Noranda's management began to explore filing a Chapter 11 bankruptcy petition to allow the company to cut costs and defer expenditures so it could remain in business until prices revived. (A1683-A1684.) Noranda retained financial advisors who helped Noranda model several different options for continuing operations after filing for bankruptcy. (A1685-A1691.)

B. The Two Accidents at the Smelter

Before Noranda could implement its cost-cutting plan, however, it suffered a serious accident at the smelter. On August 4, 2015, there was an explosion at the smelter's casthouse ("the Casthouse Explosion"). (A1445.) Fortunately, no one was injured, but the accident damaged the building and equipment, limiting the plant's ability to manufacture high-value aluminum products. (A1254-A1259; A1652-1653.)

Following the Casthouse Explosion, Noranda accelerated its plan to file for Chapter 11 bankruptcy. (A1682-A1683.) At the December 2015 and January 2016 Board of Directors meetings, the Noranda Board accepted a recommendation from management that the company pursue Chapter 11 bankruptcy while keeping all of its operations running, including the smelter. (A1683-A1689.)

However, while the January 2016 Board meeting was taking place, the smelter suffered a second, even more severe, accident. That accident, on January

7, 2016, involved a breakdown of electrical switchgear equipment that prevented Noranda from continuing to heat two of the smelter's three potlines. As a result, the molten aluminum froze in hundreds of pots in potlines one and two ("the Potline Freeze"), rendering those pots unusable until the frozen aluminum could be extracted and the pots could be restarted or relined—a lengthy and expensive process that would have involved removing and reinstalling the pot components one pot, or a few pots, at a time. (A1445; B0071-B0072; B0086-B0088.) Because potlines one and two produced molten aluminum for all of the smelter's aluminum products, this second accident affected more products than the Casthouse Explosion. (A1658.)

A few weeks after the Potline Freeze, Noranda filed its Chapter 11 bankruptcy petition. (A1446.) Because the accidents made it impossible to run the undamaged portions of the smelter economically, even with the assistance of the bankruptcy process, the lenders who provided Noranda with debtor-in-possession financing required Noranda to shut down the smelter completely, which Noranda did on March 12, 2016. (A1500-A1503; A1692-A1693; A1799-A1802.)

Noranda sold the smelter, still shut down, in November 2016 as part of the bankruptcy proceeding. (A1694.)

C. Noranda's "All Risks" Property Insurance Program

At the time of the accidents, Noranda had in place an "all risks" property

insurance program with $700 million in coverage for most losses, subject to a $200 million sublimit of liability for potline freeze losses. (A0164-A0168.) That program insured, among other things, property damage and business interruption losses, and professional fees to prepare insurance claims. Thirteen insurers participated in the "all risks" program; however, the parties have stipulated that the Factory Mutual "all risks" policy, included in the Appendix at A0156-A0240 ("the Policy"), contains the provisions that are relevant to this case. (A1443-A1444.)

D. Noranda's Property Damage Insurance Claims

Noranda submitted timely claims to the Insurers for losses resulting from the Casthouse Explosion and the Potline Freeze. (A1445-A1446.) Noranda and the Insurers each retained forensic accountants to help determine the amount of Noranda's property damage loss (as well as the magnitude of the business interruption losses, discussed below). (A1673-A1674; A2068.) Those accountants testified as experts at trial: Christopher Hess for Noranda and Peter Karutz for the Insurers. In addition, the smelter's Plant Manager, Chad Pinson, was involved in presenting the insurance claims on behalf of Noranda. (A1661-A1662; A1674; B0073-B0081.)

After the accountants exchanged their competing analyses of Noranda's claims, the parties agreed in 2016 to settle the property damage components of the two claims for a total of approximately $38.5 million, net of deductibles, which the

Insurers paid to Noranda. (A1446; A1674.) With respect to the property damage component of the Potline Freeze claim in particular, because Noranda had shut down the plant and could not repair the damaged potlines, the Insurers agreed to pay Noranda a total of $16 million, net of the deductible, on an "actual cash value" basis. (A2397.)[1]

The Insurers' $16 million Potline Freeze property damage payment included approximately $6.6 million in labor costs that Noranda would have incurred to repair the Potline Freeze damage. The accountants calculated that sum by determining the number of pots that Noranda would have needed to reline and restart to restore the potlines to their pre-accident condition and multiplying that number by the labor costs for relining and restarting a single pot. (A1575-A1579; A1674.) The $6.6 million did not include labor needed after individual pots were relined and restarted, and specifically, the labor required to operate the newly restarted pots while other pots in the potline were being repaired. (A1676-A1677; B0102.) Mr. Hess made that clear in a contemporaneous email to Plant Manager Pinson, which attached a spreadsheet that the Insurers relied on heavily at trial. (A1674-A1675; B0128.)

[1] The Policy requires the use of an "actual cash value" measure—in essence, the cost of repairing the damaged property less depreciation—for a property damage loss if the property is not repaired within two years. (A0181-A0182.)

In exchange for the $16 million, Noranda released the Insurers from liability for the property damage portion of the Potline Freeze claim. However, that release did not include "any portion of the [Potline Freeze] Claim relating to any replacement costs or non-property damages." (A2406.)

E. Noranda's Business Interruption Insurance Claims

1. The Business Interruption Coverage

The Policy provides business interruption coverage,[2] that is, coverage for lost earnings during the "Period of Liability," which is the period starting on the date of each accident and continuing through the time the insured would have needed, with the exercise of due diligence and dispatch, to repair the damage and restore operations to pre-loss conditions. (A0211-A0212; A2150-A2151; *see also Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 154 (3d Cir. 1992) (The "purpose of business interruption insurance [is] to return to the insured the amount of profit that would have been earned ... had a casualty not occurred.") (citations omitted).)[3]

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[2] The Policy employs a British expression, "time element," to refer to its "business interruption" coverage. However, like the Insurers (*see* Insurers' Br. 7 n.2), Noranda uses the American term "business interruption," instead of "time element," in this brief.

[3] An insured is entitled to recover for a business interruption loss even if it does not repair the damaged property. (*See, e.g.*, *Bard's Apparel Mfg., Inc. v. Bituminous Fire & Marine Ins. Co.*, 849 F.2d 245, 251-52 (6th Cir. 1988); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 355 (8th Cir. 1986);

The Insurers made a $5 million partial payment for the Casthouse Explosion business interruption claim. (A1445-A1446.) However, the Insurers denied coverage for the rest of Noranda's claimed $40 million in business interruption losses, including all of the business interruption losses associated with the Potline Freeze, asserting principally that Noranda would have closed the smelter in March 2016 even absent the accidents, such that the "idle periods" exclusion in the Policy would eliminate all additional business interruption coverage. (B0100-B0101; B0115-B0117.)

This insurance coverage action concerns Noranda's claim for its unpaid business interruption losses.[4]

2. The Policy's Formula for Determining the Amount of Noranda's Covered Business Interruption Loss

The Policy allowed Noranda to choose between a "GROSS EARNINGS" and a "GROSS PROFITS" formula for calculating its business interruption loss

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A0433-A0434; A2152-A2153.) However, the Period of Liability is then determined on a hypothetical basis, that is, the amount of time a reasonable business would have needed to repair the damage and restore operations to pre-loss levels. (*Id*.) The Superior Court so instructed the jury (A2152-A2153), and the Insurers have not identified that instruction as an issue on appeal.

[4] With one exception: The Policy also covers the professional fees that Noranda incurred to prepare its claim, which Noranda also claimed. (Insurers' Br., Ex. 2.)

during the Period of Liability. (A0205.) Noranda elected the "GROSS EARNINGS" recovery (A1650-A1652), which is measured as follows:

> 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[5];
>
> 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 … to the extent such payroll continues following the loss and would have been earned had no such interruption happened.

(A0205-A0206.) The Policy defines "Gross Earnings," for manufacturing operations, as "the net sales value of production less the cost of all raw stock, materials and supplies used in such production." (A0207.)

Thus, one starts with "Gross Earnings" and then: *subtracts* "all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services"; *subtracts* "ordinary payroll"; *adds* "all other earnings derived from the operation of the business"; and *adds* "Ordinary

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5 "Gross Earnings" (with initial capital letters) is a component of "GROSS EARNINGS" (in all capitals), and the two terms accordingly are not synonymous. (A1650-A1651; A1669.)

