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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

Appellate Case No. 2024-000674

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty Insurance Guaranty Association..... Defendants,

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

**RECORD ON APPEAL
VOLUME 1**

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

**DISCOVERY ORDER GRANTING
COVIL CORPORATION'S MOTIONS
TO COMPEL PENN NATIONAL**

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

This matter is before the Court on numerous motions filed by the Receiver for Covil whereby the Receiver seeks to determine the extent to which Penn National wrote additional insurance protective of Covil.

Covil has sought discovery of its insurance policies and related documentation from Penn National since 2018. The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. *See, e.g.*, Ex. 1, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003.

This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. Despite this Court's orders, Penn National has yet to perform a manual search or to scan the documents so they can be searched electronically. Covil has thus been litigating this issue since January, as summarized here:

1. After the January 7, 2021 deposition of Penn National's corporate representative, Covil moved to compel Penn National to perform a complete search.

2. At the January 2021 hearing, the Court ordered Covil to provide lists of relevant job sites, owners, and agents to Penn National for further searches, and it ordered Penn National to promptly respond with its findings.
3. Covil filed a Supplemental Motion to Compel on April 22, 2021. The Court granted Covil's motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." The Court ordered Penn National to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National."
4. Covil filed another motion on August 20, 2021 that is currently pending before the Court.
5. Covil filed another motion on September 8, 2021, also currently pending before the Court. It informs the Court that, among other things, Penn National's Boyd Wright, who was responsible for coordinating Penn National's electronic search, reiterated the manner in which Penn National would only conduct its search by policy number because "[y]ou'd have to have a policy number" to search electronically for an "additional insured," such as Covil, as well. See Wright Dep. at 23:22–24. Without a policy number, Mr. Wright admitted, Penn National would "have to look in the policy documents to see if there was any supplemental insureds." *Id.* at 23:22–24:1. To date, Penn National has not conducted this type of search.

Penn National is ORDERED to open its repository of insurance policies and to facilitate a review supervised and performed by Covil's insurer-appointed defense counsel, Ellis & Winters LLP. Both the Receiver for Covil and Penn National have expressed confidence in the professional judgment of Ellis & Winters, and as such the Court hereby DIRECTS Ellis & Winters to perform this document review, the scope of which is to be informed by Ellis & Winters' own sound professional judgment, and to report back to the Court as to progress made (as well as suggestions for meeting Covil's needs to identify responsive coverage) while not wasting Penn National's resources.

This information is critical and discoverable in the case that Ellis & Winters has been assigned by Covil's insurers to defend. Specifically, Covil has been sued in numerous asbestos liability cases in federal courts and South Carolina state courts, and Covil needs its policies to

respond to routine discovery. *See* Fed. R. Civ. P. 26(a)(1)(A)(iv) (“a party must . . . provide to the other parties . . . for inspection and copying . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment”); Rule 26(b)(2), SCRCF (“A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.”); Rule 33(b)(4), SCRCF standard interrogatory (4) (“Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.”).

For these reasons, the Court ORDERS Penn National to facilitate this review immediately, at the direction of, and to be performed by, Ellis & Winters, and to report back to the Court, on an interim basis, regarding progress made and any relevant suggestions on December 7, 2021. With the exception of matters pending before this Court, the Court issues this order as a protective order to allow these attorneys’ schedules to remain available between now and December 7 to focus on this important project.

[ELECTRONIC SIGNATURE ON FOLLOWING PAGE]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Compel

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,
Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,
Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**PROPOSED ORDER ON RECEIVER
FOR COVIL CORPORATION'S
MOTION FOR PROTECTIVE ORDER**

This matter is before the Court on the Receiver for Covil Corporation's ("Covil") December 10, 2021 Motion for Protective Order. After careful consideration of the parties' filings, arguments at the January 11, 2022 hearing, the lengthy history of this ongoing discovery dispute, and applicable law, the Court hereby grants the motion and orders the relief to Covil identified below.

By way of background, asbestos claimants and the Receiver have sought discovery of Covil insurance policies and related documentation from Penn National for years. This Court granted Covil's motions to compel and ordered Penn National to open its repository of insurance policies and to facilitate a review supervised and performed by Covil's insurer-appointed defense counsel, Ellis & Winters LLP. *See, e.g.*, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003; Nov. 5, 2021 Discovery Order on Motions to Compel Review of Repository of Insurance Policies at 2, C.A. No. 2020-40-02098.

In response to the Court's November 5 Order, Penn National facilitated a telephone conference on November 19 between and among Ellis & Winters, the Receiver's counsel, Penn National's counsel, and Penn National document custodian Brent Reifsnyder. The Receiver's

counsel reported that, during that November 19 call, Mr. Reifsnyder disclosed to the participants that he was unaware of any litigation hold notice issued by Penn National related to the Covil litigation. The Receiver's counsel further reported that Mr. Reifsnyder disclosed that Penn National has an annual document "purge" policy and that he had not been advised by anyone to suspend or alter that purge policy in response to the Covil litigation.

Immediately upon the conclusion of the parties' November 19 conference call, the Receiver prepared and served on Penn National a set of document requests seeking the litigation hold notices, if any, that Penn National issued related to the Covil litigation as well as all correspondence regarding such litigation holds. The Receiver also served a Rule 30(b)(6) deposition notice seeking information regarding the steps taken, if any, by Penn National to preserve information and documents related to the Covil litigation. On December 20, 2021, in its response to the Receiver's discovery requests, Penn National admitted that it did not issue any litigation hold notices related to the Covil litigation until December 17, 2021, and the litigation hold it did issue on December 17 was only issued to a single person—Mr. Reifsnyder.

The Receiver filed the present motion seeking a Court order to prevent the destruction of historic policy-related documents in the possession, custody or control of Penn National on a going forward basis. In light of Penn National's failure to issue a litigation hold to prevent the routine or automatic destruction of documents related to the Covil litigation, the Court finds that there is good cause to grant the motion.

Covil argues that the Court should order Penn National to cease all automatic or routine document destruction or purging of its historic insurance policies and policy-related information regardless of whether that information is in electronic or hard copy format. The Court agrees. It

is clear to this Court Penn National only put a litigation hold in place on December 17, 2021, in response to the Receiver's legitimate concerns regarding document preservation. Moreover, the Court is not persuaded that the current litigation hold, that was recently distributed to a single Penn National employee, is sufficient to preserve all relevant documents.

The Court therefore grants Covil's Motion for Protection and orders Penn National to preserve all historic insurance policies and policy-related information unless and until this Court orders otherwise. This Order includes not only historic insurance policies, but also policy-related information existing in electronic form, hard copy, handwritten notes, or any other format. As examples only, this Order includes insurance policies, certificates of insurance, underwriting files, claims files, and any other documentation, regardless of format, evidencing the terms and conditions of historic insurance coverage. Because some of this relevant material is likely stored in electronic forms, all auto-delete or other routine destruction policies for historic insurance policies and policy-related information must be suspended until further notice.

Finally, the Court will hold Penn National's Motions to Quash Covil's Rule 30(b)(6) depositions in abeyance until the Receiver has had an opportunity to develop the record more thoroughly with written discovery. The Court will allow Covil to serve written discovery on Penn National and Penn National must respond to that discovery within the timeline provided under the South Carolina Rules of Civil Procedure. After Covil has concluded its written discovery on these issues, it will revise its Rule 30(b)(6) deposition topics as appropriate in light of the written discovery received from Penn National, and the parties will meet and confer regarding the revised topics. If the parties cannot resolve any outstanding disputes regarding the revised deposition

notices, then they are ordered to report back to this Court to identify any remaining issues in dispute.

For the reasons stated above, there is good cause to enter a protective order. The Court hereby GRANTS Covil's Motion for Protective Order and ORDERS Penn National to preserve all historic insurance policies and policy-related information and to immediately suspend all auto-delete or other routine destruction policies for historic insurance policies and policy related information, including email containing copies of historic insurance policies. This protective order will remain in place until this Court orders otherwise.

AND IT SO ORDERED this ____ day of _____, 2022.



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Protective Order

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

ORDER ON DISCOVERY MOTIONS

This matter is before the Court on various discovery disputes between the Receivership for Covil Corporation (“Covil”) and Pennsylvania National Mutual Casualty Insurance Company (“Penn National”). There are numerous matters before the Court at this time, including Ellis & Winters LLP’s March 22, 2022 letter report on its inquiry into the existence and storage of certain historic policy documents pursuant to this Court’s November 5, 2021 Discovery Order;¹ the Receiver’s February 24, 2022 Motion to Compel and April 1, 2022 Supplemental Motion to Compel; the Receiver’s March 17, 2022 Motion to Challenge the Confidentiality of Certain Documents; Penn National’s December 22, 2021 Motions to Quash; and Penn National’s April 7, 2022 Motion to Seal.²

¹ The Court also considered the prior letter reports filed by Penn National in response to the Court’s November 5, 2021 Discovery Order.

² Also before the Court is the Receiver’s motion to compel Penn National in the non-Covil Receiverships. Specifically, the Receiver seeks insurance policies and policy-related documents from Penn National for 14 other entities for which Mr. Protopapas is currently the receiver. In response to the Receiver’s Subpoenas *Duces Tecum*, Penn National produced boiler plate objections and zero documents. See March 1, 2022 Motion to Compel filed against Penn National on behalf of the Receiver for Flame Refractories, Inc. and United Construction Co. of Rome, Inc., General Boiler Casing Company, Inc., Payne & Keller Company, Piedmont Insulation, Inc. and Reynolds Insulation, Pipe & Boiler Insulation, Inc. and Carolina Industrial Insulating Co., Presnell Insulation, Co., Standard Insulation Company of N.C.

BACKGROUND

Peter D. Protopapas was appointed by this Court in 2018 as the Receiver for Covil, a defunct South Carolina corporate entity. Covil engaged in the business of installing, removing and sometimes selling insulation made with asbestos materials in the State of South Carolina and in other places in the Southeast for many years between the 1960s and the 1990s. Covil has been sued in many asbestos lawsuits, and this Court was appointed to manage the asbestos docket at the direction of the Chief Justice of the Supreme Court of South Carolina. This Court therefore charged the Receiver with marshalling Covil's assets, including all occurrence-based liability insurance policies, that may respond to the asbestos suits pending against Covil.

Prior to the Receiver's appointment, this Court had a regular situation occur in which Covil Corporation would not respond to requests for information, necessitating orders compelling compliance with discover obligations. Ultimately, after granting numerous motions to compel with no response, this Court struck Covil's pleadings in an underlying asbestos case as a sanction for its failure to respond to discovery.

This Court learned subsequently that, after letting its charter lapse from the State of South Carolina, Covil had been effectively managed by the attorneys for certain insurance companies that covered Covil.³ The strategic litigation approach adopted on Covil's behalf by other insurers was to not participate in discovery. Rather, it was to accept the pleadings on Covil's behalf and then engage in a course of conduct of waiting until the last moment and then settling the cases at a nuisance value. The other insurers appeared to want to be as minimally responsive as possible

Inc., Davis Mechanical Contractors, Inc., Great Barrier Insulation Co., HEFCO, Inc., J. & L. Insulation, Inc., and J.R. Deans Company, Inc., in Case Numbers 2020-CP-40-04475, 2021-CP-40-03484, 2020-CP-40-01821, 2020-CP-40-05526, 2021-CP-40-01364, and 2020-CP-40-01952. Penn National takes the position that it cannot reasonably search its historic policies contained on microfiche cards unless the Receiver provides a specific policy number.

³ Penn National was not providing a defense in the underlying asbestos cases for Covil at that time.

to avoid discovery of the occurrence-based general liability policies covering Covil. When this Court learned of certain Covil insurers' conduct, it appointed a receiver to manage Covil's assets. And the only assets Covil had at that time, and has to this day, are the coverage provided by the "legacy" occurrence-based general liability insurance policies covering Covil that were issued during the time it was an active asbestos insulation company.⁴

Covil, under the guidance of the Receiver, has identified numerous insurance policies issued by several different insurance companies covering its defense and indemnity obligations for the asbestos suits. A court-approved Qualified Settlement Fund ("QSF") has been created and funded by the proceeds of settlements with at least six insurers. Those insurance companies went through a long process of disclosure and negotiation, resulting in approval by the Court of settlement proposals that initially funded the QSF.

Penn National is now the company with which the Receiver is seeking information and documents related to the "legacy" occurrence-based liability policies it issued covering Covil as a primary or additional insured. Penn National first came to this Court's attention in connection with the *Finch* case, which was an asbestos case tried in federal court in North Carolina resulting in a \$32.7 million judgment against Covil. Specifically, certain general liability insurance policies issued by Penn National that covered Covil were located by Penn National in response to an asbestos claimant subpoena in the *Finch* case that provided specific policy numbers for certain policies issued by Penn National to Covil. After his appointment, the Receiver subsequently requested insurance policy information from Penn National as well.

⁴ In *PCS Nitrogen, Inc. v. Continental Casualty Company, et al.*, the SC Supreme Court adopted "the post-loss exception and [held] insurer consent is not required for an assignment of liability insurance coverage rights made after a loss." No. 28093, 2022 WL 1101704, at *4 (S.C. April 13, 2022).

Throughout the Covil litigation, Penn National has taken the position that it is unable to access any possible historic occurrence-based liability coverage, from its Iron Mountain, Inc. storage facility⁵ or any other storage facility, for Covil or any other policyholder it may have insured in the past unless it is provided with a policy number. It was then developed that Penn National has stored a significant amount of historic policy-related material on microfiche cards. But, again, Penn National has repeatedly taken the position that given that its historic policy related documents are stored on microfiche by policy number, and due to the fact that the material is so voluminous, it cannot search its historic policy related documents on microfiche unless it is given a policy number.

Covil diligently pursued discovery of all insurance policies issued by Penn National that cover Covil, in any way, through written requests for information as well as multiple depositions. This Court has now gone through several hearings with Penn National and the Receiver on motions to compel relating to the ability to locate policies in Penn National's historic repositories to discover whether any of them relate to Covil or to other receiverships that have been established in this state, of which Mr. Protopapas is the Receiver. No material has been forthcoming from Penn National's historic or "legacy" microfiche archives unless it was provided with a policy number. That is still where the Court finds itself today.

It is axiomatic that insurers, such as Penn National, have a duty to cooperate with the Receiver in the search for historic liability policies by complying with their discovery obligations. Failure to do so increases expenses and wastes this Court's time. This Court fully expects that an insurance company served with discovery requests from a receiver in this state, seeking the

⁵ Iron Mountain Inc. is a national document management firm which provides storage and information management services, including information management, digital transformation, secure storage, secure destruction, data centers, cloud services, and art storage and logistics. It is highly likely this firm could provide services that would digitize and make searchable all policies and documents that Penn National stores with it.

identification and production of insurance policies issued to the company as a named insured or which otherwise includes the company as a supplemental or additional insured, will search its entire repository of insurance policies and policy-related information for documents identifying the defunct company at issue. The Receiver need only provide the insurance company with the name of the defunct company for which it is seeking to marshal insurance assets. For the avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

Penn National has totally and completely failed to meet this most basic discovery obligation here. Penn National's discovery conduct has created considerable burdens for Covil and this Court. The Receiver has diligently sought discovery of Covil insurance policies and related documentation from Penn National for several years. However, Penn National refused to review its own microfiche and paper policy related historical documents unless it was provided with a policy number for the specific policy requested. Covil was therefore forced to file numerous motions to compel. This Court conducted multiple hearings on Penn National's discovery intransigence and issued multiple discovery orders compelling Penn National to meaningfully participate in discovery. A brief summary follows:

- At the January 25, 2021 discovery hearing, the Court ordered the Receiver for Covil to develop a specific inquiry and issue a new subpoena, if necessary, providing a list of job sites and owners to Penn National and ordered Penn National to conduct the searches and to respond with its findings promptly.
- On April 22, 2021, Covil filed a second motion to compel when Penn National refused to comply with its discovery obligations. Following a hearing, the Court granted the motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." July 1, 2021 Order at 6. The Court ordered Penn National to "thoroughly search its paper records using the list

of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.*

- On August 20, 2021 and September 8, 2021, Covil filed additional motions to compel in which Covil informed the Court that, among other things, Penn National, despite the Court's previous orders, continued to take the position that it could only search its historic policies contained on microfiche cards by policy number. On October 28, 2021, the Court held a motions hearing, and on November 5, 2021, the Court granted Covil's motions to compel, ordering that Covil's defense counsel in underlying asbestos cases, Ellis & Winters LLP, use its professional judgment to develop and implement an effective scope of document review to identify any additional Penn National policies that may provide coverage for Covil as either a primary or additional insured and make "suggestions for meeting Covil's needs to identify responsive coverage" while "not wasting Penn National's resources".
- Most recently, in light of Penn National's failure to issue a litigation hold to prevent the routine or automatic destruction of documents related to the Covil litigation, on February 11, 2022 the Court granted Covil's motion for a protective order, prohibiting Penn National from destroying its historic-policy related documents until the Court holds otherwise.

Despite this Court's prior orders, as of November 5, 2021, Penn National had not performed a complete manual search of its historic insurance policies contained on microfiche cards. Nor had it processed the microfiche cards so that the information could be searched electronically. It had not even sought estimates to do such work from vendors with experience imaging microfiche. This information is critical and discoverable not only in this coverage action, but also in the numerous underlying asbestos lawsuits in which Covil is a defendant. Covil has been sued in asbestos liability cases in South Carolina state courts and federal courts, and Covil needs its insurance policies to respond to routine discovery.⁶

⁶ See Rule 26(b)(2), SCRCP ("A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfying the judgment."); Rule 33(b)(4), SCRCP standard interrogatory (4) ("Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of policies involved and the amount or amounts of liability coverage provided in each policy); see also Fed. R. Civ. P. 26(a)(1)(A)(iv) ("a party must . . . provide to the other parties . . . for inspection and copying . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment").

Ellis & Winters LLP was appointed by Covil's insurers to defend Covil in the underlying asbestos cases. Ellis & Winters' defense costs have been funded by Covil's insurers, including Penn National. This Court therefore ordered Penn National to open its repository of insurance policies and to facilitate a review performed by Covil's insurer-appointed defense counsel, Ellis & Winters. The Court directed the firm to perform this review using its own sound professional judgment and to report back to the Court with suggestions for meeting Covil's needs to identify responsive coverage while not wasting Penn National's resources. This Court entrusted Ellis & Winters with responsibility for this search because the insurance information is important and discoverable in its work as Covil's underlying asbestos defense counsel.

Approximately 120 days later, Ellis & Winters filed its March 22, 2022 report with this Court ("the Report"). After years of assurances from Penn National that it could not locate historic policies without a policy number, the Report provided an array of options for imaging and review of Penn National's policies, even in the absence of a policy number. As is relevant here, the "third option" involves imaging commercial line policy microfiche cards, eliminating certain cards solely by policy prefix. Specifically, Ellis & Winters selects a subset of commercial line microfiche cards to image by eliminating cards bearing prefixes that correspond to certain non-commercial liability policy types. The Report also explained that, after one day of in-person searching within microfiche cards at Penn National's headquarters, Ellis & Winters located three newly discovered policies covering Covil that Penn National had not produced to Covil, which all spanned the relevant timeframe of 1984 to 1986 and consisted of one inland marine policy, one boiler machinery policy, and one auto policy. Penn National's failure to independently identify and produce these additional insurance policies to Covil, which were requested years ago, is cause for great concern not only here but also in other Receivership litigation involving Penn National.

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.

RULINGS AND ORDERS

1. Ellis & Winters' Report and Recommendations

A. Imaging and Review of Penn National's Microfiche Cards

After careful consideration, the Court is persuaded that the third option recommended by Ellis & Winters in its March 22 report will meet Covil's needs to identify responsive coverage while conserving Penn National's resources.

The Court finds that Ellis & Winters has effectively narrowed the universe of potentially responsive documents down to a set of microfiche cards containing historic insurance policies and policy-related information issued prior to 1992 and maintained by Penn National. The Court finds that Ellis & Winters' third option provides a reasonable and intentional process for further reducing that universe by policy number prefix to identify types of policies that are not relevant and can be excluded from scanning.

The Court therefore adopts the “third option” recommended by Ellis & Winters and DIRECTS Ellis & Winters to use its professional judgment⁷ to develop a methodology to select a subset of commercial line microfiche cards to image by eliminating certain cards bearing prefixes that correspond to certain non-commercial liability policy types.⁸ The methodology will be shared with both the Receiver and Penn National. However, Ellis & Winters is not required to receive the approval of either the Receiver or Penn National in developing its methodology.

The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the “selected vendor”), to award the bid, and to supervise the selected vendor’s imaging of the microfiche cards into a format that is in a searchable database. Ellis & Winters will advise the Court and the parties as to the identity of the selected vendor and the terms of the selection.

