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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) **(**CORRECTED VERSION)

APPELLANTS' REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

As demonstrated in the Insurers' Opening Brief (cited as "OB"), the trial court committed legal error by permitting Noranda Aluminum Holding Corporation ("Noranda") to claim damages under a formula that contradicted the plain language of the parties' insurance policy. The trial court's decision diverged from the well-settled understanding of business interruption damages evidenced by decades of judicial opinions from across the country. Rather than hearing the damages formula contained in the policy, the jury heard a flawed formula that significantly inflated Noranda's damages claim and was premised on unreliable and inadmissible expert testimony. As a result, the jury issued a verdict that was contrary to the parties' insurance policy.

Noranda's Answering Brief (cited as "AB") fails to refute any of the critical deficits the Insurers identified in Noranda's damages claims and, instead, relies on its unsupported assertion that the Insurers' expert agreed with the faulty methodology advanced by Noranda's damages expert. To the contrary, the Insurers objected vehemently to Noranda's approach to its damages calculation. That aside, it is Noranda, not the Insurers, that bore the burden of establishing its damages. The evidence Noranda presented at trial cannot support the jury's verdict.

Indeed, Noranda's Answering Brief does not dispute that its claims depend on an unprecedented interpretation of the parties' insurance contract for business interruption damages. Although business interruption damages are a commonplace category of insurance, Noranda offers nothing in response to the Insurers' argument that "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." (OB at 29–33.) Tellingly, in its brief to this Court, Noranda does not cite any of the cases it presented to the trial court as "settled law," all of which deal only with calculation of the "Period of Liability," not the quantum of business interruption damages. (A1227.) This Court should not endorse Noranda's drastic departure from the well-settled meaning of business interruption damages clauses, which do not cover the costs of hypothetically rebuilding a damaged facility.

Although Noranda acknowledges that the purpose of the parties' insurance contract was "to return to the insured the amount of profit that would have been earned had a casualty not occurred" (AB at 14) (ellipses omitted), Noranda does not attempt to explain how its unprecedented interpretation of the insurance contract language accomplishes this purpose. Business interruption damages should have been calculated under the straightforward contractual formula equal to the "net sales value" minus variable costs (*i.e.*, ***subtracting*** variable labor costs from the potential

claim). By contrast, Noranda's expert drastically inflated the damages by ***adding*** labor costs purportedly required if Noranda had rebuilt its plant. The nonexistent labor costs to rebuild the plant are ***not*** recoverable as business interruption damages, and moreover, impermissibly duplicate the recovery Noranda received in the settlement of its property damage claim. That error was compounded by Noranda's use of inflated and unsupported assumptions about the labor costs required for the hypothetical rebuild.

Finally, Noranda's cross-appeal is without merit. The trial court correctly held that the parties' insurance policy expressly prohibited reimbursement for hypothetical "electrical inefficiency costs" associated with restarting the plant. In addition, the testimony offered by Noranda's expert in support of such damages failed to meet the minimal requirements for reliability of expert testimony demanded in Delaware courts.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. Noranda argues in its Cross-Appeal that: "The Superior Court Erred By Reducing The Jury's Verdict By $7,461,117 Attributed To Electrical Inefficiency Costs."

DENIED. Not only was the trial court correct that the parties' insurance policy expressly prohibited reimbursement for hypothetical "electrical inefficiency costs" associated with restarting the plant, but even if the policy did allow for such a claim, the testimony offered by Noranda's expert was unreliable and utterly failed to satisfy the minimum standards of reliability required for experts under Delaware law.

STATEMENT OF FACTS ON CROSS-APPEAL

Noranda's cross-appeal is based upon an unspecified claim from its expert for $7.46 million in so-called "electrical inefficiency" damages. Noranda's expert, Charles Hess, attempted to justify this line-item by telling the jury that the number reflected hypothetical additional electricity costs of restarting the potline, if the potline had been restarted (which it was not). He testified, "When you're starting 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. So that's what that claim is for." (A1659.) Mr. Hess admitted, however, that because Noranda ended up shutting down all of the potlines, it did not actually incur these electrical costs. (*Id*.) Mr. Hess nonetheless included a claim for this purported inefficiency that was never incurred "to be consistent" in calculating the hypothetical loss scenario he had constructed, in which he was assuming that repairs were made and that potlines were coming back on line and calculated Noranda's purported damages based on these unincurred electrical costs. (A1659–A1660.) Mr. Hess's only explanation of the claim was that it was one he also made in 2009 for Noranda, and that he had made on "every other smelter claim [he'd] done." (A1659.)

No other testimony supporting Noranda's $7.46 million claim was presented to the jury. Noranda cites no additional evidence in its Answering Brief—only the transcript pages quoted above, and a single page from Mr. Hess's expert report that

simply states the multi-million dollar electrical inefficiency damage claim with no explanation. (AB at 64.)

After Mr. Hess finished his testimony, the court raised a concern about which provision of the parties' insurance contract potentially provided coverage for this part of the claim. (A1678.) Noranda responded that it "comes under the expenses in the gross earnings" in Noranda's dual hypothetical worlds formula. (A1679.) Noranda did not cite any contract language to support the claim.