Payroll" but only "to the extent such payroll continues following the loss." (A1650-A1651; A2155-A2156.) Those components of "GROSS EARNINGS" are measured during the Period of Liability. (A0211-A0212; A2151.)[6]

Finally, and critically, the GROSS EARNINGS measure does *not* take into account fixed expenses, such as mortgage payments, taxes, and company overhead. Thus, while the Insurers repeatedly argued at trial, and they argue again on appeal, that Noranda was unprofitable when all costs were taken into account, that does not excuse the Insurers from their duty to pay a business interruption loss under the "GROSS EARNINGS" measure set forth in the Policy.

F. Noranda Commences Litigation, and the Superior Court Resolves Several Issues in Noranda's Favor on Summary Judgment

Noranda filed suit against the Insurers in early 2017, asserting that they had breached their insurance policies by failing to reimburse Noranda for its business interruption losses from the accidents. Noranda sought both damages and declaratory relief related to the Insurers' breaches. (A0149-A0154.) As noted, the Insurers' principal defense throughout the litigation was that Noranda's claims were barred or limited by the "idle periods" exclusion; in the Insurers' view, Noranda idled the smelter in March 2016 because of its poor financial condition,

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[6] The Superior Court instructed the jury to use this formula to determine the amount of lost "GROSS EARNINGS." (A2155-A2156.) The Insurers have not identified those jury instructions as issues on appeal.

not the two accidents. Alternatively, the Insurers contended that Noranda could not recover any damages relating to the period after Noranda sold the plant in November 2016. (B0031-B0041; A1167-A1189.)[7]

In case the Insurers' "idle periods" and "sale of the plant" defenses were unsuccessful, the Insurers' accountant, Mr. Karutz, prepared calculations of Noranda's lost "GROSS EARNINGS" as a result of the Casthouse Explosion and the Potline Freeze. He began by determining the amount of "Gross Earnings" (initial capitals) that Noranda would have lost during the Period of Liability. (A0736-A0742.) Mr. Karutz recognized that Noranda would have ramped up production as it repaired the damaged potlines and brought repaired pots back on line, one or a few at a time. He accordingly reduced the amount of lost Gross Earnings to reflect revenues generated from that ramped-up production. (A0736-A0742.) However, instead of subtracting from the lost Gross Earnings just the operating expenses and labor costs that Noranda would have saved during the Period of Liability as a result of the accidents, Mr. Karutz subtracted *all* of Noranda's labor costs at the smelter. (A0742-A0744.) Because the total labor costs at the entire smelter swamped the amount of lost "Gross Earnings" during the

[7] The jury rejected the "idle periods" defense in its special verdict (A2196-A2197), and the Superior Court granted summary judgment for Noranda on the "sale of the plant" argument. (A0432-A0436.) The Insurers do not raise either argument as an issue on appeal.

Period of Liability, Mr. Karutz arrived at zero for Noranda's lost "GROSS EARNINGS" for the Potline Freeze, and less than $5.5 million for the Casthouse Explosion. (A0745.)

After discovery closed, the parties filed motions summary judgment. Among the issues on which the Insurers moved was their contention that Mr. Karutz's method of subtracting all of the labor costs at the plant from Noranda's lost "Gross Earnings" was the correct method for calculating Noranda's lost "GROSS EARNINGS." (A0438-A0439; B0043-B0062.) The Insurers' rationale was that the "GROSS EARNINGS" calculation in the Policy provides that "Ordinary Payroll" (initial capital letters) is covered only "to the extent such payroll continues following the loss," and because Noranda shut down the plant shortly after the second loss, no payroll continued after that point. (B0058-B0061.) Therefore, the Insurers argued, they could subtract all of Noranda's payroll at the plant from the lost "Gross Earnings."

In response, Noranda distinguished between "Ordinary Payroll" (initial capitals), which is an extension of coverage in the Policy for which Noranda was not claiming, and "ordinary payroll" (no capitals). (A0308-A0310.) "Ordinary Payroll"—the cost of keeping key employees on the books after a loss, even if they are not working—is covered only if Noranda actually pays the employees. In contrast, "ordinary payroll" is a variable cost that is subtracted from "Gross

Earnings" unrelated to whether that expense may "continue[] following the loss." (A0310-A0313.)

The Superior Court agreed with Noranda on this issue, explaining that, "[i]n the absolutely absurd world of insurance policies, …, the capitalization here may actually mean something other than its plain words." (A0438.) On the issue of which labor costs should be subtracted from "Gross Earnings," the Court also sided with Noranda by finding that "ordinary payroll" (not capitalized) need not be subtracted simply because it did not "continue[] following the loss," once Noranda shut down the plant:

> The issue is complicated by the fact that, at some point after the destruction of potlines one and two, the company decided to or was forced to close the entire facility. As such, the Insurers now want to subtract the payroll for employees who worked on potline three and were let go when the facility closed, even though they agree the loss of gross earnings only relates to potlines one and two. The Court agrees with Noranda that this is not only inconsistent with the policy but also fundamentally unfair. The simple answer here is that only the earnings that would have been attributable to potlines one and two and the payroll that was saved in the operation of these two potlines should be used in the gross earnings calculation.

(A0438-A0439.) The Insurers do not seek appellate review of this ruling.

G. The Accounting Opinions Offered at Trial

Although the focus at trial was on the Insurers' "idle periods" argument (and, to a lesser extent, on the length of the Period of Liability, a subject on which the Insurers called four expert witnesses), both parties offered accounting experts

to testify regarding the amount of Noranda's loss. The Insurers' description of Mr. Hess's testimony in their opening brief never mentions that he and Mr. Karutz applied the exact same methodology for calculating Noranda's lost "Gross Earnings," that is, the value of the production that Noranda lost due to the accidents. Both experts calculated that value by comparing the "Gross Earnings" that Noranda would have achieved without the accidents to the "Gross Earnings" that Noranda would have achieved *in the hypothetical world in which it made repairs and gradually brought the pots back online*. Mr. Karutz testified explicitly that this was the correct methodology to use:

> Q. [Y]ou agree that the correct comparison for assessing Noranda's lost margin is between what would have happened if there had been no accidents and what would have happened if there were accidents but Noranda had gone ahead and made repairs; right?
>
> A. Correct.

(A1971; *see also* A2079-A2098.) Accordingly, when the Insurers argue on appeal that Mr. Hess used some sort of novel methodology to support his opinions on the amount of the loss, they fail to disclose that the Insurers offered accounting opinions at trial using precisely the same methodology. (Insurers' Br., Ex. 5 at 4-5.)

1. Mr. Hess's Damages Analysis at Trial

At trial, Mr. Hess explained both in *voir dire* and to the jury the basis for his opinions on the amount of Noranda's loss. First, Mr. Hess addressed how he

calculated Noranda's lost "Gross Earnings" during the Period of Liability. When potlines are repaired, each pot (of which there are hundreds) in the potline is started up one, or a few, at a time, such that aluminum production from the potline ramps up gradually as more pots are brought back online. (A1558; A1659.) Therefore, had potlines one and two been repaired after the Potline Freeze, Noranda would have experienced gradually increasing production from the potlines, and corresponding increasing Gross Earnings, during the Period of Liability. For this reason, Mr. Hess calculated Noranda's lost Gross Earnings as if that loss gradually decreased over time, as production from the potlines would have increased, even though, in the real world, there was no such increase in production because Noranda shut down the plant. (A1558-A1560; A1659; A1675-A1676.) To disregard the Gross Earnings generated by that ramped up production in the hypothetical world would overstate Noranda's loss. (A1560.) Mr. Karutz agreed with Mr. Hess on that point. (A1559-A1560; A1675-A1676; A1966-A1971.)

