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SC96107

IN THE SUPREME COURT OF MISSOURI

THE DOE RUN RESOURCES CORPORATION

Plaintiff-Respondent

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Defendant-Appellant

SUBSTITUTE BRIEF FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's statement, but with the following clarifications regarding the characterization of the underlying proceedings.

This lawsuit was brought by Respondent The Doe Run Resources Corporation ("Doe Run") against multiple insurers, including Appellant St. Paul Fire and Marine Insurance Company ("St. Paul"), regarding defense coverage for a set of lawsuits broadly alleging injuries associated with operation of a metal production complex in La Oroya, Peru (the "*Reid* Lawsuits"). Those lawsuits contain a whole variety of allegations against Doe Run, as well as various officers and directors, including allegations regarding injurious exposure to the commercial lead produced, stored and handled at and around the complex.

Doe Run obtained defense coverage from two other insurers, both of whose policies contained pollution exclusions that did not clearly apply to the lead in Doe Run's operations. St. Paul nonetheless continued to deny coverage based on a similar pollution exclusion, as well as an "other insurance" defense.

The circuit court granted Doe Run's motion for summary judgment regarding defense coverage and denied Appellant's motions for summary judgment specifically addressing the "pollution exclusion" and "other insurance" defenses. On the pollution exclusion defense, the circuit court followed Missouri insurance principles and appellate precedent to hold that "under the facts of this particular case and the liberal standard on the duty to defend," Appellant's pollution exclusion was insufficient to bar defense

coverage for the *Reid* Lawsuits. On the "other insurance" defense, the circuit court held that, as a matter of law, the duty to defend attaches for the *Reid* Lawsuits notwithstanding Appellant's "other insurance" provision, and also found that Appellant had not met its burden for the coverage defense. A trial took place to resolve any remaining issues.

The court of appeals affirmed the coverage rulings, but modified the start date of the defense obligations and the calculation of pre-judgment interest, and so reversed and remanded on those two minor issues. The court of appeals denied St. Paul's motion for rehearing or transfer, and then this Court granted St. Paul's application to transfer.

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INTRODUCTION

St. Paul based its application to transfer on its pollution exclusion defense, which it lost in both the circuit court and the court of appeals. The Missouri Supreme Court has not issued an opinion directly concerning a pollution exclusion, so, in that limited sense, this is a case of first impression. However, the Missouri Supreme Court has at least twice before addressed virtually the same issue presented here, but in the context of other exclusions — *i.e.* whether an insurer can bar coverage for a policyholder's basic business activities using broad generic wording in an exclusion. *Aetna Cas. & Sur. Co. v. Haas*, 422 S.W.2d 316 (Mo. 1968); *Henderson v. Mass. Bonding Ins. Co.*, 84 S.W.2d 922 (Mo. 1935).

In each case, this Court concluded that the answer is "no." If the risks inherent to a policyholder's particular business would otherwise be covered by its liability policy, it is reasonable for the policyholder to believe that generic terms in an exclusion, that are open to interpretation, naturally are not meant to bar those risks. That is especially the case when the insurer had knowledge of the policyholder's business when it sold the policy. If an insurer wants to sell a policy excluding the basic coverage that would be expected by that type of business, then it must put the policyholder on absolutely clear notice — not with imprecise generic language in an exclusion, but with language *expressly* and *specifically* excluding that part of the policyholder's business. Not surprisingly, the only on-point Missouri court of appeals decision in the context of a pollution exclusion falls squarely in line with this principle, and rejects using generic

terms like "irritant" or "contaminant" in the definition of "pollutant" to bar coverage for the policyholder's main business materials. *Hocker Oil v. Barker-Phillips-Jackson*, 997 S.W.2d 510 (Mo. Ct. App. 1999).

These are important principles, without which a policyholder may easily be confused or deceived into purchasing coverage that does not cover the primary risks of the policyholder's business, or renders the policyholder vulnerable to the insurer's discretion when the insurer interprets that coverage after-the-fact. Here, St. Paul knew that Doe Run was in the lead business, even describing Doe Run's business in the policies. Had St. Paul wanted to sell narrower coverage, St. Paul knew well how to specifically exclude liability for injury from the lead being produced, stored or handled by Doe Run. In fact, the insurance industry had developed special endorsements to do just that. But instead St. Paul sold Doe Run policies without any such exclusions — and Doe Run reasonably expected that the policies would provide coverage for many of the types of allegations in the *Reid* Lawsuits.

An equally important principle that is in play here, and is crucial to uphold, is the breadth of the duty to defend. It is a bedrock of Missouri insurance law that any potential for coverage triggers a defense obligation. Therefore, in order to bar defense coverage due to an exclusion, the insurer must prove that every single allegation against the policyholder must be barred from coverage even under the broadest permissible reading of the allegations and the narrowest permissible reading of the exclusion. St. Paul cannot

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meet this burden, and so instead tries to improperly broaden the pollution exclusion and generalize or re-characterize the allegations in the *Reid* Lawsuits.

On review before this Court, St. Paul now also reiterates its secondary coverage defense from the original appeal—that it is off the hook because other insurers are providing some defense coverage. There is an irony to St. Paul continuing with this argument, since those insurers also have pollution exclusions. Be that as it may, this coverage defense fails for the same reasons it already was rejected by the circuit court and the court of appeals: the St. Paul Policies are by default primary insurance, St. Paul has not established that they are excess and, in any event, there is not true overlap with the other defending insurance. The remaining points on appeal are more minor issues regarding the calculation of damages, based on the timing of the duty to defend and prejudgment interest.

Doe Run respectfully requests that the Missouri Supreme Court uphold the long-standing Missouri insurance law principles requiring that St. Paul provide defense coverage for the *Reid* Lawsuits, and affirm the circuit court judgment.

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RESPONDING STATEMENT OF FACTS

Doe Run provides the following, in addition to Appellant's Statement of Facts.[1]

I. Doe Run's Operations

The policyholder, Doe Run, is a natural resources company focused on the production of various forms of lead, and other metals, through its mining, milling and smelting operations. LR001519. Doe Run has mainly operated in Missouri, where Doe Run and its predecessor companies have mined for lead since the mid-1800s. *Id.* The primary material produced from lead mining is galena (PbS), which is the state mineral of Missouri. Mo. Rev. Stat. § 10.047. Doe Run also produces and sells granular lead concentrate (PbS), and pure lead (Pb) in various forms. LR001519. Producing, storing, handling and transporting lead is Doe Run's essential business and livelihood. *Id.*

II. Doe Run Peru and The *Reid* Lawsuits

The lawsuits for which Doe Run seeks defense coverage involve a metallurgical industrial complex located in La Oroya, Peru (the "La Oroya Complex") that was owned by a former subsidiary of Doe Run named Doe Run Peru (collectively, the "*Reid* Lawsuits").[2] LR001519-20. Each of the *Reid* Lawsuits presents the same template of

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[1] Doe Run does not concede any of the accompanying argument or commentary in St. Paul's Statement of Facts, but incorporates the objective facts.

[2] In the circuit court, all parties and the court routinely referred to the lawsuits as the "*Reid* Lawsuits," as opposed to St. Paul's new nomenclature "Smelter Suits" in its appellate briefing. LR001469. Doe Run Peru's La Oroya Complex is not a typical

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allegations (but for different individual Peruvian plaintiffs) against Doe Run and various officers and directors of Doe Run, including causes of action for negligence, civil conspiracy, absolute or strict liability, and contribution. LR001522,1525-55,1557-87. The claims concern, *inter alia*, alleged injuries from operations and materials at and around the La Oroya Complex, that include "but are not limited to" physical and economic injuries. LR001520,1528-29,1532,1564.

The operations and materials identified in the *Reid* Lawsuits include the core business activities and the commercial metals produced, stored, and/or handled at the La Oroya Complex. As a few examples, the *Reid* Lawsuits allege that (emphasis added):

- Injuries resulted from "***metals*** and other toxic substances it has ***generated***, ***handled***, ***stored***, and disposed of at the La Oroya complex and related operations and facilities." LR001046,1078.
- "Doe Run owned, operated, ***used***, managed, supervised, ***stored***, ***maintained***, and/or controlled the properties and the waste on such properties which contained and ***stored materials containing lead*** and other toxic substances . . ." LR001038,1070.
- Doe Run "negligently, carelessly and recklessly, made decisions that resulted in the release of ***metals*** . . . including but not limited to ***lead*** . . ." LR001040-41,1072-73.

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smelter operation, but a much broader production, storage and processing facility, so St. Paul's new term is misleading. LR001519-20,1525-87.

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- Doe Run "failed to control and contain the ***metals*** and other toxic substances ***used and generated by the complex*** . . ." LR001042-43,1074-75.

The *Reid* Lawsuits also include allegations noting that Doe Run is a lead business. For example, the petitions state that "Doe Run is the second largest total lead producer in the world … [and] is an international natural resource company based in St. Louis, Missouri and focused on the mining, smelting, recycling and fabrication of metals." LR001042,1074.

III. The St. Paul Insurance Policies

A. Scope Of Coverage

The St. Paul Policies were sold to "The Doe Run Resources Corporation" as the Named Insured, and provide broad general liability insurance, under a line of coverage titled "Global Companion Commercial General Liability Protection." LR001784,1872. In the policies, St. Paul acknowledges Doe Run's business as "mining, smelting, recycling and fabrication of base metals," and the "Estimated Exposure" listed in the Commercial General Liability Estimated Premium Summary is the hundreds of thousands of tons of lead ore to be processed each year through its facilities. LR001786,1874. Nearly the entirety of the policies are generic form terms and conditions, to which St. Paul added various typewritten figures and descriptions and several endorsements. *See*, *generally*, LR001763-1863; LR001865-2001.

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The coverage provisions of the St. Paul Policies obligate St. Paul to provide coverage for "amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that . . . happens while this agreement is in effect and is caused by an event." LR001789,1927; *see also* LR001588-1685,1687-1713. The policies define "event" as any "accident," including "continuous or repeated exposure to substantially the same general harmful conditions." LR001790,1928; *see also* LR001589-1685,1687-1713. The St. Paul Policies require a defense against any lawsuit presenting allegations that may ***potentially*** involve coverage, and regardless of the merits of those allegations. LR001589-1713,1792,1930. St. Paul has not appealed the circuit court's holdings that the allegations in each of the *Reid* Lawsuits fall within these broad coverage provisions.

B. St. Paul Pollution Exclusion

While St. Paul correctly quotes from portions of its pollution exclusion (though leaving out various language), nowhere do the policies use the word "absolute" with the exclusion, as St. Paul suggests. LR001811-13,1949-51; *see also* LR001588-1713; *cf.* Appellant's Substitute Brief at 28. Rather, the exclusion is limited, especially when read in the context of the policy as a whole and the nature of Doe Run's business, as discussed herein.

St. Paul knew Doe Run was a lead mining company and commercial producer of metals and metal concentrates. LR001786,1874. Yet, the pollutant definition in the St. Paul Policies does ***not*** state that it includes any of the metals or metal concentrates that

make up Doe Run's business (and are the subject of the *Reid* Lawsuits). ***Nor*** does the pollutant definition in the St. Paul Policies even state more generally that it includes any of Doe Run's commercial materials which, as explained further below, was required by Missouri appellate precedent pre-dating the St. Paul Policies. LR001811-13,1949-51; *see also* LR001588-1713. Rather, the St. Paul Policies provide various examples of types of claims subject to the pollution exclusion, ***none of which*** involves a policyholder's commercial business materials. LR001811-13,1949-51; *see also* LR001588-1713.

Furthermore, the St. Paul Policies specifically do ***not*** contain the Missouri Pollution Exclusion endorsement which was specially crafted by the insurer standards-setting Insurance Services Office ("ISO"), and was in use by the insurance industry when the St. Paul Policies were sold to Doe Run. The endorsement was developed specifically because the default definition of "pollutants," as "any solid, liquid, gaseous, or thermal irritant or contaminant, including: smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste" was insufficiently vague to exclude materials that make up the policyholder's business. Thus, the endorsement entitled "Missouri Changes – Pollution Exclusion" modified the exclusion by adding "This Pollution Exclusion applies even if such irritant or contaminant has a function in your business, operations, premises, site or location." The endorsement gave insurers an option to *extend* the scope of excluded "pollutants" to also encompass a Missouri policyholder's commercial materials, by expressly stating so in the exclusion. LR001024,1026; *see also* LR000941-44. The endorsement ***was not added to the St. Paul Policies*.**

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The St. Paul Policies also do not contain any lead exclusion endorsement, or other lead exclusion that was being used at the time by the insurance industry to exclude lead liabilities. LR001763-2001,2034-37.

C. St. Paul "Other Insurance" Provision

The St. Paul Policies' "other insurance" provision, includes additional relevant language omitted by St. Paul. The provision is restated more completely below (emphasis added):

> ***This agreement is primary insurance***. However, if there's any ***valid and collectible*** **other insurance** ***for injury or damage covered by this agreement***, we'll apply this agreement in connection with that other insurance in accordance with the rest of this section.
>
> * * *
>
> We explain how the limits of coverage apply when coverage is also provided under any other insurance agreement in certain policies written by us or any of our affiliated insurance companies in the Limits of Coverage section.
>
> Primary or excess other insurance. ***When there's primary other insurance, we'll share with that other insurance any damages for injury or damage covered by this agreement.*** We'll do so with one of the methods of sharing described in the Methods of Sharing section.
>
> * * *

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> We'll also apply this agreement as excess insurance over any similar coverage that is issued in a country within the coverage territory.
>
> * * *
>
> When this agreement is excess insurance.
>
> When this agreement is excess insurance, we won't have a duty to defend the protected person against the part or parts of any claim or suit for which any provider of other insurance has the duty to defend that protected person.
>
> ***However, we'll defend the protected person against a claim or suit for injury or damage covered by this agreement if no provider of other insurance will do so.***

LR001815,1953 (emphasis added).

D. The National Union Coverage

Earlier in this lawsuit, Doe Run litigated defense coverage for the *Reid* Lawsuits with National Union Insurance Company of Pittsburgh, PA ("NU"), under a Directors & Officers policy providing coverage for Doe Run's officers and directors, also named as defendants in the *Reid* Lawsuits. LR00055-65,1035-197,2062-2138. The NU D&O Policy contains a pollution exclusion, similarly worded to the pollution exclusion in the St. Paul Policies, and with virtually the same generic definition of pollutant. LR002072,2075. As described further below, in an earlier phase of the case, Doe Run won summary judgment against NU.

