SC96107

IN THE SUPREME COURT OF MISSOURI

THE DOE RUN RESOURCES CORPORATION,

Plaintiff-Respondent,

vs.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY

AND

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant-Appellant.

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. THE CIRCUIT COURT ERRED IN RULING THAT DOE RUN'S CLAIM FOR DEFENSE COVERAGE IS NOT BARRED BY THE POLLUTION EXCLUSION (ST. PAUL POINT I).

A. The Injuries In The Smelter Suits Are Alleged To Have Resulted From Doe Run's Toxic Waste Emissions, Which Plainly Are Encompassed Within St. Paul's Pollution Exclusion.

The complaints in the Smelter Suits allege that plaintiffs' injuries were caused by toxic waste emissions "***released***" and "***dispersed***" from Doe Run's La Oroya facility that traveled through the air and water into the surrounding neighborhoods, where they were inhaled and ingested by children:[1]

> 18. The minor plaintiffs lived in or around La Oroya, Peru and were exposed to and ***injured by the harmful and toxic substances released from the Defendants' metallurgical complex***.
>
> * * *
>
> 20. . . . Defendants . . . negligently, carelessly and recklessly made decisions that resulted in the ***release of metals and other toxic and harmful substances***, including but not limited to lead, arsenic,

[1] Capitalized terms herein have the definitions provided in St. Paul's substitute opening brief, which is cited as "App. Br." Doe Run's substitute response brief is cited as "Resp. Br."

> cadmium, and sulfur dioxide, ***into the air and water and onto the properties*** on which the minor plaintiffs have in the past and/or continue to reside, use and visit, which has resulted in toxic and harmful exposures to minor plaintiffs.
>
> 21. . . . the minor plaintiffs must breathe this polluted air . . . because ***the particulate matter within the air is dispersed in a dust form*** that enters and settles inside the minor plaintiffs' houses and is deposited on the ground and on all surfaces, including furniture, clothing, water, and crops.

LR000661-000662 (emphasis added).

Doe Run directs the Court's attention away from these allegations, instead quoting the background allegations that "metals and other toxic substances [were] generated, handled, [and] stored . . . at the La Oroya complex . . . ." LR001046, 1078; Resp. Br. 30. In selectively quoting from the complaints, Doe Run omits the very allegations that are dispositive as to whether the Pollution Exclusion applies – *i.e.*, ***how plaintiffs' injuries were actually caused***. That Doe Run is alleged to have had metals and other toxic substances on its premises is beside the point. The complaints do ***not*** allege that plaintiffs entered into the Doe Run property and were injured by the materials and products generated, handled and stored there. Instead, the plaintiffs' alleged injuries were the result of exposure to toxic and harmful substances "released" and "dispersed" from Doe Run's operations "into the air and water and onto the properties on which the minor plaintiffs . . . reside, use and visit." LR000662. The complaints further allege that

the "polluted air" "is dispersed in a dust form" that entered and settled "inside the minor plaintiffs' houses," and was deposited "on the ground and on all surfaces, including furniture, clothing, water, and crops." *Id*.

The complaints' allegations as to how the plaintiffs' injuries were caused fall squarely within the provisions of St. Paul's Pollution Exclusion. The Exclusion bars coverage for "pollution," defined as any injury arising from "any actual, alleged, or threatened ***discharge, dispersal, escape, migration, release, or seepage*** of any pollutant." In turn, "pollutant" is defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including: smoke, vapors, soot, fumes; acids, alkalis, chemicals; and waste." LR000336, 000473 (emphasis added). An "ordinary person of average understanding if purchasing insurance" would plainly understand the type of toxic and harmful emissions released and dispersed from Doe Run's premises to be "pollution" within the terms of the Pollution Exclusion. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009). Indeed, the complaints themselves refer to the toxic substances as "pollutant[s]" and "pollution." LR000663. The release and dispersal from Doe Run's operations is an archetypal example of industrial pollution, which almost every court in the nation that has addressed such a claim has found falls within the terms of the pollution exclusion. *See* discussion *infra* at 17-18.

Contrary to Doe Run's argument, St. Paul's knowledge that Doe Run was "in the lead business" is irrelevant to whether the Pollution Exclusion bars Doe Run's coverage claims. Resp. Br. 31. While St. Paul understood that Doe Run was in the business of mining, smelting, recycling and fabrication of base metals (LR000311, 000397), there is

no evidence in the record that St. Paul knew Doe Run's operations would pollute the environment. If Doe Run failed to take the steps necessary to capture its toxic and harmful emissions, the possibility of pollution of course existed.[2] But that risk is exactly why St. Paul includes pollution exclusions in the liability policies it issues to commercial policyholders, including Doe Run, in conformance with insurance industry practice that has existed for over 40 years. The St. Paul Policy covers numerous other business risks involving such things as libel and slander, malicious prosecution, business disparagement, slip and falls, products liability, automobile accidents, travel accidental death and dismemberment, kidnap and ransom demands, and workers compensation claims. *See* LR000288, 000392. But it unambiguously does ***not*** insure against pollution of the environment.