Next, Mr. Hess offered an opinion on the labor and other costs that were saved during the Period of Liability. He did not simply subtract from the lost Gross Earnings every dollar of labor and every penny of energy costs that Noranda saved because it shut down the plant. That is because doing so would give the Insurers the benefit of a subtraction from the lost Gross Earnings for hypothetical

ramped up production at the plant, without accounting for the cost of achieving that ramped up production. That is, if the pots in potlines one and two had been repaired and gradually brought back online, labor would have been needed to operate those pots as other pots in the potline were repaired and restarted. (A1661-A1662; A1676.) Further, because partially operating potlines are less stable than fully operational potlines, proportionally more labor is required to operate a smaller number of pots, thus increasing the amount of labor that would be needed as each of the two potlines was restarted. (A1661-A1662; A1676.) Similarly, a partially operating potline is less efficient in terms of its electrical needs, so proportionally more electricity is needed to run a partially operating potline than a fully operational potline. (A1659-A1660.) Mr. Hess took all of these factors into account in computing the costs that Noranda would have saved during the Period of Liability. (A1662-A1664.)

Finally, Mr. Hess took care not to include in his calculations the labor that was needed to repair and restart the individual pots because those labor costs had been paid through the settlement of Noranda's Potline Freeze property damage claim. Mr. Hess did this by calculating the total labor that would have been needed (a) to repair and restart the pots, and (b) to operate them as other pots were brought back online. He then subtracted out the labor needed for the repair and restart of the pots that was the subject of the property damage settlement. (A1660-A1661;

B0107-B0109.) Mr. Hess had the exact numbers for the property damage settlement repair and restart labor from the calculations that Mr. Karutz had prepared in connection with that settlement. Moreover, Mr. Hess had personally participated in the settlement of the property damage claim and had spoken with Plant Manager Pinson, who had negotiated the property damage settlement with the Insurers, about the settlement process. (A1569-A1570; A1661; A1673-A1674; A1676-A1677.) At trial, the Insurers' claims adjuster, Sean Taylor, agreed that the property damage settlement covered the labor needed for the repair and restart of the pots, but *not* the labor needed to operate the pots as the rest of the potline was restarted, confirming that the labor costs that Mr. Hess had subtracted out were the only labor costs covered by the settlement. (B0102.) Mr. Karutz also confirmed that Mr. Hess's figures were "pretty close" to his own numbers. (A2130.)

2. Mr. Karutz's Damages Analysis at Trial, Which Used the Same Methodology as Mr. Hess But Measured Saved Labor Costs Incorrectly

Before being allowed to testify at trial, the Insurers' accounting expert, Mr. Karutz, was subjected to a *voir dire* examination outside the presence of the jury. During that examination, Mr. Karutz explained his calculation of Noranda's "GROSS EARNINGS" loss. As noted, Mr. Karutz began in the same manner as Mr. Hess, by calculating the amount of "Gross Earnings" that Noranda would have lost during the Period of Liability, that is, a period in which Noranda would have

repaired the damaged potlines and would have gradually started up the pots in potlines one and two. Mr. Karutz agreed with Mr. Hess that this meant that Noranda's production would have gradually increased, and its "Gross Earnings" loss would have correspondingly decreased, over the course of the Period of Liability. (A1966-A1971.) However, instead of subtracting from that number the expenses and labor costs that Noranda would have saved during that period as production gradually increased, Mr. Karutz subtracted *all* of Noranda's labor costs for potlines one and two for the entire Period of Liability. (A1971-A1972; A1986-A1991.)[8]

In other words, Mr. Karutz assumed 100% labor savings on potlines one and two even as he calculated a gradual increase in production from those potlines and subtracted that gradually increased production from Noranda's loss. (A1981-A1984.) In this manner, Mr. Karutz subtracted "Gross Earnings" achieved as a result of ramping up production during the Period of Liability but did not account for the labor cost needed to achieve that production. He testified that he did so because he interpreted the Policy to allow him to account for labor costs only if Noranda actually paid for the labor in the real world. (A1976-A1977; A1982.)

[8] As noted, the summary judgment ruling had rejected Mr. Karutz's original theory, that he could subtract all labor costs for the entire plant.

At the conclusion of the *voir dire* examination, the Superior Court ruled that Mr. Karutz could not present this method for calculating lost "GROSS EARNINGS" to the jury. (A2057-A2059.) The Court explained that Mr. Karutz had subtracted all of the labor for potlines one and two based on his interpretation of the Policy language, whereas interpreting the Policy was outside Mr. Karutz's area of expertise:

> [W]here he's simply saying ["]I believe the policy demands that they get no labor because it wasn't incurred["] is an interpretation of a policy, not an expert opinion concerning what is the hypothetical world of bringing it back together.

(A2059.) In other words, because Mr. Karutz was not presenting a methodology for determining saved labor costs based on his expertise, the Superior Court did not allow Mr. Karutz to offer opinions at trial using that methodology. (*See Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 796 (Del. 2006) (expert can only offer opinions within the expert's area of expertise).) The Insurers have not identified this ruling as an issue for appeal.

However, the Superior Court permitted Mr. Karutz to testify to an alternative method for calculating "GROSS EARNINGS" that was within the competence of an expert accountant. Under that alternative methodology, Mr. Karutz again began by calculating the amount of "Gross Earnings" that Noranda would have lost during the Period of Liability, reducing that number to reflect ramping-up production during that repair period. But this time, Mr. Karutz attempted to

account for the labor that would have been needed to achieve the production ramp-up and corresponding increase in "Gross Earnings" that Noranda would have experienced during the Period of Liability. (A2002-A2004; A2070-A2080; A2079-A2099; A2115.) In calculating the amount of that labor cost, however, Mr. Karutz did not determine how much labor Noranda actually would have required to ramp up production at potlines one and two if Noranda had repaired those potlines. Instead, Mr. Karutz calculated the labor needs on a purely mathematical basis, as a proportion of the "margin" on Noranda's ramped-up aluminum production on the repaired potlines. (A2006-A2014; A2094-A2098; A2114-A2119; B0119-B0127.) He also calculated and deducted electricity costs for the ramp-up. (A2111; A2077-A2078.)

Finally, with respect to the labor that was covered by the Potline Freeze property damage settlement, Mr. Karutz did not take issue with Mr. Hess's opinions or methodology. Instead, Mr. Karutz testified that Mr. Hess was too conservative and should have deducted only approximately $6.255 million for pot reline and restart labor costs covered by the Potline Freeze property damage settlement, that is, $345,000 *less* than the $6.6 million that Mr. Hess actually deducted in order to calculate Noranda's business interruption loss for the Potline Freeze. (A2127-A2129.)

H. The Jury's Verdict

The jury returned a special verdict in Noranda's favor, finding that the Insurers covered the Casthouse Explosion and the Potline Freeze business interruption claims. The jury also rejected the Insurers' primary defense: that coverage was barred or limited by the Policy's "idle periods" exclusion. (A2196-A2197.)

The jury then awarded around 90% of the business interruption losses that Noranda had sought. In doing so, the jury gave careful consideration to the evidence, as shown by the fact that they determined the precise Period of Liability for each accident and then awarded damages down to the penny. For the Casthouse Explosion business interruption loss, they awarded $14,762,187.00, based on a "22 month[]" Period of Liability, and for the Potline Freeze business interruption loss, they awarded $20,727,946.50, based on a "9.5 month[]" Period of Liability. (A2197.) To arrive at these numbers, the jury relied on Mr. Hess's summary of damages on rebuttal, adopting his proposed figures, but only for the months they found were included in the Period of Liability for each accident. (B0111-B0113; B0118.)[9]

[9] The jury took the average of the length of the Period of Liability for the Casthouse Explosion proposed by Noranda's expert, Benjamin Woolley, and by the Insurers' expert, Michael Bischof. (A2197; B0097; A1863.) The jury accepted certain opinions of the Insurers' potline expert, Alton Tabereaux, to calculate the

I. The Trial Court Denies in Part and Grants in Part the Insurers' Post-Trial Motions

After trial, the Insurers moved for judgment as a matter of law on several grounds that are relevant here, including that: (1) Mr. Hess failed to subtract sufficient saved payroll for the Potline Freeze, and instead considered hypothetical labor costs that Noranda did not incur; (2) Mr. Hess included electrical inefficiency costs in his Potline Freeze calculations even though those costs were never incurred; (3) Mr. Hess's calculations included labor costs that were covered by the property damage settlement; and (4) under Mr. Hess's analysis, Noranda is better off than it would have been without the accidents. (A2215-A2221.) Alternatively, the Insurers sought a new trial on the grounds that the trial court erred in its motion *in limine* and trial rulings with respect to the testimony of Mr. Hess and Mr. Karutz, and that the jury's Potline Freeze damages award was excessive. (A2224-A2228.)