Once the universe of records to image is determined by Ellis & Winters, images are scanned by the selected vendor, and information is available in a searchable database, the Court DIRECTS Ellis & Winters to provide Penn National and the Receiver with full access, on a rolling basis, to the database to conduct document reviews in order to search for responsive information for the Covil Receivership as well as the other Receiverships for which Peter D. Protopapas has been appointed Receiver.

To be clear, Ellis & Winters is not charged with reviewing the policies in the final database for responsiveness to the Receiver’s discovery requests. Ellis & Winters and its selected vendor are the vehicles to get the policies into a database where the information can be reviewed for responsiveness by the Receiver and his outside counsel. The Receiver and his outside counsel

⁷ Both the Receiver for Covil and Penn National have expressed confidence in the professional judgment of Ellis & Winters. See November 5, 2021 Discovery Order at 2.

⁸ The non-commercial liability policy types include business owner, fidelity bond, surety bond, and personal umbrella policies.

therefore must have full and unfettered access to every page of every insurance policy and policy-related document that Ellis & Winters and its selected vendor make available in the database. This will necessarily include reviewing records of other insureds' policies.

The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's intransigence, the Court will not limit the Receiver's access to any of the information in the microfiche database. Ellis & Winters, however, should continue to make itself available to assist the Receiver search the records for the information that is needed to provide Covil with knowledge about its assets, including information concerning Penn National's policy prefixes and the identification of prefixes with policy lines of business identified in Ellis & Winters' report.

This Court DIRECTS Ellis & Winters to initiate and facilitate the above-referenced process immediately and to report back to the Court, on an interim basis, regarding progress made and any impediments to its progress. Time is of the essence.

Penn National is ORDERED to make all of its microfiche cards immediately available for review and imaging by Ellis & Winters and its selected vendor.

Penn National is also ORDERED to produce immediately to Covil all code keys for its policy prefixes, including but not limited to the documentation identifying prefixes with policy lines of business identified in Ellis & Winters' report.⁹

⁹ Ellis & Winters explained to the Court at the April 11, 2022 hearing that it learned during its inquiry that Penn National policy numbers are constructed typically to have a numeric or an alpha prefix that indicates the type of policy. The Receiver is entitled to all information Penn National provided to Ellis & Winters regarding its policy prefixes. *See, e.g.*, Ellis & Winters' Report at 2.

Penn National is further ORDERED to produce immediately to Covil all information that was disclosed to Ellis & Winters and used as a basis for identifying policy numbers for the three newly discovered Covil insurance policies located by Ellis & Winters on March 17, 2022. *See* Report at 3. This Court is deeply troubled that Penn National had access to these policy numbers in its underwriting files but did not disclose the existence of this information to the Court or bother to produce the three policies to Covil for several years.

Finally, Penn National is ORDERED to produce immediately all underwriting documentation in its possession, custody, or control for all the Receiverships for which Mr. Protopapas is the court-appointed Receiver.

B. Ellis & Winters Fees – Work to Date

Ellis & Winters reported at the April 11, 2022 hearing that all of its invoices for work to date, totaling approximately \$67,000, have been submitted to Penn National and/or Penn National's outside counsel at Goldberg Segalla LLP for payment but that those invoices have not been paid.

The Court finds that the fees and costs incurred by Ellis & Winters to date are reasonable for the tasks that were performed.

The Court hereby ORDERS Penn National to pay all outstanding invoices submitted by Ellis & Winters to Penn National and/or Penn National's outside counsel at Goldberg Segalla LLP in connection with this Court's November 5, 2021 Order within ten business days from the date of this Order.

C. Ellis & Winters and Selected Vendor Fees – Work Going Forward

This Court DIRECTS Ellis & Winters to set up a system of periodic billing to Penn National through Penn National's outside counsel at Goldberg Segalla for its work and its selected vendor's work in accordance with this Order.

This Court ORDERS that Penn National will pay all reasonable fees and costs invoiced by Ellis & Winters and its selected vendor for the work undertaken in accordance with this Order within thirty calendar days of receipt of the invoice.

This Court finds that the reasonable fees and costs that will be paid by Penn National are proportional to the needs of this case as well as the numerous other Receiverships for which this Court has appointed Mr. Protopapas. The Court is also in agreement with Ellis & Winters' well-reasoned evaluation at the April 11 hearing that its "third option" proposal constitutes "fairly typical discovery" in the context of the microfiche cards that are stored at Penn National.

This Court DIRECTS Ellis & Winters to advise the Receiver and the Court, on a periodic basis, of the expenses incurred for the work performed in accordance with this Order.

D. Confidentiality

This Court ORDERS Ellis & Winters and its selected vendor to keep confidential all insurance policies and policy-related documents processed from the microfiche cards and uploaded to the database.

This Court ORDERS the Receiver and his outside counsel to keep confidential all insurance policy or policy-related documents processed from the microfiche cards and uploaded to the database, and information obtained from those documents, that provide coverage to Covil or any other entities under Receiverships for which Mr. Protopapas is the court-appointed Receiver, except to the extent that such policies or information need to be disclosed in connection with mediation or any other court-supervised activity, including litigation.

This Court further ORDERS the Receiver to keep confidential all non-Covil and non-Receivership policies and policy related documents processed from the microfiche cards and uploaded to the database.

2. Covil's Motion to Challenge Confidentiality and Penn National's Motion to Seal

Covil moves to lift the confidential designation on the Document Retention Policies and Litigation Hold Procedure that Penn National produced to the Receiver on March 9, 2022 as "confidential material." This Court GRANTS the motion.

Penn National has not demonstrated that the documents contain propriety or commercially sensitive information worthy of protection under South Carolina law. The Court is also persuaded that Penn National has waived its argument that its document retention policies are confidential given that it made its retention document publicly available in other coverage litigation.¹⁰ Penn National's arguments to the contrary are unpersuasive and border on being specious.

Penn National is therefore ORDERED to remove the confidential designation from its Document Retention Policies and Litigation Hold Procedures and to produce all of them to Covil within five business days.

Penn National also filed a Motion to Seal Exhibit 12 to its opposition to Covil's Motion and Supplemental Motion to Compel. Covil has no objection to the motion. The motion is GRANTED, and Exhibit 12, which is a spreadsheet that purportedly shows information regarding non-workers compensation insurance policies issued by Penn National, is SEALED.

3. Penn National's Motion to Quash Deposition(s) and Covil's Motions to Compel

¹⁰ See, e.g., *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Tate Andale, Inc.*, No. 1:17-cv-00670 (D. Md.), ECF No. 50-32.

During the January 11, 2022 motions hearing, this Court noted that it would hold Penn National's motion to quash Covil's Rule 30(b)(6) deposition in abeyance until the Receiver has had an opportunity to develop the record more thoroughly through written discovery.

On January 18, the Receiver served requests for admission, requests for production, and interrogatories on Penn National. On February 17, Penn National produced its written responses to the Receiver's discovery requests and, on March 9, it produced certain documents.

Covil argues that Penn National failed to produce all responsive documents and failed to disclose all relevant information in response to its discovery requests. Covil also argues that Penn National, in certain instances, provided evasive answers. Covil therefore moved for an order compelling Penn National to provide revised and complete discovery responses.

This Court DENIES Penn National's motion to quash and DIRECTS Covil to serve a Rule 30(b)(6) deposition notice on Penn National for a deposition to take place as soon as practicable based on the date of this Order. With respect to at least one of the topics at the Rule 30(b)(6) deposition, this Court further ORDERS Penn National to provide a corporate representative to testify as to why Penn National uses the terminal digit filing system to store its historic occurrence-based liability policies.¹¹

Finally, the Court will HOLD IN ABEYANCE Covil's Motion to Compel and Supplemental Motion to Compel until the Receiver has had an opportunity to conduct the Rule 30(b)(6) deposition. If, after the deposition, the parties still cannot resolve any outstanding disputes, then they are ordered to report back to this Court to identify any remaining issues.

¹¹ This Court learned from Ellis & Winters during the April 11 hearing that Penn National used a terminal digit system to file its historic insurance policies and policy-related documents. That is, Penn National used approximately eight- or nine-digit policy numbers and filed the policies not by the numbers on the left side but by the numbers on the right side. Ellis & Winters' IT professional, Brian Flatley, could not speak to why a corporate entity, such as Penn National, would utilize such a system. However, this Court observes that such a system appears to make it much harder to find historic insurance policies when requested by their insureds.

CONCLUSION

This Court has serious concerns that Penn National's systemic failure to search for and produce insurance policy information to its insured in this case, unless it is given a specific policy number, may impact other South Carolina consumers who no longer have access to their policy numbers as well. The Court therefore DIRECTS the Receiver to transmit a copy of this order to the South Carolina Department of Insurance, Office of Consumer Services, for its review and information, at the following address: P.O. Box 100105, Columbia, South Carolina 29202-3105.

This Order applies in this case as well as in any other matters in which Mr. Protopapas is appointed the Receiver.

[ELECTRONIC SIGNATURE ON FOLLOWING PAGE]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through its
duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

ORDER

Penn National moves this Court to reconsider its May 5, 2022 Order on Discovery Motions, which addressed: (1) Ellis & Winters LLP's March 22, 2022 report on its inquiry into the existence and storage of certain historic policy documents pursuant to this Court's November 5, 2021 Discovery Order; (2) the Receiver's February 24, 2022 Motion to Compel and April 1, 2022 Supplemental Motion to Compel; (3) the Receiver's March 17, 2022 Motion to Challenge the Confidentiality of Certain Documents and Penn National's April 7, 2022 Motion to Seal; and (4) Penn National's December 22, 2021 Motions to Quash.

Upon consideration of Penn National's Motion for Reconsideration, the Receiver's Opposition to Penn National's Motion for Reconsideration, and for good cause shown, it is **HEREBY ORDERED** that Penn National's Motion for Reconsideration is **DENIED**. By separate

Order Penn National's 2022 Motion to Seal Exhibit 1 has been granted with consent of the Receiver.

This matter is an ongoing discovery issue, revolving around Penn National's refusal to produce insurance policies, and thus is not immediately appealable. Accordingly, a Motion for Reconsideration is inappropriately raised. The South Carolina Supreme Court has held, "an order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision." *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005)(See, *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974); *Patterson v. Specter Broadcasting Corp.*, 287 S.C. 249, 335 S.E.2d 803 (1985)). Pursuant to S.C. Code § 14-3-330(1), intermediate orders that involve the merits of the case may be immediately appealed and pursuant to S.C. Code § 14-3-330(2), interlocutory orders affecting a substantial right may be immediately appealed. An order which involves the merits, "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Id.* (Citing, *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780)). An order affecting a substantial right must "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Id.* (Citing, *Id.* at 335 n. 4, 426 S.E.2d at 780 n. 4). Orders involving discovery disputes such as this do not qualify as appealable Orders.

Additionally, Penn National's Motion for Reconsideration does not recite an accurate reflection of this Court's Order or the activity of the parties in this protracted discovery dispute. The Receiver's reply, filed May 18, 2022, in opposition to Penn National's Motion for Reconsideration is a completely accurate recital of the law and facts of this discovery dispute and of the Orders of this Court including the May 5, 2022 Order on discovery motions. This Order must be immediately obeyed.

It is **SO ORDERED**.

[Electronic Signature on Following Page]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company; Sam J. Crain & Co.,
Inc.; and South Carolina Property & Casualty
Insurance Guaranty Association,

Defendants.

CASE NUMBER: 2020-CP-40-02098

PROPOSED SCHEDULING ORDER

Upon consideration of the arguments made at the Status Conference held in the above referenced matter on September 8, 2022, the Court orders as follows:

1. Mediation shall occur on or before November 10, 2022.
2. A pre-trial hearing shall be held on November 18, 2022.
3. This matter is set for trial on December 12th or December 14th.
4. The parties shall submit and exchange Findings of Fact/Conclusions of Law (hereinafter “FOF/COL”) no later than seven (7) days before the trial of this matter.
 - a. Responses to each party’s FOF/COL shall be submitted and exchanged no later than four (4) days before trial.
5. The parties shall submit and exchange pre-marked trial exhibits no later than twenty-one (21) days before trial.
 - a. The parties shall submit and exchange objections to pre-marked trial exhibits no later than fourteen (14) days before trial.

- b. Responses to each party's exhibit objections shall be submitted and exchanged no later than seven (7) days before trial.
- 6. The parties shall submit and exchange trial witness lists to include expert witnesses no later than twenty-one days (21) days before trial.
- 7. The parties shall submit and exchange deposition designations no later than seven (7) days before trial.
 - a. The parties shall submit and exchange any objections and counter page/line designations of depositions to be read at trial no later than four (4) days before trial.
 - b. The parties shall submit and exchange any objections to counter page/line designations and any final counter designations no later than two (2) days before trial.
- 8. The parties shall file motions in limine no later than fourteen (14) days before trial.
 - a. Responses to each party's motions in limine shall be submitted and exchanged no later than seven (7) days before trial.

IT IS SO ORDERED.

[Signature Appears on following page.]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Scheduling Order

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

ORDER ON DISCOVERY MOTIONS

This matter is before the Court on various discovery disputes between the Receivership for Covil Corporation (“Covil”) and Pennsylvania National Mutual Casualty Insurance Company (“Penn National”).¹ After considering the pleadings, the submissions of the parties, and argument of counsel, the Court makes the following orders on these discovery matters:

REQUEST FOR PRODUCTION NO. 11

In the Receiver’s Third Request for Production (dated January 18, 2022), Request for Production No. 11, the Receiver seeks documents related to Penn National’s treatment of certain insurance policy documents to permit the Receiver to ascertain whether Penn National may have improperly discarded or destroyed certain relevant Covil-related documents. Penn National contends that it is not required to respond to this document request because of the pendency of its appeal of an unrelated May, 5, 2022 discovery order issued by this Court regarding distinct and

¹ Specifically, the Court considered Covil’s Motion to Compel filed with this Court on November 4, 2022 as well as Covil’s previously filed Motion to Compel on February 24, 2022 and a Supplemental Motion to Compel on April 1, 2022, and Penn National’s responses to same.

separate discovery issues. The Court asked counsel for Penn National how the May 5, 2022 discovery order is related to this discovery dispute. The Receiver moved to compel production of these materials from Penn National. Penn National's counsel failed to identify any relationship. The Court finds that the discovery promulgated by Request for Production No. 11 is appropriate and entirely unrelated to the issues under consideration in Penn National's appeal of this Court's May 5, 2022 discovery order. As such, the Receiver's motion to compel is hereby GRANTED, and Penn National is ORDERED to produce "[a]ll documents and communications related to the process of identification, collection, and disposal of insurance policies and policy-related documents pursuant to Penn National's document retention or purge policies and practices from [2018] to present" to the Receiver by December 1, 2022.

THE RECEIVER'S FOURTH SET OF REQUESTS FOR PRODUCTION

The Receiver propounded his Fourth Set of Requests for Production on May 13, 2022. This discovery is specifically designed to elicit even more specific information about Penn National's document retention policies and practices to evaluate whether the absence of a litigation hold resulted in potential spoliation. The Receiver moved to compel responses to request numbers 1-17, and Penn National contends that the pendency of its appeal prevents it from having to respond. These requests seek information unrelated to this Court's May 5, 2022 and Penn National's appeal thereof. The Court GRANTS the Receiver's motion and ORDERS Penn National to provide fulsome responses and a complete production in response to these requests by December 1, 2022.

UNDERLYING CLAIMS FILES FROM COVIL ASBESTOS CASES

The Receiver's Request for Production number 4 seeks Penn National's underlying claims files for fourteen asbestos cases wherein Penn National participated in funding settlements on behalf of

Covil. After several unsuccessful requests to obtain these files, the Receiver filed a motion to compel these claims files. At the hearing on this motion to compel, Penn National's counsel consented to the production of these claims files on or before December 1, 2022. The Court acknowledges this agreement and ORDERS the parties to abide by its terms.

DEPOSITION DATES FOR BOYD WRIGHT

The Receiver has requested deposition dates to depose Boyd Wright, Penn National's claims examiner for the Covil asbestos claims. At the status conference, Penn National's counsel agreed to provide dates for this deposition by November 15, 2022. The Court acknowledges this agreement and ORDERS the parties to abide by its terms.

IT IS SO ORDERED.

[JUDGE'S ELECTRONIC SIGNATURE TO FOLLOW]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2020-CP-40-02098
Covil Corporation, by and through its duly	)	
appointed Receiver Peter D. Protopapas	)	
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
Pennsylvania National Mutual Casualty Insurance	)	
Co.; Sam J. Crain & Co., Inc.; and South Carolina	)	
Property and Casualty Insurance Guaranty	)	
Association,	)	
	)	
Defendants.		

This matter comes before me upon Defendant Penn National's Motion to Confirm Jury Trial Demand, filed December 2, 2022 at 4:42 pm. This matter is scheduled for a nonjury trial in the Richland County Judicial Center at 9:30 am on December 12, 2022.

On April 27, 2020, Covil Corporation, through its Receiver Peter D. Protopapas, filed its Complaint against Pennsylvania National Mutual Casualty Insurance Co.; Sam J. Crain & Co., Inc.; and South Carolina Property and Casualty Insurance Guaranty Association. The Complaint recites the following causes of action:

First, Second, and Third Causes of Action are for Declaratory Judgments against Penn National, regarding the coverage and meaning of its policies of insurance for Covil. None of these matters are triable to a jury. The Fourth Cause of Action is for negligence for failure to procure insurance against the Crain Agency, Covil's insurance broker. Crain has never appeared or answered. The Fifth Cause of Action is for breach of contract against Crain. It has not answered or appeared. The Sixth Cause of Action is for a declaratory judgment against the

Guaranty Association for any amounts due Covil from Mission, a liquidated insurer which had excess coverage for Penn National.

The Prayers for Relief against Penn National ask the Court to declare the meaning of its insurance policies insuring Covil. None of the Causes of Action or Prayers for Relief as to Penn National raise issues which entitle Penn National to a jury trial. Plaintiff Covil has today filed a Notice that it seeks only declarations concerning its policies with Penn National. It has further dismissed Defendant Crain without prejudice. Crain was the only defendant against whom the at law causes of action for negligence and for breach of contract were brought.

Therefore, as previously scheduled, this nonjury matter will proceed to trial as to Penn National on Monday, December 12, 2022 at 9:30 am.

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE TO FOLLOW]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	
Covil Corporation, by and through its duly	)	C.A. No. 2020-CP-40-02098
Appointed Receiver Peter D. Protopapas,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING COVIL'S
	)	MOTION FOR ATTORNEYS'
v.	)	FEES AND COSTS
	)	
Pennsylvania National Mutual Casualty	)	
Insurance Company, <i>et. al</i> ,	)	
	)	
Defendants.	)	
	)	

This matter is before the Court on Covil's Motion for Attorneys' Fees and Costs under Rules 26 and 37(a)(4) of the South Carolina Rules of Civil Procedure. The motion arises out of seven motions to compel filed between January 2021 and November 2022 on various discovery disputes between the Receiver for Covil Corporation ("Covil") and Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). The Court held a hearing on the motion on April 19, 2023. Present at the hearing were G. Murrell Smith, Jr., Jonathan M. Robinson, and W. Brad Nes on behalf of Covil and Brady A. Yntema and Kirby D. Shealy, III, on behalf of Penn National. The Court has considered the motion and briefing, including the supplemental declarations, extensive arguments of counsel, and an *in camera* review of the unredacted billing records. The Court **GRANTS** the motion and orders Penn National to pay attorneys' fees in the amount of \$671,693.

BACKGROUND

This Court appointed Peter D. Protopapas in November 2018 as the Receiver for Covil, a defunct South Carolina corporate entity. Covil engaged in the business of installing, removing,

and sometimes selling insulation made with asbestos materials in the State of South Carolina and in other places in the Southeast for many years between the 1960s and the 1990s. Covil has been sued in many asbestos lawsuits before this Court, which was appointed to manage the asbestos docket at the direction of the Chief Justice of the Supreme Court of South Carolina. This Court therefore charged the Receiver with marshaling Covil's assets, including all occurrence-based liability insurance policies, that may respond to the asbestos suits pending against Covil.

Prior to the Receiver's appointment, this Court became aware of a regular pattern in which Covil Corporation would not respond to requests for information, necessitating orders compelling compliance with discovery obligations. Ultimately, after granting numerous motions to compel with no response, this Court struck Covil's pleadings in an underlying asbestos case as a sanction for its failure to respond to discovery.

This Court learned subsequently that, after letting its charter from the State of South Carolina lapse, Covil had been effectively managed by the attorneys for certain insurance companies that covered Covil.¹ The strategic litigation approach adopted on Covil's behalf by other insurers was not to participate in discovery. Rather, it was to accept the pleadings on Covil's behalf and then engage in a course of conduct of waiting until the last moment and then settling cases at a nuisance value. The other insurers appeared to want to be as minimally responsive as possible to avoid discovery of the occurrence-based general liability policies covering Covil.

