IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JW Aluminum Company, Plaintiff, v. ACE American Insurance Company, Starr Technical Risks Agency, Inc., Westport Insurance Corporation, AIG Specialty Insurance Company, & General Security Indemnity Company of Arizona, Defendants.	Case No. 2:21-CV-01034-BHH **PLAINTIFF JW ALUMINUM'S OPPOSITION TO INSURERS' MOTIONS *IN LIMINE***
ACE American Insurance Company, Westport Insurance Corporation, & General Security Indemnity Company of Arizona, Counter-Plaintiffs, v. JW Aluminum Company, Counter-Defendant.	

Plaintiff JW Aluminum Company ("JWA") submits this memorandum of law in opposition to Defendants ACE American Insurance Company ("ACE") and General Security Indemnity Company of Arizona's ("GSINDA" and, collectively with ACE, "Insurers") motions *in limine*[1] (ECF No. 256) (the "Motions").

[1] The numbering throughout Insurers' Motions risks confusing the Court. In the introductory paragraph of Insurers' Motions, Insurers describe 11 motions (numbered 1, 2, 3, 4, 5, 7, 6, 7, 8, 9, and 10), but they brief 10 motions (which are differently numbered as I, II, III, IV, VII, VIII, IX,

INTRODUCTION

Insurers largely seek to prevent JWA from introducing evidence directly relevant to the remaining issues in this case because some of that evidence is simply unfavorable. That is not a proper basis upon which to move *in limine*.

Throughout the Motions, Insurers repeatedly state that certain evidence would be simply "prejudicial." *See*, *e.g.*, Motions at 3, ECF No. 256 ("This evidence or testimony should be precluded because this claims handling evidence is irrelevant and prejudicial."); *id.* at 7 ("As such, that type of testimony is clearly prejudicial and must be precluded."); *id.* at 9. Even if that evidence was prejudicial, as opposed to merely unfavorable, this is not the standard under Rule 403 of the Federal Rules of Evidence. "[T]he touchstone for excluding evidence under Rule 403 is not prejudice, but 'unfair' prejudice." *United States v. Grimmond*, 137 F.3d 823, 833 (4th Cir. 1998); *see also Harris v. Q&A Assocs., Inc.*, No. 2:15-CV-46, 2018 WL 3084709, at *8 (N.D. W. Va. June 22, 2018) ("The question under Rule 403 is not simply one of prejudice, but of unfair prejudice—all evidence offered against a party is, by its very nature, inherently prejudicial . . . ."). As opposed to prejudice, ***unfair*** prejudice "means an undue tendency to suggest decision on an improper basis." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules).

Insurers' Motions as a whole cannot meet the standard under Rule 403. None of the evidence Insurers ask the Court to categorically preclude JWA from using would influence the jury to make a decision on an "improper basis." Insurers thus cannot meet their burden, and their Motions should be denied in their entirety.

XI, XII, and XIII). For clarity, the numbering in this Opposition will track the Roman numerals associated with each heading of Insurers' Motions.

I. DEFENDANTS' MOTION IN LIMINE REGARDING PLAINTIFF'S PRESENTATION OF EVIDENCE RELATED TO OR ALLEGING IMPROPER CLAIMS HANDLING

Insurers' Motion makes an overbroad attempt to exclude evidence related to Insurers' claims handling that falls well short of the standards under Rule 401 or Rule 403. First, evidence related to Insurers' claims handling is relevant to at least two factual issues that the Court has already held that JWA may present to the jury. Second, Insurers' assertion of the "only relevant factors regarding the prevention doctrine" is an unsupported, narrow view of what JWA is entitled to present to the jury in proving the facts supporting the prevention doctrine. Third, evidence related to how Insurers handled the case is not, in any event, ***unfairly*** prejudicial; Insurers' fear that, in retrospect, their own emails handling the claim cast them in a negative light is not a proper basis for excluding evidence. Fourth, the time it takes to explain these issues to the jury would not cause undue delay or waste time because this evidence is directly relevant to both categories of JWA's damages.

The inquiry into Insurers' claims-handling conduct is directly relevant to disputed factual issues surrounding both JWA's property and business interruption damages. The Court previously held that there is a disputed factual issue with respect to whether Insurers "hampered" or "prevented" JWA from repairing or replacing the damaged Legacy Equipment within a certain period of time, for two purposes. Order at 13, ECF No. 217; Opinion & Order at 41–42, ECF No. 173. This evidence will determine: (1) whether JWA is entitled to replacement cost value of the damaged Legacy Equipment under the Two-Year Provision (*i.e.*, JWA's physical property damages), Opinion & Order at 38–43, ECF No. 173, and (2) whether JWA is limited to a 40-week Period of Interruption for purposes of calculating JWA's cast coil business interruption damages, Order at 13, ECF No. 217.

To establish that Insurers "hampered" or "prevented" JWA from repairing or replacing the damaged Legacy Equipment, JWA is certainly entitled to put forth more than the barebones assertions urged by Insurers that "(1) JWA timely requested money; and (2) [Insurers] did not give them the requested money." Motions at 5, ECF No. 256. Under the prevention doctrine, if one contracting party's actions "substantially contributed" to another party's failure to satisfy a condition in the contract, the preventing party cannot take advantage of the failure. *Champion v. Whaley*, 280 S.C. 116, 122 (Ct. App. 1984) (holding that sellers prevented condition precedent for buyer to receive loan approval by selling house during period of exclusivity to third party buyer who changed the locks and informed inspectors for would-be buyer that he had bought the house, thereby preventing inspectors from appraising the property and finalizing the loan to would-be buyer).