The Superior Court rejected almost all of these arguments. Pointing out that the Insurers' witnesses had "at times displayed such an unfettered bias it undermined their credibility," the Superior Court concluded that the jury had simply chosen to believe the testimony of Noranda's witnesses, including Mr. Hess. (Insurers' Br., Ex. 5 at 1.) As to the saved labor issue, the Superior Court

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length of the Period of Liability for the Potline Freeze. (A2197; A1882-A1883; A1886-A1887; A1891.)

recognized that "[u]nder the insurers' view of the Policy, they get the benefit of the production increase as the plant is rebuilt, which would reduce the Plaintiff's loss, as well as the benefit of not having to reduce those earnings by the payroll cost necessary to gain that production since those expenses were not incurred." (*Id.* at 5.) The Superior Court found that this interpretation of the Policy—and thus Mr. Karutz's proposed testimony that the Superior Court had excluded—"is simply incorrect and would lead to an absurd and unfair result that would never have been contemplated by the parties." (*Id.* at 6.) Accordingly, the jury was free to decide between Mr. Hess's analysis and the revised analysis that Mr. Karutz presented. (*Id.* at 4-8.) Similarly, as to the property damage settlement, the Superior Court found that there was sufficient evidence for the jury to determine which labor costs were (or were not) included in the settlement. (*Id.* at 10.)

With respect to the Potline Freeze electrical inefficiency costs included in Mr. Hess's calculations, however, the Superior Court granted judgment as a matter of law in the Insurers' favor. The Superior Court concluded that only "earnings and routine expenses" are included in the Policy's "GROSS EARNINGS" measurement. According to the Superior Court, the Potline Freeze electrical inefficiency costs, in the amount of $7,461,117, were a "non-routine extra expense[] unrelated to the normal operation of the business." (*Id.* at 9.)

J. The Superior Court Enters Judgment in Noranda's Favor

Given the verdict in Noranda's favor on the Potline Freeze business interruption claim, the parties agreed that Noranda should be awarded an additional $131,244.09 for professional fees paid to Mr. Hess for his work on the Potline Freeze claim.[10] The Superior Court awarded that amount to Noranda. (Insurers' Br., Ex. 2.) The Insurers do not challenge that award.

The Superior Court then entered judgment in Noranda's favor. The business interruption damages awarded for the Casthouse Explosion and Potline Freeze were identical to those in the jury verdict, except for the Potline Freeze electrical inefficiency costs on which the Superior Court had granted judgment as a matter of law. The Superior Court also awarded pre-judgment interest on Noranda's business interruption losses and professional fees, which the Insurers do not challenge. (Insurers' Br., Ex. 1 ¶¶ 3-4.)

[10] The parties had previously agreed to have the trial court resolve this claim. (A1360-A1362.)

IV. ARGUMENT

A. Mr. Hess's Damages Model Was Consistent with and Required by the Policy Language

1. Insurers' First Question Presented

Did the Superior Court abuse its discretion in permitting Noranda to present a damages model that (1) used the same methodology as the Insurers' model in that both models offset Noranda's loss with gradually increasing "Gross Earnings" during the Period of Liability, and (2) properly accounted for the labor that would have been required to achieve that increase in "Gross Earnings"?

2. Scope of Review

This Court reviews a trial court's decision to admit or exclude expert evidence for abuse of discretion. (*Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 536 (Del. 2009).)

3. Merits of the Argument

a) Both Sides Used the Same Methodology to Calculate Lost Gross Earnings

After giving the Insurers the opportunity to *voir dire* Noranda's accounting expert, Mr. Hess, the Superior Court permitted Noranda to present a damages model using the same methodology as the Insurers' expert, Mr. Karutz—a model that was consistent with the fundamental purpose of business interruption insurance, the policy language, and common sense.

The purpose of business interruption insurance is to place the insured in the economic position it would have occupied absent the loss. (*Pennbarr*, 976 F.2d at 154.) More specifically, the Policy provides that Noranda is entitled to recover its lost "GROSS EARNINGS" during the "Period of Liability," which is defined as the period beginning at the time of the accident and continuing until, "with due diligence and dispatch," the damaged property can be repaired and made ready for operations. (A0211-A0212; A2151.) Accordingly, the Policy requires a comparison between what would have happened in the absence of the accident and what happened during the Period of Liability.

In this case, a calculation of Noranda's loss requires a comparison of the value of Noranda's production had the accidents not occurred (*i.e.*, what would have happened in the "but for world") with the value of Noranda's production if the accidents had happened and Noranda had made repairs "with due diligence and dispatch" (*i.e.*, what would have happened in the "hypothetical world").

This methodology was not disputed. Both parties' experts testified that the appropriate methodology for calculating Noranda's loss was to make this comparison between the "but for world" and the "hypothetical world" in which repairs were made. The Insurers' expert, Mr. Karutz, readily conceded this:

> Q. [Y]ou agree that the correct comparison for assessing Noranda's lost margin is between what would have happened if there had been

> no accidents and what would have happened if there were accidents but Noranda had gone ahead and made repairs; right?
>
> A. Correct.

(A1971.)[11] Thus, both experts compared what Noranda's production would have been in the "but for world," with no accidents, and what it would have been in the "hypothetical world," in which repairs were made. (A1965-A1971.) In the hypothetical world in which repairs were made, Noranda's production would have ramped up as repairs took place, and both Mr. Hess and Mr. Karutz testified that this results in a decrease in Noranda's "Gross Earnings" loss over time. (A1558-A1559; A1970-A1971.)

Now, on appeal, the Insurers criticize this "dual hypothetical worlds" model, in effect arguing that the "Period of Liability" definition specifies only the time period during which losses are calculated and does not mean that the losses themselves should be measured by reference to a Period of Liability in which the insured repairs the damage at the facility. (Insurers' Br. 27-28.) In other words, the Insurers say that the loss should be measured without taking into account the

[11] The Insurers assert that this testimony concerned Mr. Karutz's revised calculations "assuming Mr. Hess's model to be correct." (Insurers' Br. 12 n.7.) In fact, the testimony addressed Mr. Karutz's *original* calculations. (A1966-A1971.) He discussed his revised calculations later. (A1997.) And when he testified before the jury, Mr. Karutz devoted 20 pages of the trial transcript to an explanation of his "dual hypothetical" methodology. (A2079-A2099.)

need to mitigate damages. But this position is directly contrary to the mitigation requirement in the Policy:

> There is recovery hereunder to the extent that the Insured is ... unable to make up lost production within a reasonable period of time ....

(A0207.) Based on this Policy provision, if an insured *could* gradually repair and restart a facility during the Period of Liability but chooses not to, then the Insurers do not have to cover the insured's full losses, only those losses that the insured would have incurred under the hypothetical scenario in which the insured *did* gradually restart and ramp up its production at the facility. In other words, the Policy's mitigation requirement requires consideration of the repairs that Noranda should have made. (*See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1197 (Del. 1992) (an insured has a duty to mitigate).) To find otherwise would ignore the Policy's mitigation language and provide a windfall to an insured that chooses not to mitigate its losses.

For precisely this reason, the Insurers' expert used the precise "dual hypothetical worlds" model that the Insurers now purport to criticize. He did so because a damages model that did not account for a gradual ramp-up of production during the Period of Liability, thereby reducing Noranda's loss, would overstate Noranda's business interruption claim. (A1559-A1560; A1966-A1971.) The Insurers presented no evidence—either before trial, during expert *voir dire*, or during trial—of what Noranda's lost "Gross Earnings" would be if the comparison

were between the "but for world," with no accidents, and the real world in which the plant was shut down and Noranda made no effort to rebuild.

The experts' methodology is also consistent with the Policy's instruction, "[i]n determining the amount of loss payable, … [to] consider … [Noranda's] probable experience during the PERIOD OF LIABILITY." (A0205.) That requires the parties to consider what would likely have happened during the Period of Liability, *i.e.*, that Noranda would have repaired the damage and gradually brought production back online.