B. Missouri Law Does Not Provide That Coverage Can Only Be Barred By a Pollution Exclusion Specifically Listing the Toxic and Harmful Substances Used In the Policyholder's Business.

Doe Run contends that this Court's decisions in *Aetna Casualty & Surety Co. v. Haas*, 422 S.W.2d 316 (Mo. 1968), and *Henderson v. Massachusetts Bonding & Ins. Co.*, 84 S.W.2d 922 (Mo. 1935), establish a Missouri rule that an insurer cannot "bar coverage

[2] The Smelter Suit complaints allege: "Although suitable technologies and processes exist to prevent the pollution caused by the activities at the Defendants' metallurgical complex, such technology has not been implemented by Defendants at their La Oroya Complex." LR000663.

for a policyholder's basic business activities using broad generic wording in an exclusion." Resp. Br. 3. Based on that purported rule, Doe Run argues that St. Paul's Pollution Exclusion is unenforceable because it does not "expressly and clearly exclude injury from commercial lead produced, stored or handled at Doe Run's facilities." *Id*. 37. But neither *Haas* nor *Henderson* holds that, for an exclusion to be effective, it must list the specific materials or products utilized in the insured's business.

In *Henderson*, a dry goods store sold fireworks every year around the Fourth of July. This was known to the insurance company that issued a liability policy insuring the store. When electric lights fell on a table containing fireworks, the fireworks ignited, causing fatal burns to a child visiting the store. Citing a policy provision stating that "[n]o explosives are made, sold, kept or used on the insured premises," the insurer denied coverage. *Henderson*, 84 S.W.2d at 923. However, the trial court found coverage and this Court affirmed, concluding that, because the underwriter was advised the store sold fireworks, "it would seem reasonable to believe that [he] did not himself consider that the provision about explosives covered fireworks." *Id*. at 926. The Court held that a reasonable merchant would conclude that "explosives" refers to explosives "as used and sold commercially," not products such as "shotgun shells, rifle cartridges, fireworks and Roman candles." *Id*. at 925.

Contrary to Doe Run's argument, *Henderson* does ***not*** mandate that an insurer must "*precisely* identify the excluded business materials, knowing they were part of the policyholder's business." Resp. Br. 34 (emphasis in original). Furthermore, the pollutants at issue in the Smelter Suits are not "business materials" that were part of Doe

Run's business, but rather waste by-products that were released and dispersed into the environment.

Haas likewise does not support Doe Run's argument. In that case, an exterminating company's fogging operation caused an explosion in its customer's house, resulting in property damage. *Haas*, 422 S.W.2d at 317. The exterminator's insurer sought a judgment declaring that the policy did not cover the claim because it excludes damage to property in the policyholder's "care, custody or control." The trial court found coverage, however, and this Court affirmed. Finding a latent ambiguity in the "care, custody or control" language, the Court considered the following extrinsic evidence:

- The insurer's adjuster as well as its policy agent had advised the exterminator that the loss was covered.
- The insurer had paid "a like property damage loss under a prior identical policy," thereby placing a "practical construction of coverage under the policy." *Id.* at 319-20.

Based on this evidence, the Court held that coverage was not barred. Although not fundamental to its holding, the Court also noted that the insurer could have included language in the exclusion specifically excluding "residential or other buildings where [the exterminator] was performing its services," but did not. *Id.* at 320-21.

Unlike in *Haas*, the St. Paul Pollution Exclusion ***unambiguously*** applies to the allegations in the Smelter Suits, so extrinsic evidence is irrelevant here. Even if it were relevant, there is no evidence that any St. Paul adjuster or agent ever acknowledged

coverage of the Smelter Suits, or that St. Paul ever paid a coverage claim involving pollution like that alleged in the Smelter Suits.

Significantly, Doe Run did not cite, much less rely on, *Henderson* or *Haas* in its briefs in the circuit court or the court of appeals. Furthermore, neither case was cited in any of the court of appeals opinions, including *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. App. S.D. 1999), that have addressed the application of pollution exclusions.

Doe Run's additional argument that a reasonable policyholder might not understand that lead is included within the meaning of "irritants" or "contaminants" in the Pollution Exclusion is belied by one of the Exclusion's examples, which states that claims from ingested lead are barred: if the policyholder is sued "for bodily injury to . . . children allegedly caused by lead in . . . paint," St. Paul "won't cover such injury." LR000336, 000473. That the lead in the example is in paint and not in particulate form released and dispersed into the environment is a distinction without a difference. The example makes it crystal clear that claimed injuries from lead poisoning fall within the Pollution Exclusion. *Cf.*, *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 425-26 (Ga. 2016) (absolute pollution exclusion barred coverage claim arising from lead poisoning, even though lead was not explicitly named in the exclusion).