In order to prove that Insurers prevented JWA from repairing or replacing the damaged equipment within two years, JWA must be able to put in evidence that describes in some qualitative detail the Insurers' specific actions that "delay[ed]," "prevented," or hindered JWA from doing so. *Shannon v. Freeman*, 117 S.C. 480, 480 (1921) ("One who has himself prevented performance or tender of performance at the time set cannot take advantage of the delay."); *Champion*, 280 S.C. at 120. Thus, JWA is entitled to put on evidence showing how Insurers: (1) delayed in making any payments to JWA; (2) asked the same questions repeatedly of JWA even after JWA had already provided timely responses; (3) refused to believe JWA's explanation; (4) demanded that JWA sit for an EUO, even though one of the other insurers (AIG) thought it was unnecessary to do so; and (5) made threadbare coverage arguments as an excuse for refusing to pay JWA for its covered losses under the Policy. Insurers' suggested boiled-down, "relevant factors regarding the prevention doctrine" are plainly insufficient for JWA to meet its burden of proof.

Moreover, Insurers' coverage positions are directly relevant to points that Insurers *themselves* have put at issue. Insurers evidently plan to argue that JWA could have raised money from its owners to repair or replace the damaged equipment. Setting aside the fact that JWA asked its owners for money and the owners declined to provide additional funding, Insurers' coverage positions impacted JWA's ability to raise funds from its owners or elsewhere: Because Insurers (or at least those Insurers that remain for trial) argued that there was no coverage at all for the damaged equipment, a debt or equity investment to fund replacement of that equipment was essentially speculative litigation funding, rather than what should have been a low-risk bridge loan.

Insurers' complaint that such evidence will be "prejudicial" is likewise misplaced. First, the test is whether such evidence would be *unfairly* prejudicial, and even then, it must ***substantially outweigh*** the probative value of the evidence at issue. Fed. R. Evid. 403. "Unfair prejudice" in the context of Rule 403 means "an undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules. Here, there is no risk of the jury making a decision on an improper basis.

To make a proper showing under the prevention doctrine, JWA must prove that Insurers "wrongfully prevent[ed] satisfaction of a condition precedent." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339 n.2 (2005). Insurers try to distance themselves from the fact that the evidence of their own claims handling may paint them in an unflattering light. However, showing that their conduct wrongfully prevented, delayed, or hindered JWA from replacing its damaged equipment would inherently involve "paint[ing] Defendants in a negative light before the jury." Motions at 5, ECF No. 256. This is not a proper ground on which to limit relevant evidence. *See Champion*, 280 S.C. at 121–22 ("The defendant cannot take advantage of the uncertainty created

by his own wrongdoing. If it were otherwise, then it would be virtually impossible for a plaintiff to prove a case of prevention.").

Finally, Insurers' effort to keep this evidence out by claiming it will cause undue delay, waste time, or confuse the issues fails. This evidence is directly relevant to both categories of JWA's damages (whether JWA is entitled to cash value or replacement cost, and whether the Period of Interruption is extended) and JWA does not intend to present needlessly cumulative or excessive evidence to meet its burden. Moreover, the jury is more likely to be confused without the evidence, since the prevention doctrine makes little sense without it. Accordingly, Insurers' Motion I should be denied.

II. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF JWA'S LAY WITNESS TESTIMONY CONCERNING JWA'S ABILITY TO OPERATE LEGACY AND BOILERMAKER EQUIPMENT SIMULTANEOUSLY AND WITHIN REGULATORY COMPLIANCE AFTER THE LOSS

Insurers' motion *in limine* is a restatement of their failed summary judgment argument that, as a matter of law, JWA cannot without expert testimony establish that it would have operated the Boilermaker and Legacy facilities simultaneously had the August 4 Fire not occurred. *See* Defs.' MSJ Reply at 9, ECF No. 202 (arguing that "the views of Plaintiff's unqualified lay witness and its counsel as to what Plaintiff believed the permits allowed it to do are irrelevant and insufficient to oppose Insurers' motion for summary judgment"). The Court rejected that argument on summary judgment, holding that "a genuine issue of material fact exists surrounding JWA's permits and that a reasonable jury could conclude that JWA had the necessary permits to operate both the Legacy and Boilermaker equipment starting in August 2020." Order at 10, ECF No. 217.

JWA's claim for business interruption damages resulting from lost cast coil sales will be the most disputed and consequential factual determination remaining for the jury at trial, with the parties having already stipulated to the replacement cost value of the Legacy Equipment and

JWA's damages for lost sales of finished product or "pack pounds." *See* Ex. A (Joint Stip. of Facts) ¶¶ 23–25. To be clear, Insurers themselves injected the issue of whether JWA's permits allowed it to operate the Boilermaker and Legacy equipment simultaneously through their proffered testifying expert Stephen Trauth, who intends to opine that such simultaneous operation would have been prohibited by those permits.

Contrary to Insurers' assertions, JWA will not have lay fact witnesses offer expert testimony, whether on the technical idiosyncrasies of air emissions permitting—such as air emissions netting or air quality modeling—or otherwise. Motions at 6, ECF No. 256. As the Court determined in denying Insurers' motion for summary judgment on this exact basis, such expert testimony is not required for JWA to establish that it had the necessary permits to operate both the Legacy and Boilermaker equipment simultaneously. Order at 10–11, ECF No. 217.

Rather, JWA intends to offer proper fact evidence that is rationally based on the witnesses' personal knowledge and experience and that is probative of factual issues that the Court has already held should go to the jury. For example, JWA intends to offer testimony and evidence that (i) prior to obtaining the construction permit for Boilermaker, JWA consulted Meridian and ensured that the permit would allow JWA to operate both Boilermaker and Legacy simultaneously; (ii) at the time of the August 4 Fire, both the Legacy and Boilermaker facilities were already operating simultaneously; (iii) DHEC knew that both Legacy and Boilermaker were operating simultaneously at the time of the August 4 Fire and had already indicated its approval of simultaneous operations; (iv) the terms of the construction permit had been amended by JWA multiple times prior to the August 4 Fire; and (v) JWA had past experiences receiving permitting modifications from DHEC. Such evidence is squarely within the scope of proper fact witness

testimony, and it is highly probative of whether JWA would have produced and sold cast coil absent the August 4 Fire.