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The NU D&O Policy has an "other insurance" provision stating, in relevant part:

> 14. OTHER INSURANCE AND INDEMNIFICATION
>
> Such insurance as is provided by this policy shall apply only as excess over any other valid and collectible insurance, unless such other insurance is written only as specific excess insurance over the Limit of Liability provided by this policy. This policy shall specifically be excess of any other valid and collectible insurance pursuant to which any other insurer has a duty to defend a claim for which this policy may be obligated to pay Loss.

LR002081.

E. The Rimac Coverage

Doe Run also requested defense coverage from Rimac-Internacional Compañia De Seguros Y Reaseguros S.A.A. ("Rimac"), a South American insurance company which had issued some rather modest local Peruvian coverage to Doe Run Peru, under which Doe Run was named as a possible additional insured. LR002541-43,2747-48,2769-72. However, Rimac denied coverage and has not provided a defense. LR002349-53. The Rimac Policy states that coverage under the policy is governed by the Peruvian Civil Code, and any disputes must be resolved by Peruvian courts or Peruvian arbitration.[3]

[3] The only Rimac Policy St. Paul provided in its summary judgment motion ran from 1997 to 1998, several years before the St. Paul Policies. LR002359-79.

LR002361-65. St. Paul did not commence proceedings against Rimac to contest the denials (nor has Doe Run). LR002520.

F. Doe Run's Defense Coverage Claims

1. Litigation Against NU, And Ruling That The NU Pollution Exclusion Does Not Bar Defense Coverage For The *Reid* Lawsuits

NU originally denied defense coverage, largely based on a pollution exclusion defense, resulting in Doe Run having to initiate coverage litigation to enforce the policy. LR002059-62. The circuit court, with Judge Hemphill presiding, ruled in favor of Doe Run and against NU, on competing motions for summary judgment. LR002025-37. Specifically, the court cited Missouri case law requiring that exclusions be free from "indistinctness or uncertainty," and also was persuaded by the reasoning of *Hocker Oil v. Barker-Phillips-Jackson*, 997 S.W.2d 510 (Mo. Ct. App. 1999) (generic terms in a pollution exclusion were insufficient to bar coverage for a company's business materials). Applying these principles, the circuit court held that in the case of Doe Run and the *Reid* Lawsuits, the definition of "pollutants" would need to be much more specific to bar defense coverage. LR002029-31. The circuit court further noted that NU could have provided the necessary certainty by expressly identifying Doe Run's lead as an excluded risk, "by either including these substances in the definition of Pollutants or in separate exclusions, but did not." *Id.* at LR002031. National Union then settled with Doe Run and began paying part of the defense for the *Reid* Lawsuits. LR001715,2563-68.

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2. Doe Run Amended The Coverage Case To Add International General Liability Insurers American Guarantee And St. Paul

With part of the defense still unreimbursed, Doe Run retrained its focus on its international general liability insurers American Guarantee & Liability Insurance Company ("AGL") and St. Paul, to whom Doe Run had provided notice but had received no defense.[4] On March 16, 2012, Doe Run wrote again to St. Paul, now also citing the circuit court's rulings (whose analysis implicated the St. Paul coverage). LR002143-45. But St. Paul denied coverage based on its pollution exclusion, notwithstanding the fact that the St. Paul policies had the same (vague) definition of pollutants as the NU policy, and no exclusion concerning the lead produced, handled or stored by Doe Run. LR002147-50.

Doe Run thereafter amended the petition to add AGL and St. Paul to the coverage action. LR000106-118. AGL (who also had a pollution exclusion) then settled with Doe Run and joined NU in contributing to part of the defense of the *Reid* Lawsuits. TR000002-3,16-17,238. St. Paul, standing alone, continued to deny coverage.

G. The Circuit Court Orders And Judgments

Upon entering the case, St. Paul filed a peremptory challenge to change judges. LR000152-56. The case then proceeded through discovery and to summary judgment motion practice, and then trial. LR000224-46,2380-2400,TR000001-60.

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[4] St. Paul received notice of the original *Reid* Lawsuit around October 15, 2007. LR001715,Trial Ex. 506.

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In its Order and Judgment on the summary judgment motions concerning defense coverage, the new judge, Judge Prebil, took a new look at the pollution exclusion defense with respect to the specific language of the St. Paul Policies and the *Reid* Lawsuits. LR003411-12. The court did not simply adopt the prior NU ruling. Rather, the circuit court gave fresh consideration to Missouri appellate precedent cited by both sides, and reviewed the new Eighth Circuit opinions cited by St. Paul. Like the predecessor judge, the new judge then followed the "*Hocker Oil* reasoning" and confirmed that the operative language of the exclusion was too "vague and indistinct under these facts" to allow St. Paul to avoid the potential for coverage. *Id.* The ruling quoted from the *Hocker Oil* decision that "it would be an oddity for an insurance company to sell a liability policy … that would specifically exclude that insured's major source of liability." LR003411. Thus, Judge Prebil held that "under the facts of this particular case and the liberal standard on the duty to defend," St. Paul's pollution exclusion was insufficient to bar defense coverage for the *Reid* Lawsuits. LR003411-12.

On the "other insurance" defense, the circuit court held that, as a matter of law, the duty to defend attached for the *Reid* Lawsuits notwithstanding the "other insurance" provision cited by St. Paul. LR003412-14. The circuit court also found that, on other grounds, St. Paul had not met its burden for summary judgment. *Id.* The case proceeded to trial on any remaining issues and damages.

At trial, St. Paul tried to challenge the quantum of damages for breaching its defense obligations, including challenging the reasonableness of the defense costs.

TR000061-592. St. Paul already benefitted from a very significant offset from amounts paid by NU and AGL, who had contributed to the defense. TR000230-233,236,238-239. At the time of trial, of the over $6 million in defense costs incurred by Doe Run in the 23 *Reid* Lawsuits, only $2,024,154 remained for St. Paul's share. LR002563-68, Trial Ex. 250. The Order and Judgment from trial awarded that full amount, plus interest. LR003580-85.

H. The Court of Appeals Ruling

On appeal, St. Paul sought to reverse the circuit court rulings on the pollution exclusion and other insurance defenses. St. Paul also sought to change the timing of its defense obligation based on the dates of notice, and to avoid prejudgment interest. The court of appeals upheld the coverage rulings, and modified the notice and interest rulings, with the result that the circuit court judgment was affirmed in part, reversed in part, and remanded.

With respect to Point I, the pollution exclusion defense, the court of appeals once again found that ambiguity precluded St. Paul from barring defense coverage for the *Reid* Lawsuits. The panel did not "essentially reject[] the circuit court's reasoning" as St. Paul argues. Appellant's Substitute Brief at 42. Nor can it fairly be said by St. Paul that "The court of appeals did not find the Pollution Exclusion itself ambiguous." *Id.* at 18. Rather, the court of appeals ruled that, interpreted *in context,* the pollution exclusion *is* ambiguous as to certain allegations in the *Reid* Lawsuits. Though stated and reasoned somewhat differently than the circuit court, the principle (and the conclusion) is

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thoroughly consistent with the circuit court rulings — and with long-standing Missouri jurisprudence, as discussed further below. That is, when a liability insurer knows what the policyholder does for its business, it cannot bar coverage for a major element of that business by using generic language in an exclusion that is open to interpretation.

One difference between the rulings is that while the circuit court considered the pollution exclusion language and the nature of Doe Run's business for how a layperson in that position might interpret the exclusion, the court of appeals added to that analysis other language in the policy showing that the policy was sold with Doe Run's actual business in mind. Specifically, the court of appeals cited and analyzed part of the policy titled "Estimated Premium Summary," which identified Doe Run's risk as "mining, smelting, recycling and fabrication of base metals" and showed that the premium was even calculated based on tonnage of ore.[5] Court of Appeals Opinion at 9. The court of appeals therefore concluded that, in the context of Doe Run's business, as stated in the policy itself, "the ordinary person of average understanding purchasing Doe Run's CGL policy with St. Paul might reasonably conclude based on the language of the policy that it provides coverage for the underlying lawsuits." *Id.* at 10.

[5] St. Paul incorrectly criticizes this analysis as a "*sua sponte* interpretation of the Policy, one not advocated by Doe Run in the trial court or on appeal." Appellant's Substitute Brief at 18. In fact, those provisions were cited both in the appellate briefing, and at the appellate hearing. *See*, *e.g.*, Original Brief for Respondent at 4.

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With respect to Point II, the "other insurance" issue, whereas the circuit court had concluded that coverage defense did not apply for several reasons, including that the St. Paul insurance was primary until proven otherwise, the court of appeals did not even need to get that far. Rather, the court of appeals found that *even if* St. Paul actually were excess (without agreeing), it would make no difference for the other insurance coverage defense. *Id.* at 12. That is because the NU D&O Policy and the St. Paul CGL policies do not necessarily cover all the same parts of the *Reid* Lawsuits, since they are different types of coverage. *Id.* Seeking to diminish the court of appeals' analysis, St. Paul again (erroneously) complains that this was "a theory not advocated by Doe Run." Appellant's Substitute Brief at 19. In fact, this exact argument was raised and elaborated by Doe Run both in the summary judgment briefing and on appeal. *See*, *e.g.*, LR002512,2526,3217, Original Brief for Respondent at 42.

For Point III, regarding notice and the timing of the defense obligation, the court of appeals reversed the circuit court to find that first notice was on March 16, 2012. It did so applying what appears to have been *de novo* review, even though the court of appeals was essentially substituting its own factual finding for the circuit court's finding of fact on the issue from the bench trial. *Cf.* Court of Appeals Opinion at 7; LR003572-73. The court of appeals also concluded that "St. Paul has disclaimed coverage of only a portion of Doe Run's defense costs . . . [t]hus, St. Paul need not show prejudice." Court of Appeals Opinion at 16. But the statement was factually incorrect since St. Paul had denied *any* duty to defend.

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For Point IV, regarding interest, the court of appeals ruled that interest should run from the date the defense amounts were provided to St. Paul, since "where the person liable does not know the amount he owes, he should not be considered in default because of failure to pay." Court of Appeals Opinion at 17. The court of appeals did not expressly address the issue that St. Paul had denied coverage and had not paid any defense costs for the *Reid* Lawsuits, regardless of when they were submitted.

POINTS RELIED ON

I. The circuit court did not err in entering judgment holding that St. Paul's pollution exclusion does not bar defense coverage for the *Reid* Lawsuits, in that:

a. the St. Paul pollution exclusion is ambiguous as to the allegations concerning lead concentrate and other commercial forms of lead produced, stored or handled at the La Oroya complex, since the policyholder is a lead company in the business of making and selling those materials; and

b. that conclusion is consistent with the language of the policies and long-standing Missouri Supreme Court and appellate court authority regarding policy interpretation, reasonable expectations, and exclusions, including pollution exclusions; and

c. that conclusion also is consistent with the knowledge and behavior of St. Paul, who knew that Doe Run was in the lead business, and

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knew how to exclude coverage for alleged exposure to the lead produced, stored or handled by Doe Run, with either a lead exclusion or a Missouri-specific pollution exclusion endorsement (but did neither); and

d. this Court also respectfully should consider that the unclear definition of "pollutant" has resulted in widely varying judicial interpretations of the exclusion, misuse by insurers, and endless coverage litigation, proving that there is an ambiguity that can be resolved with a more specific and detailed definition of the excluded "pollutants" that puts the policyholder on notice and leaves no uncertainty.

(*Responds to Appellant's First Point Relied Upon*)

Henderson v. Mass. Bonding Ins. Co., 84 S.W.2d 922 (Mo. 1935)

Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316 (Mo. 1968)

Hocker Oil v. Barker-Phillips-Jackson, 997 S.W.2d 510 (Mo. Ct. App. 1999)

Am. Nat'l Prop. & Cas. Co. v. Wyatt, 400 S.W.3d 417 (Mo. Ct. App. 2013)

II. The circuit court did not err in entering judgment against St. Paul on its "other insurance" defense, in that:

a. the St. Paul policies provide primary insurance coverage; and

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b. the Rimac Policies have not been shown to constitute valid and collectible insurance; and

c. the National Union policy does not provide the same coverage and is not providing a full defense.

(*Responds to Appellant's Second Point Relied Upon*)

Arditi v. Mass. Bonding & Ins. Co., 315 S.W.2d 736, 743 (Mo. 1958)

Greer v. Zurich Ins. Co., 441 S.W.2d 15 (Mo. 1969)

COUCH ON INSURANCE, § 219:9 at 219-17 (West 1999)

Rhone-Poulenc, Inc. v. Int'l Ins. Co., 1996 U.S. Dist. LEXIS 8000 (N.D. Ill. June 11, 1996)

III. The circuit court did not err in permitting Doe Run to obtain damages for unreimbursed defense fees and costs incurred prior to March 16, 2012 because St. Paul had notice of a *Reid* Lawsuit as early as October 2007 and cannot demonstrate any prejudice because it denied coverage.

(Responds to Appellant's Third Point Relied Upon)

Jennings v. Atkinson, 456 S.W.3d 461 (Mo. Ct. App. 2014)

Cincinnati Ins. Co. v. Missouri Highways & Transp., 2014 WL 7330980 (W.D. Mo. Dec. 19, 2014)

Bagby v. Merrill Lynch, 491 F.2d 193 (8th Cir. 1974)

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IV. The circuit court did not err in awarding Doe Run prejudgment interest because Doe Run's damages were liquidated.