Doe Run's argument that lead, in its "various forms," is not necessarily an "irritant" or "contaminant" within the terms of the Pollution Exclusion misses its mark. Resp. Br. 31-32. The Smelter Suit complaints do ***not*** allege that the plaintiffs' injuries were caused by lead used or stored at Doe Run's facility as lead concentrate or as ingots.

Instead, they allege that lead was released and dispersed in a dust or particulate form into the environment. The identical argument regarding Doe Run's lead materials and products was considered and correctly rejected by the Eighth Circuit in *Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 868, 875 (8th Cir. 2013) ("*Doe Run I*"): "That its toxic or hazardous materials are valuable products if Doe Run properly contains them does not make them any less 'pollutants' when they are abandoned and released into the environment."

In a recent Eighth Circuit decision applying Missouri law, the court again ruled that whether a substance is a "pollutant" is dependent on the manner in which the substance causes injury or damage:

> We conclude that in the factual context of this case, Radium is unambiguously a contaminant. [Garnishor] may be correct that there are circumstances in which Radium and its emissions might not be harmful. But here, the complaint alleges that illegal levels of Radium were present in the water supply, creating a serious risk to the health of Autumn Hills residents, which required them to relocate or purchase alternative sources of water. Additionally, the complaint in the Original Action itself refers to Radium and its emissions as "radiological contaminants" throughout, and alleges that the levels of Radium in the water exceeded the "Maximum Contaminant Level" set forth by Missouri's Department of Natural Resources.

Williams v. Emp'rs Mut. Cas. Co., 845 F.3d 891, 905 (8th Cir. 2017). The court concluded that, in the context of these factual allegations, Radium is unambiguously a contaminant within the meaning of the pollution exclusion, and therefore that coverage is barred for the injury and damage "alleged to have resulted from the presence of Radium or alpha particles in Autumn Hills' water supply." *Id*. at 906.

Finally, Doe Run's contention that the Pollution Exclusion should be read "consistent with the reasonable expectations of a company . . . in the lead business" (Resp. Br. 32) is contrary to this Court's directive that "where insurance policies are unambiguous" there "is no basis for application of an objective reasonable expectation doctrine." *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 382-83 (Mo. banc 1991). Because the Pollution Exclusion is unambiguous as applied to the allegations of the Smelter Suits, a policyholder's supposed "expectations" in purchasing such a policy are irrelevant.

Even if expectations were relevant, it is simply implausible that an ordinary person of average understanding would reasonably expect that toxic and harmful lead, arsenic, cadmium and sulfur dioxide dispersed in a dust form from its manufacturing operations onto neighboring houses and fields would not constitute "pollution" within the terms of the Pollution Exclusion.

C. Doe Run's Reliance on *Hocker Oil* Is Misplaced.

In its opening brief, St. Paul discussed four Missouri appellate decisions that have applied pollution exclusions to bar coverage for pollution-related claims. App. Br. 30-34. Doe Run dismisses these authorities, arguing that this Court instead should follow a lone

case, *Hocker Oil*. Doe Run contends that *Hocker Oil* supports its argument "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." Resp. Br. 40. However, *Hocker Oil* does not state such a broad principle. Instead, the court limited its evaluation of the pollution exclusion in that case to the situation of a gasoline spill at an insured gasoline station, observing that cases involving other substances were "not particularly helpful" to its analysis. *Hocker Oil*, 997 S.W.2d at 516.

The *Hocker Oil* holding is premised on the court's observation that "[g]asoline is the ***product*** [the insured] sells" and the insured reasonably could have considered it to be its product, not a pollutant. *Id*. at 518 (emphasis added). Here, on the other hand, the toxic and harmful substances at issue are ***not*** Doe Run's products, but the by-products generated by Doe Run's operations and released and dispersed into the environment. Such waste by-products unambiguously fall within the meaning of "pollutants" in the Pollution Exclusion.

While contending that *Hocker Oil* should be followed here, Doe Run argues that the Southern District's subsequent holding in *Casualty Indemnity Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. App. S.D. 1999), is inapposite. Resp. Br. 49. In actuality, *City of Sparta* is directly on point. As here, *City of Sparta* involved contaminants migrating onto neighboring property. Moreover, the contaminants in *City of Sparta* included three of the four toxic substances at issue in the Smelter Suits – lead, arsenic and cadmium. 997 S.W.2d at 546. In ruling that off-site migration of toxic substances falls

squarely within the pollution exclusion, the *City of Sparta* court did not even mention its prior *Hocker Oil* decision.

The very same argument about *Hocker Oil* that Doe Run asserts here was considered and rejected by the Eighth Circuit in *Doe Run I* and *Doe Run Resources Corp. v. Lexington Insurance Co.*, 719 F.3d 876 (8th Cir. 2013) ("*Doe Run II*"). That court concluded that "*Hocker Oil* simply does not carry the weight of controlling precedent that Doe Run ascribes to it," observing that: (1) *Hocker Oil* expressly limited its holding to gasoline; (2) shortly after *Hocker Oil* was handed down, two of the three judges who decided *City of Sparta*, held, without even citing *Hocker Oil*, that a pollution exclusion bars coverage for damage from toxic sludge that had migrated from the insured's premises; and (3) *Hocker Oil's* focus on gasoline being the insured's product, rather than on its toxic characteristics when released into the environment, represents a minority view. *Doe Run I*, 719 F.3d at 874-75.