The trial court disallowed the electrical inefficiency claim after the jury's verdict, by granting in part the Insurers' Motion for Judgment as a Matter of Law. (OB, Ex. 5.) The trial court held the contractual language of the insurance policy foreclosed electrical inefficiency damages: "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.)

Noranda's failure to provide support of any kind for its "electrical inefficiency" claim was not a mere oversight at trial. The absence of any support for this claim was directly raised by the Insurers in their pre-trial motion to bar Mr. Hess's testimony. (A0478–A0479.) Noranda's only pre-trial response was to say that Mr. Hess's claim "was supported by [his] prior experience analyzing Noranda's

claim for another potline freeze in 2009, when a similar inefficiency resulted." (A1250.) No information was provided as to how the estimate was prepared in 2009. No reference to any other smelter claims was made in Mr. Hess's pre-trial statement.

ARGUMENT

I. NORANDA HAS TACITLY CONCEDED THAT IT IS ASKING THIS COURT TO ADOPT AN UNPRECEDENTED INTERPRETATION OF A STANDARD BUSINESS INTERRUPTION INSURANCE CONTRACT CLAUSE

In their Opening Brief, the Insurers explained that Noranda's "dual hypothetical worlds" interpretation of the parties' insurance contract was not only contrary to the plain language of the contract, but also illogical and unsupported by any case law. (OB at 22–33.) Noranda has not responded to most of these arguments, and has tacitly conceded them.

A. The Trial Court's Interpretation of the Insurance Contract Is Reviewed De Novo, Not for Abuse of Discretion

This Court has consistently held that it reviews trial court interpretations of contracts, including insurance contracts, de novo. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Noranda's brief concedes this dispute is one of contractual interpretation ("Mr. Hess's Damages Model Was Consistent with and Required by the Policy Language."), but it nevertheless argues that the standard of review is "abuse of discretion" simply because it affected an expert's testimony. (AB at 32.) This is not the law. The fact that an expert witness incorporated a legally incorrect reading of the insurance contract into his testimony does not reduce the level of scrutiny that the Delaware Supreme Court applies.

B. Noranda's Interpretation of the Business Interruption Policy Has No Support in the Policy Language and Is Contrary to Every State or Federal Court to Consider Similar Policy Terms

Citing case law and treatise language, the Insurers noted in their Opening Brief that business interruption insurance is a common form of insurance that has been interpreted for decades to allow for a claim of net sales lost *minus* variable costs. Noranda, by contrast, claimed that the labor costs of rebuilding the plant should be *added* to its business interruption damages using an unprecedented and unreliable methodology. (OB at 29–31.) Noranda cited no cases supporting its view and has tacitly conceded that no such cases exist. Thus, Noranda is asking this Court to be the first in at least 75 years of case law interpreting business interruption insurance claims to apply Noranda's "dual hypothetical worlds" methodology.

With no cases it can cite supporting its own damages methodology, Noranda engages in a futile effort to distinguish the cases relied upon by the Insurers. (AB at 41–43.) With respect to two of the cases cited by the Insurers,[1] Noranda protests that the plaintiffs in those cases had repaired the damaged property in question, as opposed to this case where Noranda did not. That distinction is immaterial: the principle for which the Insurers cited the cases—that business interruption damages

[1] *See Associated Photographers v. Aetna Cas. & Sur. Co.*, 677 F.2d 1251 (8th Cir. 1982); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944).

is earnings *less*—not *plus*—charges and expenses during the period of liability—is the same whether the property is repaired or not. The only difference is that a plaintiff like Noranda, which does not repair the damage, must estimate the time that would be required to repair the plant to establish the Period of Liability. The Gross Earnings calculation does not change, however, depending on whether the plant is rebuilt. The cases cited by the Insurers are therefore directly on point and hold that the Gross Earnings is measured by the "net sales" minus variable costs (including the subtraction of *ordinary* payroll from business interruption damages).

For example, in *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 632 F.2d 1068 (1980), the Third Circuit rejected recovery of "new expenses" that were incurred after a business interruption. Noranda is incorrect that the "extra expenses" denied by the Third Circuit in *Eastern Associated* are distinguishable from the hypothetical repair costs it seeks to recover. (AB at 42–43.) Rather, applying materially similar policy language, that court found the insurance contract was "unambiguous" that "the policy merely insures that the interrupted business will receive the amount of money which continued operation would have produced reduced by the amount of any routine costs which the business avoided by closing." *E. Associated*, 632 F.2d at 1078. The court rejected the insured's arguments (which mirror the claims made by Noranda here) that the policy permitted it to recover "new expenses" incurred due to the interruption in order to "leave the insured in the same

financial position it would have been in . . . had no interruption taken place." *Id.* at 1079.