(*Responds to Appellant's Fourth Point Relied Upon*)

Missouri Revised Statutes § 408.020

Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London, 400 S.W.3d 463, 477 (Mo. Ct. App. 2013)

Weinberg v. Safeco Ins. Co. of Ill., 913 S.W.2d 59, 62 (Mo. Ct. App. 1995)

ARGUMENT

I. The circuit court did not err in entering judgment holding that St. Paul's pollution exclusion does not bar defense coverage for the *Reid* Lawsuits, in that:

a. the St. Paul pollution exclusion is ambiguous as to the allegations concerning lead concentrate and other commercial forms of lead produced, stored or handled at the La Oroya complex, since the policyholder is a lead company in the business of making and selling those materials; and

b. that conclusion is consistent with the language of the policies and long-standing Missouri Supreme Court and appellate court authority regarding policy interpretation, reasonable expectations, and exclusions, including pollution exclusions; and

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c. that conclusion also is consistent with the knowledge and behavior of St. Paul, who knew that Doe Run was in the lead business, and knew how to exclude coverage for alleged exposure to the lead produced, stored or handled by Doe Run, with either a lead exclusion or a Missouri-specific pollution exclusion endorsement (but did neither); and

d. this Court also respectfully should consider that the unclear definition of "pollutant" has resulted in widely varying judicial interpretations of the exclusion, misuse by insurers, and endless coverage litigation, proving that there is an ambiguity that can be resolved with a more specific and detailed definition of the excluded "pollutants" that puts the policyholder on notice and leaves no uncertainty.

(***Responds to Appellant's First Point Relied Upon***)

St. Paul's main attempt to avoid defense coverage for the *Reid* Lawsuits has been to argue that its pollution exclusion bars any and all potential for coverage. According to St. Paul, even though the *Reid* Lawsuits include allegations regarding the various forms of lead which make up Doe Run's business, since those materials are alleged to be harmful and cause injury, they all fit the generic terms "irritant" or "contaminant" or "waste" in the definition of "pollutant." But that is not how Doe Run interpreted these policies' provisions, nor how a reasonable person buying liability coverage for a metals

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business would interpret these policies. The production, storing and handling (and ultimately sale) of those various forms of lead are the lifeblood of Doe Run's business, and its main source of potential liability. These are not "pollutants" (or "irritants" or "contaminants" or "waste") to Doe Run, and were not obviously excluded.

Missouri, like many other states, vigorously protects policyholders from the use of overbroad or unclear exclusions — that insurers can later try to interpret to their own liking. Along these lines, the Missouri Supreme Court has repeatedly held that if the insurer wants to exclude liabilities from a company's essential business materials or activities, the policy *must* say so *precisely* and *expressly*. Those decisions also indicate that the principle especially applies where, as here, the insurer knew the business of the policyholder when selling the policy. A Missouri court of appeals applied these exact principles to the pollution exclusion in *Hocker Oil*. Here, St. Paul indisputably knew Doe Run was in the lead business. Likewise, St. Paul knew how to exclude injury from the lead being produced, handled or stored by Doe Run — with either the much broader Missouri-pollution exclusion endorsement (which addressed *Hocker Oil*) or a specific lead exclusion, both of which were readily available and used by insurers at the time.

In short, under Missouri law, St. Paul *cannot* after-the-fact claim that the various forms of lead that make up Doe Run's business fit generically into the definition of pollutant as an "irritant," "contaminant" or "waste" — thereby suddenly eviscerating the vast majority of Doe Run's commercial general liability coverage.

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A. Standard Of Review

Doe Run agrees that the summary judgment rulings are subject to *de novo* review. The case also went to trial, and it should be noted that as to the results of the trial, the appellate court "will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. banc 2014) (citations omitted). Appellate courts "accept as true the evidence and inferences . . . favorable to the trial court's decree and disregard all contrary evidence." *Id.* at 200 (citations omitted).

B. Key Missouri Rules Regarding the Duty to Defend, Policy Interpretation, and Exclusions

1. Defense Coverage

Missouri law broadly applies the duty to defend in general liability policies, like the St. Paul Policies. As long as a policy has, at a minimum, the *potential* to provide coverage for at least one or more allegations against Doe Run, then the insurer is obligated to provide defense coverage. *See McCormack Baron Mgmt. Servs., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999).

As St. Paul admits, the analysis for defense coverage is based on the policies and the allegations of the *Reid* Lawsuits, *as well as* information known to the insurer or reasonably apparent to the insurer at the time they were filed. *Zipkin v. Freeman*, 436 S.W.2d 753, 754 (Mo. banc 1968). So, for example, the defense coverage analysis

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includes, and cannot ignore, all that St. Paul knew about Doe Run — including that Doe Run was in the metals business and that what Doe Run did for a living was produce, store and handle various commercial forms of lead. And, therefore, St. Paul knew that many of the allegations in the *Reid* Lawsuits purported injury not from a "pollutant," but from the materials that make up Doe Run's business.

2. Policy Interpretation

Under Missouri law, an insurance policy is a contract and the general rules of contract construction apply, but with special protections for policyholders. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210-11 (Mo. banc 1992). Under Missouri law, coverage will be construed as broadly as possible, since "an insurance policy being a contract designed to furnish protection will, if reasonably possible, be interpreted so as to accomplish that object and not to defeat it . . ." *Brugioni v. Md. Cas. Co.*, 382 S.W.2d 707, 710-11 (Mo. 1964). An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). In that case the policy *must* be construed *against* the insurer and in *favor* of coverage. *Krombach*, 827 S.W.2d at 211.

It is also "well-settled Missouri law . . . not to interpret policy provisions in isolation but rather to evaluate a policy as a whole." *Id.* (citing *Central Sur. & Ins. Corp. v. New Amsterdam Cas. Co.*, 222 S.W.2d 76, 78 (Mo. 1949)). Likewise, rather than applying technical definitions to policy terms, Missouri courts look to what an ordinary person in the shoes of the policyholder might have understood. *See*, *e.g.*, *Seeck*, 212

S.W.3d at 133 (interpretation of the "reasonable layperson in the position of [the policyholder]"); *Krombach*, 827 S.W.2d at 210 ("the meaning that would ordinarily be understood by the layman who bought and paid for the policy").

3. Exclusions

When it comes to a coverage defense based on an exclusion, an *even higher* standard applies. First of all, the *insurer* bears the sole burden of proof as to all aspects of the exclusion. *Gennari v. Prudential Ins. Co. of Am.*, 335 S.W.2d 55, 61 (Mo. 1960). Moreover, "[p]rovisions restricting coverage are particularly construed most strongly against the insurer." *Meyer Jewelry Co. v. Gen. Ins. Co. of Am.*, 422 S.W.2d 617, 623 (Mo. 1968). The language of an exclusion "must be construed so as to give the insured the protection which he reasonably had a right to expect." *Aetna Cas. & Sur. Co. v. Haas*, 422 S.W. 2d 316, 321 (Mo. 1968). Especially when an insurer knows the policyholder's business and risks, the insurer cannot exclude significant portions of that business using imprecise language in an exclusion that is open to interpretation. *See id.* ("it would have been a simple matter for [the insurer] to have specifically and with clarity excluded [that portion of the business]"); *Henderson v. Mass. Bonding Ins. Co.*, 84 S.W.2d 922, 924 (Mo. 1935) ("Generalities usually make ambiguities . . . What would the average business man think this meant when reading it in his policy?"); *accord Hocker Oil*, 997 S.W.2d at 518 ("it would be an oddity for an insurance company to sell a liability policy [and] . . . exclude that insured's major source of liability.").

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Based on these important principles in Missouri insurance law, St. Paul must prove that its pollution exclusion expressly, precisely, and unequivocally excludes any and all potential for coverage for every allegation in the *Reid* Lawsuits. As discussed below, reading the exclusion narrowly and the allegations of the *Reid* Lawsuits broadly, St. Paul has not and cannot meet this burden.

C. St. Paul Attempts To Narrow and Re-characterize The *Reid* Lawsuits To Say They Are About "Toxic Waste," When The Actual Allegations Include Injury From The Various Forms of Commercial Lead Produced, Stored and Handled At The La Oroya Complex

St. Paul tries to downplay that many of the injury allegations pertain to Doe Run's commercially valuable forms of lead, by improperly generalizing and narrowing the allegations in the *Reid* Lawsuits in a way they hope will better fit their exclusion. But under Missouri law, for purposes of determining the duty to defend, the allegations against the policyholder are read *broadly* because the test is to see if there is *any* potential for coverage. *McCormack Baron*, 989 S.W.2d at 170-71. Accordingly, the allegations may not be interpreted and narrowed by the insurer to try to avoid coverage. Likewise, even if some (or many) allegations are not covered, as long as any allegation raises any potential for coverage whatsoever, then there is a duty to defend. *See id.*

Knowing this, St. Paul argues that the *Reid* Lawsuits solely concern "toxic waste generated by the Smelting Facility." *See*, *e.g.*, Appellant's Substitute Brief at 37. But that is not what the *Reid* Lawsuits *actually* say. In fact, in the 92 paragraphs of

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allegations in the typical *Reid* Lawsuit petition, spanning 30 pages, the word "waste" is used *just once*.[6] LR001038,1070. Furthermore, as discussed, lead smelting was only one of the various operations at the La Oroya Industrial Complex. So trying to make it sound like the allegations are all about emissions from the smelter building by calling the entire site the "Smelter Facility" is highly misleading and incorrect. In short, these are just St. Paul's self-serving re-characterizations of the allegations.

On the other hand, what the *Reid* Lawsuits actually do allege, repeatedly, are exposures that broadly *include* the commercial lead being produced, used, stored or handled at and around the facility. For example, in the typical *Reid* Lawsuit petition, references to the "storage" of lead and metals appear *15 times*, references to the "use" of those materials appear *9 times*, and references to "maintaining" those materials at the plant appear *5 times*. LR001035-65, 1067-97. These are not terms that are used to describe waste, let alone terms that are limited to waste. Rather, they obviously encompass Doe Run's business materials, including the metals and metal concentrates being produced, stored and handled at the facility. *Cf.*, *e.g.*, LR001046,1078 (*Reid* Lawsuits allegation of injury from "metals . . . generated, handled, stored . . . at the La Oroya complex and related operations and facilities."); LR001038,1070 (*Reid* Lawsuits allegation that "Doe Run owned, operated, used, managed, supervised, stored,

[6] Similarly, St. Paul talks about "fugitive emissions from the Smelting Facility." Appellant's Substitute Brief at 29. Yet the *Reid* Lawsuits nowhere, not once, use the term "fugitive emissions." LR001035-65,1067-97.

maintained, and/or controlled the properties . . . which contained and stored materials containing lead . . ."); LR001042-43,1074-75 (*Reid* Lawsuits allegations regarding the "metals . . . used and generated by the complex").

Furthermore, if there were any doubt that the "lead" and "metals" in the allegations could be referring to commercially valuable materials, and not some "waste" material, that doubt is removed by St. Paul's knowledge that Doe Run is in the lead business. The duty to defend is based on the allegations, and information that was known or reasonably apparent to St. Paul at the time of the *Reid* Lawsuits. *Zipkin*, 436 S.W.2d at 754. It is undisputed that St. Paul knew Doe Run's business, both because the policies expressly indicate that Doe Run is in the business of "base metals" and because the *Reid* Lawsuits expressly allege that Doe Run is the second largest lead company in the world. LR001042,1074,1786,1874.

D. Missouri Supreme Court Precedents and Instructive Court of Appeals Rulings Dictate that St. Paul's Pollution Exclusion Is Insufficient to Bar Defense Coverage Here

The definition of "pollutant" in the St. Paul Policies does *not* identify the "lead" or "metals," which are mentioned throughout the allegations of the *Reid* Lawsuits. Rather, the definition in those policies is "any solid, liquid, gaseous, or thermal irritant or contaminant, including: smoke, vapors, soot, fumes; acids, alkalis, chemicals; and waste." But the various forms of lead produced, stored and handled at the La Oroya Complex fit none of the specifically listed items. They are not chemicals or waste. They

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are not smoke, vapors soot or fumes. They are neither an acid nor an alkali. For example, the lead concentrate (PbS), which is a metallic mineral, and pure lead (Pb) are something completely different from all those things.

However, St. Paul seems to believe that the generic term "irritant or contaminant" is enough to capture everything at issue in the *Reid* Lawsuits, including Doe Run's various forms of lead. After all, the argument goes, if someone alleges injury from a material, it must be said to be an "irritant" or "contaminant." St. Paul calls this the "plain meaning" of the policy language. But there are major flaws in this reasoning. First of all, it is a circular reading of the definition of "pollutant," since if any material alleged to cause injury is an "irritant" or "contaminant," then what is the point of having a "pollutant" definition at all — everything can be a pollutant.[7] Second, what St. Paul is actually doing is improperly reading the imprecise generic terms in an exclusion *broadly*, as catch-all language, rather than reading them narrowly and consistent with the reasonable expectations of a company that St. Paul knew was in the lead business.

Most importantly, St. Paul's approach is fundamentally inconsistent with Missouri insurance law and has been rejected multiple times by the Missouri Supreme Court in the context of other exclusions, as well as by the court of appeals specifically for the pollution exclusion.

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[7] St. Paul seems to make a similarly puzzling and circular argument for the term "waste," implying that if there has been an exposure to a material, then that material must no longer have commercial value and qualify as "waste."

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1. The Missouri Supreme Court Repeatedly Has Held That An Insurer Cannot Bar Coverage For A Policyholder's Major Business-Specific Risks Using Broad Generic Wording In An Exclusion

It appears that the Missouri Supreme Court first addressed this fact pattern regarding exclusionary language at least 80 years ago, in *Henderson v. Massachusetts Bonding & Insurance Co.*, 84 S.W.2d 922 (Mo. 1935), which is still good law. In *Henderson*, an insurer sought to defeat coverage under a liability policy issued to a general store, for the injury and death of a child when a table full of fireworks ignited and exploded in the store. *Id.* at 922-23. The policy contained a provision barring coverage if "explosives are made, sold, kept or used on the insured premises" with "no exceptions." *Id.*at 923. There had been hundreds of dangerous fireworks filled with gunpowder involved in the accident. *Id.* at 924. When the insurer had issued the liability policy it was aware that the general store would store and sell fireworks for the holidays. *Id.* at 923-24. The insurer argued that under a plain reading of the "explosives" exclusion there could be no coverage. *Id.*

Applying the same principles of insurance contract construction used today, this Court held that given what the policyholder did as a business, and that the insurer even knew the store would have fireworks, the broad generic term "explosives" was insufficient to preclude coverage. In its analysis, the Missouri Supreme Court focused on what might reasonably be understood by the owner of the business buying the coverage

— and that such a policyholder would naturally not read broad generic terms in an exclusion, which are open to interpretation, to bar the very business activities for which it is purchasing the coverage:

> What would the average business man think this meant when reading it in his policy? Shotgun shells, rifle cartridges, fire crackers and Roman candles? We think not. There is no doubt that gunpowder is an explosive. Shotgun shells and rifle cartridges contain gunpowder, but would any merchant consider that such a prohibition against explosives would prohibit him from carrying in his store rifle cartridges and shotgun shells? Is not the same thing true for fireworks?