In a more recent decision, the Eighth Circuit observed that "not even Missouri's intermediate appellate courts have relied on … *Hocker Oil* in the fifteen years since the case was decided," which "should come as no surprise, since *Hocker Oil* seems out of step with Missouri's deeply-entrenched rule" that courts may not create ambiguities to distort unambiguous language or enforce their preferred result. *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 885 (8th Cir. 2014) (finding that an acrylic concrete sealant "unambiguously constitutes a pollutant" but remanding for a

determination whether the underlying complaint alleged a "discharge, dispersal, seepage, migration, release or escape" (*id* at 884)).[3]

Simply put, Doe Run's reliance on *Hocker Oil* is misplaced. Even if *Hocker Oil* were correctly decided, its unique facts make it irrelevant to a determination whether Doe Run's release and dispersal of lead, arsenic, cadmium and sulfur dioxide into the environment fall within St. Paul's Pollution Exclusion.

D. The Issue In this Case Is Whether the St. Paul Policy, As Issued, Bars Coverage for the Smelter Suits; Exclusions Not Included In the Policy Are Not Germane to that Determination.

Under Missouri law, coverage cannot be "created by the fact that an exclusion could have been added to [a] policy but was not." *Truck Ins. Exch. v. Heman*, 800 S.W.2d 2, 4 (Mo. App. W.D. 1990). Therefore, both the circuit court and the court of appeals correctly rejected Doe Run's argument that coverage was created in the St. Paul Policy because it did not include either the so-called "Missouri Pollution Exclusion" or a lead exclusion. Resp. Br. 42-45.

As acknowledged by Doe Run, the "Missouri Pollution Exclusion" was created to address the situation in *Hocker Oil*, where the insured's product was also the pollutant at

[3] Doe Run's suggestion that this Court's denial of the petition for transfer in *Hocker Oil* is relevant is meritless. Resp. Br. 39 n.10. Denial of transfer is not an indication of this Court's approval of a decision. *See Tatum v. St. Louis Metro Delivery, Inc.*, 887 S.W.2d 679, 683 (Mo. App. E.D. 1994).

issue. Resp. Br. 44. Here, however, the pollutants at issue are toxic and harmful waste by-products released into the environment from Doe Run's operations, not Doe Run's lead products or commercial materials handled or stored on its premises. *See* LR001024.

Doe Run's additional argument that St. Paul could have, but did not, add a lead exclusion to its Policy was correctly rejected by the Eighth Circuit. Resp. Br. 44. The *Doe Run I* insurer had actually deleted a lead exclusion from its policy, even though the exclusion had been contained in prior policies it had issued to Doe Run. Nevertheless, the court concluded that the absence of a lead exclusion was irrelevant to its coverage determination:

> [T]he absence of an exclusion, standing alone, does not imply coverage; coverage must be provided in the remaining policy terms. This common sense principle was well illustrated by *Truck Ins. Exch. v. Herman*, 800 S.W.2d 2, 4 (Mo. App. 1990), where the court held that the parties' decision not to include an optional additional exclusion in an insurance policy did not "suggest[] a modification of the exclusions contained in the body of the policy." Here, the more specific lead exclusion, if included, would have overlapped the absolute pollution exclusion as it applies to the release of lead "pollutants," but the two exclusions would not have conflicted. The parties' deletion of the lead exclusion left the remainder of the CGL policy in full force and effect, including its absolute pollution exclusion.

Doe Run I, 719 F.3d at 876.

Similarly here, the absence of a lead exclusion in the St. Paul Policy "does not imply coverage." Instead, coverage must be provided in accordance with the terms of the policy that Doe Run actually purchased.

E. Missouri Court of Appeals Case Law Supports Application of the Pollution Exclusion In this Case.

Doe Run argues that *City of Sparta* and the other Missouri court of appeals decisions that have enforced pollution exclusions are not on point. Indeed, Doe Run relegates its discussion of all those cases other than *City of Sparta* to a footnote. Resp. Br. 49, 50 n.18. However, they persuasively rebut Doe Run's various arguments.

For example, the court in *Cincinnati Insurance Co. v. German St. Vincent Orphan Association, Inc.*, 54 S.W.3d 661, 665-66 (Mo. App. E.D. 2001), expressly rejected the argument that broad generic wording in a pollution exclusion renders it unenforceable. The policyholder in that case argued that the pollution exclusion was ambiguous because "there is virtually no substance or chemical in existence that would not irritate or damage some person or property." *Id.* at 665. The court disagreed, finding "that friable asbestos unquestionably falls into the category of a solid or thermal 'irritant' or 'contaminant' as those words appear in [the exclusion]." *Id.* at 665-66.