When this Court learned of certain Covil insurers' conduct, it appointed a receiver to manage Covil's assets. Covil's only assets are the "legacy" occurrence-based general liability policies covering Covil that were issued during the time it was an active asbestos insulation company.

¹ Penn National was not providing a defense in the underlying asbestos cases for Covil at that time.

Covil, under the guidance of the Receiver, has identified numerous insurance policies issued by several different insurance companies covering its defense and indemnity obligations for the asbestos suits. A court-approved Qualified Settlement Fund (“QSF”) has been created and funded by the proceeds of settlements with at least six insurers. Those companies engaged in a long process of disclosure and negotiation, resulting in approval by the Court of settlement proposals that initially funded the QSF.

Penn National is now the last known insurance company from which the Receiver seeks information and documents related to the “legacy” occurrence-based liability policies it issued covering Covil as a primary or additional insured. Penn National first came to this Court’s attention in connection with the *Finch* case, an asbestos personal injury case tried in federal court in North Carolina resulting in a \$32.7 million verdict against Covil in October 2018. Specifically, the Court became aware that two general liability policies issued by Penn National that covered Covil were located by Penn National in June 2018 in response to an asbestos claimant subpoena in *Finch*. The subpoena requested (1) the policies associated with two known policy numbers, and (2) all other insurance policies issued by Penn National that covered Covil. Penn National responded only with copies of the two policies with known policy numbers listed in the subpoena.²

Following his appointment in November 2018, the Receiver requested from Penn National copies of all the insurance policies it issued covering Covil. This effort as to Penn National began in November 2019, and continues to the present, as the Receiver continues to seek historical insurance records more than three years later. To carry out his court-appointed duty to locate and

² In the hearing on the Receiver’s motion, counsel for Penn National represented that the *Finch* plaintiffs requested only the two policies for which the plaintiffs were aware of the policy numbers. The Court notes that this is incorrect.

marshal the assets of Covil, the Receiver has served a subpoena and five sets of written discovery on Penn National and has taken four depositions of Penn National employees.

Throughout this extensive discovery, Penn National has taken the position that it is unable to access any possible historic occurrence-based liability coverage for Covil or any other policyholder it may have insured in the past unless it is provided with an exact policy number. This is even despite that Penn National admitted in answers to interrogatories on May 10, 2021, that it may have issued relevant insurance coverage located in its files: “Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents that may be responsive to this Interrogatory.” This interrogatory response necessarily required the Receiver to make inquiries into the Covil coverage that Penn National admitted it may have in its historical files.

At each turn in discovery, Penn National pulled back a small portion of the curtain, revealing just enough information about the existence of historical records and its document maintenance system to raise more questions to which it would not respond, and forcing Covil to return to this Court with additional requests for discovery intervention.

The Receiver ultimately was forced to file six different motions to compel on this issue. After each of this Court’s many discovery orders, Penn National and its representatives consistently failed to engage in a search for the policies in question, showing instead their purposeful stonewalling of the discovery process. It is clear that this is not a case of an insurance company lacking any records. Instead, it is a case in which the insurer decided to store voluminous records in such a way that it would be expensive to search them to locate a policyholder’s insurance

policies in any way other than by policy number, and now the insurer seeks to avoid evaluating its own records.

Covil's six motions to compel related to Penn National's failure to participate in discovery related to historic insurance policies were as follows:

January 15, 2021: Motion to compel a policy search after claims handler Boyd Wright's deposition revealed that he spent merely a few "minutes" in preparation for his deposition, and that he was not aware that a search through the entire company records occurred.

In a hearing on January 25, 2021 related to the policy search deficiencies Mr. Wright's deposition uncovered, this Court ordered Covil to "develop a more complete list of job sites and possible agents that might have been involved in procuring this coverage from Penn National," and "[gave] Penn National 15 days to respond to it." The Court further warned Penn National against asking Covil "for something that's just as ridiculous as what you say they asked for from you. They are not going to know policyholder's numbers or policyholders."

April 22, 2021: Motion to compel complete responses to the subpoena Covil issued as a result of this Court's January 25 Order, and to which Penn National failed to respond meaningfully.³

In a related order dated July 1, 2021, this Court found, "Moreover, although Penn National asserts it has 'exercised reasonable diligence in searching its files,' Penn National's response to the Receiver's subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. . . This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National's efforts to search for coverage."

August 20, 2021: Motion to compel a thorough search of the Penn National records as required by this Court's July 1 Order, after a deposition of Penn National employee

³ The Court notes that Penn National did provide Covil with copies of three policies insuring Covil once a hearing date was set on the motion to compel. Even with the production of the three insurance policies, Penn National failed to fully respond to the subpoena.

Brent Reifsnyder made clear that even after this Court's order, he had spent less than five minutes searching for responsive documents, he did not take any steps to locate policy-related documents, he did not consult with anyone at Penn National or otherwise about how he might be able to search for documents other than by policy number, and he had never reviewed the Receiver's list of job sites that this Court had ordered Covil to prepare in January 2021. Mr. Reifsnyder further confirmed that Penn National itself designed the system of organizing its records by policy number.

September 8, 2021: Motion to compel a thorough search of the Penn National records as required by this Court's July 1 Order, after a deposition of Penn National employee Boyd Wright made clear that Penn National's electronic system was designed in such a way as to only allow searches of policy numbers, and a search of additional or supplemental insureds would require a manual search. Further, Mr. Wright did not speak with Mr. Reifsnyder about such a process or logistics for searching the paper archives.

On November 5, 2021, following a hearing on both the August 20 and September 8 Motions, this Court found: "This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. Despite this Court's orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically." As a result, the Court entered an order requiring Penn National "to open its repository of insurance policies and to facilitate a review supervised and performed by Covil's insurer-appointed defense counsel, Ellis & Winters, LLP."

February 24, 2022: Motion to compel Penn National to produce documents related to its purge of historical insurance policy related documents, which purge was apparently revealed to the Receiver on November 19, 2021, and was made known to this Court on the Receiver's motion for evidentiary hearing on January 3, 2022. In a response to written discovery on the topic on January 18, 2022, Penn National admitted that it disposed of paper policy-related documents pursuant to its records purge policy in 2018, 2019, and 2020, and that it did not issue a litigation hold for Covil until December 2021. Further, Penn National admitted it did not review the documents it destroyed in the 2018 to 2020 period for references to Covil, and it could not identify the additional insureds or supplemental insureds listed on the documents it purged since 2018. Related discovery requests sought responsive documents and e-mail correspondence on the topic of the purge, which had not been produced in discovery.

April 1, 2022: Motion to compel Penn National to produce documents related to its purge of historical insurance policy related documents after a production of

documents included a single spreadsheet, document retention policies, and a legal hold procedure. This limited production did not include any documents to establish the parameters of the annual document purge, nor did it include any internal e-mail communications related to the purge process.

In an order dated May 5, 2022, following a hearing on both the February 24 and April 1 motions, this Court ordered Penn National to work with Covil's defense counsel in the underlying asbestos personal injury cases, Ellis & Winters, to image and review Penn National's microfiche cards on which its historical policy information is stored, and to make those records available to the Receiver; to produce all Covil underwriting information to the Receiver; and to bear the costs associated with the work performed to digitize the microfiche policy documents.

Penn National knew from the beginning of the Receiver's years-long discovery investigation that it had created a system of historical policy maintenance that would require a manual search of records should a policyholder be unable to provide a policy number. Rather than attempt a meaningful response to any of the Receiver's discovery, or otherwise offer and implement suggestions to make its system searchable, Penn National forced the Receiver and his lawyers to spend hundreds of hours over three years to reach the same conclusion. Still, after all these efforts, Covil waits for Penn National to complete the process of digitizing its historical policy records.

Penn National's stonewalling of Covil's discovery efforts extended beyond policy documents, to nearly every aspect of the litigation. Indeed, just one month prior to a scheduled trial in December 2022, Penn National had failed to produce its claim files related to fourteen asbestos claims requested by Covil, or to produce documents responsive to the Receiver's Fourth Requests for Production, until Covil filed a motion to compel. The Court granted Covil's motion to compel this discovery, which was directly relevant to the December trial date, on November 16, 2022.

LEGAL STANDARD

Under Rule 37(a)(4) of the South Carolina Rules of Civil Procedure, when a trial court grants a motion to compel, “the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys’ fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”

The South Carolina Supreme Court in *Buist v. Buist*, 410 SC 569, 766 S.E.2d 381 (2014), held that when considering whether to award attorneys’ fees a court must apply the *Glasscock* or *EDM*⁴ factors “to determine whether to award a fee, as well as the amount of the fee to award.” The six *Glasscock* factors enumerated by the South Carolina Supreme Court include: “(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services.” *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

RULINGS AND ORDERS

After careful consideration of the motion and briefing, including the supplemental declarations, extensive arguments of counsel, and an *in camera* review of the unredacted billing records, this Court finds that Covil has demonstrated the requisite factors to allow this Court to

⁴ The *E.D.M.* factors, developed more narrowly for the context of a divorce proceeding, are less instructive in an insurance dispute, and therefore are not considered in the instant analysis, but are as follows: “(1) the party’s ability to pay his/her own attorney’s fee; (2) beneficial results obtained by the attorney; (3) the parties’ respective financial conditions; (4) effect of the attorney’s fee on each party’s standard of living.” *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

render an award of attorneys' fees in the full amount requested by the Receiver's attorneys.

Award of Attorneys' Fees under Rule 37(a)(4)

Penn National's discovery conduct necessitated the Receiver's filing of a total of seven motions to compel in this case. As detailed above, the Court finds that Penn National's conduct in discovery necessitated the filing of each successive motion.

Penn National's recalcitrance to meet its discovery obligations appears directly related to its litigation strategy in the instant insurance coverage action. South Carolina law recognizes that "the insured bears the burden of proving its claim falls within the policy's coverage." *Jericho State Capital Corp. of Florida v. Chicago Title Ins. Co.*, 431 S.C. 437, 445, 848 S.E. 2d 572, 576 (2020). Penn National therefore appears to have had little independent incentive to search for all policies potentially protective of Covil in its voluminous historical records. Instead of engaging in an adequate document search as requested by the Receiver and ordered by this Court on numerous occasions, Penn National wasted this Court's and the Receiver's time and resources in its gamesmanship.

The South Carolina Supreme Court has also held that the insurer bears the burden of establishing exclusions to coverage. *See Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability."). Therefore, if Penn National is presented with a policy number, as the *Finch* plaintiffs did in June 2018, Penn National easily can locate the policy. After all, locating the policy after the insured has proven its existence is critical to Penn National's ability to establish applicable exclusions to coverage. Without access to any Covil historical archive, then, the Receiver has faced an uphill battle against Penn National.

Penn National complains that it has been forced to “play a constant game of Whack-A-Mole in responding to the flow of motions filed by Covil.” The Court finds that the opposite is true. The Receiver’s behavior has been nothing but consistent: from the beginning of this litigation, the Receiver has asked Penn National to search its records for historical insurance policies protective of Covil. Penn National also has remained consistently recalcitrant, stating since the beginning of this litigation that it “does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents that may be responsive.” In each successive discovery response, Penn National has pointed Covil in a new direction, and allowed the slow trickle of information that merely required the Receiver to seek more discovery relief from this Court. The motions to compel and hearings before this Court have made clear that the Receiver has worked tirelessly for more than three years to recover Covil’s assets—its insurance policies—from Penn National, which Penn National admits it may have.

In this context, the Court finds that Penn National’s opposition to Covil’s motions to compel was not substantially justified. The information requested in discovery is integral to the instant litigation and accessible only by Penn National.

In addition to the discovery disputes related to the historical insurance policies, in November 2022, Penn National refused to timely respond to relevant discovery in advance of a December 2022 trial date. The discovery at issue, Covil’s claim files and Penn National’s document retention policies, was directly related to a declaratory judgment action. Despite Covil’s attempts to engage in routine discovery on these topics, and to meet and confer on this issue, Penn National refused to produce these relevant documents. The Court finds that given the relevance of

the documents and the clarity of the requests, Penn National's failure to participate in this discovery was not justified.

Appropriateness of Fees Under Glasscock

The Court has carefully considered the *Glasscock* factors, as discussed fully herein and approves the full award of requested attorneys' fees.

A. The nature, extent, and difficulty of the case

This insurance coverage action against Penn National is a complex dispute arising out of an insured seeking to locate and litigate "legacy" occurrence-based liability policies Penn National issued to the insured during its existence. The litigation raises novel issues of insurance policy interpretation, and because of the discovery conduct of Penn National in this case, has required extensive and protracted litigation on the issues described in detail herein. Therefore, the first factor, the nature, extent, and difficulty of the case, weighs in favor of an attorney fee award.

B. The time necessarily devoted to the case

Second, considering time necessarily devoted to the case, over the course of the last three and a half years, and more specifically the last two years of intense litigation before this Court on these issues, the Receiver's counsel report that collectively, they have devoted over one thousand hours of time to this litigation against Penn National specifically. Hundreds of hours of attorney time were required to craft meaningful written discovery, to prepare for and execute four separate depositions of Penn National witnesses on these topics, to prepare written motions and proposed orders, to engage in attempts at negotiations with counsel for Penn National on these topics, and to appear for hearings before this court, among other necessary litigation practices. Additionally, the Receiver's counsel were forced to engage in defending against frivolous appeals of a discovery order on these issues. The Court has reviewed the billing records of each firm *in camera* and finds

that the time these firms devoted to this matter has been extensive and necessary. The Court finds that this factor weighs in favor of an attorney fee award.

C. Professional standing of counsel

Third, considering the professional standing of counsel, the Receiver engaged three law firms to assist with the instant litigation: Smith Robinson, John B. White, Jr. P.A., and Morgan Lewis. Each firm was selected for its specialty in practice and its understanding of the issues at hand. The attorneys from Smith Robinson and John B. White, Jr. P.A. are preeminent lawyers in this state who have undertaken to represent this Court's appointed receiver in contentious litigation. In addition, Morgan Lewis has particularized expertise in the handling of complex insurance coverage disputes. The Court finds that all three firms are of the utmost professional standing.

D. Contingency of compensation

Fourth, all three firms representing this Court-appointed receiver of a defunct South Carolina corporation are engaged in a contingent fee arrangement. At this time, none of the Receiver's lawyers have been compensated for their hundreds of hours of time devoted to this discovery dispute. The Court finds that this factor, too, weighs in favor of an attorney fee award.

E. Beneficial results obtained

On the issue of beneficial results obtained, the Receiver's counsel ultimately was successful in extracting the insurance policy documents from Penn National which allow the identification of additional legacy occurrence-based insurance policies covering Covil. Since his appointment in November 2018, the Receiver has been actively involved in complex and aggressive litigation on behalf of the defunct entity that has demanded the expenditure of extraordinary time and resources. The Receiver and his team of highly qualified law firms have

achieved beneficial results in obtaining insurance policies and other necessary documents in order to identify and marshal Covil's insurance assets. The Court notes that Covil had no liquid assets when the receivership began. However, over the past four and a half years, the Receiver has been highly successful in marshaling and liquidating Covil's insurance asserts to establish a qualified settlement fund for the defense and payment of asbestos bodily injury suits involving Covil. In order to obtain these beneficial results, it has been instrumental that the Receiver obtain information and documents from companies like Penn National. The Court therefore finds that the fifth factor weighs in favor of an attorney fee award.

F. Customary legal fees for similar services

Finally, this insurance coverage action and the discovery disputes involved highly complex and detailed issues of law and necessitated the association of highly qualified counsel within South Carolina and outside of South Carolina. The Court has reviewed the filed Declarations of Attorneys' Fees and redacted billing records as well as the detailed billing records of each firm submitted *in camera* and finds the legal fees charged are customary for similar services by local counsel and outside counsel. This factor weighs in favor of an attorney fee award.

Therefore, carefully considering each *Glasscock* factor in turn, the Court finds that the Receiver's counsel should be awarded the full amount they seek in attorneys' fees for their work associated with their discovery efforts against Penn National.

The Court therefore **GRANTS** the motion and orders Penn National to pay attorneys' fees in the amount of \$671,693. The Court further orders Penn National to provide written reports to the Court every two weeks as to the status of its compliance with the May 5, 2022 Order.

IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Attorney Fees

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020 CP-40-02098

Covil Corporation, by and through its duly

Pennsylvania National Mutual Casualty Co., et al.

Appointed Receiver Peter. D. Protopapas

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Honorable Jean H. Toal

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:Defendant Pennsylvania National Mutual Casualty Insurance Company's 5/22/23
Motion to Reconsider is DENIED

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

Circuit Court Judge

Judge Code

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Form 4

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company, *et. al*,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

SCHEDULING ORDER

This matter came before the Court on June 7, 2023, for a status conference. Present at the status conference were Kirby D. Shealy, III and David L. Brown for Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) and W. Brad Nes, Jonathan M. Robinson, Tina Cundari, and Shanon N. Peake for Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas (“the Receiver”). Karen Yarrish and Boyd Wright, representatives from Penn National, and the Receiver were also present. Prior to the status conference, the Receiver and Penn National submitted reports to the Court regarding the status of Penn National’s digitization and production of microfiche cards as ordered by the Court on May 5, 2022.¹ The Court has reviewed the status reports and discussed this ongoing discovery matter with counsel. The Court hereby enters the following scheduling order:

1. Penn National shall complete the digitization of the microfiche cards and provide access to a searchable database containing all digitized material to the Receiver by July 31, 2023.

¹ Penn National appealed this order to the Court of Appeals and Supreme Court. However, the appeals were dismissed by the appellate courts as interlocutory, and the discovery matter has been remitted back to this Court.

2. This matter will be set for trial on September 11, 2023.

IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Scheduling Order

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company, *et. al*,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

ORDER

This matter came before the Court on August 21, 2023, for a pretrial hearing and status conference. Prior to the status conference, the Receiver and Penn National Mutual Casualty Insurance Company (“Penn National”) submitted reports to the Court regarding the status of Penn National’s digitization of microfiche cards and the searchability of the database as ordered by the Court on May 5, 2022. The Court has reviewed the status reports and discussed this ongoing discovery matter with counsel. The Court hereby enters the following scheduling order:

1. Penn National shall submit an affidavit to this Court by September 11, 2023, from a senior Penn National official with complete knowledge about this matter, confirming that Penn National has digitized every Penn National commercial-line policy-related document, whether contained on microfiche or otherwise, in its possession, custody, or control, and that such documents are available to the Receiver in a searchable database.

2. Penn National shall continue to submit reports to this Court every two weeks starting September 11, 2023, regarding the status of Penn National’s compliance with the Court’s May 5, 2022 discovery order and the issues identified in the Receiver’s August 10, 2023 Report.

2. This matter will be set for trial on November 13, 2023 and a pretrial hearing set for October 25, 2023 at the Richland County Judicial Center.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Scheduling Order

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company.; Sam J. Crain & Co.,
Inc.; and South Carolina Property and
Casualty Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**FINAL ORDER ON FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AS TO COVIL CORPORATION
AGAINST PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY**

Before the Court are two matters: (1) the non-jury trial of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Covil”), against Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) to resolve disputes regarding the interpretation, meaning, and application of insurance policies issued by Penn National related to underlying asbestos claims; and (2) an evidentiary hearing on spoliation.¹ The proceedings commenced on November 27, 2023 and concluded on November 28, 2023. The parties made post-trial submissions on January 12, 2023, after which the matter was taken under advisement.

For the reasons explained below, the Court holds that the Receiver is entitled to judgment on his declaratory relief claims. The evidence in the record also demonstrates that Penn National

¹ The parties withdrew their motions *in limine*, stipulated all trial exhibits were admissible, and agreed to admit all deposition designations without objection. Trial Tr. Day 1, Morning Session, at 11, 15–16.

has, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies, and a spoliation order is justified. Finally, the Court finds that the Receiver is entitled to his reasonable attorneys' fees and costs.

I. INTRODUCTION

This Court is deeply concerned with Penn National's repeated discovery misconduct in this insurance coverage action. Throughout the course of the litigation, Penn National's recalcitrance to meet its discovery obligations has been well documented.² Penn National forced the Receiver to file numerous motions to compel and this Court to issue multiple discovery and sanction orders for Penn National to comply with its basic discovery obligations.^{3,4} However, the evidentiary hearing on spoliation, conducted between November 27, 2023 and November 28, 2023, revealed additional, profound abuses of discovery, culminating in the corporate representative of Penn National testifying during the evidentiary hearing and making demonstrably inaccurate statements to this Court.⁵

The evidence in the record in affidavits, deposition testimony, trial testimony, and other documentary evidence is clear and unequivocal, and it paints a disturbing picture of Penn National's discovery misconduct with respect to Covil. Penn National had a duty to preserve insurance policies and policy-related documents evidencing coverage to Covil starting in at least May 2018, and continuing throughout the current litigation. However, Penn National destroyed historic, occurrence-based general liability insurance policies on an annual basis between 2018

² Covil Trial Ex. 121, Attorneys' Fee Sanction Order against Penn National, at 1–7.