Nor is such evidence speculative or shoehorning expert testimony through a fact witness as Insurers suggest. In response to questioning *from Insurers*, JWA's former CEO, Stan Brant, testified to his knowledge and understanding of JWA's permits and emissions limits—a process in which he was personally involved while planning construction and upgrades to JWA's facilities and in his prior role as JWA's COO. *See* Ex. B (Brant Dep.) at 131–36. JWA should not be categorically precluded from eliciting such testimony before trial has even begun, and Mr. Brant will be subject to cross-examination.

A lay witness like Mr. Brant could identify the fundamental errors in the assumptions underlying Mr. Trauth's permitting analysis. *See* JWA MSJ Resp. at 24, ECF No. 206 (noting critical flaws in Mr. Trauth's assumptions). Mr. Trauth's expert report rested on the demonstrably false premise that JWA had completed construction of Boilermaker Phase II in May 2020 and Mr. Trauth conducted a netting analysis based on the simultaneous operation of Boilermaker Phase II and Legacy equipment. *Id.* Because Boilermaker Phase II (if it had ever been approved) would have occupied the same physical footprint as the Legacy equipment, expert credentials are not required to dismiss Mr. Trauth's opinion as based on his modeling of a physically impossible scenario. *Id.*

Insurers conclude their Motion with a perfunctory argument that evidence or testimony relating to JWA's ability to simultaneously operate Boilermaker and Legacy should be precluded as "highly prejudicial." Motions at 7, ECF No. 256. However, Insurers fail to articulate any particular unfair prejudice and appear to entirely misapprehend the Rule 403 standard. To exclude evidence under Rule 403 as unduly prejudicial, the moving party must establish that the prejudice

is "unfair," *Grimmond*, 137 F.3d at 833, requiring "an undue tendency to suggest decision on an improper basis," *Old Chief*, 519 U.S. at 180. In other words, Insurers cannot claim unfair prejudice simply because JWA's evidence and testimony cut against their theory of the case. Insurers have completely failed to establish unfair prejudice, much less unfair prejudice that would substantially outweigh the probative value of JWA's anticipated evidence and testimony. Furthermore, Insurers' arguments for exclusion go to the weight, but not admissibility of JWA's proposed testimony, which Insurers will have the opportunity to challenge via cross-examination.

Accordingly, the Court should reject Insurers' attempt to relitigate their summary judgment motion and deny Insurers' Motion in its entirety.

III. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE THAT JW IS ENTITLED TO DAMAGES BEYOND THE UNDISPUTED TEN-MONTH PERIOD OF INTERRUPTION

In their motion, Insurers make several statements that are contradicted by the Court's prior Order denying Insurers' motion for partial summary judgment on JWA's cast coil claim. Specifically, Insurers claim that "the duration of the POI is not a material fact in dispute." Motions at 8, ECF No. 256. This is directly contradicted by the Court's prior order denying Insurers' motion for summary judgment on the period of interruption: "In sum, the Court finds that determining whether Defendants delayed payment and how much weight that should bear on the length of the period of interruption ***are factual questions for the jury***." Order at 13, ECF No. 217 (emphasis added). Additionally, Insurers represent to the Court that "there is no dispute, as this Court has already determined that the POI is limited to 40 weeks." Motions at 8, ECF No. 256. This is not true. The Court explicitly held that "Defendants can argue and present evidence to the jury that JWA had the monetary means to rebuild within the period of interruption, and JWA can argue and present evidence to support that the converse is true to the jury and that it was, in fact, hampered in its efforts to timely rebuild due to Defendants' conduct. . . . Accordingly, the Court

declines to hold as a matter of law that JWA's cast coil claim includes only those proven net profit losses that were incurred through May 22, 2021 [the end of the 40-week period]." Order at 13, ECF No. 217.

The language that Insurers selectively quote from the Court's summary judgment opinion appears to have originated with an incorrect assertion in Insurers' memorandum in support of their summary judgment motion that "it is undisputed that the Period of Interruption is 40 weeks," which is based on a misleading citation to Stan Brant's deposition as JWA's corporate representative. *See* Order at 12, ECF No. 217 (citing ECF No. 201-1 at 40). In that passage, Mr. Brant merely testifies that the nine-month estimate to complete repairs that JWA obtained from its expert Hatch immediately after the fire back in 2020 was never updated, and that JWA had no basis to dispute the accuracy of Hatch's initial estimate of the time it might have taken to complete repairs.

In no way could Mr. Brant's testimony be construed to offer a legal conclusion regarding JWA's position on the "Period of Interruption" as that term is defined under the Policy, especially considering that neither the questions nor the answers even use the term "Period of Interruption." *See* Ex. B (Brant Dep.) at 122–23. As the Court previously recognized, the Period of Interruption—how long it would take JWA to repair the damage caused by the fire—is a quintessential issue of fact. *See* Order at 12–13, ECF No. 217 ("[W]hether Defendants' delay in payment caused a delay in JWA's ability to repair the damage and to make the facility ready for operations is an issue of fact, not one of law.").

As explained above, Insurers' actions during their handling of the claim are relevant to determining whether the prevention doctrine applies to both the ACV argument, as well as the proper period of interruption for JWA's cast coil damages. Insurers' Motion III regarding the period of interruption should be denied.

IV. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF SPECULATIVE EVIDENCE OR STATEMENTS BY JWA CONCERNING ITS CAST COIL CLAIM

Insurers' Motion seeks to preclude JWA from introducing evidence that multiple companies expressed interest in purchasing cast coil from JWA as "speculative evidence" that is "highly prejudicial." Motions at 9–12, ECF No. 256. This Motion should be denied for several reasons.