Boulevard Investment Co. v. Capitol Indemnity Corp., 27 S.W.3d 856 (Mo. App. E.D. 2000), which applied a pollution exclusion to bar coverage for damage arising from kitchen "waste," is likewise on point. Just like kitchen waste, the waste by-products released from Doe Run's premises unambiguously fall within the pollution exclusion.

Finally, the hazardous waste in *Trans World Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609 (Mo. App. E.D. 2001), is akin to the toxic waste in this case. Both are by-products of the insured's operations.

Also unavailing is Doe Run's argument that pollution exclusions necessarily are ambiguous because they are enforced in some cases but not in others. Resp. Br. 47-48. As the *Hocker Oil* court correctly observed, exclusion "[c]lauses can . . . be ambiguous in one context and not another." *Hocker Oil*, 997 S.W.2d at 516.

In sum, *City of Sparta* and the foregoing Missouri appellate authorities are well reasoned and faithfully apply this Court's statements of the principles to be applied in insurance policy interpretation. Accordingly, they provide a compelling precedential foundation for the resolution of this case.

F. ***Doe Run I*** and ***Doe Run II*** Were Correctly Decided and Are Indistinguishable From the Present Case.

This case is factually aligned with *Doe Run I* and *Doe Run II*, which involved similar allegations of environmental releases resulting in injuries. Doe Run does not even attempt to distinguish those decisions; instead, it merely asserts that they are "incorrect interpretations of Missouri law." Resp. Br. 51. To the contrary, those cases follow this Court's articulation of the principles to be applied in interpreting insurance contracts, including that "[w]here insurance policy terms unambiguously apply, including coverage exclusions, they will be enforced as written" (*citing Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. banc 1992)), and courts may not "create an ambiguity in order to distort language of an unambiguous policy, or, in order to enforce a particular

construction which it might feel is more appropriate" (*quoting Rodriguez*, 808 S.W.2d at 382). *Doe Run I*, 719 F.3d at 871, 875-76.

Doe Run attempts to discredit *Doe Run I* and *Doe Run II* by arguing that they "entirely diverged from prior Eighth Circuit application of Missouri law" and two prior Missouri federal court decisions. Resp. Br. 52-54. The prior Eighth Circuit decision cited by Doe Run is *Sargent Construction Co. v. State Auto Insurance Co.*, 23 F.3d 1324 (8th Cir. 1994). In that case, the insured contractor used muriatic acid to etch a concrete floor in order to apply another product on the floor to level it. Fumes from the acid reacted with and corroded chrome on fixtures at the job site. The district court granted summary judgment to the insurer on the basis of a pollution exclusion, but the Eighth Circuit reversed and remanded, finding that the exclusion was ambiguous as applied to the insured's use of the muriatic acid in that case. *Id.* at 1327.

Significantly, one of the three judges who decided *Sargent* was Circuit Judge Loken, who authored both *Doe Run I* and *Doe Run II*. Judge Loken undoubtedly would disagree with Doe Run's argument that his *Doe Run* decisions "entirely diverged" from *Sargent's* application of Missouri law. That the result in *Sargent* differed from the result in the *Doe Run* cases was not because the Eighth Circuit applied Missouri law differently, but because the facts in *Sargent* were unlike the industrial pollution at issue in the *Doe Run* actions.

The two federal district court decisions cited by Doe Run are *United Fire & Casualty Co. v. Titan Contractors Service, Inc.*, No. 10-cv-2076, 2013 WL 316060 (E.D. Mo. Jan. 28, 2013), and *Hartford Accident & Indemnity Co. v. Doe Run Res. Corp.*, No.

08-cv-1687, 2010 WL 1687623 (E.D. Mo. Apr. 26, 2010). Resp. Br. 53-54. However, the district court's *Titan* decision was vacated on appeal and remanded in an opinion criticizing *Hocker Oil* and noting that *Hocker Oil's* "unique facts differ substantially from those presented here." *Titan,* 751 F.3d at 885. The other case cited by Doe Run, *Hartford,* predates the Eighth Circuit's decisions in *Doe Run I*, *Doe Run II* and *Titan*, and is not good law in light of those decisions.

G. Authority From Other Jurisdictions Support the Conclusion That the Pollution Exclusion Unambiguously Bars Industrial Pollution of the Kind At Issue in this Case.

As noted in the Brief of *Amici Curiae* Complex Insurance Claims Litigation Association and The American Insurance Association In Support of Appellant ("CICLA and AIA Br."), the "overwhelming majority of courts nationwide have enforced pollution exclusions in a variety of circumstances." CICLA and AIA Br. 14. Indeed, over 100 appellate court cases have concluded that the release or discharge of pollutants from an insured's operations are barred by pollution exclusions like St. Paul's. *Id*. 17.