The cases in the Insurers' Opening Brief are just three of the many listed in *Business Interruption Insurance*, 37 A.L.R. 5th 41 (cited in the OB 29), illustrating that business interruption policies uniformly foreclose the damages calculations advanced by Noranda in this case. Noranda, meanwhile, cites no case that supports its policy interpretation or damages methodology.[2]

To resuscitate its unprecedented interpretation of the parties' insurance contract, Noranda argues for the first time on appeal that it should recover the hypothetical costs of rebuilding the plant to reflect Noranda's duty to mitigate damages. (AB at 34–35.) The parties' contract, as properly interpreted, does provide an incentive to mitigate: it provides damages only for a Period of Liability that ends

[2] Noranda suggests in its Answering Brief that the Insurers are appealing only that portion of the jury verdict relating to the potline freeze and not the portion relating to damages for the casthouse incident. This is not correct—the Insurers appealed the entire Final Order and Judgment, along with other rulings of the trial court as detailed in its Notice of Appeal and Opening Brief at 2. The Insurers' arguments relating to Noranda's incorrect interpretation of the insurance contract are applicable to both incidents. As Noranda undoubtedly knows, Mr. Hess used the inappropriate "dual hypothetical worlds" methodology with respect to his testimony about the casthouse incident, just as he did with respect to the potline incident. (A1656.) The Insurers have never excluded the casthouse incident from their appeal, which suffers from the same mistakes illustrated by the potline claim. Noranda's claim that the Insurers are not appealing the professional fees award and accompanying interest is inaccurate for similar reasons—if the fruits of the experts' professional fees are reversed, the fee award will obviously be vacated as well.

when "with due diligence and dispatch" the facility could be repaired and made ready for operations (A0211–A0214), and it specifically allows reimbursement for actual expenses incurred in expediting the repair of the facility (A0209–A0210).[3]

By contrast, Noranda's interpretation of the contract gives a business interruption claimant every incentive *not* to mitigate damages: by allowing claimants to recover business interruption damages for hypothetical labor costs that were never actually incurred, a rational claimant would choose to take the insurance payment, rather than actually incurring mitigation costs. Noranda cites no case suggesting that the duty to mitigate weighs in favor of its contract interpretation, only a case reciting the undisputed notion that insurance claimants have a duty to mitigate.

C. The Record Demonstrates That the Insurers' Expert Repeatedly Asserted His Disagreement with the Methodology and Conclusions of Noranda's Expert

Noranda's primary response to the Insurers' argument that Noranda misapplied the parties' insurance contract is that the Insurers interpreted it the same way in the proceedings below. (*See* AB at 3, 5, 21, 33, 35.) This argument is

[3] As the Insurers noted numerous times in the trial court, there is an Extra Expense provision in the contract that would have allowed Noranda to pursue a claim for costs involved in repairing the facility if those costs were actually incurred. But Noranda concedes that it incurred no such costs and that it is seeking no damages under the Extra Expense clause of the contract. Noranda's proffered interpretation of the contract would render the Extra Expense clause surplusage.

demonstrably incorrect. The record shows that the Insurers and their expert, Peter Karutz, repeatedly objected to and rejected Noranda's methodology—specifically disputing that Noranda could claim costs involved in hypothetically rebuilding the damaged facility. Those objections were made before trial in the Insurers' motion in limine, in the Insurers' repeated requests during trial to exclude Mr. Hess's testimony, and in Mr. Karutz's voir dire.

Prior to trial, the Insurers filed a motion in limine asking the trial court to prohibit Noranda's expert Christopher Hess from testifying. In their motion, the Insurers could not have been more clear that they disagreed with Noranda's "dual hypothetical worlds" model. The Insurers' brief referred to it as a "nonsense formula that leads to a nonsense result," said that it "inflate[d] Noranda's damages and create[d] a massive, multi-million dollar windfall that leaves Noranda better off than it would have been if the accidents had never occurred," and said that Noranda was "justif[ying] all this by asserting a need to give Noranda credit for phantom repair costs it would have incurred in a contrived hypothetical world that never existed." (A0449.)

Even after the trial court deferred ruling on their motion in limine to prohibit Mr. Hess's testimony, the Insurers repeatedly renewed their request that Mr. Hess's testimony be barred by objecting just before Mr. Hess testified at trial and through a request that Mr. Hess's testimony be stricken immediately after he testified. Both

motions were based in large part on the Insurers' position that Mr. Hess's "dual hypothetical worlds" model was contrary to the damages formula in the parties' insurance contract. (A1634, A1677.)[4] The trial court ultimately denied both motions.

The Insurers' expert, Mr. Karutz, also strongly disagreed with Mr. Hess's methodology. First, in his expert report, Mr. Karutz stated "The claim presented by Noranda assumes and includes continuing payroll expense, which is improper, and thereby erroneously reduces the actual payroll savings, resulting in an inflated claim amount." (A0734.)

During his voir dire at trial, Mr. Karutz repeatedly testified that he had not added hypothetical labor costs to his model because he was instructed by the Insurers' attorneys that the contract did not permit such damages. "As I understand the construction of this policy," Mr. Karutz testified, "it says that if you're going to be paid for payroll, you must incur that payroll." (A1976.) He stated this interpretation of the contract repeatedly. (A1982, A1995, A1996.) Mr. Karutz further testified that he was not aware of a single case in his 35 years of experience

[4] In both instances, the Insurers argued that Mr. Hess's methodology was inconsistent with the trial court's summary judgment opinion regarding measure of damages. As the Insurers noted in their opening brief, the trial court correctly recited the measure of business interruption damages in its summary judgment opinion, even though it then failed to apply that definition at trial. (OB at 24.)

when hypothetical rebuilding labor had been factored into a business interruption loss. (A1996–A1997.)