³ See *generally* Covil Trial Ex. 71, May 5, 2022 Discovery Order.

⁴ Covil Trial Ex. 121, Attorneys' Fee Sanction Order against Penn National, at 4.

⁵ On November 28, 2023, Penn National's corporate representative, Boyd Wright, testified at the evidentiary hearing that Penn National did not destroy microfiche. However, on cross examination, Penn National's corporate representative admitted that he never read the prior testimony of Penn National's corporate representative, Brent Reifsnyder, who had testified in deposition over a year earlier that Penn National had in fact destroyed microfiche.

and 2021, including historic comprehensive general liability insurance policies stored on microfiche, in violation of applicable law and its own Document Retention Policy. Penn National failed to issue the requisite litigation holds mandated by applicable law and its own Litigation Hold Procedure. Penn National failed to review any of the policies it destroyed for reference to Covil before destruction. Penn National failed to keep any records of what it was destroying. And Penn National issued one or more insurance policies protective of Covil that it can no longer produce, including at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits with a policy period of March 31, 1985 to March 31, 1986.⁶ The record demonstrates that Penn National destroyed material evidence that amounts to spoliation.

With respect to the non-jury trial, the Receiver asks this Court to declare the rights of the parties under two Penn National general liability insurance policies issued to Covil with policy periods of March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988. Pursuant to Section 15-53-30 of the Uniform Declaratory Judgments Act, the Receiver is entitled to have this Court determine any question of construction or validity arising under the insurance contract and to obtain a declaration of rights.⁷ To that end, the Receiver has requested Penn National's

⁶ The additional Penn National insurance policies issued to Covil include general liability coverage issued for the policy period directly preceding the March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 policy periods, for which there are true and complete copies. Covil Trial Exs. 1 and 2. Specifically, the March 31, 1986 to March 31, 1987 Penn National Policy is a "renewal" policy. See Covil Trial Ex. 1 at 29 ("Amending policy to delete products form GL0031 (4/84), and Add GI2104 (7/66) Product hazard exclusion as it was *left off at renewal*.") (emphasis added). Penn National's entire reliance at trial on a "coverage chart" to avoid a spoliation ruling is nothing more than a red herring. It is not evidence of what Penn National did or did not issue to Covil, and it certainly is no defense for Penn National's destroying Covil's policy documents during the pendency of Covil litigation. Penn National fails to address much less confront the admission in the 1986–1987 Policy that it issued general liability coverage to Covil prior to 1986.

⁷ An insurance contract may be construed before a breach occurs. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595-96, 748 S.E.2d 781, 787 (2013). Here, despite Penn National's claim to the contrary, the Receiver does not seek an advisory opinion: he seeks judicial determination of how the Penn National insurance policies respond to fourteen previously settled asbestos lawsuits that

participation in indemnity payments for settlement of the asbestos bodily injury claims filed against Covil (the “Covil Asbestos Suits”). Litigation ensued related to Penn National’s failure to participate in one claim,⁸ but ultimately, Penn National participated in settlement negotiations for several other claims. On September 1, 2022, Boyd Wright, Penn National’s Senior Home Office Claim Examiner, wrote to the Receiver to announce that the total limits that Penn National was willing to pay for future indemnity payments were dwindling fast due to Penn National’s participation in the settlement of fourteen Covil asbestos claims and his reading of the “aggregate” limit in the Penn National insurance policies.⁹

The Receiver retained two expert witnesses for purposes of helping this Court determine whether the “aggregate” limit applied, among other reasons. The Receiver’s first expert witness, former asbestos defense counsel Sharla Frost, evaluated the case files for all fourteen asbestos claims.¹⁰ Penn National had access to these same case file materials, including complaints, discovery responses, deposition transcripts, job site lists, and other relevant materials,¹¹ in advance of its participation in the settlement of each claim. Ms. Frost analyzed the materials and has provided summaries of each claim relevant to an understanding of the types of exposures to asbestos from Covil’s ongoing work for which Penn National historically has deemed appropriate to indemnify Covil. The Receiver’s second expert witness, Charles Miller, testified as to the history, derivation, intent, and purpose of the general liability and products/completed operations provisions of comprehensive general liability policies and the distinctions between operations

Penn National has paid to date, and how that informs and impacts the construction and validity of Penn National’s insurance policies with respect to pending and future Covil asbestos claims.

⁸ *Covil Corp. v. Penn Nat’l Mut. Cas. Ins. Co.*, 436 S.C. 85, 870 S.E.2d 191 (2022).

⁹ Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

¹⁰ Covil Trial Ex. 103.

¹¹ Covil Trial Exs. 15–28.

hazard coverage and products/completed operations hazard coverage. Mr. Miller also testified regarding insurance industry standards for the timely and thorough search for insurance policies.¹²

Penn National has acknowledged its disagreement with Covil as to the existence, application and/or interpretation of certain insurance coverage afforded under its general liability policies. Covil continues to be sued in the asbestos litigation, implicating additional Penn National indemnity payments while Penn National asserts that its indemnity payments continue to erode the alleged liability limits of the policies. Penn National's stated coverage positions related to the application of its policies are contrary to the Receiver's positions. Rulings clarifying the interpretation of the Penn National insurance coverage, as applied to the fourteen exemplar claims in Boyd Wright's September 1, 2022 letter, will assist the parties in resolving questions related to when the Penn National policies respond to the Covil asbestos claims, the impairment of any limits of liability, and the portion of any Covil asbestos claim to be paid by Penn National.

Because the Receiver and Penn National maintain disputes regarding the existence, interpretation, meaning, and/or application of certain Penn National insurance policies, this Court finds that the Receiver's instant action for declaratory relief against Penn National is necessary. The Court carefully reviewed and considered all evidence, briefing, and oral argument submitted by the parties.

¹² Having heard their credible and persuasive testimony, and having independently reviewed the record, the Court adopts fully the expert witness opinions provided by Ms. Frost and Mr. Miller.

II. FACTUAL BACKGROUND

A. Covil Corporation's Business and the Covil Asbestos Suits

1. **Covil was a Greenville, South Carolina—based insulation contractor between 1948 and 1991.**

In 1948, Palmer Covil opened a small insulation contracting business in Greenville, South Carolina.¹³ The company was incorporated in 1954.¹⁴ Over the next thirty years, Covil grew to become a major regional insulation contractor, installing or removing asbestos-containing insulation in a variety of heavy industrial facilities across South Carolina.¹⁵ In 1991, Covil was administratively dissolved.¹⁶

2. **Covil was placed into receivership in November 2018.**

When Covil failed to respond to two asbestos personal injury claims in South Carolina state court in November of 2018, defaults were entered in both cases. *See* Order Granting Default Judgment against Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018); Order Granting Default Judgment against Covil

¹³ *See* Covil Trial Ex. 79, Dep. of Palmer Covil in *Evelyn White v. Combustion Engineering Company, Inc., et al.*, Nos. 77–1369, 77–1384 (D.S.C.), Volume 1, at 9:10–13 (“**Q.** This says prior to March of Nineteen Sixty-four, I assume that means back to Nineteen Forty-eight when you started? **A.** I think so.”); *see also* Volume 1 at 86:21-87:4 (“**Q.** And you worked as an apprentice or a mechanic up until about Nineteen Forty-two? **A.** No, I didn’t work all the time, I worked for about a couple or three years as an apprentice and then I got out of the insulation business and worked at something else until about Nineteen Thirty-six or Thirty-seven and went back to it at that time and I worked in the business in various capacities until Nineteen Forty-eight when I started my own business.”).

¹⁴ *See* Covil Trial Ex. 80, Certified Doc. from Secretary of State of South Carolina.

¹⁵ *See* Covil Trial Ex. 81 at COV_005788 (Covil promotional material, noting “Founded in 1947, we have for 32 years furnished the Southeast with insulation products from companies that set industry standards. As contractors our workmanship has proved to be of such high quality that we too, are setting standards throughout the Southeast.”); *id.* at COV_005785 (Resume of Work Performed by Covil Corporation); *id.* at COV_005787 (Resume of Work Performed by Covil Corporation).

¹⁶ Covil Trial Ex. 101, Certificate of Administrative Dissolution.

Corporation, *Hill v. Advance Auto Parts*, C.A. No. 2018-CP-4004680 (S.C. Comm. Pl. Nov. 2, 2018). In addition to requesting entry of defaults in both cases, plaintiffs moved to appoint a receiver over Covil Corporation. See Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). On November 2, 2018, this Court appointed Peter Protopapas as the Receiver of Covil Corporation. See *id.* The Receiver was tasked with “the right and obligation to administer any insurance assets of Covil corporation as well as any claims related to the actions or failure to act of Covil’s insurance carriers.” *Id.* at 1.

3. Covil continues to be sued in asbestos personal injury litigation.

Since the Receiver’s appointment, Covil has continued to be sued in the asbestos litigation for claims arising out of Covil’s historic operations, among other allegations, throughout the southeastern United States (the “Covil Asbestos Suits”). I find that Mr. Protopapas has done an exceptional job as Receiver in administering the insurance assets of Covil to resolve legitimate Covil Asbestos Suits.¹⁷

As established by the credible testimony of Sharla Frost,¹⁸ a litigator specializing in the defense of asbestos-related product liability cases, Covil faces potential verdict risks in the Covil

¹⁷ As this Court stated to Penn National at trial, “The luckiest day you ever had was when someone like Peter Protopapas got involved for your insured. Because there’s a guy who’s not trying to gouge you at all. He’s trying to talk fairly as a defendant and as a receiver for a defendant about what makes sense and whether claims have validity and so forth and so on.” Trial Tr. Day 1, Morning Session, at 31:2–9. Penn National agreed, stating: “The record is Mr. Protopapas has done an outstanding job in retaining and defending claims and resolving claims. There’s no dispute about that.” *Id.* at 31:10–14.

¹⁸ At trial, “[b]y reason of her education, training, and experience,” this Court qualified Ms. Frost “[a]s Plaintiff’s expert in the area of the history and evolution of asbestos litigation and evaluation of asbestos claims.” Trial Tr. Day 1, Afternoon Session, at 44:4–8. As reflected in her trial testimony and CV (Covil Trial Ex. 94), Ms. Frost has had a lengthy career defending a wide variety of defendants in various industries in asbestos litigation across numerous jurisdictions in the United States, including South Carolina.

Asbestos Suits based on a number of factors, including the plaintiff's disease/medical diagnosis, the nature of the alleged asbestos exposures, the plaintiff's job duties, along with case specific damage factors. Two of these factors are among the most salient considerations when evaluating verdict risk for the Covil Asbestos Cases: (1) the plaintiff's disease/medical diagnosis and (2) the types of exposures that a plaintiff had to the defendant's work operations or product at issue.

As to the evaluation of verdict risk based on the plaintiff's disease/medical diagnosis, Ms. Frost credibly testified as follows:

For the purposes specifically of these cases, I was looking really at whether they were mesothelioma. Mesothelioma, as you are well aware, is what's called a "signature disease" by the plaintiffs' experts. That means that it is a disease that is most commonly associated with exposure to asbestos. It is a type of lung cancer that occurs in the mesothelial lining of the lungs. It is exquisitely painful. It is invariably fatal. And it is associated with an extraordinarily high risk of an adverse verdict for a defendant, particularly in a living mesothelioma case, but also in the death cases.

...

Lung cancer can be caused by exposures other than asbestos. It is – has potential alternative causes which makes it a somewhat lower risk of verdict exposure, but it is still highly associated with asbestos exposure. And accordingly, if there is exposure documented in the record, it presents a significant risk of a verdict against a defendant in one of these cases.

Trial Tr., Day 1, Afternoon Session, at 60:21–61:17. Therefore, once a plaintiff's disease process is identified, an individual with experience in asbestos litigation immediately will become aware of the relative risk the case presents from a disease perspective, as well as potential defenses to begin to employ in the case of a lung cancer diagnosis, as compared with a mesothelioma diagnosis.

As to the evaluation of verdict risk based on plaintiff's exposure to asbestos from Covil's ongoing work operations at a site, completed work operations at a site, or products supplied to a site, Ms. Frost credibly testified as follows:

Q. So I want to talk to you about one of the other factors, in particular the other factor that you were looking at with regard to the cases against Covil, and that is the conditions of exposure. And what we have here are two types of exposure, direct exposure and bystander exposure. Could you, again, generally provide a description of each of those for the Court?

A. Well, direct exposure is pretty much what it sounds like. That's the person who is using the product and is directly exposed to asbestos from his work activity.

A bystander is someone who may not himself be working with the asbestos-containing product, for example, for Covil, it's the person who may not have been installing the insulation but he was in the area, and there was either cutting or some sort of manipulation of the product that releases friable asbestos and puts them in the zone where they have exposure in the breathing zone to those products even though they are not themselves hands-on with it.

Q. And do all of these activities that we have listed here, installing, removing, replacing, repairing, maintaining, are those all the types of activities that can release those fibers and cause exposure either directly to a worker or to a bystander?

A. The industrial hygiene literature and the medical literature related to asbestos all demonstrate that each of these types of activities have been proven to release friable asbestos that in turn presents a risk of exposure to those people who are in the vicinity.

...

Q. All right. So you talked a minute ago about job positions. Again, describe to the court what you're looking at when you're reviewing conditions of exposures, in particular job positions.

A. Well, you're looking to see what level of exposure they likely had.

So the insulators, as demonstrated by Selikoff and others, have an extremely high amount of exposure. But also the pipefitters who work around those products, whether they are in the vicinity at the time that the product is being installed or they're required to cut into the insulation later in order to access pipes, those are demonstrated types of exposure. Similarly, the welders who must repair pipes or repair other metal items around are demonstrated to have exposures.

Electricians who are working in an industrial setting where others are working with asbestos-containing products have exposure, depending on the product that they are using. An electrician may have direct exposure because many of the fire suppression items that were associated with electricity contained asbestos.

Carpenters, they built the frameworks that went around the pipes. They had exposure.

Q. Like the scaffolding?

A. The scaffolding, yes.

And the laborers or helpers who did the cleanup or did other sorts of tasks in the vicinity of any of these other positions also are demonstrated in the literature to have fairly significant exposure and are, therefore, at risk.

Id. at 61:22–65:1. Specifically as to Covil, Ms. Frost evaluated the complaints, discovery materials, dispositive motions and oppositions thereto, and pre-trial reports of Covil’s defense counsel, Ellis & Winters, to determine the verdict risk presented by each of the fourteen Covil Asbestos Cases for which Penn National participated in settlement. *Id.* at 65:2–66:21; Covil Trial Exs. 15–28. At trial, Ms. Frost provided credible and helpful analyses of five of the settled claims, *Ashworth, Jonas, Morgan, Moss, and Wannamaker*. *See id.* at 67:1–81:3. Ms. Frost’s Pre-Trial Declaration provided similar credible analyses of the remaining settled Covil asbestos claims to provide this Court with the background necessary to fully analyze the types of asbestos claims for which Penn National has previously indemnified Covil for purposes of context for the coverage determination. *See* Covil Trial Ex. 103, Declaration of S. Frost at 6–23.

B. Penn National’s Insurance Policies and the Covil Asbestos Suits

1. Covil purchased insurance policies from Penn National.

During the company’s existence, Covil purchased a range of different insurance policies and policy renewals from Penn National, including but not limited to multiple years of comprehensive general liability, auto, and inland marine coverages.¹⁹ For example, Penn National admits in this lawsuit that it issued general liability coverage to Covil through Policy Number 515-50-28-53-7 for the period March 31, 1986 to March 31, 1987 (hereinafter “1986–1987 Policy”)

¹⁹ *See, e.g.*, Covil Trial Exs. 1, 2, 4, and 5.

and Policy Number 515-50-28-53-8 for the period March 31, 1987 to March 31, 1988 (hereinafter “1987–1988 Policy”) (collectively, “the Penn National Policies”),²⁰ and produced what it characterized as “true and accurate” copies of those specific policies.²¹ Penn National also issued auto coverage to Covil through Policy Number 130 03 87 00-6 for the period March 31, 1985 to March 31, 1986, Policy Number 130 03 87 00-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 130 03 87 00-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Auto Policies”).²² Further, Penn National issued inland marine coverage to Covil through Policy Number 900 0521 40-6 for the period March 31, 1985 to March 31, 1986, Policy Number 900 0521 40-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 900 0521 40-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Inland Marine Policies”).²³

2. The Penn National Policies contain clear and unambiguous policy language.

In the “Insuring Agreement” of the comprehensive general liability insurance coverage part of the Penn National Policies, Penn National promises:

The company will pay on behalf of the **insured** all sums which the insured shall become legally obligated to pay as damages because of:

Coverage A. **bodily injury**, or

Coverage B. **property damage**.

[to] which this insurance applies, caused by an **occurrence**, and the company shall [have] the right and duty to defend any suit against the **insured** seeking damages on

²⁰ Penn National Trial Ex. 2, Penn National’s Answer to Compl. ¶ 8. Penn National failed to produce “true and accurate” copies of any other comprehensive general liability coverage issued to, or otherwise protective of, Covil as a named insured or additional/supplemental insured. As explained in this Court, the Court also finds that Penn National issued a comprehensive general liability policy to Covil for the policy period of March 31, 1985 to March 31, 1986. See Covil Trial Ex. 1 at 29 (Change Endorsement establishes 1986-1987 Policy is a renewal policy).

²¹ Covil Trial Exs. 1–3.

²² Covil Trial Ex. 5.

²³ Covil Trial Ex. 4.

[account] of such **bodily injury** or **property damage**, even if any of the allegations of [the] suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.²⁴

The "Limits of Liability" section of the Penn National Policies addresses "Coverage A," which applies to bodily injury, as follows:

Coverage A—The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one occurrence shall not exceed the limit of **bodily injury** liability stated in the declarations as applicable to "each occurrence."

Subject to the above provision respecting "each occurrence," the total liability of the company for all damages because of (1) all **bodily injury** included within the **completed operations hazard** and (2) all **bodily injury** included within the **product hazard** shall not exceed the limit of **bodily injury** liability stated in the declarations as "aggregate."²⁵

The "Limits of Liability" further provide:

Coverages A and B—For the purpose of determining the limit of the [company's] liability all **bodily injury** and **property damage** arising out of continuous or [repeated] exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.²⁶

The applicable "Definitions" section of the Penn National Policies contains these definitions:

- "**bodily injury**" means bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;²⁷
- "**completed operations hazard**" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs

²⁴ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000002; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000045.

²⁵ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000004; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000047.

²⁶ *Id.*

²⁷ Covil Trial Ex. 1, 1986 to 1987 Policy at Penn National Policies 000036; Covil Trial Ex. 2, 1987 to 1988 Policy at Penn National Policies 000081.

after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. ‘Operations’ include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.²⁸

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed;²⁹

- “**occurrence**” means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; and
- “**products hazard**” includes bodily injury . . . arising out of the named insured’s products . . . but only if the bodily injury . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.³⁰

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.³¹

The Court notes that Penn National’s proffered insurance expert, Mr. Bernd Heinze, testified that the 1986–1987 Policy and the 1987–1988 Policy are unambiguous. Trial Testimony, Day 2 at 52–53.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

3. Penn National contributed to settlements to resolve covered Covil Asbestos Suits.

Penn National has paid more than \$600,000.00 to participate in the settlement of fourteen covered asbestos bodily injury claims against Covil under the Penn National Policies.³²

Considering the underlying defense file with regard to each of the fourteen Covil Asbestos Suits in which Penn National participated in settlement, Covil's expert witness, Sharla Frost, evaluated each suit to explain the potential verdict risk the cases presented from the perspective of the disease/medical diagnosis with which the plaintiff presented, the job/job duties of each particular plaintiff, the work site(s) where each particular plaintiff performed work during his working life, the time period(s) when the plaintiff worked at each such work site, and the overlap in terms of those time periods with periods when Covil insulation employees performed work operations at the same work site.³³

As credibly detailed in Ms. Frost's Declaration and trial testimony, the following asbestos suit settlements for which Penn National participated under its insurance policies—*Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker*, and *Moss*—alleged that Covil performed contracting work at the respective plaintiff's worksites at the same time that the plaintiff was working at those same jobsites, and that Covil's contracting work allegedly caused the plaintiff to be exposed to asbestos.³⁴ As Ms. Frost credibly explained, these cases each presented a high verdict risk, and therefore were appropriate for resolution before trial, because the "worker is working at the same site while the Covil work activities are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or

³² See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

³³ See Covil Trial Ex. 103, S. Frost Decl. at 3–23.