Id. 925. Rather, this Court determined that it was up to the insurer to *precisely* identify the excluded business materials, knowing they were part of the policyholder's business. General catch-all terms do not suffice:

> The insurer can always prevent the necessity of strict construction against it, or any construction at all, by stating the terms of any provision so clearly, definitely and specifically as to make its meaning so plain that no room is left for construction . . . It should not be permitted to ambush a policyholder from behind a general term . . .

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Id. at 924, 25. Therefore, the Court concluded that since the insurer "knew what kind of store it was" and "chose to use the general term 'explosives' rather than to specify definitely any articles or materials to be prohibited, and did not designate specifically 'fireworks' as prohibited articles" then "under the circumstances" coverage could not be excluded. *Id.* at 926.

The Missouri Supreme Court again addressed this type of issue a few decades later, in *The Aetna Casualty & Surety Company v. Haas*, 422 S.W.2d 316 (Mo. 1968), which is also still good law on these points. In *Haas*, a general liability insurer sought to exclude coverage for its policyholder in the pest extermination business when there was an explosion in a house the policyholder was fumigating. *Id.* at 317. The "care, custody or control" exclusion in the policy stated that it barred coverage for property "as to which the insured for any purpose is exercising physical control." *Id.* at 318. The exterminators typically would lock the doors and windows to houses they were fumigating, so the house was admittedly within their "physical control." *Id.* The insurer argued that a plain reading of the exclusion therefore barred coverage. *Id.* The insurer knew the policyholder's business when it sold the policy, having "knowledge of the type of operations" and even "the manual classification for the premium to be charged was selected knowing the kind of work [the policyholder] was in." *Id.* at 318-19.

This Court again rejected the insurer's defense. The Court again found that, especially when the insurer is aware of the policyholder's business, generic terms in an

exclusion are ambiguous if they would effectively bar coverage for a significant risk of that particular business, and could have been stated more clearly and precisely:

> there exists a latent ambiguity . . . The clause is uncertain as to its application, and as applied to the facts and circumstances is susceptible to more than one interpretation.
>
> * * *
>
> it would have been a simple matter for [the insurer] to have specifically and with clarity excluded residential and other buildings where [the policyholder] was performing its services from coverage. Exclusion clauses are strictly construed against the insurer, especially if they are of uncertain import. An insurer may, of course, cut off liability under its policy with a clear language, but it cannot do so with that dulled by ambiguity . . . the language must be construed so as to give the insured the protection which he reasonably had a right to expect . . .

Id. 319-21.

The holdings in *Henderson* and *Haas* fit hand in glove with the oft-repeated principles in Missouri insurance law that exclusions must be narrowly construed and any ambiguities must be interpreted in favor of coverage. *See*, *e.g.*, *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 705-06 (Mo. banc 2011); *Krombach*, 827 S.W.2d at 210.

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The holdings also are consistent with the heightened scrutiny of boilerplate provisions seen in many Missouri insurance cases.[8]

Significantly, *Henderson* and *Haas* are *the same circumstances as the present case*, but just with a different exclusion and different generic language. Like the insurers in those cases, St. Paul here knew Doe Run's business, and knew that Doe Run was acquiring liability coverage specifically for its metals operations. Yet, St. Paul did not expressly and clearly exclude injury from the commercial lead produced, stored or handled at Doe Run's facilities (which would have made this much less valuable coverage to Doe Run). Rather, St. Paul opted for generic language in the pollution

[8] *See*, *e.g.*, *Scottsdale Ins. Co. v. Ratliff*, 927 S.W.2d 531, 533-34 (Mo. Ct. App. 1996) (finding the "boilerplate" definitions in the printed portion of the policy ambiguous as to the policyholder's specific business, and commenting that "Such attempts to fit myriad fact situations into a common mold present frequent problems of construction and much litigation."); *Niswonger v. Farm Bureau Town & Country Ins. Co.*, 992 S.W.2d 308, 321 (Mo. Ct. App. 1999) (finding ambiguity where the insurer "attempts to contradict [the policyholder's] reasonable expectations" with only "boilerplate language"); *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 673 (Mo. Ct. App. 2007) (finding certain definitions "boilerplate and are therefore ambiguous, in that they cannot be readily applied to a business such as [the policyholder's] without considering the surrounding circumstances").

exclusion regarding "irritants" or "contaminants," and now after the fact seeks to bar that fundamental coverage for Doe Run's operations.

2. In The Only On-Point Missouri Court of Appeals Case, The Court Applied These Same Principles To Reject Virtually The Same Arguments Made By St. Paul

Although the Missouri Supreme Court has not addressed this same issue in the context of a pollution exclusion, there is one on-point court of appeals decision — *Hocker Oil v. Barker-Phillips-Jackson*, 997 S.W.2d 510 (Mo. Ct. App. 1999). In *Hocker Oil*, the issue was coverage for liability to a gasoline business resulting from an alleged gradual leak of gasoline from a storage tank onto neighboring property. The policy in *Hocker Oil* had virtually the same definition of "pollutant" as the St. Paul Policies.[9] The insurer argued that gasoline must be an excluded "pollutant" because it fit a plain reading of the general terms in the definition, regardless of whether the policyholder was a gasoline business.

Just like the Missouri Supreme Court in *Henderson* and *Haas*, however, the court of appeals in *Hocker Oil* ruled that the context of the policyholder's business could *not* be ignored, and that the insurer could not rely on generic terms in an exclusion to bar risks

[9] Specifically, the *Hocker Oil* policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.* at 514.

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specific to that business.[10] Citing *Krombach*, 827 S.W.2d at 210, the court of appeals considered the reasonable expectations of a layman standing in the shoes of the business that bought and paid for the policy:

> Gasoline is not identified, with particularity, as being a "pollutant" for purposes of the pollution exclusion in the insurance policy Hocker acquired from [the insurer]. Hocker could have reasonably concluded that gasoline was not deemed a pollutant for purposes of the exclusion since it was not specifically identified as such . . . Hocker is in the business of transporting, selling and storing gasoline on a daily basis. Gasoline is not a pollutant in its eyes. Gasoline is the product it sells. Gasoline belongs in the environment in which Hocker routinely works . . . The policy was, therefore, ambiguous as to whether gasoline was a pollutant for purposes of the exclusion.

Id. at 516,18. And, consistent with *Henderson* and *Haas*, the court of appeals found it significant that the insurer knew Hocker was a gasoline company when it sold the policy without a precise exclusion for injury or damage from gasoline leaks. *See id.* at 518 ("it

[10] The insurer in *Hocker Oil* filed an application for transfer in this Court, making the same basic arguments as St. Paul, and this Court denied review. SLR000059-64.

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would be an oddity for the insurance company to sell a liability policy to a gas station that would specifically exclude that insured's major source of liability.").

Accordingly, the court of appeals concluded, like the Missouri Supreme Court had in *Henderson* and *Haas*, that generic language in an exclusion was not clear enough to bar the risks specific to the policyholder's business. In the context of the pollution exclusion, that meant that the imprecise generic terms like "irritant," "contaminant," and "waste" are not sufficiently clear and precise to bar coverage for injury or damage from the policyholder's commercial materials, like the gasoline produced, stored or handled by a gasoline company (or the lead produced, stored or handled by a lead company).[11]

3. The Circuit Court Was Correct To Apply These Principles

These are important principles that protect Missouri policyholders and, respectfully, should be maintained and upheld by this Court. Judge Prebil correctly applied these principles to St. Paul's defense coverage obligations for the *Reid* Lawsuits, concluding that he would "follow the *Hocker Oil* reasoning" because "the operative

[11] The recent *American National Property & Casualty Co. v. Wyatt*, 400 S.W.3d 417 (Mo. Ct. App. 2013) case again confirmed that the context of the policyholder, and the reasonable expectations of someone in their position, are important for interpreting generic terms in an exclusion. *Id.* at 425. There, the court of appeals concluded that a homeowner policyholder might reasonably not see carbon monoxide as a "pollutant," even though it is a toxic substance that differently situated people might see as fitting the plain language of the "pollutant" definition. *Id.* at 425-26.

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language in these policies [is] vague and indistinct under these facts." LR003411-12. The analysis and conclusions of *Hocker Oil* are on point and, as discussed, are entirely consistent with long-standing Missouri Supreme Court precedent. The leaked gasoline from an underground tank in *Hocker Oil* is no different from the lead materials stored at La Oroya, as alleged in the *Reid* Lawsuits. In fact, the allegations in the *Reid* Lawsuits are far broader, and include all sorts of other potentially covered allegations regarding the various forms of lead produced, stored, and handled at La Oroya. *See* Responding Statement of Facts, Section II, *supra.*

Likewise, in Judge Hemphill's earlier decision concerning the NU pollution exclusion (which had roughly the same generic definition of "pollutants,") the circuit court aptly noted that the insurer easily *could* have excluded substances like Doe Run's lead as part of its pollution exclusion "by either including these substances in the definition of Pollutants or in separate exclusions, but did not." LR000736-37. And "[w]hile this omission, by itself, does not automatically make the pollution exclusion ambiguous . . . the Court is persuaded by the reasoning of *Hocker Oil*," finding that with respect to the particular allegations in the *Reid* Lawsuits and facts of this case the pollution exclusion is insufficient to bar defense coverage. LR000737.[12]

[12] Troubled by the confusingly broad definition of "pollutants," Judge Hemphill's Order goes one step further than *Hocker Oil* and the other Missouri precedents, to say that if NU wanted to provide the policyholder certainty as to what is excluded, it should have listed *every* excluded pollutant by name (similar to what is required in at least one other

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In affirming Judge Prebil's judgment against St. Paul, the court of appeals in this action maintained the focus on the nature of Doe Run's business and the reasonable expectations of someone in that position who had bought the policy. On the other hand, the court of appeals focused more on the evidence of those operations directly in the policy, as typed onto the estimated premium summary page. Court of Appeals Opinion at 9. So it was clear that St. Paul understood when it wrote the policy that Doe Run was seeking coverage as a metals company, and that was inconsistent with St. Paul's current broad interpretation of the pollution exclusion to encompass those metals.

All told, in the present action, *five separate judges* (two in the circuit court and three on the court of appeals) have now rejected the same pollution exclusion arguments by insurers. They used slightly different analyses, but in each case essentially ruled that the exclusion cannot bar defense coverage for the *Reid* Lawsuits because of ambiguity in the context of what Doe Run specifically does for its business.

E. St. Paul Knew How to Exclude Coverage for Liabilities Arising from Doe Run's Various Forms of Lead, Using Standard Lead Exclusions or a Missouri-Pollution Exclusion Endorsement, but Sold Doe Run Policies Without Those Exclusions

Tellingly, St. Paul knew (or should have known) that the policies it was selling to Doe Run did not bar coverage for injury from the various forms of lead produced, stored

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jurisdiction). *See infra* Section I(I). However, that stricter holding is not necessary for Doe Run to prevail against St. Paul.

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and handled by Doe Run. St. Paul knew that Missouri law governed this coverage.[13] And the insurance industry, including St. Paul, was well aware of the Missouri principles discussed above and the resulting *Hocker Oil* decision. In fact, they had developed a special endorsement that would *expand* the regular "pollutant" definition, like the one used in the St. Paul Policies, to explicitly encompass the materials that make up the policyholder's business.

No later than 2000, following the *Hocker Oil* decision, and well before the St. Paul Policies, the Insurance Services Office (commonly referred to as the ISO — an insurance industry organization which develops and provides insurers with standard policy forms)[14] published "Missouri Pollution Exclusion" endorsements if insurers wanted to sell coverage with a broader pollution exclusion in Missouri. These "Missouri Pollution

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[13] "The parties are in agreement that Missouri law governs the interpretation of the St. Paul Policy because the Policy was issued to Doe Run, whose principal place of business is in Missouri." Appellant's Original Brief at 27, citing *Egnatic v. Nguyen*, 113 S.W.3d 659, 666 (Mo. Ct. App. 2003); *see also* LR000286,296.

[14] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) (describing ISO as "an association of approximately 1,400 domestic property and casualty insurers . . . the almost exclusive source of support services in this country for CGL insurance . . . ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.").

Exclusion" endorsements added the language "even if such irritant or contaminant has a function in your business, operations, premises, site or location." LR001024,1026.

As discussed in an April 2000 insurance industry newsletter updating insurers on the new ISO endorsements, "Mandatory Pollution Exclusions are being revised in response to *Hocker Oil Company v. Barker-Phillips-Jackson and Ranger Insurance Company, 997 S.W. 2d. 510 (Mo. App. S.D. 1999) . . . The endorsement now makes it clear that regardless of how important the potential source of pollutant is to the business, there is no coverage.*" LR000941-44. But St. Paul did not include this language. Instead, St. Paul sold to Doe Run, and Doe Run purchased from St. Paul, the *broader* coverage that *would* provide a defense for allegations of exposure to the various forms of lead that make up Doe Run's business.

Likewise, if St. Paul had wanted only to sell Doe Run a policy that excluded those lead liabilities, St. Paul also could have included any number of standard lead exclusions, or used a definition of "pollutant" that expressly identified Doe Run's lead. However, St. Paul did no such thing.[15] *Cf.* LR000741 (exclusion in another policy, which identified "asbestos or asbestos product, *lead or lead product,* noise, and electric, magnetic or electromagnetic field," and therefore excluded lead).

[15] *Cf. Stonewall Ins. Co. v. Nat'l Gypsum Co.*, 1991 U.S. Dist. LEXIS 19146 (S.D.N.Y. Dec. 31, 1991) (pollution exclusion did not bar asbestos claims because the insurer knew the policyholder manufactured asbestos-containing products and failed to include an asbestos exclusion).