In short, there is nothing novel, or contrary to the insurance policy, about the methodology that Mr. Hess and Mr. Karutz both used.

b) The Calculations Necessary to Determine the Amount of Lost "GROSS EARNINGS"

Mr. Hess's analysis then turned to the issue of costs. If the experts were going to reduce the lost "Gross Earnings" to reflect ramped-up production during the hypothetical Period of Liability, then they also needed to account for the cost of ramping up production. (A1561-A1563; A1661-A1662; A1676.) Again, Mr. Karutz used that same methodology at trial. (A2079-A2099.)

Putting this in terms of the Policy language discussed above, the calculation of lost "GROSS EARNINGS" starts by determining the "Gross Earnings" and then *subtracting* "all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services";

subtracting "ordinary payroll"; *adding* "all other earnings derived from the operation of the business"; and *adding* "Ordinary Payroll" but only "to the extent such payroll continues following the loss." (A1650-A1651; A2155-A2156.) The Insurers correctly summarize this calculation, but they then argue that what Noranda is doing is *adding* the "ordinary payroll" rather than subtracting it. (Insurers' Br. 25.) This is incorrect.

Because the determination of an insured's loss involves a comparison between (A) the "but for" world in which no accident occurred, and (B) the world in which the insured makes repairs (in order to restore the insured to the position it would have been in absent the accident), the Policy necessarily requires two separate calculations of "GROSS EARNINGS": (A) one without the accident, and (B) one with the accident. Those two measures of "GROSS EARNINGS" are compared (A *minus* B) in order to determine (C) the insured's lost "GROSS EARNINGS," which is the amount recoverable under the insurance policy. (A1648-A1651.) The chart below illustrates how this calculation is performed:

A	B	C
"Gross Earnings" absent the accident	"Gross Earnings," if any, during repairs	
minus costs absent the accident	*minus* costs during repairs	
equals "GROSS EARNINGS" absent the accident	*equals* "GROSS EARNINGS" during repairs	Insured's lost "GROSS EARNINGS" (A *minus* B)

What this chart shows is that there are two separate calculations of "GROSS EARNINGS" that need to be performed. Under both scenario (A) (with no accident) and scenario (B) (the repair scenario), the calculation is performed by taking the "Gross Earnings" and *subtracting* the costs that would have been incurred to achieve those "Gross Earnings," in order to arrive at "GROSS EARNINGS." In a situation in which production did not resume until repairs were complete, the "GROSS EARNINGS" figure for scenario (B) would be zero. In Noranda's case, however, if the plant had been repaired, pots would have been gradually brought back online while other pots were being repaired, meaning that the "GROSS EARNINGS" figure in the repair scenario would not have been zero. In that instance, the "GROSS EARNINGS" figure for scenario (B) is calculated by determining the "Gross Earnings" that would have been achieved in the

hypothetical world in which pots were gradually brought back online and then subtracting the costs that would have been incurred to obtain those "Gross Earnings." Both experts agree on this. (A1559-A1560; A1675-A1676; A1966-A1971.)

The two "GROSS EARNINGS" figures (scenario (A) and scenario (B)) are then compared to each other to determine Noranda's lost "GROSS EARNINGS," that is, the amount that Noranda's Insurers must pay in order to restore Noranda to the position it would have been in absent the accident.

While the Insurers try to challenge this methodology on appeal, they cannot do so because their expert used the same methodology. Although the Insurers originally proposed to present their accounting expert, Mr. Karutz, to testify that *all* of Noranda's labor costs for potlines one and two for that entire period should be subtracted as saved labor, the Superior Court refused to allow that testimony after a *voir dire* examination outside the presence of the jury. (A2057-A2059.) The Insurers have not appealed the Superior Court's decision to exclude Mr. Karutz's original opinions. Instead, they have accepted that ruling and, at trial, they offered Mr. Karutz to testify to a methodology that allowed for hypothetical labor costs during the Period of Liability (but with different numbers attached to those labor costs than the numbers Mr. Hess used). (A2094-A2098; A2114-A2119; B0119-B0127.)

Having chosen themselves to present a "dual hypothetical worlds" model to the jury—and not having appealed the Superior Court's refusal to allow them to do otherwise—the Insurers have waived any challenge to Mr. Hess's use of the same methodology. (*See Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir. 2007) (expert testimony held reliable where based on expert's observation and expertise, and opposing party's expert had adopted the same methodology; "When a litigant clearly believes a certain methodology is acceptable as shown by his or her own expert's reliance on that methodology, it is disingenuous to challenge an opponent's use of that methodology.").) The Insurers cannot complain that Mr. Hess included hypothetical labor in his calculation when they presented the identical theory to the jury through their own expert.[12]

[12] Notwithstanding their expert's presentation at trial, the Insurers' position on appeal appears to be that, instead of taking into account the costs that would have been incurred during the Period of Liability, the proper analysis is to look at the costs that Noranda actually incurred in the real world in which the plant was not repaired but was shut down. (Insurers' Br. 27 (arguing that expenses must be "actually incurred in order to be part of a business interruption claim" and that the Policy "bars a claim for 'hypothetical' rebuilding costs").) Such an approach, however, gives the Insurers the benefits of a deduction for ramped-up production without taking into account the costs of achieving that production. But if "Gross Earnings" ramp up during the Period of Liability, such that Noranda's lost production decreases over that period (as agreed by both Mr. Hess and Mr. Karutz), then some labor and other costs must have been necessary in order to achieve that ramped-up production (as also agreed by Mr. Hess and Mr. Karutz). By ignoring the costs, the Insurers want to have their cake and eat it too.

c) The Insurers' Arguments Regarding Other Policy Language Are Inapposite

The Insurers also argue that Noranda's damages model contradicts the Policy language providing that "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." Because costs that are incurred during a restart process are often "extraordinary," argue the Insurers, they should not be part of the business interruption calculation. (Insurers' Br. 26.) This argument proves too much. The Insurers do not dispute that in the event that an insured *does* repair a damaged facility, its actual costs incurred during that repair process are properly a part of the calculation. (*See, e.g., Associated Photographers, Inc. v. Aetna Cas. & Sur. Co.*, 677 F.2d 1251, 1254-56 (8th Cir. 1982); *Nat'l Union Fire Ins. Co. v. Scandia of Hialeah, Inc.*, 414 So. 2d 533, 535 (Fla. App. 1982).) Accordingly, such costs should likewise be considered in connection with the insured's hypothetical ramped-up production during the repair period, as was done here by both Mr. Hess and Mr. Karutz.

The Insurers also cite various provisions in the Policy describing separate coverages that can be recovered only if particular costs are actually incurred in the real world, such as Extra Expense and Ordinary Payroll coverage. (Insurers' Br. 26-27.) But these provisions are inapposite because Noranda is not claiming under

those extensions of coverage. That the Policy provides for different coverages that are subject to different conditions in no way imposes those conditions on the coverage Noranda is seeking. If anything, the express reference to the need to incur expenses to take them into account in the Extra Expense and Ordinary Payroll coverages, and the absence of such a requirement in the "ordinary payroll" language, means that the Court cannot infer that requirement into the "ordinary payroll" provision. (*See In re Verizon Ins. Coverage Appeals*, 2019 WL 5616263, at *8 & n.77 (Del. Oct. 31, 3019) (unpublished).)

Finally, authorities have not consistently rejected Noranda's damages approach, as the Insurers contend. (Insurers' Br. 29-33.) The Insurers' treatise sets forth business interruption loss calculation principles with which Noranda (and Mr. Hess) agree. Consistent with those principles, Mr. Hess's methodology does not put Noranda in a better position. (*See* Section III.G.1 *supra*.) Moreover, the cited cases are inapposite. In two, the insureds continued operations during the period of interruption and repaired the damaged property. (*See Associated Photographers*, 677 F.2d at 1252; *Nat'l Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corp.*, 141 F.2d 443, 445 (10th Cir. 1944).) Thus, those courts did not confront situations in which the insured did not repair a facility, as here. The third case addresses an insured's claim for "new expenses" incurred after a business interruption, which is the equivalent of Extra Expenses, which Noranda does not

seek. (*See E. Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075-79 (3d Cir. 1980).) Consequently, these cases do not concern Noranda's approach here.

B. Mr. Hess's Damages Model Was Reliable

1. Insurers' Second Question Presented

Was it an abuse of discretion for the trial court to admit the expert testimony of Noranda's accountant about the amount of labor that would have been required to restart the damaged potlines when the expert based his opinion on his personal knowledge from other smelter claims and on information from the New Madrid smelter's Plant Manager?