First, this Motion represents yet another improper effort by Insurers to relitigate arguments that they already made and lost at summary judgment. *See, e.g.*, Defs.' MSJ Reply at 25, ECF No. 202 (arguing that "preliminary communications with Novelis, Granges and Arconic" were too speculative to support JWA's lost profits damages). At summary judgment, the Court rejected Insurers' arguments and, "after review of the parties' arguments, the evidence in the record, and the applicable law," the Court held that JWA's cast coil claim was not "too speculative to support recovery." Order at 11, ECF No. 217. As such, Insurers' Motion is an attempted end-run around the Court's summary judgment ruling and should be denied.

Second, Insurers' Motion improperly seeks to raise the evidentiary bar above and beyond what South Carolina law requires to establish lost profits. For example, Insurers argue that the expressions of interest from Novelis, Granges, and Arconic are too speculative to go to a jury because they "are not evidence of a guaranteed purchase." Motions at 10, ECF No. 256. But this is a repeat of Insurers' flawed summary judgment arguments that "preliminary communications with Novelis, Granges and Arconic" were too speculative and that "Plaintiff has not produced even one sales contract or purchase order to establish that it would have sold any cast coil." Defs.' MSJ Mem. at 35, ECF No. 117-1; Defs.' MSJ Reply at 25, ECF No. 147.

South Carolina law does not require evidence of a "guaranteed purchase" or a "purchase order" to establish lost profits. Rather, South Carolina law requires that lost profits be established

with "reasonable certainty" and acknowledges that the "methods of proof and the 'reasonable certainty' requirement bear an inherent flexibility." *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 214 (1988). While a claimant cannot recover on lost profits that are merely conjectural or speculative, the rule "recognizes the practical impossibility of exact calculation of such profits and requires only a fair and reasonable approximation of them *from all of the facts, circumstances and data disclosed by the evidence*." *S.C. Fin. Corp. v. West Side Fin. Co.*, 236 S.C. 109, 125 (1960) (emphasis added).

At trial, JWA will introduce evidence that JWA could have and would have sold cast coil if the August 4 Fire had not occurred and that multiple industry participants had expressed interest in purchasing cast coil from JWA. JWA will also present expert testimony regarding unprecedented, sky-high demand for cast coil in the market after the August 4 Fire. *See* Pl.'s Resp. at 36–37, ECF No. 134; Order at 10–11, ECF No. 217. The Court has already held that JWA's evidence clears the "reasonable certainty" hurdle and thus should deny Insurers' Motion, which is another attempt to raise JWA's evidentiary burden beyond the requirements of South Carolina law.

Third, Insurers' Motion misapprehends the Rule 403 standard, claiming that evidence that multiple entities were interested in purchasing cast coil from JWA, "without further evidence that sales would have occurred," is "highly prejudicial." Excluding evidence under Rule 403 requires a showing that any alleged prejudice would be "unfair," *Grimmond*, 137 F.3d at 833, including "an undue tendency to suggest decision on an improper basis." *Old Chief*, 519 U.S. at 180. JWA's evidence on lost profits, including the expressions of interest by multiple market participants in purchasing JWA's cast coil, is not unfairly prejudicial simply because it cuts against Insurers' preferred narrative. To the contrary, it is directly probative of the central factual dispute remaining in the case—whether JWA would have sold cast coil had the August 4 Fire not occurred. Thus,

Insurers have utterly failed to establish unfair prejudice that substantially outweighs the probative value of JWA's evidence.

Furthermore, to the extent that Insurers argue the emails of interest from Novelis, Granges, and Arconic "are not evidence of a guaranteed purchase" and do not contain "price quotes or specific negotiations," such arguments go to the weight, not the admissibility, of that evidence. At trial, Insurers will have the opportunity to challenge the evidence via cross-examination, which further militates against exclusion. *See, e.g.*, *Hoffman v. Kansas City Life Ins. Co.*, No. 2:18-CV-346, 2019 WL 2297348, at *5 (D.S.C. May 30, 2019) (reasoning that defendants' "concerns go more to the weight that a jury may ascribe to his testimony," and thus those concerns were "better addressed during cross-examination").

Finally, at the end of Insurers' Motion, they tack on a vague request to preclude "the presentation of large, unsupported revenue figures related to JWA's cast coil claim," without any explanation of what evidence or testimony they are referring to. Motions at 11–12, ECF No. 256. In addition to the reasons set forth above, this portion of Insurers' Motion should be denied because it is vague and does not specify the evidence or argument to be excluded. *See United States ex rel. Lutz v. BlueWave Healthcare Consultants, Inc.*, No. 9:11-CV-1593, 2017 WL 11621327, at *1 (D.S.C. Nov. 16, 2017) ("District courts routinely deny a motion in limine that does not specify the evidence or argument to be excluded because such a motion is premature."). To the extent that Insurers seek to exclude the report, opinions, or testimony of JWA's expert on its cast coil claim, Ibrahim Yucel, the Court has already rejected similar arguments on summary judgment, as well as denied Insurers' motion to exclude Mr. Yucel's testimony. Order at 16–17, ECF No. 217. As the Court soundly reasoned, any potential for juror confusion raised by Insurers "can be properly addressed through direct and cross-examination at trial." *Id.*

For the foregoing reasons, Insurers' Motion IV should be denied in its entirety.

VII. DEFENDANTS' MOTION IN LIMINE REGARDING THE EXCLUSION OF THE DEPOSITION TRANSCRIPTS OF BRIAN BENNETT AND REPRESENTATIVES FROM INSURERS NO LONGER IN THE CASE

Insurers claim that potential deposition testimony from Brian Bennett, the Sedgwick adjuster who handled the loss, is "not relevant to the issues in this case," in part because Mr. Bennett "lacks authority to bind the insurers on coverage matters." Motions at 12, ECF No. 256. Under South Carolina law, Mr. Bennett unequivocally had the authority to bind Insurers. Insurers also argue that deposition testimony from AIG representative Joseph Price would be "highly prejudicial" and would "serve no legitimate evidentiary purpose." *Id.* at 13. Both Mr. Bennett's and Mr. Price's deposition testimony are relevant and would not be unfairly prejudicial to Insurers.