Noranda agrees that the trial judge forbade Mr. Karutz from presenting his own damages methodology. (AB at 26.) Over the Insurers' objections, the trial court limited Mr. Karutz's testimony to a rebuttal of Noranda's calculations assuming Noranda's methodology to be correct.[5] The Insurers contemporaneously recorded their objection to Mr. Hess's methodology for a possible appeal, and the trial court assured them that they had not waived their objections. (A2059.)

This Court may also readily dismiss Noranda's remaining claim that Mr. Karutz's agreement with Mr. Hess on the calculation of "Gross Earnings" meant that Mr. Karutz adopted Mr. Hess's entire methodology and waived any right to challenge it on appeal. It was not Mr. Hess's calculation of Gross Earnings that Mr. Karutz and the Insurers repeatedly protested at trial—it was his use of a hypothetical rebuilding of the plant to perform his calculations for the other categories, including "saved labor" where Mr. Hess added labor costs rather than subtracting them.

[5] Noranda suggests that the Insurers somehow conceded that the trial court was correct to circumscribe Mr. Karutz's testimony by not making it a separate point in their Opening Brief. (AB at 39.) The question of policy interpretation is an issue of law and the proof of damages falls to the plaintiff, there was no requirement that the Insurers present an expert to rebut the plainly inadmissible and unreliable testimony of Mr. Hess, much less directly appeal that decision now. The admissibility of Mr. Karutz's testimony, moreover, flows from a proper interpretation of the parties' business interruption policy, which is at the core of this appeal.

Noranda therefore misrepresents the trial record by claiming that Mr. Karutz agreed with its methodology.[6]

D. The Insurers Did Not Waive Their Challenge to Noranda's Damages Methodology by Objecting and Then Litigating the Case Within the Confines of the Trial Court's Rulings

Noranda asserts twice in its Answering Brief that the Insurers waived their rights to argue issues on appeal because the Insurers continued to litigate their case within constraints imposed by the trial court that limited Noranda's presentation of expert testimony and excluded certain evidence. In particular, Noranda asserts (a) that the Insurers "accepted" the trial court's rejection of their interpretation of the insurance contract because the trial court limited Mr. Karutz's testimony to a rebuttal of Mr. Hess's calculations and assumptions (while presuming Noranda's methodology was correct), and (b) that the Insurers cannot argue that the parties' property damage settlement barred any additional recovery for repair damages because the Insurers prepared a jury instruction on this issue and presented evidence to the jury after the trial court rejected their argument that the property settlement

[6] Before Mr. Hess testified at trial, Noranda also argued to the trial court that the parties were in agreement on how to calculate damages, including the use of Noranda's "dual hypothetical worlds" formula. (A1636.) The Insurers made clear to the trial court that they did not agree with this methodology and considered it to be directly contrary to the language of the insurance policy. (A1644.)

barred any recovery. (AB at 39–40, 55–56.) Noranda's arguments are fatally undermined by Delaware law.

The very case cited by Noranda to support its argument, *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996), explicitly states that an interlocutory position that is unsuccessfully asserted in the trial court is not waived simply because the unsuccessful party continued to litigate the case in conformity with prior rulings of the trial court. *Id*. at 439 & n.4. The Insurers' exhaustive objections to Noranda's damages methodology are enumerated above, and the Insurers argued before trial that the property damage settlement barred Noranda from asserting any claim at all for rebuilding costs (not just costs that could be specifically identified as having been previously paid). (A1310–A1312.) The Insurers noted their objections and preserved them for appeal. They were thereafter entitled to litigate the case within the trial court's rulings while still preserving their objections for appeal.

E. Regardless of Mr. Karutz's Testimony, Noranda as the Plaintiff Bore the Evidentiary Burden of Properly Establishing Damages, and If Its Expert Failed to Do So, the Case Should Be Remanded for a Proper Trial on Damages

Even if the Court were to find that both Mr. Hess and Mr. Karutz had adopted readings of the insurance contract that were impermissible, reversal would still be required because Noranda as the plaintiff bore the burden of properly establishing damages. In all civil matters, the plaintiff bears the burden to establish damages. If

both the plaintiff and the defendant have failed to present proper damage cases at the trial court, the appropriate remedy is for this Court to reverse the verdict and remand the case to the trial court for a proper calculation of damages. *Steppi v. Stromwasser*, 297 A.2d 26 (Del. 1972) (finding that neither party properly calculated damages, and reversing for a proper calculation of damages); *see also H.E. Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400, 409 (5th Cir. 2003) (finding that both parties' experts miscalculated damages and remanding case for proper finding regarding damages).

Noranda cites a single case in its Answering Brief for the proposition that the Insurers waived their right to challenge Mr. Hess's testimony because Mr. Karutz used "the same methodology." (AB at 40.) Leaving aside the discussion above debunking this claim as a factual matter, the case cited by Noranda also does not say what Noranda claims. The word "waiver" appears nowhere in the case—*Shuck v. CNH Am., LLC*, 498 F.3d 868 (8th Cir. 2007)—and far from finding a waiver, the appellate court conducted its own analysis of the challenged experts' opinions and found that the challenged experts had observed the relevant evidence, applied specialized knowledge, and systematically included and excluded possible theories of causation. *Id*. at 875. Indeed, *Shuck* has been routinely cited by other courts, not for the issue of waiver, but for its substantive analysis of the merits of the experts' testimony in the trial court. The court did criticize the appellant for arguing that a

methodology shared by its own expert was legally improper, but that is entirely different from finding a waiver.