2. Scope of Review

This Court reviews a trial court's decision to admit or exclude expert evidence for abuse of discretion. (*Gen. Motors*, 981 A.2d at 536.)

3. Merits of the Argument

The Insurers argue that the Superior Court should have sustained their objections to Mr. Hess's testimony regarding the calculation of the labor cost component of Noranda's loss. This argument fails for a number of reasons. First, the Insurers invoke just two objections they made at trial regarding Mr. Hess's testimony: (1) that Mr. Hess relied on Noranda's Plant Manager Mr. Pinson regarding what Noranda would have done with respect to labor for restarting the plant, and (2) that Mr. Hess did not do an independent analysis of how many people it would require to restart the potlines. (Insurer's Br. 34 (citing A1635).) As explained in subsections (a) and (b) below, neither objection finds support in the Rules of Evidence. Accordingly, it was not an abuse of discretion to overrule

them. Second, as explained in subsection (c), the Insurers' other arguments about the admissibility of Mr. Hess's testimony regarding the labor cost component of Noranda's loss were not preserved below and would fail in any event. Finally, as explained in subsection (d), because the testimony of Mr. Pinson and Mr. Hess was based on personal knowledge and was uncontroverted, the trial court was well within its discretion in overruling the Insurers' objections.

a) Mr. Hess Properly Relied on Facts and Data in the Record

As to the Insurers' first objection, that Mr. Hess relied only on a conversation with Mr. Pinson in opining as to the labor requirements for a restart, that is permitted under the Rules of Evidence and, in any event, does not fairly describe what Mr. Hess relied upon. Under D.R.E. 703, "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." In testifying about the labor figures built into his loss calculations, Mr. Hess explicitly relied upon both (1) statements by Plant Manager Pinson, and (2) Mr. Hess's own knowledge based on other smelter potline claims he worked on. (A1563-A1569 (Mr. Hess's testimony relying on Mr. Pinson's statements regarding labor requirements after a restart); A1570-A1571 (Mr. Hess's testimony that he has observed that in other smelter restarts, labor is not variable).) Mr. Pinson's statements and Mr. Hess's observations both support Mr. Hess's assessment that restarting aluminum potlines is a labor-intensive process. Thus,

unlike the experts in the cases the Insurers cite, Mr. Hess's testimony and calculations were fully informed and supported by credible evidence.

Mr. Pinson laid a foundation that he had worked for Noranda for twenty years and was the Plant Manager of the New Madrid plant, which had experienced a similar potline freeze in 2009, after which Noranda had repaired and restarted the plant. (B0067-B0070; A1263.) Mr. Pinson testified that, during the restart of a potline, "you're pretty much putting [] one person on each pot to babysit it and to start it up and take care of it .... We've got a lot of them going online at one time, and so there's a lot of extra labor that's actually put out in the plant to actually try to start the potline back up." (A1265.) In other words, after individual pots in a potline are repaired and restarted, proportionally more labor is required to operate newly restarted pots while other pots in the potline are repaired and restarted. This is because a partially operating potline is more unstable than one that is operating at full, or close to full, capacity. (A1265.) Mr. Pinson's testimony confirmed for the jury that if Noranda had restarted the damaged potlines, it would have used proportionally more labor per pot to do so. (A1265-A1266.)

Mr. Pinson also provided uncontroverted testimony that during the 2009 potline freeze at the smelter, Noranda had "kept all the employees onboard because it actually takes more labor to restart a potline and restart all these pots." (A1263.)

The Insurers' potline expert, who was also present for the 2009 restart, did not disagree.

With respect to his own knowledge as someone who has worked on many aluminum smelter claims, Mr. Hess provided uncontroverted testimony based on his personal observations that the labor required for a potline restart is "not variable," meaning that it does not decrease proportionally with decreased production. (A1570-A1571.) The Insurers' potline expert, Mr. Tabereaux, agreed that when potlines are restarted, they have to be monitored more carefully by the workers at the plant. (A1917-A1918.)

Given the factual support for Mr. Hess's opinions regarding labor needs during a potline restart, and the absence of controverting evidence from the Insurers, it was certainly not an abuse of discretion for the trial court to allow Mr. Hess to testify to the labor costs that would have been incurred during the Period of Liability.

b) Mr. Hess Properly Relied on the Type of Facts Accountants Reasonably Rely On

As to the Insurers' second objection, that Mr. Hess did not do an independent analysis of the labor requirements for repairing and restarting the plant, D.R.E. 703 permits experts to rely on facts or data as long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an

opinion on the subject." (*See Bowen*, 906 A.2d at 795.) That is exactly what Mr. Hess did.

The Insurers are essentially arguing that experts should be required to verify independently every piece of information on which they rely, no matter how many other indicia of reliability there are. That is not the law. And for good reason: the Insurers' proposed rule would be a serious impediment to proving one's case through expert testimony because an expert would need expertise not only in the subject matter of his or her testimony but also in all of the factual predicates for that testimony. Instead, courts routinely allow accounting experts to offer opinions based on reliable third party sources. (*See, e.g.*, *Inline Connection Corp. v. AOL Time Warner Inc.*, 470 F. Supp. 2d 435, 443 (D. Del. 2007) (under D.R.E. 703 and professional accounting standards, expert accountants may rely upon facts or assumptions provided by the client); *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988) (it is "obvious" that personnel interviews are "normally and reasonably relied upon by accountants"); *Simon v. Weissmann*, 301 F. App'x 107, 116 (3d Cir. 2008) (similar).) It was entirely reasonable for Mr. Hess, a forensic accountant, to rely on Mr. Pinson's statements about the labor needed to restart the potlines in order to calculate Noranda's loss: Mr. Pinson was the person responsible for "the entire facility: operations, maintenance, the whole process." (B0067-B0070.) No one was in a better

position to say what Noranda would have done, especially since Mr. Pinson could attest to what actually happened when the potlines were brought back into operation after a major potline freeze in 2009. (A1263-A1265.) As Mr. Hess testified, accounting experts rely on people like Mr. Pinson in forming their opinions. (A1650 ("You talk to the people who are in the business, who are the experts at what they do.").) It was certainly not an abuse of discretion to allow Mr. Hess to offer an opinion based on facts supplied by the person in charge.

c) The Insurers Did Not Preserve Their Other Arguments

The Insurers also appear to argue that Mr. Hess acted as an impermissible conduit for "unreliable hearsay" because he relied on Mr. Pinson's statements. (Insurers' Br. 37.) But the Insurers never objected to this testimony at trial as hearsay. Having failed to object below, they waived the right to object now. (D.R.E. 103; *Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 550 (Del. 2006).) In any event, Mr. Pinson's statements were not hearsay because they were made in deposition testimony that the Insurers took in this case, which was played for the jury because Mr. Pinson himself was an unavailable witness. (*Id.* 804(b)(1); A1263-A1266.)

The Insurers also attempt to paint Mr. Hess's reliance on Mr. Pinson's testimony as "blind." (Insurers' Br. 38.) But the Insurers neglect to mention that the jury heard directly from Mr. Pinson when his extensive deposition video was

played, and the jurors were capable of assessing the credibility and reliability of his and Mr. Hess's testimony in that light. The Insurers also ignore that Mr. Hess worked closely with Mr. Pinson in preparing the claim and knew precisely the depth and breadth of Mr. Pinson's knowledge about aluminum production and the labor requirements needed to restart the potlines at the New Madrid plant. (A1561-A1567; A1661-A1662; A1676.) By contrast, the Insurers presented no testimony, expert or otherwise, on how many workers it would have taken to restart the New Madrid potlines. Their insistence that Mr. Hess's numbers are "facially absurd" is therefore nothing more than *ipse dixit* and far from enough to show an abuse of discretion.

d) Because the Testimony of Mr. Pinson and Mr. Hess Regarding Labor Needs Was Uncontroverted, the Court Was Entitled to Conclude That Mr. Hess's Labor Numbers Were Reliable

Finally, the Insurers argue that Mr. Hess relied on "assumptions about how many employees Noranda would need to repair the facility and run it as repairs were made" that were "facially implausible." (Insurers' Br. 34.) The Insurers complain that Mr. Hess "assumed" that "every one of the potline employees would need to remain employed" during portions of the Period of Liability and then "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 'babysit' the repaired potlines, which allegedly would have required additional

attention after they were repaired." (*Id.* at 35.) The Insurers' argument, however, is divorced from any type of technical analysis of how aluminum potlines are restarted and instead is based on nothing more than their unsupported assertion that starting up potlines cannot possibly require as much labor as Noranda's witnesses said. But the Insurers also concede that the costs associated with the restart of damaged plant equipment can be "extraordinary" (*id*. at 26) which directly contradicts their position that it was an abuse of discretion for the Superior Court to allow Noranda's expert to testify that extra labor was needed to start up the potlines.