Notably, JWA does not currently plan to play any portions of Mr. Bennett's deposition testimony during its case-in-chief. In any event, Mr. Bennett's deposition testimony relates to Insurers' claims handling, which, as explained in response to Insurers' Motion I, is relevant to JWA's property and business interruption damages. *See supra* at 3–6. Insurers' claim that Mr. Bennett lacks authority to bind them is incorrect. Mr. Bennett was Insurers' agent throughout the handling of JWA's claim. Mr. Bennett testified that he "represent[ed] the insurance companies," that he "owe[d] duties to the insurance companies," and that he was "authorized to make communications on behalf of the insurance companies." Ex. C (Bennett Dep.) 23:18–20; *id.* 24:13–21; *id.* 25:24–26:3; *id.* 26:15–18 ("Q: And do you have the ability to make offers on behalf of the insurance company? A: With their authorization."); *id.* 37:24–38:1 ("Q: And so do you view the insurance companies in this matter as your clients? A: Yes.").

The only case cited by Insurers holds the exact opposite of what Insurers claim it says. In that case, the Supreme Court of South Carolina held that "the acts of the adjuster or adjusting

company (agent) may be imputed to the insurer (principal)." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 355 S.C. 614, 619 (2003). This directly contradicts Insurers' assertion that Mr. Bennett "lacks authority to bind the insurers on coverage matters." Motions at 12, ECF No. 256. Insurers' Motion VII should be denied with respect to Mr. Bennett's deposition testimony.

Likewise, Mr. Price's deposition testimony is highly relevant to the prevention doctrine and would not be unfairly prejudicial. AIG was bound by the same policy terms and underlying facts as the other Insurers but took very different coverage positions throughout its claims handling process and this litigation. AIG did not argue that damaged Legacy equipment had somehow been removed from coverage just a few weeks before the fire. AIG's actions speak to the unreasonableness of Insurers' delay, reformation counterclaim, and ultimate denial of JWA's claim. Likewise, AIG did not join in Insurers' demand that JWA sit for an examination under oath ("EUO"). That AIG did not demand an EUO is a fact. It is not "commentary or conjecture" that is "inherently speculative and inadmissible." Motions at 13, ECF No. 256. The fact that another Insurer who was essentially identically situated reached a different coverage decision and thought the EUO was unnecessary (and said as much in internal emails)[2] is probative of whether Insurers' conduct wrongfully prevented, delayed, or hindered JWA from repairing or replacing its damaged Legacy Equipment. As such, Insurers' Motion VII to exclude the deposition testimony of Brian Bennett and Joseph Price should be denied.

[2] See Ex. D (PX128) ("There isn't anything we can do about the balance of the market's desire to press the SOV issue [the reformation argument], and demand an EUO. We are separating ourselves from that process, and our letter clearly does that. We want our letter to be ahead of the market's EUO demand. The balance of the market's strategy is to have the EUO demand out there before JW decides to sue.").

VIII. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE OR TESTIMONY THAT JWA DID NOT HAVE THE FUNDS NECESSARY TO REPAIR OR REPLACE THE LEGACY EQUIPMENT AND AFFIRMATIVE MOTION TO TAKE JUDICIAL NOTICE OF SEC FILINGS OF JWA'S OWNERS

Insurers' Motion VIII seeks to preclude JWA from introducing "any testimony or evidence suggesting that Defendants prevented JWA from rebuilding or replacing the equipment, as such testimony is unduly prejudicial." Motions at 14, ECF No. 256. In so doing, Insurers again seek to relitigate a failed motion for summary judgment and take from the jury one of the most important factual questions remaining in this case—*i.e.*, whether Insurers prevented compliance with the Policies' Two-Year Provision by failing to make payments to JWA. Insurers' motion should be denied for several independent reasons.

First, as JWA has repeatedly explained, "the touchstone for excluding evidence under Rule 403 is not prejudice, but 'unfair' prejudice," *Grimmond*, 137 F.3d at 833, which "means an undue tendency to suggest decision on an improper basis," *Old Chief*, 519 U.S. at 180. JWA's evidence goes to whether it had the necessary funding to repair or replace its equipment.

This is also another issue the Court has already resolved. The Court expressly found that whether Insurers prevented JWA from rebuilding or replacing the equipment was a fact issue nearly two years ago. *See* Opinion and Order at 42, ECF No. 173 ("[T]he Court that finds a jury could reasonably conclude that Insurers' conduct prevented JWA from replacing or repairing the damaged equipment within two years."). Although Insurers' Motion approaches this issue from a slightly different angle, framing the issue in terms of "funds necessary to repair," it is a second bite at the same apple. Insurers' argument is also foreclosed by the parties' Joint Stipulation, which contains the parties' agreement that prevention is a disputed fact issue. *See* Ex. A (Joint Stip. of Facts) ¶ 22 ("[I]t will be up to [the jury] to decide whether ACE and General Security prevented or hindered JWA from replacing the Legacy Equipment within two years."). Because prevention

is a live fact issue for the jury, and JWA's access to funds is central to the prevention question, evidence of JWA's access to funds is highly probative and should not be excluded.

Insurers add a sentence at the end of their "unduly prejudicial" argument, predicting that JWA's evidence will portray them as "big bad insurance companies." Motions at 14, ECF No. 256. Evidence concerning JWA's access to funds has no relation to whether the jury perceives Insurers in that way. And even if it were tangentially related, the high probative value discussed above is not "substantially outweighed" by that marginal risk. Fed. R. Evid. 403.