The Smelter Suit claims involve exactly the kind of industrial pollution that courts across the country have concluded falls unambiguously within pollution exclusions. *See, e.g.*, *Emp'rs Mut. Cas. Ins. Co. v. Indus. Rubber Prods., Inc.*, No. 04-3839, 2006 WL 453207, at *4 (D. Minn. Feb. 23, 2006) (metallic iron and iron oxide resulting from the cleaning of industrial parts and dispersed in particulate form into the environment is "pollution" within the meaning of an absolute pollution exclusion); *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480, 486 (2005) ("[T]he widespread dissemination of

silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution.'"). Indiana is the exception. Doe Run cites the Indiana Supreme Court's opinion in *State Automobile Mutual Insurance Co. v. Flexdar*, 964 N.E.2d 845 (Ind. 2012), in support of the argument that a pollution exclusion must specifically list the contaminants involved in the policyholder's business in order to apply. Resp. Br. 57-59. *Flexdar* actually goes further, holding that the only way insurers can provide the clarity required under Indiana law is for a pollution exclusion to identify by name each toxic or harmful substance considered to be a pollutant within the exclusion. *Flexdar*, 916 P.2d at 851-52.

The *Flexdar* holding is contrary to the rules of insurance policy interpretation enunciated by this Court, which do not require such itemization but instead apply "the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Ritchie*, 307 S.W.3d at 135. Nor is the *Flexdar* approach practical. As observed by the Seventh Circuit:

> Drafters cannot anticipate all possible interactions of fact and text, and if they could the attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy . . . . The resulting contract would not only be incomprehensible but more expensive.

Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991). Furthermore, "[J]ust because language could be more precise or explicit does not mean it is ambiguous." *City of Carlsbad v. Ins. Co. of State of Pa.*, 180 Cal. App. 4th 176 (2009).

Amicus Curiae United Policyholders contends that the Washington Supreme Court's decision in *Xia v. Pro Builders Specialty Insurance Co.*, 393 P.3d 748 (Wash. 2017), aligns with Indiana's "concerns" about a pollution exclusion's failure to list the pollutants with specificity. Brief of *Amicus Curiae* United Policyholders In Support of Plaintiff-Respondent ("United Policyholders Br.") 31-33. However, the *Xia* court actually found that the pollution exclusion at issue there unambiguously applied to carbon monoxide resulting from the defective installation of a water heater, even though carbon monoxide was not specifically identified in the exclusion as a "pollutant." *Id*. at 756. Nonetheless, the court found coverage, concluding that the defective installation was the "efficient proximate cause" of the loss. *Id*. at 758. However, the court cited with approval two appellate court decisions applying pollution exclusions to bar coverage: *City of Bremerton v. Harbor Ins. Co.*, 963 P.2d 194 (Wash. App. 1998) (pollution exclusion barred coverage for claims arising from noxious odors emanating from a toxic waste plant), and *Cook v. Evanson*, 920 P.2d 1223 (Wash. App. 1996) (pollution exclusion barred coverage for claims arising from a commercial sealant's vapors). *Id.* at 752. Those cases are wholly consistent with the conclusion that the Smelter Suit claims are barred by St. Paul's Pollution Exclusion.

Finally, *amicus*'s contention that the insurance industry supposedly "overdrafted" the pollution exclusion injects dubious and disputed hearsay outside of the record in this case. United Policyholders Br. 35-36. It should not be given any credence by this Court. Furthermore, *amicus*'s contention does not negate this Court's articulated principle of insurance contract interpretation that a policy should be given "the meaning which would

be attached by an ordinary person of average understanding if purchasing insurance." *Ritchie*, 307 S.W.3d at 135. Such a person would surely understand the type of toxic and harmful emissions alleged in the Smelter Suits falls unmistakably within St. Paul's Pollution Exclusion. To paraphrase the court of appeals, if the Pollution Exclusion does not bar coverage for the allegations in the Smelter Suits, one would have to wonder what kind of activity it would exclude. *City of Sparta*, 997 S.W.2d at 552.

* * *

For all of the foregoing reasons, this Court should reverse the circuit court's judgment on the Pollution Exclusion, find that St. Paul has no duty to defend the Smelter Suits, and direct the circuit court to enter a final judgment in favor of St. Paul and against Doe Run.

II. THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT AGAINST ST. PAUL ON ITS OTHER INSURANCE DEFENSE (ST. PAUL POINT II).

A. St. Paul's Policy Applies In Excess of the Rimac Policies.

Doe Run claims that the St. Paul Policy "look[s], breathe[s], and smell[s] like primary coverage." Resp. Br. 62. To the contrary, the St. Paul Policy was issued based on Doe Run's ***express representation and agreement***, as set forth in the Policy's Binder, that Doe Run had procured a primary policy from Rimac and that the St. Paul Policy is excess to it:

> It is agreed that the insured has a primary General Liability policy in place for US $1,000,000 per occurrence, and that ***the [St. Paul***

Policy] will be excess to this primary policy issued by Rimac Seguros.