The Insurers' potline expert, Mr. Tabereaux, was present throughout the trial. But neither he nor the Insurers' accounting expert, Mr. Karutz, nor any fact witness, offered any alternative to Mr. Hess's analysis of the labor that would be needed to restart potlines one and two in the "hypothetical world" in which the potlines were repaired and brought back online.[13] Nor did any witness controvert the testimony of Mr. Pinson, on whom Mr. Hess partly relied.

Mr. Karutz, for his part, did present some labor numbers for partially operating potlines. However, Mr. Karutz admitted on cross-examination that those

[13] Although Mr. Tabereaux testified to the numbers of people required to operate fewer than all three potlines, he only provided such testimony with respect to potlines that were already fully up and running, and not with respect to potlines that were gradually being brought back online. (A1903-A1907.)

numbers were based solely on a "proportional" analysis—that is, they were assumed to be proportional to Noranda's production—and that he had performed no analysis, and had no opinion, regarding the numbers of workers actually needed to restart individual pots or a potline. (A2115-A2118.) The jury did not credit Mr. Karutz's opinions on this issue, choosing instead to agree with Mr. Hess and awarding the amounts to which Mr. Hess opined. (A2196-A2197; B0118.) The Insurers ask this Court to second-guess the jury's finding that Mr. Hess was more credible than Mr. Karutz, but this Court cannot do so. (*See Morgan v. State*, 922 A.2d 395, 400 (Del. 2007) ("the jury is the sole trier of fact responsible for determining witness credibility, resolving conflicts in testimony and for drawing any inferences from the proven facts") (citation omitted).)

Because the Insurers presented no testimony regarding the number of people required to restart a potline, Mr. Hess's testimony on this point—based on information from Mr. Pinson and on Mr. Hess's own personal experience—was uncontroverted. Accordingly, the trial court did not abuse its discretion in overruling the Insurers' objections to this uncontroverted and amply supported testimony. (*See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1362 & n. 19 (10th Cir. 1989) (expert's calculations were reliable where based on underlying data and the absence of "contradictory evidence"); *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010)

(where expert testimony incorporates "the fundamental facts of the case," "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility").)

C. Mr. Hess's Damages Model Properly Accounted for the Property Damage Claim That Noranda Had Previously Settled

1. Insurers' Third Question Presented

Is there any competent evidence supporting the jury's finding that the business interruption damages that Noranda sought for the Potline Freeze did not include sums that Noranda released when it settled the Potline Freeze property damage claim?

2. Scope of Review

The "findings of the jury, if supported by evidence, shall be conclusive." (DEL. CONST., art. IV, § 11(1)(a).) Accordingly, the jury's findings must be accepted if there is "any competent evidence upon which the verdict could reasonably be based." (*Town of Cheswold*, 9 A.3d at 473-74 (citation omitted).) When, as here, the appellant is challenging the amount of damages that a jury decided to award, "the validity of damages determined by the jury should likewise be presumed." (*Young v. Frase*, 702 A.2d 1234, 1236-37 (Del. 1997) (citations omitted).)

3. Merits of the Argument

a) The Parties Submitted the Claimed "Double Recovery" Issue to the Jury for Resolution

There is no dispute that to the extent the Insurers paid an item as part of the Potline Freeze property damage settlement discussed in Section III.D *supra*,

Noranda cannot claim that item as a loss in this case. That would be a "double recovery."

The Insurers argued at trial that the business interruption claim that Noranda presented for the Potline Freeze included costs that fell within the property damage settlement. (A1635-A1636; A1677.) Over Noranda's objection, the Superior Court permitted the jury to consider the extent to which the labor cost needed to bring the potlines back online was "covered in the property damage settlement in this case." (A2156.) To that end, the Insurers proposed a jury instruction, which the Superior Court gave as presented (with minor adjustments about which the Insurers do not complain):

> Noranda is not entitled to be paid twice for the same damages by making claims under different provisions of the policy. Therefore, in calculating the amount of damages Noranda is owed, you may not include any sum for which Noranda has already been paid.
>
> As you have heard, the Insurers and Noranda have settled claims for physical damage to Noranda's property from the two accidents. Insurers paid Noranda $16 million for damages from the Potline Freeze and $22 million for the Casthouse claim.
>
> To the extent you find that Noranda seeks to be paid as part of its Time Element claim for damages or expenses that are property damage under the policy and for which Noranda has already been paid, Noranda is not entitled to those claimed sums.
>
> The Insurers have the burden of proof in regard to establishing if the payments made in the settlement include[] money being sought by Noranda in this litigation.

(A2157-A2158.)

By presenting the issue to the jury and preparing the instruction that the Superior Court gave, the Insurers cannot argue that there is an open contract interpretation question on the issue. (*See E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 439 n.4 (Del. 1996).) Instead, the sole issue on appeal is whether the jury's implicit finding that Noranda's damages claim did not involve a double recovery is supported by competent evidence in the record. As is discussed next, ample evidence supported that finding.

b) The Evidence Supporting the Jury's Verdict on the "Double Recovery" Issue

As discussed in Section III.G.1 *supra*, Mr. Hess prepared a business interruption claim for the Potline Freeze that took labor costs into account, but he subtracted $6.6 million of those costs from the claim because they fell within the Potline Freeze property damage settlement. (A1660.) Mr. Hess derived the $6.6 million figure from a month-by-month breakdown of the labor costs that would have been required to reline and restart the individual pots in the potlines (A2387) and from his conversations with the Plant Manager, Mr. Pinson, about the approximate number of pots that would have been relined and restarted each month. (A1661; A1674-1675; B0107-B0109.) There is no serious dispute over that number: the Insurers' accountant Mr. Karutz acknowledged that Mr. Hess's $6.6 million number was "pretty close," testifying that Mr. Hess in fact was a bit

too generous to the Insurers and should only have been $6.255 million. (A2127-A2130.)

Instead, the issue that the Insurers presented to the jury was whether the $6.6 million number captured all of the labor costs that were the subject of the settlement. On that, Mr. Hess testified in part as an accountant but also as a fact witness who had participated in preparing the documentation for the property damage settlement. He had personal knowledge of what was, and was not, included in that settlement, and he testified on that subject to the jury. (A1673-A1677; B0107-B0109.)

Mr. Hess explained that the $6.6 million in labor costs that he took out of the claim because they were included in the property damage settlement were different from the "normal operational labor" that is needed to maintain the individual pots after they are relined and restarted, while other pots in the potlines are being relined and restarted. (A1661; A1676.) Mr. Hess testified that the parties did not include the latter costs in the property damage settlement. (A1676-A1677; B0109.)

The Insurers cite no evidence to support their assertion that the operational labor costs needed to operate pots after they are restarted "were included in the plain language of the property damage provisions of the Policy." (Insurers' Br. 44.) In fact, that statement is contradicted by substantial evidence that those costs

were *not* considered property damage. For example, Mr. Pinson testified that extra operational or "babysitting" labor was different from "the equipment replacement cost," such as "labor to rebuild the pot." (A1265.) Likewise, Mr. Hess testified that reline and restart labor—and not operational labor—"are the only two included in the property damage" because those types of labor are needed to "repair[] the damaged asset," unlike operational labor. (A1676-A1677; B0107-B0109.) As noted, both witnesses were involved in settling Noranda's property damage claims (A1673-A1674), so their testimony about the distinction between those categories of labor relied on their firsthand knowledge of the settlement. And, critically, the Insurers' claims adjuster, Sean Taylor, who also was involved in the claim, agreed with Mr. Pinson and Mr. Hess about the limited scope of that settlement. (B0102 ("Q. Property damage doesn't pay for labor to run the pots after they are up and running, right? A. Correct.").)