II. NORANDA'S DAMAGES EXPERT IMPROPERLY BASED HIS LABOR CALCULATIONS ON AN UNSUPPORTED STATEMENT BY THE FORMER PLANT MANAGER, WHO LACKED KNOWLEDGE OR EXPERTISE TO ESTIMATE THE LABOR NORANDA WOULD NEED TO RESTART THE PLANT

In their Opening Brief, the Insurers noted that Mr. Hess's testimony depended on an absurd, out-of-court statement by Noranda's former plant manager: even though the pothouse explosion eliminated two thirds of the plant's production capacity, the plant manager assumed Noranda would keep all of its hundreds of employees during the time it "gradually" brought pots back on line. The Insurers—echoing a comment that the trial judge himself made—argued that Mr. Hess's labor assumptions did not satisfy the reliability requirements for expert testimony in Delaware courts because Mr. Hess relied solely on his claim that the former plant manager had said it (in a conversation that is not part of the record). (OB at 34–39.)

Noranda does not respond to the Insurers' argument by defending the foundational information underlying Mr. Hess's opinion or the intellectual rigor of his assumptions, as required by Delaware case law. *Rivera v. Delaware,* 7 A.3d 961, 971-72 (Del. 2010); *Goodridge v. Hyster Co.*, 845 A.2d 498, 504 n. 20 (Del. 2004). Instead, Noranda's response to this argument is (a) that the plant manager who told Mr. Hess that every employee would have been retained was knowledgeable, and (b) that there was unrebutted testimony in the trial record that *some* additional labor is initially required to monitor pots that have been repaired. Even assuming both of

these statements to be true, they do not justify Mr. Hess relying upon the outlandish assumption that the required additional labor would consist, from the day of the accident, of every single one of the hundreds of employees previously working on the two potlines and in the portions of the plant dependent on the two potlines. As noted in the Insurers' Opening Brief, by the time of trial, not even Mr. Hess was willing to stand by this assessment. (OB at 38.)[7]

Mr. Hess admitted at trial that he did not do any analysis of his own regarding the labor needed to restart the plant, and instead simply relied on a conversation with Chad Pinson. (A1608–A1609.) Mr. Hess also admitted at trial that Mr. Pinson's statement was "all an approximation. We don't know—we don't know what would have happened. The approximation there would be to assume that that labor level would have been what they would have continued, you know, could have been higher, could have been lower." (A1571.) When Mr. Hess offered this initial formulation at trial, even the trial judge did not think it made sense, referring to it as "simply almost illogical." (A1637.) At trial, Mr. Hess jettisoned his first set of assumptions and testified to a second set of labor assumptions, which he also attributed to Mr. Pinson. (A1660–A1661.)

[7] Mr. Hess's assumption that every employee would be retained is even more far-fetched in view of Noranda's admission that it had "major layoffs" planned for January prior to the pothouse incident. (A1289.)

Noranda argues in its Answering Brief that the trial court could not, and this Court cannot, examine the factual basis for Mr. Hess's opinions because they were based on the statements of a knowledgeable fact witness. But the cases cited by Noranda do not stand for the proposition that Mr. Hess could blindly rely on the alleged statement by Mr. Pinson. (AB at 48.) Rather, each of the cases cited by Noranda requires reliance on third party information to be reasonable. *See, e.g., Int'l Adhesive Coating Co., Inc. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 544 (1st Cir. 1988) ("[A]n expert is entitled to rely on facts and/or data which have not been admitted into evidence if the expert's reliance on those facts is reasonable . . . . As noted in Rule 703, such reasonableness is measured against the facts or data upon which experts in the particular field normally rely.").

In addition, it was not reasonable for Mr. Hess to rely on the information provided by the plant manager, Mr. Pinson, because Mr. Pinson was <u>not</u> knowledgeable about the labor costs involved in repairing the damaged potlines. Mr. Pinson was asked a foundational question during his trial deposition, whether <u>*any*</u> pots could be relined during the approximately three months after the accident when electrical switch gear service would not yet have been repaired. Mr. Pinson answered that <u>*he did not know*</u>. (AR0003–AR0004.) This is not surprising—Mr.

Pinson was no longer working at the New Madrid facility when the potline incident occurred. (B0071.)[8]

Noranda also argues for the first time on appeal that Mr. Hess is an expert qualified to make his own independent assessments of Noranda's labor needs. (AB at 45–47.) At trial, however, Mr. Hess repeatedly denied that he had such knowledge or expertise. Again and again, in response to requests that he explain or justify the seemingly illogical assumptions underlying his numbers, Mr. Hess responded that he was not an engineer, but had seen similar claims in other cases. (A1593, A1598, A1610, A1632.) The fact that Mr. Hess has worked on claims as an accountant and had an opportunity to read claims prepared for other cases does not render him an expert on the data and labor requirements underlying those claims. *See, e.g.*, *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (verdict reversed in part because expert was permitted to testify outside his field of expertise).