³⁴ *Id.*

maintenance of asbestos containing thermal insulation there is, of course, a significant risk of exposure to asbestos. Likewise a worker whose job function is nearby on the jobsite where such insulation installation, removal, replacement, repair, or maintenance work is taking place, faces a significant risk of a high dose exposure because of the release of asbestos fibers into the air as a result of the insulation work being performed by the insulation contractor's—in this case, Covil's—employees, even if his personal job duties do not require the manipulation of the asbestos containing materials himself.”³⁵

C. Penn National Failed to Maintain Covil's Historic Insurance Policies and Policy-Related Documents.

1. Penn National's duty to preserve its historic insurance policies was independently triggered in 2018, 2019, 2020, and 2021.

Penn National was on notice in May 2018 that it should preserve its historic Covil insurance policies from automatic destruction or deletion when asbestos claimants in *Ann Finch v. Covil Corporation*, 1:16-cv-1077 (M.D.N.C.), served Penn National with a subpoena requesting “all liability insurance policies and endorsements issued to Covil between 1969 and 1995[.]”³⁶ At that time, Covil faced significant potential liability in the *Finch* asbestos personal injury case, which ultimately resulted in a \$32 million verdict against Covil.³⁷ Although Penn National was not involved in the defense of the *Finch* case, the underlying asbestos personal injury plaintiff's counsel, Dean Omar Branham & Shirley, LLP, served the subpoena on Penn National seeking policies for two known policy years (86/87 and 87/88) and also seeking documents related to any and all other policies protective of Covil. Penn National responded to the subpoena on June 15, 2018, but only searched for Covil policies by the exact policy numbers provided to it by the

³⁵ *Id.* at 4.

³⁶ Covil Trial Ex. 12, *Finch* Subpoena to Penn National, at 5.

³⁷ *Id.*

asbestos claimant's counsel for the two identified policy years.³⁸ In response to the subpoena, Penn National did not perform a search for any other policies covering or potentially covering Covil for any other years despite the request for same having been clearly made in the subpoena. Additionally, Penn National did not institute any form of internal litigation hold for Covil policies at this time.

Then, in October 2019, Penn National was named as a defendant in the Covil coverage litigation in the Middle District of North Carolina.³⁹ This put Penn National on notice that specific and identifiable litigation was filed against the company and that all evidence of Penn National's historic insurance policies covering Covil as a named insured or additional/supplemental insured would be relevant. Specifically, the Receiver immediately served discovery on Penn National, demanding that it identify "all insurance policies [Penn National] issued to Covil or which otherwise include Covil as an insured."⁴⁰ Penn National understood the Receiver's request to include policies covering Covil as a named insured or additional insured, claiming in response that it "*does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured.*"⁴¹ Therefore, no later than October 2019, Penn National was on notice that the Receiver sought documents and information about both named insured as well as additional insured coverage for Covil in ongoing litigation.

³⁸ Covil Trial Ex. 13, Penn National Subpoena Resp., June 15, 2018.

³⁹ On October 2, 2019, another of Covil's historical insurers, Hartford, named Penn National as a third-party defendant in the first Covil insurance coverage action, filed in the Middle District of North Carolina. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-932 (M.D.N.C. Oct. 2, 2019), ECF 104. On November 20, 2019, Covil amended its Answer to include a third-party action against Penn National. *See id.*, ECF 131 at ¶¶ 118, 169, 174–176. Penn National moved to dismiss Covil's third-party complaint, but the motion was denied on February 24, 2020. *See id.*, ECF 227.

⁴⁰ Covil Trial Ex. 42, Dec. 18, 2019 Penn National Disc. Resp. at Interrog. No. 1.

⁴¹ *Id.*

At the same time, the Receiver requested that Penn National “describe [its] document retention policies, oral or written, that relate to insurance policies, underwriting information related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”⁴² Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.⁴³ Once again, Penn National failed to issue any form of internal litigation hold at this time to prevent the destruction of any Covil-related documents.

In February 2020, the Receiver filed suit against Penn National in this Court.⁴⁴ The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.⁴⁵ The Receiver also requested Penn National’s document retention policies from 1950 through 2018.⁴⁶ Penn National repeated its responses from the North Carolina case.⁴⁷ Penn National did not institute a litigation hold in response to this litigation.

In April 2020, the Receiver filed this case against Penn National. In his Complaint, the Receiver made clear that he was seeking “an order requiring that Penn National . . . provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Covil together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files[.]”⁴⁸ Subsequent discovery revealed that Penn National had not conducted a fulsome

⁴² *Id.* at Interrog. No. 9.

⁴³ *Id.*

⁴⁴ *Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020).

⁴⁵ Covil Trial Ex. 52, May 15, 2020 Penn National Disc. Resp. at RFP No. 2.

⁴⁶ *Id.* at RFP No. 11.

⁴⁷ *See id.* at RFP Nos. 2 and 11.

⁴⁸ Penn National Trial Ex. 1, Covil Comp. at 11(¶ B.).

search of its records for policies covering Covil as either a named insured or an additional insured. The Receiver continued to serve requests for coverage, and Penn National continued to stonewall.⁴⁹ Once again, Penn National did not institute a litigation hold in response to this litigation.

2. Penn National destroyed historic occurrence-based general liability insurance policies and policy-related documents as part of its annual document purges in 2018, 2019, 2020, and 2021 without issuing a litigation hold related to the Covil litigation.

On a November 19, 2021 call with the Receiver's counsel and Ellis & Winters, Penn National disclosed for the first time that it conducts an annual purge of archived general liability insurance policies as they age out of its retention period without any litigation hold in place related to the Covil litigation. This disclosure was confirmed a month later in Penn National's written discovery responses.⁵⁰ Based on Penn National's admission, it is clear that Penn National conducted annual document purges at the end of 2018, 2019, and 2020 (or the very beginning of 2019, 2020, and 2021), all of which were performed *after* it was on notice—as early as May 2018 with the *Finch* subpoena—of the need to preserve documents that potentially identify insurance coverage for Covil.⁵¹

⁴⁹ Ex. 57, May 10, 2021 Penn National Resp. to Receiver's Interrog. at Interrog. No. 1.

⁵⁰ Covil Trial Ex. 64, Dec. 20, 2021 Penn National Responses to Receiver's Second Req. for Produc. at RFP No. 1 ("Penn National has not issued any formal litigation hold notice at this time. . . . Pursuant to [Penn National's] retention policy, certain policy-related documents may be identified for purging throughout the course of the year."). Penn National finally issued a litigation hold on December 17, 2021. See Covil Trial Ex. 10, Dec. 17, 2021 email litigation hold from S. Maier to B. Reifsnyder.

⁵¹ See Covil Trial Ex. 84, B. Reifsnyder Dep. Tr., Nov. 11, 2022, at 41:23–42:8 ("Q. Do you recall when policies were purged in 2018? A. We purge policies—we—we pull them. Everything is then purged the beginning of the new year. Q. So if a purge was taking place in 2018, it would have been January or February 2018? A. If we were doing a purge in 2018, then everything that was pulled to be destroyed—to be purged in 2018 would have been purged early, meaning January, 2019."); see also *id.* at 53:14–22 ("Q. So the documents identified to be purged in 2019, did you review any of those policies to determine whether Covil was identified as an insured on any of

Specifically, Penn National has admitted that it (1) destroyed liability policies and policy-related documents in 2018, 2019, and 2020; (2) did not issue a litigation hold related to any litigation involving Covil until December 2021; (3) did not search the liability policies and policy-related documents it destroyed between 2018 and 2021 for references to Covil before purging them; and (4) can no longer identify each and every named insured, additional insured or supplemental insured listed in the now destroyed policy-related documents, as follows:

- Penn National admitted that it identified policy-related documents by policy number that were beyond the scope of its retention timeframe for possible disposal in 2018, 2019, 2020, and 2021.⁵²
- Penn National admitted that it disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁵³
- Penn National admitted that it disposed of liability insurance policies in 2018, 2019, and 2020.⁵⁴
- Penn National admitted that it did not issue a litigation hold for any Covil litigation until December 2021.⁵⁵
- Penn National admitted that it did not review the policy-related documents for references to Covil before it disposed of the purged documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁵⁶
- Penn National admitted that it did not review the liability insurance policies for any reference to Covil before it disposed of them in 2018, 2019, and 2020.⁵⁷
- Penn National admitted that it cannot identify each and every named insured, additional insured or supplemental insured listed in the paper and microfiche-

those policies before you destroyed them in 2020? A. From looking through them individually is the nature of the question? Q. Yes. A. The answer is no.”)

⁵² See, e.g., Covil Trial Ex. 68, Feb. 17, 2022 Penn National Resp. to Req. for Admis. at RFA No. 2.

⁵³ See *id.* at RFA Nos. 3, 5, 7.

⁵⁴ See *id.* at RFA Nos. 4, 6, 8.

⁵⁵ See *id.* at RFA No. 21.

⁵⁶ See *id.* at RFA Nos. 11, 13, 15.

⁵⁷ See *id.* at RFA Nos. 12, 14, 16.

policy-related documents it destroyed, purged, or otherwise disposed of since 2018.⁵⁸

3. Because of its own actions, Penn National can no longer locate all of its historic liability insurance policies and policy-related documents protective of Covil.

Penn National has asserted that it is unable to locate any additional policies or policy-related documents indicating coverage protective of Covil, but Penn National has not produced “complete and authentic copies” of each of the Covil policies and policy renewals issued to Covil, including general liability policies that pre-date the 1986–1987 Policy.⁵⁹

Likewise, the policies and policy-related documents that Penn National has produced in this case also demonstrate that Penn National policies include endorsements in which other companies or individuals are covered that are not identified on the declarations page of the policy. The 1986-1987 Policy, for example, identifies the following entities and individuals as “Special Named Insureds”: Covil Corporation, Inc.; Covil Residential Insulation, Inc.; Covil Construction Co, Inc.; C&J Realty Co., Inc.; Industrial and Associated, Inc.; John Hamrick Link; James P. Covil; Yvonne Wells; and Charles McWhorter.⁶⁰ The 1987–1988 Policy includes a similar list on the “Special Named Insured” Endorsement.⁶¹ Given the list of insureds identified in these endorsements, it follows that Covil may have been identified as an insured on other Penn National policies that Penn National may have been able to locate had it not destroyed historical policies.

As Penn National admitted in its first set of discovery responses on December 18, 2019, and consistently stated in discovery thereafter, it now has no reliable way to search its own records

⁵⁸ See *id.* at RFA No. 23.

⁵⁹ See Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 0000029 (Change Endorsement establishes 1986–1987 Policy is a *renewal*).

⁶⁰ Covil Trial Ex. 1, at 11.

⁶¹ Covil Trial Ex. 2, at 10.

for this information: “Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents *that may be responsive* to this interrogatory.”⁶²

4. Insurers, such as Penn National, have known about the need to preserve their legacy occurrence-based general liability policies once long-tail claims are asserted against their policyholder since at least 1986.

Insurance companies have been on notice regarding the need to preserve their legacy occurrence-based comprehensive general liability insurance policies once an asbestos lawsuit is filed against its insured for decades. As Sharla Frost explains, “The Manville Corporation filed for bankruptcy in 1982 and came out of . . . bankruptcy in 1986, starting the Manville Trust operations in 1988. Part of the controversy with the Manville bankruptcy initially had to do with the handling of the insurance proceeds that were contributed to the bankruptcy estate for use by the Manville Trust. That was done very early in the litigation. And from that point onward it was very obvious that one was going to have a long-tail litigation and there were going to be implications for the insurance proceeds.”⁶³

The U.S. Supreme Court, recounting the history of the Johns Manville Trust creation in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 141 (2009), similarly explained, “[i]n a settlement described as the ‘cornerstone’ of the Manville reorganization, the insurers agreed to provide most of the initial corpus of the Trust, with a payment of \$770 million to the bankruptcy estate, \$80 million of it from Travelers.” *Citing MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d.

⁶² Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrog. and Resp. to Covil’s First Set of Req. for Admis. at Interrog. No. 1 (emphasis added).

⁶³ Covil Trial Ex. 96, Sharla Frost Dep. at 12:15–13:5.

Cir. 1988); Bkrtcy. Ct. Op. 134(a); *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrtcy. S.D.N.Y. 1986). Not only was this information reported in the legal cases, but also newspapers published stories regarding the Manville Trust plan at the time it was negotiated.⁶⁴

Penn National has no excuse for failing to suspend its systemic document destruction or purge policy and failing to ensure that it preserves all Covil policy-related documents with a litigation hold during the pendency of the litigation relating to Covil.⁶⁵

D. Penn National repeatedly failed to meet its basic discovery obligations.

Penn National's delayed revelation of its policy document purge is directly related to its failure to meet its basic obligations to fully respond to written discovery and to produce witnesses prepared to testify as to key issues in this case. Penn National's stonewalling activity required Covil to file six motions to compel against Penn National between January 15, 2021 and April 11, 2022, and thereby required this Court to enter six separate orders over the course of two years to discover basic information from the insurance company related to its issuance of insurance coverage to Covil, and its maintenance of historical policy documents. Despite Covil's efforts, and this Court's demands, Penn National still has yet to fully comply with its discovery obligations in this case.

⁶⁴ See, e.g., Covil Trial Ex. 102, Tamar Lewin, A New Set of Hurdles for Manville, N.Y. TIMES (Feb. 17, 1986) <https://timesmachine.nytimes.com/timesmachine/1986/02/17/591186.html> ("Under the plan, Manville would establish a trust to pay present and future claimants. The trust would be funded with \$615 million of insurance money, \$200 million in cash, notes and receivables, and up to 80 percent of Manville's stock.").

⁶⁵ Penn National presented testimony from its expert witness, Bernd Heinze, in an effort to suggest that destruction of documents, including insurance policy information, was reasonable around the time of the creation of the Manville Trust and thereafter to the extent policies covered companies other than asbestos manufacturers, such as Covil. The Court does not find Mr. Heinze's generalized testimony to be credible or persuasive on this point. Indeed, Mr. Heinze acknowledged that in the 1980's and 1990's when he was a practicing lawyer that he was "aware of asbestos and other kinds of long-tail bodily injury claims in litigation that companies and their insurers were facing." Trial Tr., Day 2, Morning Session at 23:1-10.

1. Penn National refused to conduct an adequate and fulsome search of its records for Covil policy documents when required to do so.

Penn National's prolonged discovery intransigence focused on the premise that it could not access any possible historic occurrence-based liability coverage from its archives for Covil or for any other policyholder unless provided with a policy number.⁶⁶ As more fully detailed below, this was despite the fact that Penn National itself, Covil, and later Covil's asbestos personal injury defense lawyers, Ellis & Winters, acknowledged that it was possible to engage a vendor to scan the historical policy documents in Penn National's remaining collection of paper and microfiche records to create a more searchable set of information. A solution clearly existed, but Penn National consciously elected to waste this Court's and the Receiver's resources in prolonged discovery fights.

This Court best summarized Penn National's misconduct in an order on May 5, 2022, as follows:

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies . . . amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.⁶⁷

The stonewalling position extended beyond policy documents, to nearly every aspect of the litigation. Following the Court's May 5 discovery order, Penn National refused to produce its claim files related to fourteen asbestos claims until Covil filed a motion to compel; and it also refused to

⁶⁶ Covil Trial Ex. 71, May 5, 2022 Order, at 4.

⁶⁷ *Id.* at 8.

produce documents responsive to the Receiver's Fourth Request for Production. The Court granted Covil's motion to compel on November 16, 2022.

2. Penn National's additional discovery misconduct.

- a.** Penn National produced a witness who had no information regarding policy searches Penn National performed.

More than a year after first filing a case against Penn National, on January 7, 2021, Covil had its first opportunity to depose a Penn National corporate representative, Penn National's claims adjuster, Boyd Wright. In his deposition, Mr. Wright testified that he merely spent a few "minutes" in preparation for the deposition asking the Penn National clerical staff what they had done to perform a search for Covil policies—he could not specify the actual searches Penn National performed.⁶⁸ Mr. Wright was aware that the clerical personnel searched an electronic system, which he could only identify as "version 6 or version 7," and which he does not personally use because "it requires coding that [he] can't ever get straight."⁶⁹ He also confirmed that the clerical employees did not search for—and Penn National does not maintain—an index of insurance policies that include information identifying "additional insureds" covered by Penn National policies.⁷⁰ Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."⁷¹

In a hearing on January 25, 2021 related to the policy search deficiencies Mr. Wright's deposition uncovered, this Court ordered Covil to "develop a more complete list of job sites and possible agents that might have been involved in procuring this coverage from Penn National," and "[gave] Penn National 15 days to respond to it."⁷² The Court warned Penn National against

⁶⁸ See Covil Trial Ex. 76, B. Wright Dep., Jan. 7, 2021, at 9:5–12, 43:14–44:18.

⁶⁹ *Id.* at 39:7–16, 39:21–25.

⁷⁰ *Id.* at 45:14–25.

⁷¹ *Id.* at 67:4–6.

⁷² Covil Trial Ex. 100, Hearing Tr. at 141:14–24.

asking Covil “for something that’s just as ridiculous as what you say they asked for from you. They are not going to know policyholder’s numbers, or policyholders.”⁷³

b. Next, Penn National failed to comply with a subpoena, despite explicit instructions from the Court.

Fifteen days after the hearing, on February 8, 2021, Covil re-issued its subpoena to Penn National, this time listing relevant contractors and job sites as the Court requested.⁷⁴ Despite this Court’s warning against doing so, Penn National’s first reaction to the subpoena included requesting the Receiver to provide “a policy number for any policy that may relate to Covil or the Contractors listed.”⁷⁵ Ultimately, Penn National responded to the subpoena request, objecting on many grounds over the course of two pages, including that the subpoena did not provide “any policy number.”⁷⁶ Following its objections, Penn National asserted that it spent an “immense amount of time” conducting a search and exercised reasonable diligence in searching its files.⁷⁷ However, the actual substance of the subpoena response was limited to a single two-page e-mail chain in which several policies issued to contractors from Covil’s list were identified, but Penn National determined they were “not relevant to this action because such policies do not provide coverage to Covil Corporation.”⁷⁸

Given Penn National’s incomplete responses and improper objections to the Receiver’s subpoena, Covil filed a supplemental motion to compel on April 22, 2021, which this Court heard on June 25, 2021. Just two weeks before the hearing, Penn National produced three policies

⁷³ *Id.* at 143:17–21.

⁷⁴ Covil Trial Ex. 53, Letter and Subpoena to Penn National, Feb. 8, 2021.

⁷⁵ Covil Trial Ex. 54, Letter from D. Harris to M. Shisko, Feb. 12, 2021.

⁷⁶ Covil Trial Ex. 55, Penn National’s Subpoena Resp., Feb. 22, 2021.

⁷⁷ Covil Trial Ex. 56, Penn National’s Suppl. Subpoena Resp., Mar. 9, 2021, at 5.

⁷⁸ *Id.* at 7.

protective of Covil in its discovery responses in another case.⁷⁹ In its July 1 order following the hearing, the Court found:

The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have ‘performed the necessary due diligence’ and ‘exercised reasonable diligence in searching its files,’ yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case. The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

Moreover, although Penn National asserts it has ‘exercised reasonable diligence in searching its files,’ Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. . . .

This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National’s efforts to search for coverage.⁸⁰

The Court therefore ordered Penn National to “provide the Receiver with a detailed description of how Penn National maintains its paper records” by July 9, 2021, and to thoroughly search its paper records by July 23, 2021.⁸¹

⁷⁹ Covil Trial Ex. 62, Order granting Covil’s motions to compel, July 1, 2021 (*Finch and Covil v. USF&G*, No. 2019-CP-40-03003 (S.C. Comm. Pl.) at 4.

⁸⁰ *Id.* at 5–6.

⁸¹ *Id.* at 6.

c. Penn National ignored another set of explicit instructions from this Court to perform a physical search of paper documents.

Penn National relied on its Director of Administrative Services, Brent Reifsnyder, to provide the court-ordered detailed description of how it maintains its paper records.⁸² In his July 9 Affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.⁸³ The Affidavit outlined the storage and search procedures for both archive forms. Importantly, Reifsnyder attested, “[p]olicy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system” that marks each file with the last two digits of a policy number.⁸⁴

In a second Affidavit dated July 23—the date by which Penn National was to thoroughly search its paper records—Reifsnyder did not attest to having performed a thorough search.⁸⁵ Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents[.]”⁸⁶ He asserted, “the only alternative means of searching such [non-electronic] documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured.”⁸⁷

⁸² See Covil Trial Ex. 73, Aff. of B. Reifsnyder, July 9, 2021.