The Insurers ignore this evidence entirely, quoting only an excerpt of the *voir dire* examination of Mr. Hess in an attempt to show that Mr. Hess's testimony about labor costs attributable to the settlement was purportedly "confused and patently unreliable." (Insurers' Br. 45.) But the Insurers did not object at trial to Mr. Hess's testimony about which costs were included in the settlement and thus waived any right to argue the issue on appeal. (D.R.E. 103.)

Moreover, their excerpt conflates whether the labor costs were released as part of the property damage settlement—the issue the Insurers raise on appeal—and the amount of the labor costs that Mr. Hess calculated. In this excerpt, Mr. Hess was being asked about total labor costs from an earlier saved labor calculation. (A1603-A1610; A2371-A2373.) Those calculations differed from the saved labor calculations Mr. Hess presented at trial, which, as noted, subtracted the labor costs attributable to the property damage on a month-by-month basis. (A2387.) Thus, this exchange has nothing to do with whether Mr. Hess properly excluded labor costs within the property damage settlement from his Potline Freeze business interruption calculations. To the extent the excerpt relates to the total amount of labor costs used by Mr. Hess, as discussed above, Mr. Hess properly relied both on his experience with similar potline restarts (including at New Madrid) and on his conversations with Mr. Pinson to help identify those numbers. (*See* Section IV.B.3.b-.c *supra*.) Mr. Hess explained that proportionally more operational labor would be required as potlines one and two were restarted, but that the labor needed per pot would then level out as the potlines became fully operational. (A1661; A1676.) Mr. Tabereaux, the Insurers' potline expert, offered consistent testimony. (A1917-A1918.)

No basis exists for overturning the jury's damages findings on these issues.

D. Noranda's Cross-Appeal: The Superior Court Erred by Reducing the Jury's Verdict by $7,461,117 Attributed to Electrical Inefficiency Costs

1. Noranda's Question Presented

Did the Superior Court err in effectively concluding that no reasonable jury could find that Noranda would have incurred $7,461,117 in costs relating to electrical inefficiency in connection with the restart of the potlines during the Period of Liability? (A1355-A1357; A1962-A1963; A2244-A2247.)

2. Scope of Review

"A jury verdict is presumed to be correct …." (*Dunn v. Riley*, 864 A.2d 905, 906 (Del. 2004).) Accordingly, a court may only grant judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." (Super. Ct. Civ. R. 50(a)(1).) In an appeal from a JMOL ruling, the Court considers "whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury." (*Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998) (citation omitted).) This Court will defer to a jury verdict when "under any reasonable view of the evidence the jury could have justifiably found for" the party that prevailed before the jury. *Id*. (citation omitted).

3. Merits of the Argument

a) The Record Does Not Support the Superior Court's Assertion That There Was No Evidence That Noranda's Electrical Costs Were Included in the "GROSS EARNINGS" Calculation

As discussed in Section III.E.2 above, the calculation of "GROSS EARNINGS" begins by determining "Gross Earnings" and then *subtracting* "all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services." (A2155-A2156.) As also discussed above, both experts opined that the determination of Noranda's lost "GROSS EARNINGS" involves a comparison between the "GROSS EARNINGS" in the "but for world" (absent the accident) and the "GROSS EARNINGS" in the Period of Liability (in which repairs are made). (*See* Section III.G *supra*.) Therefore, Noranda's costs must be determined in those two scenarios, that is, with and without the accident.

Electricity is a significant cost incurred in aluminum production; indeed, it is the single largest cost, next to raw materials, that an aluminum smelter incurs. (A1653; A1681.) Thus, in the context of both of the "GROSS EARNINGS" calculations (in the "but for world" and in the Period of Liability), electrical costs will figure significantly. Moreover, when potlines are being restarted, which is done one pot or a few pots at a time, the overall operation of the potline is far less efficient than during normal operation in that proportionally more electricity per

pot is needed to operate a partially operating potline. (A1659-A1660.) This additional electricity per pot is the cost that Mr. Hess classified as "electrical inefficiency" in his calculations. (A1659.)

Accordingly, the electrical inefficiency costs that Mr. Hess testified about fall squarely with the calculation of "GROSS EARNINGS," as a cost that would be incurred during the Period of Liability in order to bring pots back online. Both Mr. Hess and Mr. Karutz assumed that production would ramp up during the Period of Liability, meaning that the "Gross Earnings" during that Period would increase, and that Noranda's lost "Gross Earnings" would correspondingly decrease over time. (A1659; A1675-A1676; A1966-A1971.) In order to be consistent, the costs required to achieve that ramping-up production must then be subtracted from "Gross Earnings." Mr. Karutz conceded this. (A2111; A2077-A2078 (electricity costs); A2114-A2115 (labor costs).) The electrical inefficiency cost is one of those costs. Indeed, Mr. Karutz deducted electricity costs when calculating Noranda's loss in the hypothetical world in which Noranda repaired the plant. (A2077-A2079.) Accordingly, the Superior Court's finding that this cost is not "covered in the Policy" (Insurers' Br., Ex. 5 at 9) misses the point: the cost is *deducted* from the ramped-up production that offsets the "Gross Earnings" numbers. It is not the affirmative claim.

Similarly, the Superior Court's finding that the electrical inefficiency cost was not a "routine expense" was directly contrary to the evidence. (*Id.*) Electricity is one of the principal routine expenses that is incurred during aluminum production. (A1653; A1681.) The electrical inefficiency cost that Mr. Hess included in his calculations was no different from the electrical costs that are routinely incurred by aluminum smelters, which use enormous amounts of electricity to heat the pots in the potlines and to keep the aluminum molten. (A1653; A1659.) The only function of the number that Mr. Hess assigned to "electrical inefficiency" in his calculations was to account for the fact that, during a potline restart process, proportionally *more* of this routine electrical cost will be incurred. (A1659.) Without incurring this additional cost, the potlines could not be operated after a restart, meaning that the "Gross Earnings" would not be ramping up (as both Mr. Hess and Mr. Karutz assumed in their calculations), and Noranda's "GROSS EARNINGS" loss would not be decreasing over the course of the Period of Liability. It would be fundamentally unfair to decrease the measurement of Noranda's loss over the Period of Liability to reflect ramped-up production, as both experts did, without allowing for the costs, including electrical inefficiency costs, that Noranda needed to incur to mitigate its losses by ramping up production.

b) The Jury's Decision That Noranda Would Have Incurred $7,461,117 in Electrical Inefficiency Costs During Repairs Was Supported by the Evidence

Mr. Hess explained to the jury his calculation of Noranda's lost "GROSS EARNINGS," including the costs that Noranda would have incurred while making repairs, which, as noted, are a necessary part of the calculation. (A1648-A1651.) Mr. Hess also explained that Noranda's electrical costs during the Period of Liability would have been elevated due to the fact that, "[w]hen you're restarting a potline, you experience a huge electrical inefficiency, that is, you're using the same amount of electricity to get not as much out of it." (A1659.) Based on his extensive experience in working with aluminum smelters, including in connection with the similar loss suffered by the New Madrid plant in 2009, Mr. Hess determined that the additional electrical cost that that Noranda would have incurred due to this inefficiency, had it made repairs, was $7,461,117. (A1659-A1660; A2298.) The Insurers, in contrast, made no attempt to calculate the cost that Noranda would have incurred due to electrical inefficiency during the potline restart, and they therefore presented no competing number to the jury. The jury's determination to accept Mr. Hess's opinion that this cost to Noranda was $7,461,117 was therefore supported by the evidence, and was consistent with the only evidence on this issue that the jury heard. Accordingly, the Superior Court erred in overturning the jury's determination that Noranda would have incurred a

cost of $7,461,117 due to electrical inefficiency, had it repaired and started up potlines one and two.

V. THE CASTHOUSE EXPLOSION LOSS

The Insurers did not identify the jury's verdict on the Casthouse Explosion loss as an issue for appeal. Accordingly, regardless of how the Court rules on the issues that the parties have raised, the Court should affirm the Casthouse Explosion verdict.

VI. CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment below on all issues apart from the JMOL ruling on "electrical inefficiency," which the Court should reverse with instructions to reinstate the full jury verdict.

Respectfully submitted,

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