[8] Noranda also tries to buttress Mr. Pinson's out-of-court statements by noting that he also claimed that Noranda retained all of its employees following an earlier potline incident in 2009. (AB at 46.) Noranda's own expert cautioned against comparing the responses to the 2009 and 2016 potline freezes and explained the many distinguishing factors, including large layoffs, which had preceded the 2009 incident. (A1263.)

Noranda is also wrong that Mr. Hess's calculations are admissible so long as they were unrebutted (which, in any event they were not). Noranda cites *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989). In that case, however, the court accepted the testimony of plaintiff's expert both because it was unrebutted *and* because the court found that "the assumptions and projections based on these data appear to present a plausible basis for calculating the damages." *Id.* at 1362. But, as demonstrated above, Mr. Hess's were not plausible. Rather, Mr. Hess's assumptions were far from plausible and did not meet the reliability standards demanded of experts in Delaware courts. The damages based on his testimony should be reversed.

III. THE PARTIES' PRIOR SETTLEMENT OF NORANDA'S PROPERTY DAMAGE CLAIM BARRED ITS CLAIM FOR COSTS THAT WOULD HAVE ALLEGEDLY BEEN INCURRED IN HYPOTHETICALLY REBUILDING THE PLANT

Noranda's Answering Brief does not squarely address either of the arguments raised by the Insurers with respect to the property damage settlement the parties reached before the litigation began: that the plain language of the agreement prohibited any additional claims for repair costs arising from the potline incident, regardless of how they were recharacterized by Noranda, and that Mr. Hess' testimony did not define so-called "babysitting" costs or reliably distinguish those costs from those covered by the property damage settlement.

A. Noranda Has No Response to the Insurers' Argument That the Plain Language of the Parties' Property Damage Settlement Prohibited Noranda from Making Any Claim for Additional Funds Associated with Repairing the Damaged Potline

The Insurers noted in their Opening Brief that, even if Noranda were permitted to seek reimbursement for hypothetical rebuilding costs under the Insurance Policy (which it is not), Noranda had waived any such claims as part of the $38.5 million property damage claim settlement it reached with the Insurers prior to this litigation. (OB at 43–44.) As the Insurers also noted, this is a matter of contract language interpretation that receives de novo review on appeal. (*Id.* at 41.)

Noranda ignores the plain language of the property damage settlement agreement and insurance contract in its Answering Brief, trying once again to reframe it as an evidentiary issue. (AB at 54–59.) But the contract language is straightforward and controlling. The property damage settlement paid Noranda the "actual cash value" of its losses. (A2397, A2406.) "Actual cash value" is a defined term between the insurers and Noranda under the Policy. It means "the amount it would cost to repair or replace insured property, on the date of loss, with material of like kind and quality, with proper deduction for obsolescence and physical depreciation." (A0235.) In short, based on the plain language of the agreements binding the parties, Noranda agreed to accept settlement funds from the Insurers and, in exchange, to waive any claim for amounts required to repair insured property.[9]

"Repair costs," as that term is used in the parties' contracts, should be given its common sense reading. *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997). "In the common usage, the word 'repair' means to fix by replacing or putting together what is broken, or . . . to bring back to good or useable

[9] The settlement excluded "replacement costs" and "non-property damages" neither of which are at issue here. (A2406.) Noranda has not alleged that it is entitled to replacement costs (as opposed to repair costs) for the potline, and "non-property damages" simply refers to the business interruption damages that the parties agree were excluded from the settlement. As Noranda summarized the exclusion for the trial court, "The release says that there's an exception to the release, which is the claim as it pertains to alleged time element loss." (A1306.)

condition." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 290 (Del. 2001) (interpreting "repair or replace" clause in auto insurance policy). "The term 'repair' generally means to restore to sound condition after damage or injury. And as commonly used, the word 'repair' means to fix by replacing or putting back together what is broken, or . . . to bring back to good or usable condition.'" *Compagnie des Bauxites de Guinee v. Three Rivers Ins. Co.*, 2007 WL 1656253, at *5 (W.D. Pa. June 7, 2007) (alterations in original, citation and internal quotation marks omitted); *see also Lonski v. Hartford Fire Ins. Co.*, 2004 WL 1636580, at *1-2 (Mich. Ct. App. July 22, 2004) (per curiam) (term "cost to repair" in insurance policy is unambiguous and includes costs to clean up cement dust after repair).

An aluminum plant is not repaired until it has successfully resumed normal operations, and temporary costs involved in reaching that point—whether they are characterized as "babysitting" or not—are properly considered repair costs under any common sense definition of that term. Those repair costs were waived by Noranda under the plain language of the parties' contract and the property damage settlement, the plain language of which settled and released all claims relating to "damages . . . to 314 pots that were in operation at the time of the [pot line freeze]." (A2403.) Accordingly, Noranda is forbidden from seeking additional damages related to hypothetical rebuilding costs.