Second, Insurers argue that JWA had the ability to pay for repairs or replacement because entities affiliated with JWA's shareholders (*e.g.*, KKR & Co. Inc.) had the ability to pay for repairs or replacement. Insurers make that argument to support two requests: (1) that the court exclude JWA's evidence that it lacked funds and (2) that the court take judicial notice of four SEC filings relating to the financials of the corporate parents of JWA's shareholders. *See* Motions at 15, ECF No. 256 (citing Defs.' Exs. H–K).

The Court should deny both requests. As an initial matter, JWA does not contest the reliability of the SEC filings. Instead, the problem with Insurers' argument is that it ignores the fundamental principle of corporate separateness that, absent an agreement to the contrary, a shareholder cannot be compelled to provide financing to a company to pay for repairs or capital improvements. *See Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 385 (4th Cir. 2018) ("The corporate form generally insulates shareholders from personal liability for the corporation's debts, because those debts are not imputed to the shareholders."); *see also Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) ("It is a fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity."). Further, as explained in JWA's Motions in Limine, the SEC filings

Insurers cite are not even those of the entities that actually own JWA equity. Insurers' argument here fails because it tries to hold JWA accountable for the decisions of completely separate entities over which it had no control.

Third, Insurers misconstrue Stan Brant's testimony to claim that "JWA admitted that it had the funds to replace the Legacy Equipment." Motions at 14, ECF No. 256. To the contrary, it is undisputed in the evidentiary record that JWA's shareholders were asked and declined to finance the repair of the Legacy Equipment, such that their financial resources were not available to JWA for repairs. Ex. B (Brant Dep.) 89:14–90:18. Although JWA's corporate representative Mr. Brant testified that JWA's shareholders may have had the "financial wherewithal" to raise funds to repair the Legacy Equipment, he clarified that the shareholders "did not have a desire to have an additional equity infusion at that time." *Id.* 90:15–18. In other words, and contrary to Insurers' assertion, JWA unequivocally testified that it *did not* have the funds to replace the Legacy Equipment because—regardless of the financial condition of JWA's shareholders—JWA sought funds from its shareholders and its shareholders declined.

For those reasons, Insurers' Motion VIII should be denied.

IX. DEFENDANTS' MOTION IN LIMINE REGARDING THE EXCLUSION OF EVIDENCE OF JWA'S HISTORY OF LOSSES PRIOR TO AUGUST 4, 2020

Insurers' Motion seeks to preclude JWA from introducing evidence of losses it sustained prior to the August 4, 2020 fire. Insurers' argument that any such losses are irrelevant, unduly prejudicial, confusing, and misleading fails.

JWA will ask the court to admit that evidence only if it becomes relevant, which will depend on what Insurers do at trial. In deposing JWA witnesses and designating evidence for trial, Insurers have signaled that they will argue that JWA's private-equity owners somehow caused JWA to dishonestly inflate its business interruption claim. Insurers intend to introduce exhibits,

and likely intend to elicit testimony, that JWA had discussions with its owners for guidance on pursuing its claims and that its owners recommended it retain counsel. *See* Defs.' Ex. List at 33–34, ECF No. 229-2 (designating (1) an email to JWA regarding preparation of BI claim and (2) the attachment to that email). In the same vein, Insurers intend to introduce evidence that JWA sought legal counsel shortly after the fire. *See* Defs.' Dep. Designations at 4, ECF No. 229-1 (designating Grimes Dep. 62:6–63:19,[3] which discusses JWA email requesting law firm recommendations); Defs.' Ex. List at 32, ECF No. 229-2 (designating that email as an exhibit). If the Court permits Insurers to use those pieces of evidence,[4] JWA should be allowed to present the jury with the actual reason that it discussed its claims with its owners and sought counsel: this was brand new territory for JWA. Because it had never experienced a loss approaching this magnitude, JWA understandably sought help from experienced parties.

To be clear, whether evidence of pre-August 4, 2020 losses is relevant will hinge entirely on whether Insurers try to use the above or similar pieces of evidence to attack the validity or amounts of JWA's claims. If they do, then the jury should not be left with Insurers' one-sided story. JWA would consent to a limiting instruction to ensure that the jury considers JWA's loss history only for the appropriate purpose—not for, as Insurers suggest, prior claims handling or any other irrelevant topic. Defendants' Motion IX should therefore be denied.

[3] *See* Ex. G (Grimes Dep.).

[4] By making this argument, JWA does not waive its objections to the three exhibits and the deposition excerpt just described. *See* Pl.'s Objs. to Defs.' Ex. List at 6, 9, ECF. No. 231-2; Pl.'s Objs. to Defs.' Dep. Designations at 24, ECF. No. 231-1.

XI. DEFENDANTS' MOTION IN LIMINE REGARDING EVIDENCE OR TESTIMONY CONCERNING JWA SHUTTING DOWN THE FACILITY'S UTILITIES TO AVOID A CATASTROPHIC EXPLOSION

Insurers seek to prevent JWA from explaining the circumstances of the August 4 Fire, which is the entire reason for this case. JWA has already reached agreement with Insurers that it will not call Chief Robert Maibach, the Fire Marshal, in order to streamline the case and save time. Insurers now seek to improperly hamstring JWA from telling the basic facts of the story to the jury.

The context of the events of August 4, 2020 is critical to JWA's explanation of what happened to cause millions of dollars' worth of damage. Shutting down the utility lines was the main source of damage to JWA's equipment because it was this act that caused molten aluminum to solidify in the machines and render the equipment inoperable. JWA is entitled to explain to the jury *why* it made the decision to shut down the utility lines: to avoid a catastrophic explosion. Without this evidence, the jury very well may be left to wonder if JWA was somehow negligent in handling the fire, or else may think that JWA sought to game the insurance companies for money after suffering a preventable harm. Likewise, the jury may wonder why or how machines designed to handle molten aluminum were somehow damaged by the very material they were built to contain.