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Despite all this, now that it is faced with a costly defense obligation for the *Reid* Lawsuits, St. Paul is attempting, after the fact, to effectively write such broader exclusions into its policies — by expansively interpreting the broad generic terms "irritant," "contaminant" and "waste," in order to reduce the coverage purchased by Doe Run. That is unacceptable. Put another way, when two versions of an insurance contract are available, and the policyholder chooses and pays for the better version — in this case without a Missouri pollution exclusion endorsement or a specific lead exclusion — it is abundantly reasonable for the policyholder to expect that the policy will provide the broader coverage. That is even more the case when Missouri case law pre-dating the St. Paul Policies, and especially *Hocker Oil*, made clear to all parties that such precisely worded exclusions would be necessary for St. Paul to bar coverage for allegations of injury from the lead produced, stored or handled by Doe Run.

F. The Examples Provided In The St. Paul Pollution Exclusion Only Further Support That The Exclusion Does Not Apply Here

St. Paul next tries to claim it came close enough to precisely specifying that Doe Run's lead is a "pollutant," because its pollution exclusion cites an example involving lead paint in an apartment building. But that is not remotely close to identifying the commercial forms of lead that are produced, stored or handled by Doe Run. Specifically, the lead paint example reads as follows:

> You own an apartment building. Its woodwork is finished with paint that contains lead. Two of your renters sue you for

> bodily injury to their children allegedly caused by the lead in that paint. The children supposedly consumed the lead by eating chips of the paint from the window sills in their apartments. We won't cover such injury.

LR000336. The apartment owner is *not* in the business of producing, transporting, storing or selling lead paint. It is in the business of renting apartments and owning real estate. Notably, the example *does not say* that a lead paint company sued for lead paint injury would not be covered.[16]

In fact, the St. Paul Policies *do not* include *any* examples where the policyholder's main commercial materials are treated as pollutants. Therefore, the examples given in the policy actually have the opposite effect, and suggest to the policyholder that the exclusion does *not* apply to the policyholder's commercial materials. *See Brugioni v. Maryland Cas. Co.*, 382 S.W.2d at 712 (detailed additional language in a provision further supported the policyholder's interpretation, because it showed the provision was "carefully planned" and "skillfully drafted" by the insurer, and thus further proved that the insurer was capable of precisely and clearly excluding the specific risk at issue, but that it failed to do so).

[16] Furthermore, the lead compounds in lead paint consist of lead pigments like lead chromates ($PbCrO_4$), lead oxides (Pb_3O_4), and lead carbonates ($PbCO_3$), which are completely different things than the lead concentrate (PbS) and pure lead (Pb) Doe Run produces as a metals company.

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G. St. Paul Relies On Off-Point Missouri Case Law, Or Federal Cases That Depart From Missouri Insurance Principles

St. Paul tries to argue around the principles applied in *Hocker Oil* by citing Missouri court of appeals cases where the pollution exclusion barred coverage in circumstances completely different from the facts here. In so doing, St. Paul hopes to suggest that the pollution exclusion is either always ambiguous or never ambiguous, in a vacuum from the particular circumstances.

But, as discussed above, the Missouri Supreme Court has repeatedly held that broad general terms in an exclusion must be scrutinized from the perspective of the policyholder who reasonably assumes their main business risks will be covered, unless the policy clearly and precisely says otherwise. The context of the policyholder business is essential to the analysis — and what a policyholder reasonably considers an "irritant" or "contaminant" or "waste" versus their commercial materials is naturally different, depending on their particular business. Consistent with this approach, Judge Prebil acknowledged that the circuit court's ruling was based on "the facts of this particular case." LR003411-12.

However, before reviewing St. Paul's Missouri court of appeals cases in more detail, it is worth noting that *even if* those cases were on-point (which they are not), they would simply be competing alternative interpretations of the pollution exclusion — which is further strong evidence of ambiguity. That is, if numerous seasoned judges cannot agree on the meaning of a policy term, how can it fairly be called "unambiguous,"

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especially in the context of an exclusion, which is subject to narrow construction and heightened scrutiny. *See*, *e.g.*, *Mendenhall v. Prop. & Cas. Ins. Co.*, 375 S.W.3d 90, 93-94 (Mo. banc 2012) (discussing the diversity of judicial interpretation regarding a term in the policy, and finding that the "differing views further indicate an ambiguity" and that "it is reasonably susceptible to alternate interpretations"); *Schmohl v. Travelers' Ins. Co.*, 117 S.W. 1108, 1111 (Mo. Ct. App. 1915) ("Where an insurer doing a nation-wide business employs terms in its policies which have become the subject of seriously conflicting judicial interpretations, it should be held to have adopted that construction which is most beneficial to the insured."), rev'd on other grounds 182 S.W. 740 (Mo. 1917); *Allstate Ins. Co. v. Hartford Accident & Indem. Co.*, 311 S.W.2d 41, 47 (Mo. Ct. App. 1958) (conflicting judicial opinions are "itself indicative that the word as so used is susceptible of at least two reasonable interpretations").[17]

[17] Or as aptly put by one out-of-state court of appeals, "The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation." *Cohen v. Erie Indem. Co.*, 432 A.2d 596, 599 (Pa. Supr. Ct. 1982); *cf.*, *generally*, *State Auto Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 850-51 (Ind. 2012) (discussing the diversity of conflicting interpretations of the same basic pollution exclusion definitions found in the St. Paul Policies).

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Taking a closer look at St. Paul's case law support, St. Paul foremost relies on *Casualty Indemnity Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. Ct. App. 1999), which came after *Hocker Oil,* and which found that a pollution exclusion barred coverage. From here, St. Paul argues that the court of appeals implicitly rejected the prior reasoning of *Hocker Oil*. But the two cases are apples and oranges. In *City of Sparta*, the alleged damage was from sewer sludge waste migrating to neighboring property. The city, as one of its numerous municipal functions, had a wastewater treatment facility. That process would create sludge waste, which then was disposed. *Id.* at 546. However, at times the city gave some sludge to a nearby farmer who could use it as fertilizer, and sometimes the city collected a fee. *Id.* ("Sparta gave or sold sludge to Bradens . . . as a fertilizer or soil supplement."). In the coverage case, the policyholder lawyers tried to argue that because of these nominal transactions with the farmer, the city was effectively in the sludge business, so that sludge should not be considered a "pollutant" under the generically worded definition.

The court denied coverage based on the pollution exclusion. *Id.* But the distinction from the facts in *Hocker Oil* (as well as *Henderson* and *Haas*) is clear. The city was not in the business of producing, storing and selling sludge for a living. It was in the business of providing the public health and safety service of treating wastewater. *Id.* Unlike Hocker Oil's gasoline or Doe Run's lead, the city did not see the sludge as something of value that it expected to be covered. The side transaction with the farmer was likely a favor or convenience. This difference between this undesired sludge waste

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and a commercial material was annunciated in the opinion, when the court remarked that if that "sludge removed from sewage by Sparta's wastewater treatment facility" was not a "pollutant" it "would leave one wondering" what was. *Id.* at 552.[18]

St. Paul also attempts to sway the Court away from existing Missouri law by citing to two federal court rulings in different cases, concerning different policies, locations and issues, where the federal court declined to apply the Missouri insurance principles of

[18] Obvious distinctions also apply to St. Paul's other cited cases *Boulevard Investment Co. v. Capitol Indemnity Corp.*, 27 S.W.3d 856 (Mo. Ct. App. 2000), *TWA, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609 (Mo. Ct. App. 2001) and *Cincinnati Insurance Co. v. German St. Vincent Orphan Association*, 54 S.W.3d 661 (Mo. Ct. App. 2001). In *Boulevard*, the issue was a restaurant's waste where that waste was *expressly* listed as an excluded pollutant. So it was not a commercial material, and it was expressly and precisely excluded. In *TWA*, an airline sought coverage for environmental cleanup of a waste and sludge site. In that case, TWA conceded these were not its commercial materials and that they fell within the pollution exclusion (unlike the metals at issue here), and the focus was the completely different question of whether there was a sudden and accidental release (relevant to a different type of pollution exclusion). In *German St. Vincent*, the issue was asbestos during the removal of vinyl flooring. The policyholder was an orphanage, and neither the asbestos, nor even the vinyl flooring, was one of the policyholder's commercial materials.

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Hocker Oil. Judge Prebil correctly rejected these decisions in favor of Missouri precedent.

In particular, St. Paul claims that this Court should follow *The Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 868 (8th Cir. 2013) ("*Lexington I*") and *The Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 876 (8th Cir. 2013) ("*Lexington II*"). However, those decisions (really one combined decision issued in part in two cases, but written by the same judge, issued on the same day, and cross-referencing each other), are incorrect interpretations of Missouri law and, rather strangely, presuppose that the Missouri Supreme Court would overrule long-standing Missouri law principles protecting policyholders in favor of a couple out-of-state supreme court decisions from very insurer-friendly jurisdictions. For example, the *Lexington I* opinion relies on decisions from Montana and Alaska, suggesting that the Missouri principles applied in *Hocker Oil* are in the minority across other jurisdictions. 719 F.3d at 875 ("that focus was a minority position when adopted.").[19] But how Missouri's long tradition of policyholder protections compares to other states is irrelevant.[20] (And Missouri is not even an outlier with respect to the pollution exclusion

[19] The decision also improperly confines *Hocker Oil* to gasoline stations. 719 F.3d at 874. But the *Hocker Oil* decision has no such express limitation, and instead spends extensive text articulating the general principles behind its holding.

[20] Indeed, a few months ago the Eighth Circuit applied a pollution exclusion, under North Dakota law, to even bar coverage for injuries caused by a condensate tank explosion —

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as at least one other state, Indiana, might have even stricter specificity requirements.) Rather, as discussed, *Hocker Oil* is a court of appeals' correct application of Missouri's long-standing legal principle that an insurer cannot bar coverage for a policyholder's major business-specific risks using generic terms in an exclusion. *Cf. Henderson*, 84 S.W.2d at 924-26; *Haas*, 422 S.W.2d at 317-19.

In any event, to the extent federal case law has any application here at all, it is worth noting that the *Lexington* opinions entirely diverged from prior Eighth Circuit application of Missouri law. Up until that point, the Eighth Circuit had adhered to existing Missouri law principles to find similar pollution exclusion language ambiguous under these types of circumstances — instead of being influenced by insurer-friendly rulings from a couple other states. In *Sargent Construction Company v. State Auto Insurance Company*, 23 F.3d 1324 (8th Cir. 1994), a case that pre-dated *Hocker Oil*, the Eighth Circuit examined virtually the same "pollutant" definition at issue here, and whether the muriatic acid commonly used by the policyholder construction company as part of its business could be excluded under the general term "irritant or contaminant." *Id.* at 1327. The court held that "laypersons in the construction business would not consider muriatic acid to be a 'pollutant.'" *Id.* at 1327. Therefore, citing the Missouri

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reasoning that the liquid causing the explosion "has the ability to soil, stain, corrupt, or infect the environment" and is therefore a "contaminant." *Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co.*, 847 F.3d 594, 599 (8th Cir. 2017). That type of analysis of the exclusion, and result, would be abhorrent to Missouri insurance law.

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Supreme Court in *Krombach* for the principle that "an ambiguity in an insurance contract arises when there is duplicity, indistinctness, or uncertainty in the meaning of the words," the Eighth Circuit ruled that the "pollutant" definition was ambiguous under the circumstances. *Id.*

Likewise, other federal decisions have readily acknowledged *Hocker Oil*, and the Missouri law principles discussed above, when interpreting a pollution exclusion. In *Hartford Accident & Indemnity Co. v. Doe Run Resources Corp.*, another Doe Run insurer moved for summary judgment based on a pollution exclusion, seeking to bar indemnity coverage for injury claims relating to a different set of lead operations. According to the insurer, its motion "raise[d] one question: whether lead is a pollutant." Judge Shaw cited to *Hocker Oil* and ruled that under policies issued to Doe Run, as a lead company, lead was not necessarily a "pollutant." He went on to hold that the many commercially valuable forms of lead, such as lead concentrate, do not unambiguously qualify as "pollutants" to Doe Run. *See* 2010 U.S. Dist. LEXIS 40608, at 12 ("Lead concentrate, even before smelting, is a useful and commercially valuable material. In fact, most other lead metal producers sell lead concentrate as their end-product, rather than proceeding to the smelting process."). The court in *Hartford* further noted that to generically consider the various forms of lead a pollutant under policies issued to Doe Run, a lead company, would render a large part of the coverage illusory. *Id.* at *22-23. And that the insurer (like St. Paul) "knew of potential risks arising from lead," yet "chose not to specifically exclude" those risks. *Id.* Accordingly, the *Hartford* court ruled that

allegations against Doe Run of lead exposure from activities at a different smelter facility raised the potential for coverage notwithstanding the pollution exclusion.

The *Hocker Oil* analysis was also applied by Judge Shaw in *United Fire & Casualty Co. v. Titan Contractors Service, Inc.*, 2013 U.S. Dist. LEXIS 10716 (E.D. Mo. Jan. 28, 2013). There, the district court granted coverage (both defense and indemnity) to the policyholder, finding that the pollution exclusion did not bar liability for injury due to a main commercial material of a construction company. *See id.* at *37 ("[T]he insured is entitled to characterize the allegedly polluting substance in a manner consistent with the insured's daily activities, particularly if the alleged pollutant belongs in the environment in which the insured routinely works. The exclusion may not apply if the court finds the definition of pollutant to be beyond the reasonable expectations of the insured.") (citing *Hocker Oil*, 997 S.W.2d at 518).[21]

H. The Public Policy Arguments Of St. Paul And Its Amicus Do Not Hold Water, and Rather Are Self-Serving Efforts To *Narrow* Coverage They Already Sold To Missouri Businesses Without Precise Exclusions

St. Paul and its amicus try to argue that reversing the circuit court (and therefore ignoring the long-standing Missouri rules discussed above) would give greater certainty *to the insurance industry*. But *the insurers* are the ones drafting the policies, and charged

[21] The decision has since been overturned based on the *Lexington I* ruling, which technically binds the Eighth Circuit courts to (erroneously) ignore *Hocker Oil* until the Missouri Supreme Court speaks on the issue.

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with making exclusions clear, conspicuous and compliant with governing law. Indeed, much of Missouri insurance law is shaped around the need and desire to protect *policyholders*, since insurers hold most of the leverage and have a strong financial incentive to interpret policies to their own advantage (that is, to provide the least amount of coverage in the face of a claim) and to contest claims. Overbroad and imprecise exclusions allow insurers unfair discretion at the point of claim. An insurer can say the exclusion means whatever it wants it to mean, and can also apply the exclusion inconsistently, depending on the size of the claim or other factors that should be irrelevant.