Noranda argues in its brief that extrinsic evidence demonstrates that the property damage settlement agreement should not be interpreted in a way that would bar Noranda from seeking additional damages for hypothetically "babysitting" the potline after it was repaired. (AB at 54–59.) This argument is immaterial as a matter of law because extrinsic evidence is not relevant when the written agreements are plain and clear on their face, as they are in this case. *O'Brien*, 785 A.2d at 289. Ambiguity in an insurance contract does not exist where the court can determine the meaning of a contract without any guide other than the knowledge of the simple facts on which the contract's meaning depends. *Id.* at 288. But even if extrinsic evidence were admissible, Noranda's recitation of it is not accurate. For example, Noranda claims that the plaintiff's potline expert Alton Tabereaux "offered consistent testimony" with Noranda's argument that additional labor was needed to monitor potlines as they were restarted. (AB at 59.) In fact, Mr. Tabereaux testified at trial that any required "monitoring" of repaired potlines would be performed by a computer, and that the idea of "babysitting labor" was, in his words, "absolutely a falsehood." (A1885–A1886.)

B. Noranda Does Not Attempt to Refute the Insurers' Argument That Mr. Hess's Testimony Regarding Costs Not Covered by the Property Damage Settlement Did Not Meet Delaware's Standard for Reliability

The Insurers noted in their Opening Brief that Mr. Hess's testimony about waiver of specific hypothetical rebuilding costs failed to meet the reliability

requirements for expert testimony in Delaware courts. (OB at 44–46.) Specifically, the Insurers detailed how "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." (*Id.* at 45.) Noranda has not even attempted to defend the reliability of Mr. Hess's testimony on this issue.[10] Instead, Noranda now claims that Mr. Hess was discussing another topic: "total labor costs from an earlier saved labor calculation." (AB at 59.) But the very pages cited by Noranda demonstrate otherwise—they show Mr. Hess being asked "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?," and answering "No." (A1609.)

[10] Noranda does claim that Mr. Karutz agreed with Mr. Hess's calculations and "testif[ied] that Mr. Hess in fact was a bit too generous to the Insurers[.]" (AB at 27, 56–57.) However, a review of the pages cited by Noranda for this proposition (A2127–A2130) reveals that this is not what Mr. Karutz said. Mr. Karutz disagreed with the categories enumerated by Noranda's counsel, and when directly asked "So you think that he should have deducted from the claim a little bit less than he did," he responded "No, that's not what I said. He should have deducted more, but I didn't make an issue of it because it didn't seem to be that relevant." (A2129.) In fact, Mr. Karutz testified that the amount deducted should have been "rather substantially more" than what Mr. Hess deducted. (A2027.)

IV. THE TRIAL COURT'S DISALLOWANCE OF NORANDA'S UNSUPPORTED CLAIM FOR "ELECTRICAL INEFFICIENCY" DAMAGES SHOULD BE AFFIRMED

A. Question Presented

Did the trial court err in denying Noranda's claim for more than $7.4 million in "electrical inefficiency" damages when the parties' insurance contract excluded such damages and Noranda's expert did not offer reliable testimony in support of such damages?

B. Scope of Review

The trial court found as a matter of contract law that Noranda was not entitled to "electrical inefficiency" damages. Therefore, this Court's review of the trial court's interpretation of the insurance contract is *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Although the trial court's decision on contract grounds made further analysis unnecessary, an alternate basis for affirmance here is that Noranda's expert's testimony in support of such damages did not meet the standards of reliability demanded by Delaware courts.

Contrary to the Noranda's Answering Brief, there is no deference due to the jury's verdict in this Court's review, because the trial court's decision was not based on any evidence presented to the jury.

C. Merits of Argument

In its cross-appeal, Noranda asks this Court to reverse the trial court's granting of the Insurers' Motion for Judgment as a Matter of Law on Noranda's claim for $7,461,117 in "electrical inefficiency" damages. The trial court's decision on this issue should be affirmed. The trial court's decision was consistent with its reading of the insurance policy's damages language, and in any event required by the failure of Noranda's expert to offer admissible expert testimony supporting the claim.

1. Even if Noranda could claim hypothetical rebuilding costs, the policy plainly forecloses recovery of electrical inefficiency costs never incurred

As detailed in this brief and the Opening Brief, the trial court erred by permitting Noranda to claim business interruption damages for hypothetical costs that would have been incurred as a result of repairing the damaged facility. Electrical inefficiencies comprised more than $7 million of the $35.5 million in damages that Noranda claimed for this hypothetical repair cost. If this Court agrees that Noranda's hypothetical costs of repair are not recoverable under the business interruption policy, then Noranda's claim for electrically inefficiency costs is plainly disallowed as well. But even under Noranda's hypothetical repair-cost model, electrical inefficiencies are not an allowable category of recoverable costs. Moreover, the scant trial testimony provided no reasonable basis for quantifying hypothetical electrical inefficiencies and therefore did not support the jury's award.

The trial court held Noranda could not include "electrical inefficiency" damages in its calculation of "gross earnings" because the alleged additional electrical expense "is not the normal cost associated with operation of the pots," and "earnings and routine expenses are included in the calculation [of gross earnings under the policy], but it is not intended to cover non-routine extra expenses unrelated to the normal operation of the business." Mem. Op. on Def's Mot. for a J. as a Matter of Law (Ex. 5) at 8–9 (Ex. 5 to Opening Brief).