The events of August 4, 2020 and the reasoning behind JWA's decision-making on that day give important, necessary context for the jury, and tend to show that JWA's Legacy Equipment was damaged beyond repair. Moreover, evidence that JWA prevented an explosion could not possibly have any bearing on the jury's view of Insurers because it happened before the claim was even filed. And in fact, preventing this evidence could allow the jury to have an unnecessarily tainted view of JWA and how JWA handled the fire on August 4, 2020. The bar for relevance is low, and Insurers have not articulated why the probative value of this evidence would be substantially outweighed by unfair prejudice to Insurers.

Furthermore, Insurers' own expert, Andrew Turner, will opine on the melting and casting operations at JWA's Mt. Holly facility, including why JWA turned off the utilities at the plant: "The metal would have solidified in the furnaces as when the fire occurred, utilities would have been turned off to prevent ether [*sic*] a gas leak and explosion or electrocution of the firefighters who would be tackling the fire." Ex. E (Turner Rpt.) at 6. Although Mr. Turner's actual opinions are unclear from his vague report, it appears as though he will testify that JWA was not operating in accordance with best practices during and following the fire. For instance, Mr. Turner describes in his report that JWA's casting machines "were left as if just turned off with metal in the casting rollers and coils still on the coilers" and states that "it would have been expected that efforts to repair and restore the Legacy equipment to operational conditions would have been taken *within hours* or days after the event." Ex. E (Turner Rpt.) at 6–7 (emphasis added). JWA is entitled to rebut this characterization of its machines by explaining why they were left "as if just turned off." Accordingly, Insurers' Motion XI should be denied.

XII. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF JWA'S TESTIMONY OR EVIDENCE CONCERNING PAYMENTS BY OTHER INSURERS WHO HAVE SETTLED OUT OF THIS LAWSUIT, AND PARTIAL SETTLEMENT AND RELEASE AGREED TO BY THE PARTIES

Insurers' Motion seeks to preclude JWA from introducing evidence or testimony (i) concerning payments and settlements by other insurers and (ii) that JWA can receive property damages and business interruption damages in excess of certain agreed upon limits.

JWA does not intend to introduce testimony or evidence at trial regarding its recent settlements with Westport and AIG—two of the four Insurers that were originally defendants in this case. However, Insurers' Motion is improper and overbroad because the history and timing of Insurers' initial payments up to the $10 million sublimit for the Molten Material Endorsement is directly probative of one of the central factual issues remaining in this case—*i.e.*, whether JWA

was prevented from repairing or replacing the equipment damaged in the August 4 Fire. Insurers have further put the timing of their initial $10 million payment at issue given that Insurers propose to introduce expert testimony suggesting that JWA's failure to repair the Legacy Equipment "clearly indicates that there was no intention to reinstate any of the furnaces to an operational condition." Ex. E (Turner Rpt.) at 7. Furthermore, Insurers have not articulated any unfair prejudice that would result from such evidence—because there is none—much less unfair prejudice that would substantially outweigh its high probative value to issues at the core of this case.

The second part of Insurers' motion has no bearing, given that the parties already agreed, in a recent joint status report to the Court, that JWA "cannot receive an award of property damages in excess of its expert's replacement cost opinion of $34,964,227 and that JWA cannot receive an award of business-interruption damages in excess of the Policy's business interruption sublimit of $80,153,418." Ex. F (Joint Status Email (5-8-2025)) at 5. JWA has no intention of departing from that agreement.

For the foregoing reasons, Insurers' Motion should be denied with respect to evidence or testimony relating to Insurers' initial payments to JWA up to $10 million, and the remainder of Insurers' Motion should be denied as moot.

XIII. DEFENDANTS' MOTION IN LIMINE REGARDING EXCLUSION OF EVIDENCE THAT MARSH DID NOT HAVE AUTHORITY TO BIND JWA REGARDING THE ISSUANCE OF THE ACE POLICY

Finally, Insurers' Motion seeks to preclude JWA from introducing evidence that Marsh lacked authority to bind JWA regarding the post-loss issuance of Endorsement R, which purported to change the ACE Policy's BI deductible from $826,000 to 30xADV. The Motion further seeks to exclude *any* evidence that Endorsement R was not validly issued. Neither request has merit.

Insurers treat the motion *in limine* as a vehicle to argue that the evidence conclusively establishes their position—even though the Court denied them summary judgment on the issue. *See* Order at 13–14, ECF No. 217 ("[T]he Court finds that a reasonable jury could conclude that Endorsement R was not properly part of the ACE policy at the time of the August 4, 2020, fire."). As the foregoing discussion makes clear, the relative persuasiveness of Insurers' evidence has no bearing on the relevance of JWA's evidence cutting the other way. Simply because JWA's evidence cutting the other way might *undercut* Insurers' case, that does not mean that it carries any risk of *unfair prejudice*. Whether the higher BI deductible is properly part of the policy is a live issue, so evidence that it is not properly part of the policy is highly probative and should not be excluded.

Insurers' Motion also gets the substantive law wrong for at least two reasons—both raised in JWA's Motion *in Limine*.

First, even assuming Lindsay Grimes, JWA's broker, had the authority to bind JWA, it is well established that post-loss modifications to an insurance contract are invalid as a matter of law. *See* 2 Couch on Insurance § 25:17 (3d ed. 2025) ("A modification that will bind the parties must be based on all the elements required to initially make a binding contract of insurance, and no revision or alteration of an existing contract of insurance can be regarded as effective where the parties have not agreed thereto prior to the loss." (footnotes omitted)); *Dudek v. Commonwealth Land Title Ins. Co.*, 466 F. Supp. 3d 610, 621 (D.S.C. 2020) (declining to give effect to post-loss attempt to correct mistake in policy and reasoning that "the court analyzes the language of an insurance policy as it existed when the insured's claim under the policy arose").