LR003302 (emphasis added).[4] Moreover, Doe Run admitted that Rimac issued such policies ***during St. Paul's coverage period*** and that it is a named insured under those policies. LR000603-000604.[5]

Rimac's denial of coverage does ***not*** establish that coverage under its policies is unavailable. Resp. Br. 65-66. If that were true, there would have been no reason for Doe Run to pursue any of the insurers in this case, because all denied coverage. Moreover, contrary to Doe Run's argument, the Rimac policies are clearly "valid and collectible insurance," as shown by the very section of Couch on Insurance that Doe Run cites. *Id.* 66. That section states that a "valid and collectible insurance" provision "is meant to exclude invalid or illegal insurance, such as insurance which is voidable for misrepresentation, and uncollectible insurance, such as insurance of an insolvent

[4] The Policy itself states: "We'll also apply this agreement as excess insurance over any similar coverage that is issued in a country within the coverage territory." LR000340, 000477. The applicable "coverage territory" is Peru and the "other similar coverage" was issued by Rimac.

[5] Doe Run's characterization of the Rimac policies as "some modest Peruvian policies" (Resp. Br. 61) is misleading and incongruous, given that the Rimac limit of $1,000,000 per occurrence is exactly the same as the $1,000,000 aggregate limit in the St. Paul Policy. LR000309, 000423.

company." 15 COUCH ON INSURANCE, § 219:9 (West 1999). Doe Run's citation to this Court's decision in *Greer v. Zurich Insurance Co.*, 441 S.W.2d 15 (Mo. 1969), also does not negate the conclusion that the Rimac policies are "valid and collectible." In *Greer*, the Court held that a policy "was not known to [the claimants and insureds] through no fault of their own and could not reasonably have been discovered by them before it was too late to render it valid and collectible insurance with respect to their claim." *Id*. at 34. Here, the Rimac policies were not unknown to Doe Run. To the contrary, Doe Run sought coverage under them.

B. Because National Union Has the Duty to Defend the Smelter Suits, St. Paul Does Not Have that Duty.

The St. Paul Policy provides that St. Paul, as an excess insurer, "won't have a duty to defend" against "any claim or suit for which any provider of other insurance has the duty to defend." LR000341, 000478. Because National Union has a duty to defend Doe Run, St. Paul does not have that duty.

Doe Run argues that National Union "only provides partial defense coverage," so St. Paul must also defend. Resp. Br. 63. This argument overlooks the fact that Doe Run won summary judgment requiring defense coverage from National Union for the Smelter Suits ***in their entirety***. LR001477, 001508. Doe Run's contention that National Union does not need to provide a defense to all of the Smelter Suit claims is contradicted not only by the court's judgment, but by Doe Run's acknowledgement that an insured found to have a duty to defend any individual claim in a petition must defend all claims alleged therein. Resp. Br. 26. That Doe Run decided to settle with National Union for only part

of its defense fees is of no significance. The dispositive fact is that National Union was adjudicated to have the duty to defend.

Doe Run likewise argues that the National Union policy is not "valid and collectible other insurance *for injury or damage covered by* [St. Paul's Policies]." Resp. Br. 67 (emphasis in original). Even if that were true, and it is not, it is irrelevant because all that is required under the St. Paul Policy to relieve St. Paul of a duty to defend is that "any provider of other insurance has the duty to defend." LR000341, 000478.

Contrary to Doe Run's contention that the National Union policy "principally [provides] coverage for Doe Run's indemnification obligations to its officers and directors" (Resp. Br. 67), the National Union policy in fact provides liability coverage ***for Doe Run itself*** as well as for Doe Run's directors and officers. As explained in St. Paul's opening brief, the National Union policy is an "Executive and Organization Liability Insurance Policy" that, in Coverage B, provides "Organization Insurance" insuring wrongful acts engaged in by Doe Run itself as a corporate entity. LR002064, 002068.

Finally, Doe Run's arguments that National Union issued a claims made policy while the St. Paul Policy is an "event" based policy, and that the St. Paul Policy purportedly covers a broader time period than the National Union policy, are also irrelevant. Resp. Br. 67-68. The dispositive fact is that National Union has a duty to defend the Smelter Suits in their entirety. Therefore, St. Paul has no obligation to provide a defense.

* * *

Accordingly, this Court should reverse the circuit court's judgment on the Other Insurance issue, find that St. Paul has no duty to defend the Smelter Suits, and direct the circuit court to enter a final judgment against Doe Run and in favor of St. Paul.

III. THE CIRCUIT COURT ERRED IN AWARDING COVERAGE FOR PRE-TENDER COSTS (ST. PAUL POINT III).

Doe Run's argument that the *de novo* standard is inapplicable to the Pre-Tender Costs issue is mistaken because the relevant evidence consists entirely of undisputed correspondence between Doe Run and St. Paul. Resp. Br. 72-73. Because St. Paul is not required to prove prejudice in order to prevail on the Pre-Tender issue, the issue whether St. Paul was prejudiced by Doe Run's failure to provide it notice prior to tender is irrelevant. App. Br. 60-62.