⁸³ *Id.* ¶ 6.

⁸⁴ *Id.* ¶¶ 8, 16.

⁸⁵ See Covil Trial Ex. 74, Aff. of B. Reifsnyder, July 23, 2021.

⁸⁶ *Id.* ¶ 6.

⁸⁷ *Id.* ¶ 7.

When deposed with regard to the content of his Affidavits, Reifsnyder admitted the following:

- he spent *less than five minutes* trying to locate documents responsive to the Court's Order.⁸⁸
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.⁸⁹
- he did not consult with anyone at Penn National or outside Penn National about how he might be able to search for documents other than by policy number.⁹⁰
- until preparing for his deposition, he had never reviewed the list of job sites the Receiver provided to Penn National to facilitate Penn National's searches.⁹¹
- Penn National itself designed the system of organizing its records by policy number.⁹²
- he only considered, but did not pursue, one alternative means of searching: "[S]omebody would need to coordinate having somebody physically pull up and look through every conceivable record from microfilm and paper storage."⁹³
- he never consulted with anyone how a manual search could be conducted, never determined how long such a search would take, never determined how many individuals it would take to conduct such a search, never discussed procuring additional staff or resources for a search, and never determined how much the search would cost, whether conducted internally or by an outside vendor.⁹⁴

Shortly thereafter, Covil deposed Penn National's 30(b)(6) deponent, Boyd Wright, who was in charge of Penn National's electronic document search. Like Mr. Reifsnyder's complete refusal to search Penn National's paper or microfiche files, Mr. Wright doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search electronically for an

⁸⁸ Covil Trial Ex. 77, Aug. 3, 2021 B. Reifsnyder Dep. at 65:3–11.

⁸⁹ *Id.* at 49:20–50:1.

⁹⁰ *Id.* at 50:2–9.

⁹¹ *Id.* at 47:10–24.

⁹² *Id.* at 43:11–16.

⁹³ *Id.* at 50:20–51:3.

⁹⁴ *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

“additional insured,” such as Covil, as well.⁹⁵ Without a policy number, Mr. Wright admitted, Penn National would “have to look in the policy documents to see if there was any supplemental insureds.”⁹⁶ But Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for documents responsive to the Subpoena, let alone begin that task.⁹⁷

In short, Penn National’s flagrant defiance of this Court’s orders continued.

d. This Court ordered Penn National to permit Ellis & Winters to search Penn National’s policy documents—leading to the revelation of more discovery malfeasance.

Given this background, on November 5, 2021, the Court entered an order requiring Penn National “to open its repository of insurance policies and to facilitate a review supervised and performed by Covil’s insurer-appointed defense counsel, Ellis & Winters, LLP.”⁹⁸ The Order required interim reports, with the first to be made on December 7, 2021.⁹⁹

In so ordering, the Court reasoned: “This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional

⁹⁵ Covil Trial Ex. 78, Aug. 26, 2021 B. Wright Dep. at 23:22–24.

⁹⁶ *Id.* at 23:22–24:1.

⁹⁷ *Id.* at 36:6–11. The Court notes that to the extent Penn National’s expert, Mr. Heinze, was presented in an effort to vouch for the appropriateness of Penn National’s document retention system or the adequacy of its policy search efforts related to Covil, his testimony is rejected. While Mr. Heinze made a visit to Penn National’s headquarters in November 2022, during which time he observed boxes containing microfiche and reviewed a few randomly selected microfiche slides, he acknowledged that he (i) never spoke with Mr. Reifsnyder or Mr. Wright about their search efforts, (ii) is unaware of who at Penn National was involved in any document searches related to Covil or how much time was spent conducting those searches, (iii) does not know what documents were reviewed during any such search, and (iv) is not aware of and never asked if any index exists linking policy numbers to insured name or policy issue date. Trial Tr., Day 2 Morning Session at 43–49, 57–58.

⁹⁸ Covil Trial Ex. 63, Nov. 5, 2021 Order, at 1.

⁹⁹ *Id.* at 2.

insured. Despite this Court's orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically."¹⁰⁰

3. Following the November 2021 Order, Penn National revealed its history of document destruction without a litigation hold in place.

No longer protected by its position that it would not perform a manual search of its policy records on its own, after the November 5, 2021 Order, it was quickly revealed that (a) Penn National purposefully downgraded its ability to perform policy searches in 2010, despite knowing the potential for claims from policyholders with long-tail liability in the asbestos litigation; (b) Penn National routinely purged its policy documents, including microfiche; and (c) there was no litigation hold for Covil until December 2021 despite the existence of several different litigations.

a. In 2010, Penn National downgraded its ability to search for insurance policies by policyholder name.

It is notable that Penn National's corporate representative testified in a 1991 deposition that *it was possible* at that time to search its policy index by policyholder name.¹⁰¹ In this case, however, Brent Reifsnyder testified that the only way to search for historic policies is by policyholder *number* using the system he created in 2010.¹⁰² In fact, Mr. Reifsnyder admitted that Penn National designed the 2010 electronic system of organizing its records by policy number only.¹⁰³ Specifically, Mr. Reifsnyder himself designed the computer system, 2k10, in 2010 to

¹⁰⁰ *Id.* at 1.

¹⁰¹ See Covil Trial Ex. 83, E. Rice Dep. at 16:16–22 (“In order to find if there were policies issued to General Gasket, we went back and went through our indexing system by name as well as by the policy number that was—or the alleged policy number that was provided on the documents that you furnished.”); see also Covil Trial Ex. 99, Nov. 30 2022 B. Wright Dep. at 57:4–58:8 (confirming that he had seen the deposition previously, and “Q. But you have no reason to believe that this was not his 30(b)(6) deposition testimony on behalf of Penn National; correct? A. The document is what it is, and I accept it at face value.”).

¹⁰² See Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 112: 10–17.

¹⁰³ Covil Trial Ex. 77, Aug. 3, 2021 B. Reifsnyder Dep. at 43:11–16.

provide only three pieces of information about Penn National's policies: (1) the policy number, (2) the date of policy cancellation or nonrenewal, and (3) the date the policy should be destroyed under Penn National's twenty-five-year document retention policy for insurance policies.¹⁰⁴

The 2k10 System was designed with a specific purpose in mind: to determine what documents record clerks could destroy under the Penn National document retention policy. As Mr. Reifsnyder testified, the Penn National document retention policy specifies that policy documents can be destroyed 25 years after the date of the policy cancellation or nonrenewal.¹⁰⁵ The policy does not, however, provide details for how the document destruction process should take place.¹⁰⁶ As a result, Mr. Reifsnyder was left with preparing his own system, and he did: the 2k10 System.¹⁰⁷

Mr. Reifsnyder explained that in 2010, Penn National hired clerks to perform the task of inputting policy numbers into the computer system, and the company paid the clerks so little that they did not want the low-paid employees to do a complex analysis that a policyholder name entry would require.¹⁰⁸ Mr. Reifsnyder described the policyholder name as "extraneous information."¹⁰⁹ Penn National produced a spreadsheet of the output of the 2k10 System in this case, which shows

¹⁰⁴ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 91:1–24.

¹⁰⁵ *Id.* at 127:17–21; Covil Trial Ex. 8, Penn National Doc. Retention Policy.

¹⁰⁶ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep at 68: 5–12 ("Q. The process that you have described here today for identifying policies in a calendar year and destroying them in January of the next year, is that policy written anywhere? A. Not that I'm aware of. Our – our records retention policy offers that once they hit that destruction date, then they're eligible to be purged.").

¹⁰⁷ *Id.* at 59:17–60:22.

¹⁰⁸ *Id.* at 92:24–93:25 ("Q. When you were going through this 2k10 database exercise and pulling the policyholder number, at that period, you could have pulled the policyholder name as well, correct? A. We could have, however – however, the people doing that job would have no idea to know whether that was the policyholder name without looking at each form. They were not underwriting people. They were clerks. No experience in underwriting, no experience in dealing with policies. They were just basic clerks. . . . It was a manual [] task. We assigned the appropriate level staff from a dollar perspective to that task.").

¹⁰⁹ *Id.* at 91:25–92:23.

that the oldest policy subject to the destruction program as of the time the spreadsheet was printed was a 1982 policy.¹¹⁰

b. Penn National purges policy documents on an annual basis, with no quality control mechanism in place.

Since the 2k10 System has been in place, on an annual basis, Mr. Reifsnyder prints out a list of all Penn National policies subject to destruction within the calendar year, which he places outside his office door.¹¹¹ His team of five document clerks locates all copies of the policy documents, in both paper and microfiche form, writing “done” next to each policy number on the printed list as the policies are collected.¹¹² No copies of those lists were maintained.¹¹³ In January of the calendar year after the documents are collected, the full set of policies to be destroyed, both in paper form and in microfiche form, are collected and sent to Iron Mountain for destruction.¹¹⁴

Penn National is unable to recreate or identify who the policyholders were for the policies that were destroyed in previous years.¹¹⁵ As Mr. Reifsnyder explained when asked about the policies that were destroyed in 2019, for instance, “[s]o everything is only by policy number.

¹¹⁰ Covil Trial Ex. 11, Microfiche Destruction Spreadsheet; *see also* Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 626–8.

¹¹¹ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 103:9–22.

¹¹² *Id.* at 104:2–17 (“Q. Would they return that part of the list to you to QC or verify that they have done that section of the list? A. They would write done on it. That way we knew that that section . . . Done, D-O-N-E, on the sheet. As they worked through the sheet, they would check off each file so that they weren’t looking for something that they had already found. At the end of doing the list, they would just—we would know when they—the whole series was done because everything was marked off.”).

¹¹³ *Id.* at 104:19–105:2 (“Q. And this was all done by hand? A. Yes, sir. Q. Do you have a copy of that list from 2018? A. No. Do you have the list from 2019? A. No. Do you have that list from 2020? A. Not that I’m aware of.”).

¹¹⁴ *Id.* at 46:6–47:5; *see also id.* at 53:6–8 (“What was purged for 2019 would have been pulled 2018, 2019 in preparation for their eventual purge early the following year.”).

¹¹⁵ *Id.* at 44:2–17.

Everything that was in—pulled was by policy number. I would have no idea out of all the records who was Covil, who was not.”¹¹⁶

Mr. Reifsnyder acknowledged that the document destruction process is not without errors. He explained that one of the most problematic pieces of the destruction process is that sometimes the microfiche stick together, which means that a document clerk may pull more sheets of microfilm than should be destroyed.¹¹⁷ No one performs an independent quality control or spot checking of the documents to be destroyed.¹¹⁸ Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.¹¹⁹

c. Penn National did not put a litigation hold notice in place until December 2021—more than three and a half years after it became aware of the need to search for (and retain) Covil policies.

On November 19, 2021, the parties held a telephone conference to discuss Penn National’s policy search efforts.¹²⁰ During that call, Penn National’s records custodian, Brent Reifsnyder, admitted when questioned that Penn National regularly destroyed or otherwise purged historic policy-related documents—and continued to do so *even after* the Court’s November 5, 2021 Order. This routine purge included destroying files in its repository of microfiche and paper policy documents without reviewing any of those documents to determine whether Covil was listed as an

¹¹⁶ *Id.*; *see also id.* at 67:4–22 (“I understand what you’re saying. There’s nothing that’s additional to say we destroyed them.”).

¹¹⁷ *Id.* at 78:6–9.

¹¹⁸ *Id.* at 81:4–8 (“I do not look at a quality control at all. They pull the files. They prep them, meaning pull them out and—and date them, and we go to—they’re sorted and put in boxes. I do not go through the files.”).

¹¹⁹ *Id.* at 77:25–78:5.

¹²⁰ *See* Covil Trial Ex. 66, Order on Mot. for Protection, Feb. 11, 2022, at 1–2; *see also* Covil Trial Ex. 93, Penn National’s Interim R. to the Ct., Dec. 7, 2021, at 1.

additional insured on those policies or whether the information was otherwise responsive to the sampling and review ordered by the Court.

Immediately upon the conclusion of the Parties' November 19, 2021, conference call, the Receiver prepared and served on Penn National a set of document requests seeking the litigation hold notices, if any, that Penn National issued related to the Covil litigation as well as all correspondence regarding such litigation holds. On December 20, 2021, in its response to the Receiver's discovery requests, Penn National admitted that it did not issue any litigation hold notices related to the Covil litigation until December 17, 2021, and the litigation hold it did issue on December 17 was only issued to a single person—Mr. Reifsnyder.¹²¹

Out of concern that the December 17, 2021, litigation hold was insufficient, Covil filed a Motion for Protection, requesting the Court to order Penn National to preserve all its historic insurance policy documents.

On February 11, 2022, this Court entered an order requiring Penn National: "to preserve all historic insurance policies and policy-related information unless and until this Court orders otherwise. This Order includes not only historic insurance policies, but also policy-related information existing in electronic form, hard copy, handwritten notes, or any other format. As examples only, this Order includes insurance policies, certificates of insurance, underwriting files, claims files, and any other documentation, regardless of format, evidencing the terms and conditions of historic insurance coverage. Because some of this relevant material is likely stored in electronic forms, all auto-delete or other routine destruction policies for historic insurance policies and policy-related information must be suspended until further notice."¹²²

¹²¹ Covil Trial Ex. 64, Dec. 20, 2021 Penn National's Resp. to Pl.'s Second Set of Req. for Produc., at RFP No. 1.

¹²² See Covil Trial Ex. 66, Order on Mot. for Protection, Feb. 11, 2022, at 3.

In so holding, this Court found, “[i]t is clear to this Court Penn National only put a litigation hold in place on December 17, 2021, in response to the Receiver’s legitimate concerns regarding document preservation. Moreover, the Court is not persuaded that the current litigation hold, that was recently distributed to a single Penn National employee, is sufficient to preserve all relevant documents.”¹²³

This Court’s concern over the efficacy of the litigation hold was well founded: not even Penn National was aware of its litigation hold procedure, and confusion remains as to who received a litigation hold from whom, and when. Scott Maier, an in-house lawyer for Penn National, was presented by Penn National as a corporate representative for deposition on November 21, 2022. During his deposition, Mr. Maier confirmed that he issued the litigation hold to Mr. Reifsnyder in December 2021 pursuant to the Penn National Legal Department’s litigation hold policy.¹²⁴ Mr. Maier further testified that the Penn National Claims Department has its own litigation hold policy which is distinct from the Legal Department’s litigation hold policy under which Maier issued the hold to Mr. Reifsnyder.¹²⁵ At no time—not when he issued the December 2021 litigation hold to Mr. Reifsnyder and not when he was preparing to testify as a corporate representative—has Mr. Maier ever confirmed with the Claims Department whether it ever issued a litigation hold notice related to Covil documents.¹²⁶

¹²³ *Id.* at 2–3.

¹²⁴ Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

¹²⁵ Covil Trial Ex. 97, Nov. 21, 2022 Scott Maier Dep., at 45:3–6 (“Q. Do you know if the Claims Department has a separate litigation hold policy or procedure? . . . A. I’ve been advised they do.”).

¹²⁶ *Id.* at 56:15–57:1 (“Q. Did Mr. Parson confirm to you that a Litigation Hold Notice had been issued by the Claims Department in connection with any of the Covil litigation? A. He did not confirm a notice went out, no. Q. As the corporate representative for Penn National, can you tell me whether the Claims Department ever issued a litigation hold notice under its policies or procedures related to any of the Covil litigation as that term is defined in the 30(b)(6) notice? A. I cannot.”).

In a deposition on November 30, 2022, Boyd Wright testified that he did not receive a litigation hold notice from his supervisor in the Claims Department, Adam Parsons, but instead received a notice directly from Scott Maier:

Q. Did you receive a litigation hold for the Covil litigation?

A. When Scott presented this, yeah.

...

Q. When you say "Scott," are you referring to Scott Maier?

A. Yes, Scott Maier, corporate counsel.

Q. How did Mr. Maier present the litigation hold to you?

A. He sent an email out to a number of people that advised it was a legal hold. I don't know if Scott provided this specific document, but I went and pulled it if he didn't just, you, know, so that I would have it, from the center of my file.

Q. We spoke earlier about a gentleman named Mr. Parsons. Do you recall that?

A. Yes.

Q. Did you receive a litigation hold from Mr. Parsons related to Covil litigation?

A. No.¹²⁷

When asked again specifically whether he received a litigation hold from the Claims Department related to the Covil litigation, Mr. Wright testified, "not from anyone in the claims division, but when Scott Maier's litigation hold comes out, we accept it for what it is and don't do anything to violate it until he tells us otherwise."¹²⁸ When asked whether Mr. Parsons received the litigation hold, Mr. Wright testified, "Oh, I'm sure he did. I mean, as far as I know or can remember or

¹²⁷ Covil Trial Ex. 99, Nov. 30, 2022 Boyd Wright Dep. Tr. at 41:9–42:3. The Court notes that Mr. Wright's testimony that he received a litigation hold from Mr. Maier is in direct conflict with Mr. Maier's testimony that he only sent a litigation hold to one person—Mr. Reifsnyder.

¹²⁸ *Id.* at 44:9–15.

understand, it would be very common for every division within the company to be notified and Adam certainly would have been notified if there was a litigation hold. I mean, *if he wasn't, that's appalling.*"¹²⁹

III. CONCLUSIONS OF LAW

A. Legal Standard for Interpreting Penn National's Policies Under South Carolina Law.

The Parties agree that South Carolina law applies. Under South Carolina law, "[i]nsurance policies are subject to the general rules of contract construction." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614 732 S.E.2d 626, 628 (2012) (quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)); *see also Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (same). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628. (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Courts must enforce, not write, contracts of

¹²⁹ *Id.* at 54:4–11 (emphasis added). The Court notes that the testimony presented by Penn National's expert, Mr. Heinze, on the issue of the litigation hold was inconsistent and unpersuasive. To begin with, while he disclaimed having any opinion on the Penn National litigation hold issue during his November 2022 deposition, he nevertheless sought to offer an opinion at trial suggesting that the issuance of the first and only litigation hold by Penn National in December 2021 was appropriate based on industry custom and practice. Trial Tr. Day 2, Morning Session, at 25:2–16, 29:9–30:3. However, on cross examination, the flaws in Mr. Heinze's new opinion were revealed. For example, he testified on direct examination that the reason the December 2021 litigation hold was issued because (i) "there had been coverage litigation in which Penn National was involved" regarding policies issued to Covil and (ii) there was "another case in which Penn National is not a party [and] Covil had requested policy information." Trial Tr., Day 2, Morning Session, at 27:7–20. Yet, these two events occurred well before December 2021. He also acknowledged that Penn National received the *Finch* subpoena in May 2018, and was aware of the current litigation being filed in April 2020, yet offered no explanation for why it would be appropriate to wait until December 2021, to issue a litigation hold. Further, he claimed to be unaware of Penn National being named in a coverage action in October 2019 and thus offered no explanation for why a litigation hold would not have been appropriate at that time. Trial Tr. Day 2 Morning Session, at 35:5–36:23.

insurance, and their language must be given its plain, ordinary and popular meaning.” *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).

“Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628m (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574). Whether the language of a contract is ambiguous is a question of law for the court. *Id.* “An insurance contract is read as a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity.’” *Beauford Cty. Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (quoting *Yarborough v. Phx Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, this Court must construe “[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (quoting *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797). “Interpretation of an unambiguous insurance policy, or a policy with a patent ambiguity, is for the court.” *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144, 718 S.E.2d 137 (Ct. App. 2015) (citing *Beauford Cty.*, 392 S.C. at 526, 709 S.E.2d at 95-96). “A patent ambiguity is one that arises upon the words of a . . . contract.” *Id.*¹³⁰

“Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)).

¹³⁰ As a general matter, “where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.” *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) (citing *Klutts Resorts Realty, Inc. v. Down’Round Devp. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)).

B. The Aggregate Limit of Liability in the Penn National Policies Does Not Apply to Operations Claims—It Only Applies To Completed Operations and Products Claims.

1. The distinction between operations hazard, completed operations hazard, and products hazard.

It has been long established that the risk insured by the “products hazard” and the “completed operations hazard” is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself.”¹³¹ By contrast, “[w]here an insured begins an operation and the evidence shows it is still in progress” when an injury or damage occurs, the applicable hazard is “premises-operations” and not “completed operations.”¹³²

The “Dean Henderson article” is the seminal academic exploration of the “products hazard” and the “completed operations hazard” in liability insurance policies. A Westlaw search reveals that courts have readily accepted Henderson’s formulation, citing it more than 150 times. For example, in *Boyer Metal Fab, Inc. v. Md. Cas. Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the Oregon Court of Appeals cited Dean Henderson’s article for the proposition that “the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, *will cause bodily injury or damage to property of others*

¹³¹ Covil Trial Ex. 30, Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

¹³² *Id.* at 434–35; *see also, e.g., Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Emps. Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

after it leaves the insured's hands." (emphasis added); see also *W. Emp'rs Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983) (quoting Henderson directly).