Even though Endorsement R was added two weeks after the fire and is therefore invalid, Insurers try to avoid that conclusion by claiming that Endorsement R was agreed to prior to the

loss. However, any alleged "agreement" is not evident from the four corners of the Policy as issued (and as of August 4, 2020), and it is also well established that the parol evidence rule bars consideration of any agreements prior to or contemporaneous with the unambiguous, integrated policy. *See Moats Constr., Inc. v. New Beach Constr. Partners, Inc.*, No. 8:17-CV-2009, 2020 WL 13076115, at *5 (D.S.C. Oct. 13, 2020) ("[T]he parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." (quoting *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302 (1990))).[5] The integrated policy issued by ACE unambiguously contained an $826,000 BI deductible. ACE tried to modify it after the loss. The $826,000 deductible therefore controls, and Insurers lose on this issue as a matter of law.

Second, it is well established that a modification to an insurance policy, as a type of contract, must be supported by sufficient consideration. *See, e.g.*, 2 Couch, *supra*, § 25:25 ("Because the modification is contractual in nature, it follows that there must be consideration to support the obligation of each party under the contract, at least where the modification affects the coverage terms of the policy." (footnotes omitted)); *see generally Layman v. State*, 368 S.C. 631, 640 (2006) ("Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration."). ACE's attempted modification would result in a

[5] If Insurers' argument is that the parties agreed to modify the policy after its issuance but before the fire, that argument also fails because (1) they do not point to a single piece of evidence to that effect and (2) the terms contained *in the policy* at the time of the loss are the terms that govern the parties' rights and obligations under the contract. *See, e.g.*, *Washington v. Nat'l Serv. Fire Ins. Co.*, 252 S.C. 635, 640 (1969) (notwithstanding pre-loss agreement to amend the policy, finding "no reason in logic or law" to give the post-loss endorsement retroactive effect); *cf. also Merchants' Mut. Ins. Co. v. Lyman*, 82 U.S. 664, 670–71 (1872) (refusing to give effect to parol evidence of pre-loss negotiations and verbal agreement where the policy was not reduced to an integrated writing until after the loss).

unilateral benefit to ACE (a higher deductible) with no corresponding benefit to JWA or detriment to ACE. *See* 17A Am. Jur. 2d. *Contracts* § 501 (2025) ("Generally, consideration necessary to support modification of a contract is sufficient if there is any benefit to the promisor or any loss, detriment, or inconvenience to the promisee." (footnotes omitted)). Even assuming Ms. Grimes had authority to bind JWA, the attempt to modify the contract lacked consideration and is therefore invalid for that reason as well.

Insurers' Motion makes it sound beyond dispute that JWA assented to the Endorsement through Ms. Grimes. In reality, even assuming that Ms. Grimes could bind JWA and setting aside the legal impossibility of a consideration-free, post-loss modification, *Ms. Grimes did not agree to modify the BI deductible in the ACE policy.* In support of their theory that Ms. Grimes agreed to modify the policy, Insurers only cite two excerpts from Ms. Grimes's deposition. *See* Motions at 20, ECF No. 256. In both, she essentially states that the Endorsement was added to the Policy without her objection—no more. *See* Ex. G (Grimes Dep.) 65:11–66:6, 86:1–10. But her mere failure to object to the endorsement—added two weeks after the fire—cannot constitute assent under the circumstances. *See generally Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 315 (2025) (citing Restatement (Second) of Contracts § 69(1)) (discussing the general rule that silence does not constitute acceptance). And to the extent that Ms. Grimes opined in her deposition that the Endorsement was part of the policy, such opinion does not equate to testimony that she *agreed* to Endorsement R.

The only other facts that Insurers point to in support of their theory are (1) JWA's signature on a Request for Admission that "the document attached" was "a true, correct, and complete copy of the insurance policy issued by ACE to JW Aluminum," and (2) Stan Brant's deposition testimony that the Endorsement was "properly part of the policy." Motions at 20, ECF No. 256;

Pl.'s Resp. to Defs.' Req. for Admis. at 8, ECF No. 256-15; Ex. B (Brant Dep.) 126:12–24. As to the Request for Admission, JWA merely admitted that the policy attached was authentic—that the document was what Insurers said it was—not that every term contained therein was legally valid and enforceable. And as to Mr. Brant's cited deposition testimony, like Ms. Grimes, Mr. Brant did not testify that JWA ever agreed to the Endorsement. Whether Mr. Brant, a non-lawyer, thought it was "properly" part of the policy at the time of his deposition does not determine whether it was validly issued and effective at the time of the fire.

The Court has already ruled on this issue. The Court rejected many of these same arguments months ago in denying Insurers' motion for summary judgment and holding that the validity of Endorsement R was a question for the jury. Order at 13–14, ECF No. 217. The Court should do the same here.

CONCLUSION

For the foregoing reasons, Plaintiff JWA respectfully requests that the Court enter an Order denying Insurers' Motions *in Limine*.

Dated: November 5, 2025

Respectfully submitted,

/s/ *Beattie B. Ashmore*

Beattie Ashmore (Fed. I.D. No. 5215)
650 East Washington Street
Greenville, SC 29601
Telephone: (864) 467-1001
Fax: (864) 672-1406
Beattie@BeattieAshmore.com

William T. Reid, IV (*Pro Hac Vice*)
Craig A. Boneau (*Pro Hac Vice*)
Scott D. Saldaña (*Pro Hac Vice*)
Dylan E. Jones (*Pro Hac Vice*)
Julia D. Byrne (*Pro Hac Vice*)
John Hammel Strauss (*Pro Hac Vice)*
Samuel Hilliard (*Pro Hac Vice*)
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Hwy, Ste. C300

Austin, TX 78746
Telephone: (512) 647-6100
Fax: (512) 647-6129
wreid@reidcollins.com
cboneau@reidcollins.com
ssaldana@reidcollins.com
djones@reidcollins.com
jbyrne@reidcollins.com
jhstrauss@reidcollins.com
shilliard@reidcollins.com

Attorneys for Plaintiff JW Aluminum Company