Accordingly, as discussed at length above, Missouri protects its policyholders from imprecise generic terms in exclusions. This is especially the case when it comes to the policyholder's specific business, that the policyholder would reasonably expect to be covered. The logic is simple and fair, *to both policyholders and insurers*. Policyholders are entitled to know *exactly* what coverage they are getting so they can adequately protect themselves by purchasing the appropriate coverage or making other appropriate financial or contractual arrangements. Meanwhile insurers are at liberty to draft policies with as much detail as may be needed to clearly and unequivocally exclude a specific business material or activity. And they are experts in doing just that. *Cf. Haas*, 422 S.W.2d at 320-21 ("it would have been a simple matter" for the insurer to have done so "specifically and with clarity"). Or, an insurer can offer the broader coverage if that is more likely to make the sale. In this case, St. Paul knew how to use lead-specific

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exclusions or a Missouri pollution exclusion endorsement, but simply chose a narrower exclusion when selling its coverage to Doe Run, being a customer policyholder that operates specifically in the lead business.

St. Paul and amicus also disingenuously argue that St. Paul's exclusion should be interpreted broadly because otherwise St. Paul would be providing coverage for which no premium was collected. Of course, insurers are well-aware that exclusions are *never* interpreted broadly. At least not under Missouri law. But, furthermore, the St. Paul Policies were issued to Doe Run after *Hocker Oil*, and after the insurance industry had developed the widely used Missouri-specific pollution exclusion endorsement and the widely used lead exclusion, neither of which was added to the St. Paul Policies. As discussed, St. Paul knew that Doe Run is a Missouri business and that Missouri law governs these policies. So, St. Paul knew exactly what it was selling, and charged what it wanted as a premium for the policies that it issued without those exclusions, in order to sell them to Doe Run.

It is *Doe Run* who is being short-changed, if St. Paul is able to exclude significant additional liabilities after the fact. Indeed, Doe Run purchased these policies in the context of *Hocker Oil* and the Missouri legal principles discussed above, under which the lead it produced, stored or handled was not excluded as a "pollutant" (or otherwise) under the language in the St. Paul Policies. It would be patently unfair, and is against fundamental Missouri protections afforded to policyholders, to reinterpret the terms in the St. Paul Policies to now exclude such coverage.

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I. Missouri Courts Are Not Alone In Holding That Imprecise Generic Terms Used In Pollution Exclusions Are Problematic — And At Least One State Has Held That The Only Way For Insurers To Solve The Ambiguity Is With A Specific Identification Of All "Pollutants"

Just like there are Missouri cases rejecting pollution exclusion defenses, for example *Hocker Oil* and *Wyatt*, there are numerous cases in other jurisdictions also rejecting pollution exclusion defenses on a host of similar and different grounds. It is superfluous to string-cite dozens of competing interpretations from around the country. This case presents a Missouri-specific legal question and there is strong Missouri Supreme Court precedent scrutinizing the application of general exclusions to a business' specific risks (*Henderson* and *Haas*), and scrutinizing any language restricting coverage (*Krombach* and others), that yields the answer here — that St. Paul cannot evade its defense obligation for the *Reid* Lawsuits. But the point is that Missouri is not alone.

Still, this Court may take interest that one nearby state has come up with perhaps the most complete and practical solution to protect its policyholders from the rampant confusion, misuse by insurers, and coverage litigation that has accompanied generic pollution exclusion language. In *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012), the Indiana Supreme Court held that the only way for insurers to provide the necessary clarity to exclude various "pollutants" is to precisely identify each material considered a pollutant, so there could be no doubt whatsoever. This was because policyholders are entitled to *absolute* certainty with respect to

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exclusions, and whether an alleged pollutant "would ordinarily be characterized as pollution, is, in our view, beside the point . . . we must resolve any doubts against the insurer." *Id.* at 851-52 (citation omitted). Also, as a practical matter, courts are otherwise left "in the awkward and inefficient position of making case-by-case determinations as to the application of the pollution exclusion." *Id.* at 851.

Just like St. Paul here, the insurer in *Flexdar* (and that insurer's amicus — the same Complex Insurance Claims Litigation Association that is amicus here), unconvincingly argued to the Indiana Supreme Court that it would be impossibly burdensome to write such an exclusion. But the court aptly observed that the insurance industry *already had* drafted an Indiana pollution exclusion endorsement adding such specificity, yet the insurer in *Flexdar* had sold the policy without it. (Of course, this is also just like here, where St. Paul chose not to use the Missouri pollution exclusion endorsement in the policies it sold to Doe Run). For comparison, and this Court's reference, the "Indiana-Changes – Pollution Exclusion" endorsement read:

> "Pollutants" mean[s] any solid, liquid, gaseous, bacterial, fungal, electromagnetic, thermal or other substance that can be toxic or hazardous, cause irritation to animals or persons and/or cause contamination to property and the environment including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Specific examples identified as pollutants include, but are not limited to, diesel, kerosene, and

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> other fuel oils . . . carbon monoxide, and other exhaust gases . . . mineral spirits, and other solvents. . . tetrachloroethylene, perchloroethylene (PERC), trichloroethylene (TCE), methylene chloroform, and other dry cleaning chemicals . . . chlorofluorocarbons, chlorinated hydrocarbons, adhesives, pesticides, insecticides . . . and all substances specifically listed, identified, or described by one or more of the following references: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Priority List Hazardous Substances (1997 and all subsequent editions), Agency for Toxic Substances And Disease Registry ToxFAQs, and/or U.S. Environmental Protection Agency EMCI Chemical References Complete Index.

Id. at 852. Clearly, the insurance industry (and St. Paul) knows how and is capable of providing the additional precision needed to give a policyholder business certainty as to whether its commercial materials (or any other risks) are being excluded as "pollutants."

These rules make perfect sense for states, like Missouri and Indiana, where there is a long history of striving to make sure policyholders know, up-front, *exactly* what coverage they are buying and what is excluded. If insurers know how to be sufficiently specific to eliminate vagueness and uncertainty, it is their obligation to do so. When insurers decide to issue policies without the necessary specificity (for example by not

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adding the necessary state-specific endorsements or material-specific exclusions to modify the general form language) then they are selling the broader coverage.

II. The circuit court did not err in entering judgment against St. Paul on its "other insurance" defense, in that:

a. the St. Paul policies provide primary insurance coverage; and

b. the Rimac Policies have not been shown to constitute valid and collectible insurance; and

c. the National Union policy does not provide the same coverage and is not providing a full defense.

(*Responds to Appellant's Second Point Relied Upon*)

St. Paul has been the last insurer standing. Another insurer on the risk with an equivalent pollution exclusion, NU, ultimately contributed to Doe Run's defense for the *Reid* Lawsuits.[22] But instead of following their lead, St. Paul used this fact to add an "other insurance" coverage defense to their grounds for denying coverage — claiming that because Doe Run obtained a judgment against NU, St. Paul became excess to NU, thus relieving St. Paul of its duty to defend. The circuit court (and court of appeals) correctly disposed of this argument, both because St. Paul has not proven that it is anything but primary insurance, and because the NU and St. Paul Policies may provide coverage for different parts of the *Reid* Lawsuits.

[22] As did AGL, who also had equivalent coverage defenses to St. Paul.

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St. Paul also bases its contention on some modest Peruvian policies (issued to Doe Run Peru), that St. Paul claims provide collectible identical coverage thereby triggering an excess coverage provision in the St. Paul Policies. But the Peruvian insurer denied coverage, and the circuit court correctly held that St. Paul has not met its burden to show that those policies are collectible or that they provide the same coverage when it comes to the *Reid* Lawsuits. And that is one of the main purposes of the international St. Paul Policies purchased by a company headquartered in Missouri — they do not require Doe Run to go to Peru to litigate the denial of a local foreign insurer before Doe Run can get immediate "primary" coverage from St. Paul here in Missouri. Rather, the St. Paul Policies say just the opposite — that in such instance, St. Paul must provide coverage.

A. Standard of Review

As with the first point relied on, Doe Run agrees that the summary judgment rulings themselves are subject to *de novo* review.

B. The St. Paul Policies Are Primary Insurance

It requires mention that St. Paul's opening brief starts with the false premise that its policies by default are excess coverage. Just the opposite. The St. Paul Policies by default provide primary coverage. LR000340. As noted by the circuit court, even the "Other Insurance" clause on which St. Paul bases its motion expressly states that "This Agreement is primary insurance." LR000340,3414. It is only under very specific circumstances that the St. Paul Policies shift to provide excess coverage (circumstances that St. Paul did not establish to exist here). *Id.*

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St. Paul implausibly contends that this language was read out of context. But on top of the clear statement in the St. Paul Policies that it is "primary insurance," the policies look, breathe, and smell like primary coverage. For example, unlike excess coverage, the St. Paul Policies provide a full and immediate duty to defend. LR000317,454. Furthermore, St. Paul can have no qualm with the depth of the circuit court's analysis, since Judge Prebil's opinion addresses the full text of the other insurance provision, including but not limited to the "primary insurance" language, and then carefully contrasts that language with the provisions in the other policies that St. Paul contends are primary. *Id.*

C. Even If Not Primary Coverage, St. Paul Would Still Have To Defend The *Reid* Lawsuits — Rendering St. Paul's Entire Argument Moot

Before addressing St. Paul's attempts to prove that its policies transform to excess coverage, it is also an important point that the St. Paul Policies include provisions that specifically require St. Paul to provide defense coverage to Doe Run where there is any need for it *regardless of any possible "other insurance" issues.* The reason for such language is because "other insurance" clauses are intended to resolve contribution rights between insurers, not to allow an insurer like St. Paul to refuse defense coverage or hold the policyholder at bay while St. Paul resolves possible allocations with other insurers. Anderson et al., INSURANCE COVERAGE LITIGATION, § 13.13[A] (2d ed. 2000 & 2008 supp.) ("'[O]ther insurance' clauses set forth a mechanism for allocation of liability

among insurance companies when more than one insurance policy potentially applies to a claim. They should not apply to disadvantage policyholders.").[23]

Accordingly, the St. Paul Policies state that "when there's primary other insurance, we'll share with that other insurance." LR001815,1953. But even in the unusual circumstance where St. Paul becomes excess, regardless of all else, "we'll defend the protected person against a claim or suit for injury or damage covered by this agreement if no provider of other insurance will do so." *Id.* (St. Paul can then seek that money back from the "other insurers.") ***So, in all events, St. Paul agrees to defend when needed***.

And it is needed. Here, Rimac has denied coverage, and NU only provides partial defense coverage. LR002349-53,1715,2563-68. NU will stop paying once its policy has exhausted (because, unlike the St. Paul Policies, defense payments erode the NU Policy's limits). LR002064. In short, Doe Run needs defense coverage from St. Paul, and no other insurer will pay for it. St. Paul has not, and cannot, show otherwise. Therefore, the "other insurance" provision cannot possibly relieve St. Paul of its defense obligation.

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[23] *See also id.* ("The 'other insurance' clause is a *policy condition, not an exclusion, and should not be used, in effect, to exclude coverage*, which is the effect of insurer arguments to apply the clause in disputes with policyholders. In any event, it is the insurer's burden to show that coverage is precluded, especially in the face of policy language to the contrary.") (emphasis added).

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D. St. Paul Failed To Establish Its Policies Are Excess To The Rimac Policy For The *Reid* Lawsuits

St. Paul argues the Rimac insurance is local primary coverage and, therefore, St. Paul's Policies are excess insurance. However, pursuant to the terms of the "other insurance" provision, St. Paul must also *prove* that Rimac provides (1) "*valid and collectible* other insurance" and (2) "similar coverage" for the *Reid* Lawsuits. LR001815,1953. Neither is the case here, and St. Paul did not meet that burden.

1. St. Paul Failed To Prove The Rimac Policy Provides Equivalent Coverage For The *Reid* Lawsuits, So The St. Paul Policies Remain Primary

The Rimac Policy provides distinct coverage from the St. Paul Policies. One is a Peruvian version of insurance governed by Peruvian law, versus international commercial general liability insurance governed by Missouri law.[24] Without any analysis of the Rimac Policy's terms pursuant to Peruvian law, St. Paul cannot meet its burden to demonstrate that the Rimac Policy provides the same coverage for the *Reid* Lawsuits.[25]

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[24] The Rimac Policy also was purchased by a different policyholder and therefore part of a different coverage program.

[25] St. Paul's argument that coverage "must be" the same simply because Doe Run requested defense from both Rimac and St. Paul makes no sense. Doe Run gave notice to a variety of insurers. LR000731-43.

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Furthermore, as a matter of law, the only Rimac Policy provided in St. Paul's motion covers the period of 1997 to 1998, while the St. Paul Policies run from 2005 to 2007. Because they cover different time periods (and therefore the injuries allegedly incurred during those different time periods) the policies are inherently different. *See*, *e.g.*, *Alticor, Inc. v. Nat'l Union Fire Ins. Co.*, 916 F. Supp. 2d 813, 828-29 (W.D. Mich. 2013) (surveying numerous cases that "have consistently held that successive or consecutively issued insurance policies do not implicate 'other insurance' provisions within those policies.").

St. Paul tries to overcome this by raising the prospect of later Rimac policies. But that is pure speculation. Doe Run does not possess such policies and St. Paul has not put any such policies into evidence here, despite extensive discovery, including discovery by St. Paul on Rimac.

2. The Rimac Policy Is Not "Valid And Collectible" Because St. Paul Has Failed To Establish Rimac Will Defend The *Reid* Lawsuits

Another fundamental requirement in the "other insurance" provision is that the alleged other insurance must be "valid and collectible." That means the Rimac Policy has to be providing coverage for the *Reid* Lawsuits, which is not the case. And St. Paul did nothing to challenge or overcome Rimac's denial of coverage.[26]

[26] St. Paul erroneously tried to suggest Doe Run has to go to Peru to challenge the denial and prove the Rimac Policy will never be collectible. But well-established Missouri

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Relying on out-of-state (New York and Illinois) and unpersuasive case law, St. Paul argues "valid and collectible" could just mean the other policy is solvent and has not been cancelled. Appellant's Substitute Brief at 47-48. But St. Paul is flat wrong, and the common usage of "collectible" is that the policyholder will receive payment. Indeed, in *Greer v. Zurich Insurance Co.*, 441 S.W.2d 15 (Mo. 1969), this Court expressly rejected St. Paul's argument:

> [I]f the term "collectible" was intended to be limited to insolvency situations, the policy should have so provided . . . The courts should not read into a policy a ground of avoidance of liability that is not clearly expressed therein, and doubts and uncertainties in the language used should be resolved in favor of the insured.