Doe Run's argument that its tender of the 2007 Suit provided sufficient notice of the Smelter Suits (Resp. Br. 75) disregards the Policy's notice provision, which requires notice of ***each*** suit as it is served; it does ***not*** provide that only the first in a series of related suits need be forwarded. LR000298-000299, 000435-000436. Therefore, tender of the voluntarily dismissed 2007 Suit did not relieve Doe Run of its obligation to tender the subsequently filed Smelter Suits. It is undisputed that Doe Run did not tender those subsequent Suits until March 2012. LR000652-000654.

Nor did the November 2010 letter trigger a defense obligation. Resp. Br. 75. That letter was addressed to Zurich, Doe Run's domestic primary insurer, with a copy to a number of domestic insurers excess to the Zurich policies. While the letter reported on the status of a number of cases pending against Doe Run, including the Smelter Suits, it

made clear that it was being provided to the excess insurers ***merely to keep them apprised of the status of the cases discussed***. LR003484-003485. Accordingly, the November 2010 letter did not seek a defense from St. Paul.

Doe Run contends that a formal tender is not required under Missouri law to invoke an insurer's duty to defend. Resp. Br. 75-77. However, 30 Missouri Practice: Insurance Law Practice, § 7.42 at n.10 (2016), expressly provides that, for a duty to defend to exist, an insured must invoke coverage by tendering its defense to the insurer. App. Br. 52. Doe Run disregards that statement and instead cites another in that treatise stating that the notice to the insured must be "reasonably accurate." Resp. Br. 76. However, that statement has to be read in conjunction with the statement requiring a tender. Read together, they provide that the required tender must set forth a reasonably accurate notice of the allegations being asserted against the insured.

Doe Run's attempt to distinguish *State Farm Fire & Casualty Co. v. Alberici*, 852 S.W.2d 388 (Mo. App. E.D. 1993), and *Hartford Insurance Co. v. Federal Ins. Co.*, 682 S.W.2d 871 (Mo. App. E.D. 1984), is unavailing. Resp. Br. 76-77. Both cases require that the policyholder request a defense.

That tender, as opposed to mere notice, is required is amply demonstrated by Doe Run's November 2010 letter to Zurich and its domestic excess insurers. Although that letter provided "notice" that numerous lawsuits, including the Smelter Suits, were pending against Doe Run, the letter did not state that it was seeking a defense from St. Paul or any of the other excess carriers. Therefore, it would be unreasonable to conclude

that notice alone, without an indication that the policyholder is seeking coverage, triggers the duty to defend.

Finally, Doe Run is mistaken in its argument that St. Paul must prove prejudice in order to prevail on the Pre-Tender Costs issue. Resp. Br. 77-78. Rather than relying on cases addressing the pre-tender issue, the circuit court cited only cases involving breach of notice and cooperation conditions, which results in total forfeiture of coverage. The rule against recovery of pre-tender costs, on the other hand, simply limits the amount of covered costs that an insured can recover and, as such, should not require a showing of prejudice.

IV. THE CIRCUIT COURT ERRED IN AWARDING PREJUDGMENT INTEREST (ST. PAUL POINT IV).

Doe Run's argument on prejudgment interest disregards that it (1) chose to sue and settle with other carriers before suing St. Paul and (2) did not inform St. Paul of the amounts received and allocated from these settlements until ***one week before trial***. App. Br. 63-64. St. Paul was simply unable to calculate its alleged share of defense costs until Doe Run first specified how it allocated and applied its settlements with those other carriers. Indeed, Doe Run acknowledges that the judgment "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." Resp. Br. 81. Because Doe Run did not inform St. Paul of the actual amount it was seeking, or even identify the specific invoices for which it sought payment from St. Paul, until just before trial, it is not entitled to prejudgment interest. LR003533-003536, 003569. *See Nangle v. Brockman*, 972 S.W.2d

545, 551 (Mo. App. E.D. 1998); *Transamerica Ins. Co. v. Penn. Nat'l Ins. Cos.*, 908 S.W.2d 173, 177 n.6 (Mo. App. E.D. 1995).

CONCLUSION

St. Paul requests that the Court enter the relief requested in Appellant's Substitute Brief.

Dated: June 2, 2017

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned hereby certifies that:

1. Substitute Reply Brief of the Appellants contains the information required by Rule 55.03;

2. Substitute Reply Brief of the Appellants complies with the limitations contained in Rule 84.06(b); and

3. Substitute Reply Brief of the Appellants, excluding the cover page, certificate of service, this certificate and the signature block, contains 7,538 words per Microsoft Word for Windows.

Dated: June 2, 2017

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CERTIFICATE OF SERVICE

It is hereby certified that on this 2nd day of June, 2017, a copy of the foregoing **Appellant's Substitute Reply Brief** was filed electronically with the Clerk of the Court to be served by operation of the Court's Electronic Filing System on all counsel of record. In addition, a copy was also served on the following via electronic mail:

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