In making this ruling, the trial court relied on the policy language, which provided, "[i]n 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 (emphasis added).) By definition, "electrical inefficiency" damages are not normal charges and expenses that would have been incurred had there been no interruption. A separate section of the insurance contract allows claims for "Extra Expense." But that section does not apply because, as the trial court noted, it requires that the costs actually be incurred, which they concededly were not. Noranda did not contend that the "Extra Expense" provision applied to the claim for "electrical inefficiency." Mem. Op. on Defs.' Mot. For a J. as a Matter of Law at 9 (Ex. 5 to Opening Brief).

The payroll costs allegedly required for a hypothetical restart of the plant were permitted as business interruption damages by the trial court, which the Insurers have appealed. But even if this Court upholds the trial court's approach to Noranda's 'dual hypothetical worlds' damages methodology, the disallowance of "electrical inefficiency" damages is consistent with the trial court's approach, because "ordinary payroll" is treated by the insurance contract as a separate category from "charges and expenses." (A0205.) Therefore, although the Insurers believe that the contract bars all hypothetical rebuilding costs, the trial court's reading of the policy to permit such hypothetical costs for payroll but not for alleged "electrical inefficiency" is internally consistent, as the contract contains specific language regarding the necessity of actually incurring non-payroll costs that will be later claimed as Extra Expense.

The trial court's decision with respect to "electrical inefficiency" damages therefore should be affirmed even if this Court determines that Noranda was entitled to pursue its "dual hypothetical worlds" damages theory with respect to labor expenses.

2. The calculation of electrical inefficiency costs was entirely unreliable as a matter of law

Aside from the language of the insurance contract, Mr. Hess's testimony on electrical inefficiency should never have been permitted because it did not meet the minimum standards of reliability demanded of experts in Delaware courts.

As detailed in the Insurers' Opening Brief, a trial judge must determine that an expert's methodology and ultimate conclusion are reliable based on the methods and procedures of science, rather than subjective belief or speculation. The trial judge should also 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. (OB at 36 (citing *Rivera v. Delaware*, 7 A. 3d 961, 971-72 (Del. 2010), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).)

Mr. Hess's testimony on electrical inefficiencies provided no basis that could satisfy *Daubert*. The sole support for his opinion was that he used this method in calculating other claims, including a claim involving Noranda.[11] Mr. Hess, however, offered no explanation as to how he developed this method or what methodology he employed.

As with his other testimony, Mr. Hess's statements regarding his opinion on electrical inefficiency changed markedly during the course of this litigation. When Mr. Hess first opined on this issue, the sole basis for his opinion was a single 2009 claim he allegedly prepared for Noranda (again, with no reference to the facts of that

[11] Mr. Hess relied on the 2009 incident at Noranda's plant, yet Mr. Hess had previously discouraged any comparison between the 2009 and current incidents with respect to measuring damages. Mr. Hess wrote "I…was involved in the 2009 loss and can verify that conditions were quite different. The cause of the shutdown, the manner in which the plant was shut down, and the economic environment are some examples of the difference between 2009 and 2016. It is not reasonable to use the 2009 startup as a model for the hypothetical 2016 startup." (A0702 – A0703.)

claim or how he originally calculated the number). (A0687.) By the time of trial, the claimed basis had expanded to "other smelter claims that [he'd] worked on" (A1659) with none identified and with no explanation of how calculations were performed for those claims.

Mr. Hess's opinion had no stated basis in any fact or method of analysis, and thus falls into the category singled out by courts as being particularly unreliable under *Daubert*. "Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Delaware courts have applied this principle to bar the testimony of experts who offer opinions that are based on little more than their status as experts. *See Wiercinski v. Brescia Props., LLC*, 2015 WL 227980, at *3 (Del. Super. Jan. 15, 2015) (rejecting expert's opinion on dating of wood rot because it is "based solely on his work experience, and his methodology is not supported by any scientific data").

It is the plaintiff's burden to demonstrate the reliability of its expert's opinion, *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. 2000), and to do so by "demonstrat[ing] that scientific conclusions have been generated using sound and reliable approaches." *In re Asbestos Litig.*, 911 A.2d 1176, 1201 (Del. Super. 2006). Therefore, an expert's failure to explain the basis for an important

inference requires that the expert's opinion be excluded. *Jones v. Astrazeneca LP*, 2010 WL 1267114, at *9 (Del. Super. Mar. 31, 2010).

In this case, Mr. Hess made no effort—either before or during trial—to explain the basis for his opinion, even after the Insurers squarely raised the reliability of his opinion in this area in a pre-trial motion. He simply said that he had claimed it before. This cursory explanation for a $7.4 million damages claim does not even begin to satisfy the requirements that Delaware imposes on experts seeking to offer opinions in Delaware courts.

CONCLUSION

For the reasons stated above and in the Appellants' Opening Brief, 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, and that this Court deny the Appellee's Cross-Appeal.

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CERTIFICATE OF SERVICE

I, Matthew Denn, hereby certify that on this 21st day of February, 2020, I caused true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF AND ANSWERING BRIEF ON CROSS APPEAL** (CORRECTED VERSION – TABLE OF CONTENTS) to be served upon the following counsel in the manner indicated:

VIA FILE AND SERVEXPRESS

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