Id. at 34 (internal citations omitted); *see also* COUCH ON INSURANCE, § 219:9 at 219-17 (West 1999) (discussing that other insurance can become uncollectible due to policyholder not satisfying conditions for coverage).[27]

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insurance principles require that the insurer (not the policyholder) prove any exclusions or other coverage defenses. LR3413; *see Gennari*, 335 S.W.2d at 61.

[27] Although Missouri has few other cases regarding this language, there is ample case law across other jurisdictions holding that if an insurer denies coverage, it is *per se* not "valid and collectible" insurance. For example, in *Rhone-Poulenc, Inc. v. International Insurance Co.*, 1996 U.S. Dist. LEXIS 8000 at *43 (N.D. Ill. June 11, 1996), the court

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E. St. Paul Failed To Establish Its Policies Are Excess To The NU D&O Policy For The *Reid* Lawsuits

1. The NU D&O Policy Is Not "Other Insurance"

The NU D&O Policy also is not "valid and collectible other insurance *for injury or damage covered by* [St. Paul's Policies]." LR001815,1953. The St. Paul Policies provide commercial general liability coverage, but the NU D&O Policy is a claims-made Directors and Officers policy, principally providing coverage for Doe Run's indemnification obligations to its officers and directors (who are also defendants in the *Reid* Lawsuits).[28] LR001035-97, 2064-2138. Furthermore, the NU D&O Policy provides coverage for "claims," whereas the St. Paul Policies provide coverage for "events." LR002068,1789. The St. Paul Policies also cover a broader time period than

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held that a similar provision was "inapplicable . . . because the CGL carriers disclaimed coverage and, thus, there is no other collectible insurance" even if "the CGL carriers may be disclaiming coverage wrongly." *See also Cameron Int'l Corp. v. Liberty Ins. Underwriters, Inc. (In re Oil Spill)*, 2012 U.S. Dist. LEXIS 115463, at *38 (E.D. La. Aug. 16, 2012) (standard is if other insurance "*actually and presently* applies") (emphasis in original).

[28] This distinction is admitted on St. Paul's website: "Directors and Officers liability insurance provides specialized coverage for the directors and officers of your company." LR002583.

the NU D&O Policy. LR000286,391,2064. Thus, the policies do not cover the same injury or damage.

2. NU's Own Other Insurance Provision Precludes St. Paul From Becoming Excess Coverage

Even if the NU D&O Policy qualifies as "other insurance," that policy contains its own competing "other insurance" provision stating, in relevant part:

> Such insurance as is provided by this policy shall apply only as excess over any other valid and collectible insurance, unless such other insurance is written only as specific excess insurance over the Limit of Liability provided by this policy. This policy shall specifically be excess of any other valid and collectible insurance pursuant to which any other insurer has a duty to defend a Claim for which this policy may be obligated to pay Loss.

LR002081.

As the circuit court pointed out, unlike the St. Paul provision, the NU provision actually contains stronger "excess" language and does not state that the NU D&O Policy provides primary insurance. LR003414. Therefore, even if some coverage in the policies were to overlap, the St. Paul Policies would be primary to the NU D&O Policy or, at worst, their respective "other insurance" provisions would cancel each other out. In such a circumstance, both insurers must provide primary coverage. *See Arditi v. Mass.*

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Bonding & Ins. Co., 315 S.W.2d 736, 743 (Mo. 1958) ("[T]he 'other insurance' provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them . . . where both policies carry like 'other insurance' provisions, we think (they) must be held mutually repugnant and hence be disregarded.").[29] Alternatively, the NU D&O Policy would be excess to the St. Paul Policies (not *vice versa*).

3. St. Paul Offers No Supporting Case Law

Tellingly, St. Paul does not cite a single case to support its contention that the judgment against NU absolves St. Paul of defense coverage. By contrast, Missouri has ample case law showing that the St. Paul Policy is not excess to the NU D&O Policy in these circumstances. *Cf.*, *e.g.*, *Shelter Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 223 S.W.3d 905, 907 (Mo. Ct. App. 2007) ("[T]he trial court erred by not disregarding [the other insurance provisions]."); *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, 355-56 (Mo. Ct. App. 1986) (same) ("This is the rule in Missouri . . .").

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[29] *Nat'l Indem. Co. v. Liberty Mut. Ins. Co.*, 513 S.W.2d 461, 470 (Mo. 1974) (other insurance provisions cancel each other where "[B]oth policies contain provisions undertaking to make such coverage excess over any other insurance available to the insured."); *see also Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 164 (Mo. Ct. App. 2005) (when two insurance companies cover the same risk the "other insurance" clauses "are treated as mutually repugnant and are disregarded").

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F. The "Difference In Conditions" Endorsement Does Not Alleviate St. Paul's Defense Obligations

Finally, as a fallback argument, St. Paul argues that since its policies state that Doe Run will procure certain local coverage of at least $1,000,000, that somehow alleviates St. Paul's defense obligations for the *Reid* Lawsuits, with the implication that perhaps it is Doe Run's fault if that local coverage does not apply.

But that is not what the endorsement says — and it does not mean a Peruvian policy exists during the same time period as the St. Paul Policies, or that if such a policy exists that it provides (or was supposed to provide) coverage for the *Reid* Lawsuits. First of all, the endorsement simply memorializes the representation that "*certain* other insurance is issued in countries within the coverage territory" (which is a nearly global area) and that such insurance should be maintained during the policy period (emphasis added). LR001825,1876.

Nor does the endorsement state what that "certain" coverage for injury or damage encompasses. So even if St. Paul had shown that a Peruvian policy existed during its policy period, it cannot be assumed that the policy would provide coverage for the *Reid* Lawsuits. For example, Rimac, which issued local policies at least for 1997 to 1998, denied coverage for the *Reid* Lawsuits.

And that is the value of the St. Paul Policies as primary coverage — they provide (primary) defense coverage to Doe Run unless there is a local program policy *that steps in and provides the defense*. The phrase "difference in conditions" does not

automatically confer excess status for all claims.[30] Just the opposite. The St. Paul Policies provide *broader* safeguard coverage that also encompasses any differences in conditions. They allow Doe Run to avoid the hassle and expense of litigating coverage issues with a foreign insurer in Peru, or wherever they may be. If there is a foreign insurer that does not step up, St. Paul is there. If there is no foreign policy, St. Paul is there. Or at least they are supposed to be.

III. The circuit court did not err in permitting Doe Run to obtain damages for unreimbursed defense fees and costs incurred prior to March 16, 2012 because St. Paul had notice of a *Reid* Lawsuit as early as October 2007 and cannot demonstrate any prejudice because it denied coverage.

(Responds to Appellant's Third Point Relied Upon)

When Doe Run triggered coverage from other insurers, those insurers reimbursed Doe Run's defense fees through October 26, 2011. At trial here, Doe Run sought to recover from St. Paul unreimbursed fees from October 27, 2011 forward. But St. Paul

[30] The *Manpower Inc. v. Insurance Co. of Pennsylvania*, 807 F. Supp. 2d 806 (E.D. Wis. 2011) case cited by St. Paul on this argument is not instructive. *Manpower* is not a Missouri case, and addresses a distinctly different policy and provision, where an excess policy lists specific underlying primary policies over which it is excess. That is unlike the St. Paul Policies, which state that they are "primary insurance" and generically reference other types of insurance they may be excess of under certain specific circumstances.

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argues that Doe Run is not entitled to any fees incurred prior to March 16, 2012 because that is the date that St. Paul claims Doe Run first formally "tendered" coverage.[31]

The circuit court correctly concluded that Doe Run is entitled to recover those unreimbursed fees because Doe Run provided notice to St. Paul (multiple times) prior to March 2012. The facts even showed that St. Paul opened a claim file for the *Reid* Lawsuits.[32] Likewise, the facts showed that St. Paul suffered no prejudice, nor could it have suffered prejudice from any alleged "voluntary payments," because St. Paul denied coverage altogether. As a result, St. Paul has not sought to participate in the defense in any form or fashion.

A. Standard of Review

St. Paul erroneously argues for *de novo* review, citing to *Jennings v. Atkinson*, 456 S.W.3d 461 (Mo. Ct. App. 2014). However, St. Paul even admits "the court's ruling on the pre-tender issue is based on a mixture of facts and law." Appellant's Substitute Brief at 51. As a result, the much more deferential "abuse of discretion" review is required here, because the issue is not "strictly a question of law":

> Our review of this judge-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), under which we

[31] The defense fees and costs incurred between October 27, 2011 and March 16, 2012 amount to around $550,000.

[32] It came out at trial that St. Paul unilaterally closed that file sometime later without ever notifying Doe Run.

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> will affirm the circuit court's judgment unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.

Jennings, 456 S.W.3d at 464.

St. Paul is also wrong when it claims that "the facts are not in dispute." Appellant's Substitute Brief at 51. Indeed, the circuit court recognized the factual dispute as evidenced by the February 18, 2015 trial judgment, which contained multiple pages of *"Factual Findings*" which rejected St. Paul's defense: finding, *inter alia*, that "Doe Run provided notice to St. Paul of the first Reid lawsuit on October 19, 2007" and additional notice on later dates, that St. Paul failed to provide coverage but instead St. Paul "closed its file in 2010 without notice to Doe Run," and that "the evidence at trial proved that St. Paul could have suffered no prejudice." LR003572-73; *cf. Palmer v. Hawkeye Sec. Ins. Co.*, 1 S.W.3d 591, 592 (Mo. Ct. App. 1999) (*Murphy* abuse of discretion standard applied when reviewing findings regarding prejudice).

B. What St. Paul At Times Calls A Pre-"Tender" Coverage Defense Is Simply A Voluntary Payment Coverage Defense, Which Missouri Law Has Long Held To Only Apply Where There Was No Notice Or Chance For The Insurer To Provide Coverage

At bottom, St. Paul claims that there is a special "tender" requirement under the St. Paul Policies, but St. Paul's brief fails to cite any case law or policy language in support and, in fact, the St. Paul Policies only required "notice" of claim.

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1. The Applicable Language Is Found In The Voluntary Payments Provision

The St. Paul policies contain a voluntary payments provision which states that "Doe Run must *notify* St. Paul of underlying suits 'as soon as possible'" and "Doe Run must 'not . . . pay out any money . . . without [St. Paul's] consent.'" LR001773-74,1911-12 (emphasis added). Moreover, the case law cited by St. Paul only further confirms that the voluntary payments provision does not bar recovery of defense costs where "notice" was provided. Indeed, *Cincinnati Insurance Co. v. Missouri Highways & Transportation*, 2014 WL 7330980 (W.D. Mo. Dec. 19, 2014) and *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 193 (8th Cir. 1974) both make clear that "indemnitee has the right to recover attorney's fees reasonably incurred in the defense of a claim, provided the indemnitor has *notice* of the lawsuit and an opportunity to defend." *Cincinnati*, 2014 WL 7330980, at *1 (emphasis added);[33] *Bagby*, 491 F.2d at 198 n.9

[33] The facts in *Cincinnati* further support Doe Run's position that formal tender is not necessary. Specifically, "Cincinnati contends that formal tender was not made until February 26, 2007. Evidence submitted by MHTC in support of its motion for fees states that Cincinnati first received MHTC's demand for a defense on or about May 14, 2004. This date corresponds with the Court's prior findings regarding when Cincinnati received ***notice*** of the suit against MHTC. MHTC is entitled to fees incurred from May 14, 2004 through December 21, 2012, the date of the conclusion of the lawsuit, in defense of the Clay County action." *Cincinnati Ins. Co.*, 2014 WL 7330980, at *2.

(same); *Nusbaum v. City of Kansas City*, 100 S.W.3d 101, 108 (Mo. banc 2003) (same); *Monsanto Co. v. Gould Electrics, Inc.*, 965 S.W.2d 314, 318 (Mo. Ct. App. 1998) (same). Even *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*, 904 N.E.2d 1267 (Ind. 2009) stands only for the proposition that voluntary payments are precluded where the policyholder failed to give *any notice*. *See id.* at 1273. But those are not the facts here.

Here, the circuit court found that Doe Run gave "notice" to St. Paul in October 2007 and again in November 2010. LR003572, Trial Exs. 506, 512. And because it had "notice," St. Paul opened a claim file. The fact that St. Paul did not provide a substantive response to Doe Run, or that it later closed the claim file (without notifying Doe Run) does not alter the fact that St. Paul had "notice" of the claims against Doe Run in the first place. St. Paul's later denial of coverage also does not alter the fact that it received "notice" of the claims in both 2007 and 2010. LR003572, TR000454-57.

2. There Is No Case Law Requiring A Formal "Tender"

Knowing that it received notice (multiple times), St. Paul argues that there can be no coverage unless Doe Run "tendered" the claim to St. Paul. Noticeably, St. Paul cites to no Missouri case holding that a policyholder is required to use special language to formally "tender" claims (rather than just provide "notice") in order to obtain defense coverage. Knowing that it has no case to support this heightened requirement, St. Paul paraphrases Missouri Practice: Insurance Law & Practice, and also *State Farm Fire & Casualty Co. v. Alberici*, 852 S.W.2d 388, 389 (Mo. Ct. App. 1993) on which the treatise relies. But in doing so, St. Paul specifically ignores the portion of the treatise which

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states, "The insurer is entitled by the cooperation provision of the policy to receive reasonably accurate *notice* of the allegations brought against the insured for the duty to defend to be triggered." 30 MISSOURI PRACTICE: INSURANCE LAW & PRACTICE, § 7.42 (2d ed. 2016) (emphasis added).[34]

St. Paul's reliance on *Alberici* and *Hartford Ins. Co. v. Federal Ins. Co.*, 682 S.W.2d 871, 872 (Mo. Ct. App. 1984) (*see* Appellant's Substitute Brief at 52) also does not alter this standard. Indeed, neither case is applicable because, in those cases the insurers filed for declarations of no coverage before the policyholder ever sought coverage. But nowhere in those cases does any court hold that the policyholder is required to do anything more than provide "notice" to trigger coverage. The cases, in fact, say the opposite — that no additional "tender" is required to trigger coverage. *See, e.g., Huntsman Advanced Materials, LLC v. OneBeacon Am. Ins. Co.*, 2011 U.S. Dist. LEXIS 81672, at *18 (D. Idaho July 21, 2011) ("OneBeacon asserts that an insurer cannot be liable for defense costs until the policyholder formally 'asks' for a defense. The Court disagrees."); *Enron Corp. v. Lawyers Title Ins. Corp.*, 1990 U.S. Dist. LEXIS 19063, at *17 n.8 (D. Neb. Jan. 4, 1990) ("The parties, in their briefs, have made minor

[34] St. Paul's reliance on II MISSOURI INSURANCE PRACTICE, is similarly misplaced as this treatise erroneously relies on *Alberici* to argue that "the insured must actually ask to have the insurer defend the insured for the insurer to have the duty to defend." II MISSOURI INSURANCE PRACTICE, § 10.3 at 10-8 (Mo. Bar 5th ed. 2004). But, as noted above, *Alberici* does not stand for this proposition.

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arguments concerning the difference between the concept of tender and the notice requirement in the policy. The Court, however, can find no practical reason for making a distinction in this case.").

C. St. Paul Cannot Show The Required Prejudice

Because Doe Run provided St. Paul with proper notice, the voluntary payments provision was not violated. But even if this were not so, under the well-established holdings of this Court, St. Paul can still only avoid providing coverage if it can prove that the failure of notice caused St. Paul actual and substantial prejudice. *See Tresner v. State Farm Ins. Co.*, 913 S.W.2d 7, 11 (Mo. banc 1995) (discussing the bedrock prejudice rule in Missouri insurance law).[35]

The burden of proving such prejudice lies solely with St. Paul. *Weaver v. State Farm Mut. Auto. Ins. Co.*, 936 S.W.2d 818, 821 (Mo. banc 1997). But, in this case, at trial "the evidence proved that St. Paul could have suffered no prejudice" because, *inter alia*, St. Paul denied coverage from the outset. LR003573. Indeed, St. Paul's corporate witness in charge of the claims admitted that St. Paul would have denied coverage no matter when it received a so-called "tender." TR000461-62, LR003573-74. The timing

[35] This rule is so fundamental it is even recognized in the model jury instructions specially formulated for insurance coverage claims. *See* Missouri Approved Jury Instruction 32.24 (where there is evidence of a material breach, "Your verdict must be for the [insurer] if you believe: First, [the policyholder] (describe violated policy condition . . .), and Second, [the insurer] was thereby prejudiced.").

of the notice, therefore, had *no effect* on St. Paul's refusal to participate in the defense of the underlying litigation.[36]

Knowing that Missouri law does not support its position on the prejudice rule, St. Paul is left to cite to authority from Oregon. *See* Appellant's Substitute Brief at 61 (citing to *Century Indem. Co. v. Marine Group, LLC*, 2015 WL 810987 (D. Or. Feb. 25, 2015)). But Oregon has a much narrower prejudice rule, that favors insurers, and so it has no application here. In any event, *Marine Group* is even inapposite on the facts, because there it appeared that the policyholder had not provided *any* notice to the insurer, which is not the case here.

IV. The circuit court did not err in awarding Doe Run prejudgment interest because Doe Run's damages were liquidated.

(*Responds to Appellant's Fourth Point Relied Upon*)

A. Standard of Review

With regard to this final issue, and as noted by St. Paul, the key facts here were undisputed: there was no dispute that Doe Run provided St. Paul with defense invoices years prior to trial, there was no dispute that Doe Run periodically provided invoices to St. Paul thereafter, and there was no dispute that St. Paul denied coverage and announced

[36] The court of appeals suggested that the prejudice rule did not apply since the court believed that St. Paul only disclaimed a portion of Doe Run's defense costs. Court of Appeals Opinion at 16. But the conclusion was not supported by the facts. Rather, St. Paul disclaimed *any and all* coverage under the Policies. *See* LR000136-000143.

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that it had no intention of ever paying any of Doe Run's defense invoices. TR000415-16, 438. Because the key facts were undisputed, Doe Run agrees that the issue of prejudgment interest is a "legal" question subject to *de novo* review.

B. St. Paul Does Not Get To Avoid Interest By Disputing Coverage

The basic law regarding a litigant's right to prejudgment interest is also not in dispute. For example, there is no dispute that Missouri Revised Statutes § 408.020 allows prejudgment interest on "all moneys after they become due and payable." *See Schmidt v. Morival Farms, Inc.*, 240 S.W.2d 952, 961 (Mo. 1951) (pre-judgment interest "is the measure of damages for failure to pay money when payment is due"). And, the parties are in agreement that prejudgment interest is owed on damages that are "liquidated" — that is, damages that are fixed and determined, or that are "readily determinable." *Investors Title Co. v. Chicago Title Ins. Co.*, 983 S.W.2d 533, 538 (Mo. Ct. App. 1998) (citing *Scullin Steel Co. v. Paccar, Inc.*, 708 S.W.2d 756, 766 (Mo. Ct. App. 1986)). Damages are "readily determinable" when they are ascertainable by a computation or by a recognized standard. *Id.* The purpose of prejudgment interest, of course, is to see to it that the plaintiffs are *fully compensated* by accounting for the time-value of money. *See Schmidt*, 240 S.W.2d at 961.

Hoping to avoid paying prejudgment interest, St. Paul now argues that the damages set forth in the invoices were not "liquidated" because, according to St. Paul, it could not determine exactly how much it owed until just before trial. But the position is wrong on the facts, and on the law.

On the facts, the "damages" here were Doe Run's defense bills in the *Reid* Lawsuits. Every penny of those damages was memorialized in an invoice from one of Doe Run's defense counsel or from a vendor. It follows that Doe Run's total "damages" were the sum of those invoices. As discussed, Doe Run gave St. Paul notice of the *Reid* Lawsuits as early as October 2007, but St. Paul did not offer to provide any defense coverage, nor did St. Paul request any invoices. When Doe Run sued St. Paul for coverage, Doe Run produced defense invoices received to that point. TR000415-16. Those invoices were provided by December 6, 2012. St. Paul, therefore, had these invoices *two years before trial*.

Important for the legal analysis, from the outset, St. Paul *denied* that it owed coverage. And based on that position, St. Paul refused to pay — and did not pay — any part of any invoice while coverage was litigated. That is to say, St. Paul's failure to pay was not based on any misapprehension or misunderstanding of the amount of Doe Run's unreimbursed defenses costs. To the contrary, St. Paul's refusal to pay resulted specifically and directly from St. Paul's (incorrect) conclusion that it owed no defense coverage at all. And because St. Paul vehemently held to this position, St. Paul never so much as asked Doe Run how much was owed. As a legal matter, St. Paul's wrongful denial does not render Doe Run's damages "unliquidated" until the legal theories are tested. *See Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 477 (Mo. Ct. App. 2013) ("The fact that LMI presented several coverage defenses and disputed some of the costs is of no consequence. Missouri courts have allowed

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prejudgment interest for insurance claims where the parties did not agree to the amount due under the policy."); *accord Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 7 (Mo. banc 1987). Rather, the damages were "liquidated" because they remained "readily determinable" had St. Paul actually sought to determine what it owed.

When the coverage trial was over, Doe Run was awarded a judgment against St. Paul. The judgment, however, was for less than Doe Run originally demanded from St. Paul because, in the interim, Doe Run had obtained partial coverage payments from other insurers. But even this does not render the damages "unliquidated" because "[a]n award of less damages than requested does not preclude an award of prejudgment interest on the ascertained damages." *Catron*, 723 S.W.2d at 7; *see also Burger v. Wood*, 446 S.W.2d 436, 444 (Mo. Ct. App. 1969) (holding prejudgment interest "may be allowed to a plaintiff even though it be found he is not entitled to the full amount of his demand."); *Boenzle v. United States Fid. & Guar. Co.*, 258 S.W.2d 938, 944 (Mo. Ct. App. 1953) (awarding prejudgment interest although the policyholder demanded a much greater sum than was ultimately awarded).[37]

[37] A holding to the contrary would lead to the illogical result that Doe Run lost its entitlement to prejudgment interest on unreimbursed amounts simply because Doe Run also pursued and obtained coverage from other insurers. Policyholders should be incentivized to seek coverage. Likewise, the reduction in unreimbursed defense costs benefited St. Paul. The breaching insurer (here, St. Paul) should not obtain the windfall

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Again, St. Paul's failure to pay a penny of coverage did not result from any "confusion" arising out of the fact that Doe Run triggered coverage from other insurers. Rather St. Paul's refusal to provide coverage resulted from St. Paul's *denial* that it owed any coverage at all. Even when the circuit court determined (on summary judgment) that St. Paul owed coverage, St. Paul still never tried to determine how much it owed. Instead, St. Paul stuck to its position, and steadfastly refused to pay anything. Despite St. Paul's improper *legal* positions, there were no *factual* disputes as to the unreimbursed defense costs — so Doe Run's damages were "liquidated," and prejudgment interest is required. This rule makes sense because any ruling to the contrary "would allow an insurer to accrue pecuniary benefit unfairly by the simple expedient of producing conflicting estimates of value." *Columbia Mut. Ins. Co. v. Long*, 258 S.W.3d 469, 480 (Mo. Ct. App. 2008). In any event, even assuming St. Paul might have had some difficulty calculating the full amounts owed, "exact calculation is not necessary for a claim to be liquidated." *Weinberg v. Safeco Ins. Co. of Illinois*, 913 S.W.2d 59, 62 (Mo. Ct. App. 1995).

Transamerica Insurance Co. v. Pennsylvania National Insurance Co., 908 S.W.2d 173 (Mo. Ct. App. 1995), cited by St. Paul, does not contradict these basic principles. Indeed, *Transamerica* is factually inapposite because, in that case, "there was no evidence that defendant was aware of the amount owed until just prior to trial." *Id.* at

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of avoiding pre-judgment interest because its aggrieved policyholder expended the effort to also enforce its coverage rights against other insurers.

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177. Here, by contrast, it was undisputed that Doe Run provided St. Paul with many invoices two years before trial, and then continued to periodically provide invoices to St. Paul thereafter.

The court of appeals well understood that St. Paul's refusal to pay resulted not from any confusion as to the amounts owed, and so the court of appeals *affirmed* the circuit court's finding that St. Paul owed prejudgment interest under section 408.020. But the court of appeals questioned the way the circuit court had calculated the prejudgment interest. Specifically, the circuit court accrued pre-judgment interest on each invoice from a date thirty days after each invoice was received by Doe Run. That is, the circuit court ran pre-judgment interest from the date Doe Run was required to pay each invoice. But the court of appeals stated that pre-judgment interest should only run from the date when St. Paul "actually learned" of each invoice. St. Paul now argues that this Court adopt the court of appeals' formula for calculating the interest. Under these circumstances, however, adopting that formula would result in perverse incentives, and bad public policy.

Specifically, it bears repeating that, from the outset, St. Paul *denied* that it owed Doe Run any coverage. And based on this (improper) denial, St. Paul *never* intended to pay any of Doe Run's defense costs — St. Paul never even asked Doe Run how much was owed. And St. Paul stuck to this position each time Doe Run provided more invoices to St. Paul: St. Paul made no effort to understand the invoices, add up the invoices, or pay any part of the invoices. (Indeed, St. Paul *still* has not paid Doe Run a penny of defense

costs.) Precisely because St. Paul had denied coverage, therefore, it should be irrelevant when Doe Run sent each batch of invoices to St. Paul — St. Paul was never going to analyze them or pay them until a court ordered it to. What is relevant, however, is that Doe Run was required to pay each one of those invoices within 30 days of Doe Run's receipt, even knowing that St. Paul was refusing to reimburse those invoices.

Thus, it makes perfect sense that the circuit court began accruing pre-judgment interest from the date that Doe Run (the aggrieved policyholder) was required to pay the invoice because that is when Doe Run suffered the out-of-pocket damage. By contrast, a rule that only accrued prejudgment interest from the date the invoices are sent to the breaching insurer would require the policyholder (who already is fighting an underlying litigation without the coverage it is owed) to immediately send each and every invoice to the denying insurer (who has already announced that it has no intention of paying the invoice in the first place). This latter rule would require the victim of the insurer's breach to endlessly engage in the useless and futile act of sending bills to the breaching insurer just to make sure that it will be made whole with prejudgment interest in the end. Such an obligation is contrary to common-sense Missouri insurance law precedents which does not require policyholders to engage in a futile act.[38]

[38] *See, e.g.*, *Hocker Oil*, 997 S.W.2d at 521 ("Ranger explicitly denied coverage for that loss. Under these facts tendering the petition filed by the Bays to Ranger would have been useless. *A party is not required to do a useless act.*") (emphasis added); *see also Randolph v. Supreme Liberty Life Ins. Co.*, 215 S.W.2d 82, 83 (Mo. Ct. App. 1948) ("The

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The better rule, particularly when the insurer has denied coverage and refused to pay any invoice in the first place, is to begin accruing interest from the date that the aggrieved policyholder was required to pay the invoice. This rule, which the circuit court used to calculate the pre-judgment interest owed, should respectfully be confirmed here.

CONCLUSION

For the foregoing reasons, Doe Run respectfully requests that the Missouri Supreme Court affirm the circuit court judgment.

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plaintiff admitted that he did not file a proof of death with the defendant but stated that he asked for the papers necessary to make his claim and was told that nothing would be paid on the policy. If his evidence is true, which was a matter for the jury to determine, he was not obliged to file the proof. It would have been a useless act to present to the defendant proof of a claim that it had already denied and it has been held that denial of liability constitutes a waiver of the proof.").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that:

1. Substitute Brief for Respondent includes the information required by Rule 55.03;

2. Substitute Brief for Respondent complies with the limitations contained in Rule 84.06(b); and

3. Substitute Brief for Respondent contains 23,019 words, excluding the cover, the certificate of service, this certificate of compliance, and the signature block, as determined by the Microsoft Word for Windows word-counting system.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2017, the Substitute Brief of Respondent The Doe Run Resources Corporation was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system, and by disc, upon:

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