Another case that looked substantially to Dean Henderson's formulation is *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978). There, the Superior Court looked to Henderson's article in its discussion of the basic "timing" issues underlying the "products hazard" and "completed operations hazard" in liability insurance policies:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, *but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.*

Id. at 1215 n.5 (emphases added). It is not surprising, then, that other courts have noted that the "products hazard" applies only when the injury *is caused by a defective product placed into the stream of commerce*, or when injury or damage is *caused by the insured's completed work*. See *B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985); see also *CPS Chem. Co. v. Cont'l Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds by* 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in complete agreement that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).¹³³

¹³³ The case law and commentary is clear that the "products hazard" applies *only* when injury is caused by a "completed" product placed into the stream of commerce, *e.g.*, *B & R Farm Servs., Inc.*, 483 N.E.2d at 1077; *Szczeklik v. Markel Int'l. Ins. Co., Ltd.*, 942 F. Supp. 2d 1254, 1265 (M.D. Fla. 2013), or by a product previously installed at a job site *and* the injury occurs *after* the insured "has relinquished control of [the] jobsite." See, *e.g.*, *Friestad*, 393 A.2d at 1215 n.5. Injuries caused by "un-completed" products, injuries caused by "component" products, or injuries caused by products installed as part of a continuing installation or construction project are *not*

2. The clear and unambiguous policy language.

The Penn National Policies contain an “aggregate” on the declarations page for “Bodily Injury and Property Damage Liability Combined Single Limit.”¹³⁴ The term “aggregate” is not defined in the Penn National Policies.¹³⁵ Therefore, to understand the parties’ intent with respect to the total limit of liability, the Penn National Policies must be read as a whole.¹³⁶ Penn National concedes that the “\$1 million per occurrence/aggregate policy limit” is “***subject to the terms, conditions and endorsements that compose the entire policy.***”¹³⁷

Section III of the Insuring Agreement in the Penn National Policies declares expressly and unequivocally which hazards are included with the “Limits of Liability.” The Penn National Policies expressly contain a limit of liability provision, which provides for both a per occurrence limit and an aggregate limit for bodily injury liability for damages because of bodily injury included with the **completed operations hazard** and **products hazard**, but not a limit for an **operations hazard**:

III. LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury** or **property damage**, or (3) claims made suits brought on account of **bodily injury** or **property damage**, the company’s liability is limited as follows:

Coverage A – The total liability of the company for all damages, including damages for care and loss of services, because of bodily injury sustained by one or more persons as the result of any one occurrence shall not exceed the limits of bodily injury liability stated in the declarations as applicable to “each occurrence.”

within the “products hazard.” It is only *after* the insured “has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.” *Id.*

¹³⁴ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000028; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000071.

¹³⁵ Covil Trial Ex. 1 at Penn National Policies 000036; Covil Trial Ex. 2 at Penn National Policies 000081.

¹³⁶ Covil Trial Ex. 99, Nov. 30, 2022 B. Wright Dep. Tr. at 12:1–8.

¹³⁷ Covil Trial Ex. 14, B. Wright letter to P. Protopapas, Sept. 1, 2022 (emphasis added).

Subject to the above provision respecting “each occurrence”, the total liability of the company for all damages because of (1) all bodily injury included within the **completed operations hazard** and (2) all bodily injury included within the **products hazard** shall not exceed the limit of bodily injury liability stated in the declarations as “aggregate”.¹³⁸

The policy declarations page specifies an aggregate limit of liability for bodily injury of \$1,000,000 for each occurrence, and \$1,000,000 in the aggregate.¹³⁹

Reading these contract provisions together (i.e., the declarations page and Section III of the Insuring Agreement), as is required under South Carolina law, the clear and unambiguous language of the Penn National Policies contain an aggregate or total limit of one million dollars for damages because of bodily injury included within the completed operations hazard and the products hazard only. The Penn National Policies contain no aggregate or total limit of liability for damages because of purely “operations” bodily injury claims. Accordingly, the operations coverage part for each of the Penn National Policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on Penn National’s liability to pay, subject only to a “per occurrence” limit of liability.¹⁴⁰

3. An aggregate limit of liability was generally not made applicable o premises-operations coverage in comprehensive general liability policies.

Covil’s expert witness on insurance industry customs and practices, Charles Miller,¹⁴¹ credibly and convincingly testified at trial that aggregate limits were not the norm for general

¹³⁸ Covil Trial Ex. 1 at Penn National Policies 000004 (emphasis in original; highlighting added).

¹³⁹ Covil Trial Ex. 1 at Penn National Policies 000001.

¹⁴⁰ While the language of the Penn National policy is clear and unambiguous, this Court must construe any ambiguity in the Penn National Policies “liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615.

¹⁴¹ At trial, this Court qualified Mr. Miller as an expert witness in the area of insurance industry standards, customs, and practices related to his areas of trial testimony. Mr. Miller was employed by Fireman’s Fund Insurance Company for 18 years in insurance claims, holding various positions including senior adjustor, branch office general adjustor, and claims manager. He handled a wide

liability claims in the 1973 Insurance Services Office (“ISO”)¹⁴² standard comprehensive general liability (“CGL”) policy form, and the Penn National Policies are identical to the 1973 ISO standard CGL policy form language.¹⁴³ Many, if not most, insurers at that time included an aggregate limit for claims arising from “products” or “completed operations” hazards (*e.g.*, sale or distribution of a product or the failings of a completed project causing injury at a later date), but had no aggregate limit for general liability claims that arose out of a policyholder’s ongoing operations.¹⁴⁴ Insurers were wrote CGL coverage without aggregate limits for certain hazards, primarily premises-operations hazards, because they were expected to have low loss frequency.¹⁴⁵

Mr. Miller also credibility testified at trial that “the operations coverage in the Penn National policies in effect from 1986 to 1988 is not limited by an aggregate limit, it only has an occurrence limit.”¹⁴⁶

range of claims dealing with commercial lines, including liability claims and asbestos litigation, and worked with a range of forms, including the standard comprehensive general liability forms at issue in this litigation. Mr. Miller is also familiar with the change in policy forms over time, including changes to standard comprehensive general liability forms promulgated by the Insurance Services Office in 1973 and 1986. Mr. Miller also has a law degree, practiced insurance law, and in 2004 founded a sole proprietorship called the Insurance Law Center where he works as an insurance claims practice and coverage expert.

¹⁴² ISO is an organization that developed standard policy forms used in the insurance industry.

¹⁴³ See Covil Trial Ex. 98, Covil’s Expert Witness Charles Miller Dep. at 55:2–15. Penn National presented James A. Robertson as its counter-expert to Mr. Miller’s testimony. At trial, the Court found that Mr. Robertson was qualified as an expert based on his training, education and experience. See Trial Tr. Day 2, Morning Session, at 67. However, the Court found his testimony wholly unpersuasive on this and other insurance industry custom and practice topics.

¹⁴⁴ Covil Trial Ex. 134, Charles Miller Op. Outline, at MILLER 01376.

¹⁴⁵ *Id.*

¹⁴⁶ Miller Trial Tr. at 17:19–18:01; see also Miller Trial Tr. at 21:21–22:12 (Q: What is the basis of your opinion that the aggregate limit in the Penn National policies do not apply to operations claims? A: Well, the basis is multiple. First of all, the basis is the insurance policy language itself which is applied based on its own terms, as is done commonly in the insurance industry by claims handlers. The other basis is my own experience and knowledge with exactly the same policy form and the language while I was in the industry and my continuing education on its course—on its application and the understanding of how it is applied in the industry. Which leads to the other bases which is my research into the history and development of this—of aggregate limits on

The Court finds, consistent with the plain terms of the policies and South Carolina law, that the one million dollar “aggregate” or “total limit” of liability in the Penn National Policies applies to “completed operations” and “products” bodily injury claims only; the “aggregate” does not apply to “operations” bodily injury claims.

4. The completed operations hazard includes asbestos claims only when a claimant is exposed to asbestos after Covil completes its operation.

a. The clear and unambiguous policy language.

The completed operations hazard described in the Penn National Policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of liability, apply only when a plaintiff is exposed to asbestos after Covil completed its installation or removal operations or work at a particular jobsite. The aggregate limit of liability in the Penn National Policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil after Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.

The determination of the applicable hazard depends upon the timing and cause of the injurious exposure to asbestos:

- If the exposure happens during operations, the resulting claim for damages is within the premises-operations hazard.
- If the injury is caused by the insured’s operations, the resulting claim for damages is within the premises-operations hazard.

operations coverage and what—and how that developed and the scope of that aggregate as it is understood and applied in the industry.”).

- If the exposure happens after operations are completed, the resulting claim for damages is within the completed operations hazard. If the injury is caused by the insured's completed operations, the resulting claim for damages is within the completed operations hazard.

The inception date of a particular policy is not pertinent to this analysis. It does not fix the “cause” of the injury and does not answer the fundamental question of which hazard the claimant’s injury was caused by the insured work-in-progress or the insured’s completed work.

The continuing nature of asbestos bodily injury running from initial exposure until manifestation of a clinical disease or death means that a plaintiff exposed to asbestos only during Covil’s asbestos operations in the 1960s sustained injury while Covil’s operations were ongoing in the 1960s *and* after those operations were completed, even absent additional exposure. Or, in other words, the bodily injury in the hypothetical *started* during operations and continued after those operations were completed.

There is nothing in either the structure or the language of the Penn National Policies that suggests a claim for bodily injury is within the “completed operations hazard” if a long-term injury process begins while the operations are ongoing *and* continues until they were completed. The “completed operations hazard” applies “only if *the* bodily injury. . . occurs after such operations have been completed.”¹⁴⁷ Thus, if *any* bodily injury occurs *before* the operations are completed, then “*the*” bodily injury could not have occurred *after* the operations were completed.

Under this scenario, some of “*the*” injury occurred before the operations were completed, while some of “*the*” injury occurred after the operations were completed. The use of the definite article “the” before “bodily injury” in the provision suggests that *all* of the bodily injury must occur *after* the operations are completed for the “completed operations hazard” to apply. If “the” injury—all of it—happens after the operations are completed, the claim is within the “completed

¹⁴⁷ See Covil Trial Ex. 1 at Penn National Policies 000036.

operations hazard.” If not, then the claim is not within the “completed operations hazard.” It is instead within the “premises-operations hazard.” By requiring the injury to occur *entirely* after the operations were completed for a resulting claim to fall within the “completed operations hazard,” the policies therefore foreclosed the possibility that “completed operations” claims could result from either exposures or accidents that happened during ongoing operations.

b. The underwriting intent.

All of this is consistent with long-understood underwriting intent, as expressed in historical writings, insurance textbooks, insurance industry interpretive materials, and in legal and academic commentary.

There is nothing in the policies that assesses coverage based on the insured’s activities or operations during the policy period. Instead, the policies cover *injury* or *damage* during the policy period, regardless of whether the injury-causing event happened during the policy period or before the policy period. One of the principal drafters of the standard “occurrence” policy language from which the policies in this case were derived explained the basic underwriting intent behind this coverage in an often-cited 1965 speech:

This brings into focus one important change in our policy—the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.

The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid under this new contract. . . .

So, even for new business, the underwriter must be more alert than ever. More potential losses may be inherited from the past. A harmful waste disposal practice unknown to the underwriter because it has since been corrected, or which the applicant promises to correct, may still produce serious losses during your period

of coverage. This has always been true for products, but with gradual injury or damage being covered, the potential is a lot worse.¹⁴⁸

Another principal author of the “occurrence” form noted that an intended feature of the policy is that multiple, consecutive policies will afford coverage in “exposure types of cases” that involve cumulative, long-term injury such as asbestos:

Note also the reference to injurious exposure to conditions which results in injury. This eliminates any requirement that the injury result from a sudden event. Although, it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident. For example, slow ingestion of foreign substances or inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage—the injury must take place during the policy period.

In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.

Stempel at 370 (quoting Richard H. Elliott, “The New Comprehensive General Liability Policy,” in *Liability Insurance Disputes*, 12-3, 12-5 (Sol Schreiber & Stuart J. Motelson eds., PLI 1968)).

Further, the Penn National Policies do not state or even suggest that “operations” coverage is limited only to the policy on the risk during the time that the insured conducted operations that resulted in cumulative, long-term injury that did not become known for years or decades later. The insurance industry knew by the mid-1960s at the latest that potential losses resulting from the “inhalation of noxious fumes,” for example, “may be inherited from the past,” yet neither of Penn National’s policies from the 1980s at issue contain an aggregate limit, or total “cap,” on the insurers’ liability for Covil’s “operations” losses.

¹⁴⁸ Covil Trial Ex. 29, Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 368–69 (2005/2006) (quoting Gilbert L. Bean (Liberty Mutual Insurance Company), “Address at the Mutual Insurance Technical Conference on New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks” (Nov. 15–16, 1965)).

Penn National addressed this particular problem as respects potentially inherited *product liability exposures* by placing an aggregate limit of liability on their policies for losses within the “products hazard.” Had Penn National wanted the aggregate limit of liability to apply to bodily injury resulting from “operations” exposures that happened before the inception date of their policies to limit their liability for Covil’s losses they “inherited from the past,” they could have easily included language such as this in their policies:

The aggregate limit of liability applies to all damages for bodily injury or property damage to which this insurance applies because of an accident, an event or continuous or repeated exposures to conditions that occurred prior to the first date upon which this policy is in force.

This type of language does not, however, appear in the Penn National Policies at issue, and Penn National cannot re-write its policies and add a limitation on their liability that it did not include when it contracted with Covil.

At its most fundamental level, a “hazard” in an insurance policy “is the source from which an accident may arise, or ‘a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.’” *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 417-418 (Mass. 1941)); see also *Service Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit, Mich.*, 311 F.2d 612, 617 (6th Cir. 1962) (“The word ‘hazard’ as used in the policy must mean ‘the source of a risk.’ . . . Thus, a ‘hazard’ is a danger or risk lurking in a situation or place.”). “Along with other meanings, the standard dictionary defines the noun ‘hazard’ as exposure to the chance of loss or injury.” *Caminetti v. Guar. Union Life Ins. Co.*, 126 P.2d 159, 163 (Cal. 1942). The Merriam-Webster On-line Dictionary defines “hazard” to include “a source of danger.” Available at www.Merriam-Webster.com (definition of “hazard”). See also *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered

under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress.").

Commentators are in complete agreement the "premises-operations hazard" covers the insured against legal liability resulting from its work-in-progress, while the "completed operations hazard" covers the insured against legal liability resulting from its completed work.

For example, a standard risk management and insurance textbook sketched the scope of the two hazards succinctly: the "completed operations hazard" applies when "the liability arises from the unsatisfactory *outcome* of the work, not from the actual *performance* of the work, as with operations liability."¹⁴⁹

The Insurance Services Organization promulgates standard policy forms used by Penn National. It published a training workbook for claims handlers in the mid-1980s that identified several examples of injuries as falling within the "products-completed operations hazard" of the standard general liability insurance policy, including the following:

¹⁴⁹ Covil Trial Ex. 31, James L. Athearn, S. Travis Pritchett & Joan T. Schmit, *Risk and Insurance*, at 510 (6th ed. 1989) (emphases added); *see also* Covil Trial Ex. 32, Mark S. Dorfman, *Introduction to Risk Management and Insurance*, at 397 (7th ed. 2001) ("Completed operations insurance. This type of policy covers claims from injuries arising after a service is rendered and the property's control is returned to the owner. This coverage would help Leaky Louis, the plumber, whose negligence caused a water heater to explode."); Covil Trial Ex. 35, Fire Casualty & Surety Bulletin, June 1985 (the "completed operations hazard. . . is the insured's potential liability for bodily injury or property damage that arises out of the insured's completed work"). The Fire Casualty & Surety Bulletin is "used by insurance agents and brokers to interpret standard insurance policy provisions." *Md. Cas. Co. v. Reeder*, 221 Cal. App. 3d 961, 972 (1990). It is frequently cited by courts when interpreting disputed insurance policy provisions. *See, e.g., Ind. Ins. Cos. v. Granite State Ins. Co.*, 689 F. Supp. 1549, 1555 (S.D. Ind. 1988) (citing the June 1985 Fire Casualty & Surety Bulletin for the proposition that "[c]ompleted operations coverage is designed to protect the insured from liability arising from the insured's completed work"); *see also Prudential-LMI Comm. Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1513 (1994) (Fire Casualty & Surety Bulletin admissible to determine whether insured's policy interpretation was reasonable).

The ACE Construction Company remodels one of the Case Company branch offices. ACE is the named insured, *after ACE has completed the job* a portion of the ceiling falls, injuring a customer.¹⁵⁰

ISO contrasted this with examples of damage that were *not* within the “products-completed operations hazard” of the policy, including this one:

During delivery of some ice machines to National Inns, a child is injured when one of the machines falls off the delivery truck.¹⁵¹

The ISO workbook later defined “Completed Operations Insurance” as “[a] form of insurance issued particularly to various types of contractors. It covers a contractor’s liability for accidents arising out of jobs or operations that he has completed.”¹⁵² In sum, the ISO thus explained that “completed operations” coverage applies to injuries that happen after a job is completed, while “operations” coverage applies to injuries that happen during the performance of a job. The two coverages do not overlap.

The online Glossary of Insurance and Risk Management Terms, published by the International Risk Management Institute (“IRMI”), defines “premises-operations” in an identical manner. It is:

[o]ne of the categories of hazards ordinarily insured by a general liability policy. Composed of those exposures to loss that fall outside the defined ‘products-completed operations hazard,’ it includes liability for injury or damage arising out of the insured’s premises or out of the insured’s business operations while such operations are in progress.¹⁵³

Legal and academic commentators have concluded similarly that the “premises-operations hazard” covers liability resulting from the insured’s ongoing work, while the “completed operations hazard” covers liability resulting from the insured’s completed work. Whether the

¹⁵⁰ Covil Trial Ex. 33, Insurance Services Office, *General Liability Coverage*, at 26 (1985) (emphasis added).

¹⁵¹ *Id.* at 28 (emphasis added).

¹⁵² *Id.* at 106.

¹⁵³ Covil Trial Ex. 34, IRMI, Premises-Operations Definition, <http://www.irmi.com/online/insurance-glossary/terms/p/premises-operations.aspx>, (last visited Nov. 29, 2022).

operations resulting in injury happened during the policy period is immaterial under policies that cover “injury” during the policy period as opposed to “operations” during the policy period.

For example, an attorney representing insurers *rejected* a broad interpretation of the “completed operations hazard”:

Given these seemingly clear [CGL] provisions [regarding completed operations] it should not be surprising that despite efforts by some parties (mostly insurers) to argue for a very broad interpretation of the completed operations hazard,

“commentators are in complete agreement that this [coverage] refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or services contracts.

See Covil Trial Ex. 29, Stempel, *supra*, at 389-90 (quoting Theodore A. Howard, “Products/Completed Operations Coverage 1997: Still Learning Professor Henderson’s Lessons 25 Years Later,” *Coverage*, Vol. 7, at 33, 38, n. 17 (Dec. 1997) (quoting *CPS Chem. Co.*, 489 A.2d at 1270.)).

Academic commentary is in accord:

The natural reading of the words of the CGL policy suggests that tort claims arising from a policyholder's regular, ongoing operations are general premises-operations liability claims and do not evolve or transform into “completed operations” hazard claims merely because the construction activity comes to a conclusion sometime after the events that give rise to tort liability irrespective of the claimants’ relation to those later activities.

Id. at 385. Indeed, “completed operations” coverage has applied historically only to injuries *caused by* the insured’s completed work and not by its work-in-progress:

The concept of what constitutes a “completed operation” and the verbiage used to describe and define it has been generally consistent throughout the history of the CGL policy. The CGL policy language itself states the perhaps self-evident proposition that when a policyholder has finished a building or project and moved on to other activities, the building or project then becomes a “completed operation” much like a product that has been placed in the stream of commerce.

For injuries that begin after that time, the aggregate limits of the CGL policy applicable to products or completed operations claims set forth the insurer's

maximum liability for third-party claims that arise because of failings of the building or project that cause injury. By contrast, injuries that begin during operations are properly classified as general liability injuries.

Id. at 387.

In short, if the plaintiffs' exposure to asbestos happened solely during the insured's ongoing operations, the aggregate limits of liability do not apply to the claim. In that instance, the source of the plaintiff's injury—the "hazard" or "risk" giving rise to the claim—was the insured's work-in-progress, and not the insured's completed work. The Second Circuit succinctly summarized this point in a dispute concerning insurance and reinsurance for claims asserted against Owens-Corning Fiberglas ("OCF") arising from its installation of the asbestos-containing "Kaylo" product over several decades. The insurance policies at issue in that case were sold by Travelers to OCF between 1952 and 1979:

Non-products coverage protected OCF from claims for asbestos-related injuries resulting from asbestos exposure on OCF's premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products. . . . [I]f claims arising from multiple occurrences triggered non-products coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.

Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America, 419 F.3d 181, 184 (2d Cir. 2005).

Finally, Mr. Miller also credibility testified at trial that "the operations coverage [under the Penn National Policies], once it applies does not change to completed operations after expiration of the applicable policy."¹⁵⁴

¹⁵⁴ Miller Trial Tr. at 33:09–33:14.

5. Penn National has the burden to prove an asbestos claim is a completed operations or product hazard claim to apply it to the aggregate limit of liability.

Penn National bears the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits as well as the “exhaustion” of the aggregate limits of liability in its policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Clayton*, 364 S.C. at 560, 614 S.E.2d at 614 (citing *Boggs*, 272 S.C. 460, 252 S.E.2d 565); *see also Benjamin*, 415 S.C. at 144–48, 781 S.E.2d at 141–44 (upholding circuit court decision to construe an ambiguous term in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Acc. Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 716 A.2d 751, 757 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is Penn National’s burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in its policies, where such aggregate

limits have been proven by Penn National as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, Penn National bears the burden of demonstrating that aggregate limits in its policies, if any, apply to any particular asbestos suit.

6. The Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss claims are not subject to the Penn National Policies' aggregate limit of liability.

The settlement amounts that Penn National contributed to resolve the *Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* claims, as identified in Penn National's September 1, 2022 letter to the Receiver,¹⁵⁵ do not meet the definition of "completed operations hazard" or "product hazard" claims and therefore are not subject to the aggregate limit of liability in the Penn National Policies and do not impair the total limits of liability. Penn National has not carried, and cannot carry, its burden to prove otherwise. Rather, the evidence adduced in each of these cases reveals exposure to asbestos from Covil's *ongoing work operations* at a jobsite, and thus are subject only to the "per occurrence" limits of the policies.

Based on the foregoing, the bodily injury allegedly suffered by these claimants are "operations" claims and not "completed operations" or "products" claims. The Court hereby grants the Receiver's request and declares, as a matter of law, that the aggregate limit of liability of the Penn National Policies does not apply to the above-referenced asbestos claims because the bodily injury liability arising from Covil's operations necessarily falls outside of the completed operations hazard and products hazard of the Penn National Policies.

7. Coverage should be allocated on an all sums basis.

The Court must next determine how Covil's liability should be allocated. Courts take two different approaches to allocation. Some courts allocate liability on proportionate basis, an

¹⁵⁵ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

approach generally referred to as “pro-rata allocation.” Other courts allow an insured to allocate liability on a joint and several basis to a single triggered insurance policy, an approach generally referred to as “all-sums allocation.”

Which approach to allocation should be adopted here—like the initial coverage determination—is governed by the terms of the insurance policy. “Insurance policies are subject to general rules of contract construction.” *Standard Fire Co. v. Marine Cont. & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990). The Court “must give policy language its plain, ordinary and popular meaning.” *Id.* This is a fundamental precept of insurance law in South Carolina that has been embraced repeatedly by the South Carolina Supreme Court.¹⁵⁶ It requires an insurer to fulfill the promise of coverage actually made to a policyholder under the terms of the insurance policy.

Adhering to this principle, the South Carolina Supreme Court has held that liability for progressive property damage spanning multiple policy periods must be allocated on a pro-rata basis to all triggered policies. *Crossmann Cmtys. of N. C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). The Court reached this determination “rel[ying] heavily” on

¹⁵⁶ See e.g., *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) (“The Supreme Court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning. We should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.”); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 437 S.C. 587, 591, 879 S.E.2d 742, 744 (2022), *reh'g denied* (Nov. 17, 2022) (holding that policy terms “must be interpreted under their common meaning”); *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (holding the “[c]ourt must give policy language its plain, ordinary, and popular meaning. . . . The court’s duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.”) (quotation and citations omitted); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law”).

Boston Gas Co. v. Century Indemnity Co., 454 Mass. 337, 357-59, 910 N.E.2d 290, 305, 306-07 (2009), which the Court explained “provides the reading of the relevant policy language that we believe is correct.” *Id.* at 61–62, 600. In *Boston Gas*, the Massachusetts Supreme Judicial Court interpreted an Insuring Agreement that obligated the insurer to pay for “property damage . . . to which this insurance applies,” and a “Policy Period, Territory” provision that stated “[t]his policy applies to . . . property damage . . . which occurs anywhere during the policy period.” 454 Mass. at 343, 910 N.E.2d at 296. Essentially the same Insuring Agreement was before the Court in *Crossmann*, and the policies at issue expressly provided that “the insurance applied ‘only if . . . bodily injury or property damage occur[red] during the policy period.’” *Crossmann*, 395 S.C. at 53, 717 S.E.2d at 595. The Court held that the limitation placed on property damage to which “the insurance applied” limited the insurer’s promise to pay to property damage that occurred during the policy period. *Id.* at 62, 600.¹⁵⁷

The South Carolina Supreme Court has not been presented with the question of whether the same rule applies in progressive bodily injury cases. As was the case in *Crossmann*, the terms of the Penn National policies govern that question. Here, the policy terms that govern Covil’s progressive bodily injury claim are distinct from the policy terms at issue in *Crossmann* and notably do not limit the bodily damage to which “the insurance applies” to bodily damage that occurs during the policy period. To the contrary, the policy provisions define Penn National’s obligation to insure Covil for bodily injury in broad terms that encompass all consequences of bodily injury, without regard to when they occur. In this case, an all sums approach to allocation is most consistent with the Penn National policy language. All sums allocation also best serves

¹⁵⁷ The Court further held that pro-rata allocation of liability in a progressive property damage case was consistent with the reasonable expectations of the contracting parties and public policy goals. *Id.* at 63–64, 601.

the contracting parties' reasonable expectations of bodily injury coverage and policy goals for bodily injury coverage.

a. The terms of the Penn National policies embrace all-sums allocation.

Three parts of the insurance policies determine the scope of coverage that the Penn National policies provide for bodily injury claims: the “Insuring Agreement,” the “Policy Territory” provision, and the “bodily injury” definition. In the “Insuring Agreement,” Penn National promises to “pay on behalf of the **insured** all sums which the insured shall become legally obligated to pay as damages because of . . . **bodily injury** . . . [to] which this insurance applies, caused by an **occurrence**[.]” The “Policy Territory Provision” addresses the “bodily injury” to which this insurance applies and provides that “[t]his insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.” The “Definitions” section of the policy defines “bodily injury” to mean “bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death **at any time** resulting therefrom[.]” (Emphases added).

None of these policy provisions impose a temporal or proportionate limit on Penn National’s obligation to defend or indemnify Covil for a progressive bodily injury claim. The Insuring Agreement imposes an open-ended obligation on Penn National that extends to include the overall legal liability borne by the insured “because of” bodily injury to which the insurance applies. Penn National promises to pay, without qualification, “all sums which the insured shall become legally obligated as damages” “because of” such bodily injury. Penn National agreed to protect Covil from its entire legal liability. That broad promise fulfills the purpose of comprehensive general liability insurance, which the South Carolina Supreme Court has recognized “grants the insured broad liability coverage for . . . bodily injury which is then narrowed

by a number of exclusions.” *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009).

The Insuring Agreement sets two preconditions on coverage and the imposition of this broad insuring obligation on Penn National: (1) Covil’s legal liability must be because of “bodily injury . . . to which this insurance applies,” and (2) the bodily injury must be “caused by an occurrence.” The provision that establishes the “bodily injury . . . to which the insurance applies,” and the “bodily injury” and “occurrence” definitions determine whether those preconditions are met. Each of these policy terms reinforces that Penn National’s insuring obligation extends to all consequences that flow from “bodily injury,” and is not limited to injury that occurs during the policy period.

What distinguishes this case from *Crossmann* is that the Penn National policy provision that establishes the “bodily injury . . . to which this insurance applies” does not place a temporal limitation on the scope of “bodily injury” covered by the policies. The “Policy Territory” provision of the policy states that “[t]his insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.” The policy language clearly imposes a limitation on coverage as it provides coverage applies “only” to certain “bodily injury” and “property damage.” However, unlike in *Crossmann*, the limitation placed on the “bodily injury” to which the policy applies is **only** a geographic limitation, not a temporal limitation. This fundamentally distinguishes the Penn National policies from the policies at issue in *Crossmann* and the *Boston Gas* decision relied on by the South Carolina Supreme Court. In both *Crossmann* and *Boston Gas*, the policy provision establishing the scope of the property damage and bodily injury “to which this insurance applies” required that the property damage and bodily injury occur “during the policy period.” That limitation is not part of the Penn National policies. Rather, the provision of the Penn National

policies that establishes the “bodily injury . . . to which this insurance applies” establishes that it is only necessary that the bodily injury “occur within the policy territory.”

Crossmann, a case that dealt with coverage for progressive property damage, also did not address the “bodily injury” definition contained in the Penn National policies. That definition includes two references to time, and each serves a separate purpose. “Bodily injury means bodily injury, sickness or disease . . . which occurs during the policy period. . . including death at any time resulting therefrom.” The phrase “at any time” references the scope of the “bodily injury” encompassed by the policy. “Bodily injury” includes “bodily injury, sickness and disease” and also the consequences that flow therefrom, up to and including “death at any time.” The definition expressly rejects the idea that bodily injury covered by the policy is confined to bodily injury occurring during a limited temporal period by providing that “bodily injury” includes “death at any time.” *Am. Precision Indus., Inc. v. Fed. Ins. Co.*, No. 14-CV-1050-RJA-HKS, 2021 WL 8263499, at *11 (W.D.N.Y. Aug. 4, 2021) (“The “death at any time” provision necessarily extends the protection of each Primary Policy beyond the policy period.”); *Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Ins. Co.*, No. 17-CV-01804-WHO, 2018 WL 1335880, at *4 (N.D. Cal. Mar. 15, 2018) (“The definition of “bodily injury” in the Zurich policy contemplates and promises indemnification to damages that arise outside of the policy period.”); *Canon Elec., Inc. v. Ace Prop. and Cas. Co.*, No. BC 290354, 2017 WL 10992340, at *26 (Cal. Super. Ct. Aug. 17, 2017) (“These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. These policies expressly provide a transfer of the liability risk from the insured to the insurer for all consequential harms—past, present and future—flowing from that injury.”). If it is to be given its ordinary meaning, the phrase “at any time” cannot be interpreted

as temporally truncating the “bodily injury” covered by the policy. Such a limitation is inimical to the meaning of the term “any,” which modifies the word “time.” “Any” is commonly understood to mean “unmeasured or unlimited in amount, number or extent” and “appreciably large or extended.”¹⁵⁸

The inclusion of the phrase “during the policy period” in the definition of “bodily injury” does not support a contrary interpretation. When a court interprets an insurance policy, it must give meaning to all words used in the policy. *Crossmann*, 395 S.C. at 62, 717 S.E.2d at 600–01. Application of this principle to the “bodily injury” definition requires the Court give meaning to each part of the definition, and the significance of the phrase “during the policy period” must be harmonized with the phrase “at any time.” Interpreting “during the policy period” as importing a temporal limitation into the “bodily injury” definition puts one part of the “bodily injury” definition in conflict with another part. What harmonizes all elements of the definition is interpreting the phrase “during the policy period” as establishing a trigger of coverage. That is, through the use of the phrase “during the policy period,” the definition of “bodily injury” requires that some of part of the bodily injury must occur during the policy period to trigger the policy.¹⁵⁹ Once a policy is triggered, the “bodily injury” encompassed by the policy includes the injury and consequences flowing from the injury up to and including death “at any time.”

The “occurrence” definition also reflects an intention to impose on the insurer a broad obligation to insure bodily injury that is not subject to a temporal limitation. The policy anticipates that “bodily injury” might result from “continuous or repeated exposure to conditions.” The

¹⁵⁸ Any, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/any>) (accessed January 11, 2024).

¹⁵⁹ South Carolina has adopted a modified continuous trigger of coverage. *Crossmann*, 395 S.C. at 55, 717 S.E.2d at 596. Coverage is triggered at the time of an injury-in-fact and continuously thereafter through progressive damage.

definition does not limit an occurrence to “bodily injury” that results from conditions that take place during the policy period. Rather, the definition uses expansive language to provide that an occurrence will encompass “bodily injury” that results from “continuous” conditions. The use of the word “continuous,” which is commonly understood to mean “marked by uninterrupted extension in space, time, or sequence,” reflects an intention that conditions that result in bodily injury should not be temporally limited.¹⁶⁰

An all sums approach to allocating liability for progressive bodily injury claims gives meaning to all of the Penn National policy language that governs a progressive bodily injury claim and is most consistent with those terms.

This policy language is only consistent with an all sums approach to allocation. The result here is the same as in *American Precision Industries*, *Polar Mohr*, and *Canon Electric*, where the court held:

[T]he . . . policies at issue here must be allocated based on an “all sums” methodology. Their insuring provisions expressly provide that the policyholder will be indemnified for “all sums” for which it is liable for damages arising from an occurrence, which may be continuous. These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. These policies expressly provide a transfer of the liability risk from the insured to the insurer for all consequential harms—past, present and future—flowing from that injury. To give meaning to the policies’ provisions that extended protection beyond the policy period for continuing injuries means that “all sums” allocation must be applied. To do otherwise would be to disregard and render these provisions “surplusage”.

Cannon Elec., 2017 WL 10992340, at *26. Prorating the insurer’s liability would require the Court to disregard policy terms and rewrite the agreement between Penn National and Covil, which would be contrary to South Carolina law. *B.L.G. Enterprises.*, 334 S.C. at 535, 514 S.E.2d at 330

¹⁶⁰ *Continuous*, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/continuous>) (accessed January 11, 2024).

(“The court’s duty is ‘limited to the interpretation of the contract made by the parties themselves[.]’”) (citations omitted)).

b. All-sums allocation also is most consistent with the purpose of comprehensive general liability insurance coverage for progressive bodily injury claims.

The all-sums approach to allocation requires Penn National to protect Covil against both the immediate and long-range consequences of asbestos-related injuries, including death. That approach to allocation not only reflects the grant of coverage made by the terms of the Penn National policies. It also is most consistent with the overall purpose of comprehensive general liability (“CGL”) insurance, which is to protect the policyholder from liability.

As the South Carolina Supreme Court has recognized, “[t]he standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions.” *Newman*, 385 S.C. at 197, 684 S.E.2d at 546. The protection afforded by the policies is not limited to an injury occurring during a limited period of time. Rather, the policies insure against “consequential risk,” which flows from the policyholder’s tort liability for damage to persons or property. *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 8–9, 747 S.E.2d 426, 430 (2013) (citing *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565–66, 561 S.E.2d 355, 358 (2002) (overruled in part on other grounds by *Crossmann*, 395 S.C. 40, 717 S.E.2d 589)). Consequential damages in tort, particularly for asbestos-related injury, compensate a victim for both the damages they have suffered and for the damages they will suffer up to and including death. A business with CGL coverage has taken steps to ensure that it is able to pay a claimant for the full scope of this liability.

Accordingly, the Court holds that each Penn National Policy is required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits.

8. Covil is entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The Court must next determine whether multiple asbestos claims should be treated as a single occurrence or multiple occurrences under the Penn National insurance policies at issue. Penn National raises this issue for the first time at trial, asserting multiple asbestos claims should be treated as a single occurrence.¹⁶¹ The Court rejects Penn National’s request as inconsistent with the plain terms of the policies.

The policies at issue provide coverage for legal liabilities resulting from an “occurrence.” An “occurrence” is defined in the policies as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”¹⁶² Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

¹⁶¹ Penn National’s proffered expert witness, James Robertson, provided generalized testimony that “it’s possible that [all underlying asbestos claims] may be considered a single occurrence even though there are separate claims. . . .” Trial Tr., Day 2, Morning Session, at 91:14–22. The Court does not find Mr. Robertson’s generalized testimony to be credible or persuasive on this point or consistent with the language of the Penn National insurance policies at issue here.

¹⁶² Covil Trial Ex. 1 at 36.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil's operations exposed workers and other bystanders to asbestos.¹⁶³

Courts have held that the type of asbestos operations claims against Covil resulted from multiple "occurrences" under the standard definition of "occurrence" used during the time of Penn National's policies. *See, e.g., Gerling*, 419 F.3d 184 ("[I]f claims arising from multiple occurrences triggered [operations] coverage, then [the insurer] was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much [the insurer] had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected [the insurer] to liability anew."); *see, e.g., Com. Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1211 (Md. Ct. Spec. App. 1997) ("The event causing damage in the asbestos-related bodily injury cases is exposure to asbestos fibers Since each individual claimant has a unique work history, each claimant's exposure must be viewed as a separate occurrence."); *In re Prudential Lines Inc.*, 158 F.3d 65, 83 (2d Cir. 1998) (holding that each asbestos claim arose from a separate occurrence); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767-68 (6th Cir. 1995) (same); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 908 (Conn. 2001) ("we are not persuaded that thousands of exposures to asbestos, occurring at different times and places, constitute one occurrence"); *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876, 887 (Ohio Ct. App. 2007) (holding that "each individual exposure to asbestos, and the resulting injury, constituted a separate accident or occurrence").¹⁶⁴

¹⁶³ *See* Covil Exs. 15-29.

¹⁶⁴ *See also Exxon Corp. v. St. Paul Fire & Marine Co.*, No. CIV. A 94-2111, 1996 WL 665751 (E.D. La. Nov. 15, 1996) (separate encounters with hazardous material by different men working

9. Continuous trigger of coverage applies to Covil Asbestos Suits.

The term “trigger of coverage” describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured’s policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a “continuous trigger of coverage” or an “injury in fact trigger of coverage” inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result that the Court need not choose between these conceptually similar approaches.¹⁶⁵

In its policies, Penn National promised to cover any claim arising out of an “occurrence” so long as “bodily injury” happened during the policy period, even if the claim is made years after the policy expires. See Penn National Policies 000002, 36, 45, 81. Insurers developed this type of “occurrence” policy “to make clear that gradually occurring losses would be covered so long as they were not intentional.” *Cont’l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 648 (1993). Thus,

around oil field constitutes separate occurrences); *CSX Transp., Inc. v. Continental Ins. Co.*, 680 A.2d 1082 (Md. 1996) (each claimant’s allegation of noise induced hearing loss is a separate occurrence); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 973–74 (Mass. 1990) (discrete acts of child abuse at different locations in school are separate occurrences).

¹⁶⁵ See *Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

latent injury claims, such as the underlying asbestos claims asserted against Covil, are precisely the type of claims for which the Penn National Policies were designed.

As discussed below, based on the relevant policy language, existing South Carolina law, the drafting history of the relevant policies, other equitable considerations, and Penn National's course of performance, the continuous trigger theory governs the issue whether any Covil Asbestos Suit "give[s] rise to a duty on the part of Penn National to defend and/or indemnify Covil," *i.e.*, "triggers" the Penn National Policies.

a. The plain language of the Penn National Policies encompasses coverage for subclinical injury and subclinical disease that happened during the policy period.

The policy language is the starting point for insurance policy interpretation. As used in the Penn National Policies, the term "bodily injury" plainly encompasses subclinical injury and subclinical disease. Any argument that a clinical disease is required to trigger coverage, or that only the initial asbestos exposure itself triggers coverage, is contrary to both the language of the Penn National Policies and South Carolina law.

The Penn National Policies provide, in relevant part: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance policy applies, caused by an occurrence" ¹⁶⁶ Under the Policies, "bodily injury" means "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." ¹⁶⁷ And "occurrence" means "an accident including continuous or repeated

¹⁶⁶ Covil Trial Ex. 1, at Penn National Policies 000002; Covil Trial Ex. 2, at Penn National Policies 0000045.

¹⁶⁷ Covil Trial Ex. 1, at Penn National Policies 000036; Covil Trial Ex. 2, at Penn National Policies 0000081.

exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”

Relevant principles of insurance policy interpretation under South Carolina law are well established. First, “[i]f the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). In accord with this principle, “[c]ourts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.” *Sloan Const. Co. v. Central Nat. Ins. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). Second, “[w]here the words of a policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured.” *McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993). Third, “an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.” *Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153.

The Penn National Policies’ definition of “bodily injury” is clear and unambiguous and includes subclinical injuries other than disease and sickness. “Bodily injury” is defined in relevant part as “bodily injury, sickness or disease sustained by any person.”¹⁶⁸ On its face, this language states that the Penn National Policies are triggered if any one of multiple events happens during a Penn National policy period. “Disease” is one such event. “Bodily injury” is another such event.

¹⁶⁸ Covil Trial Ex. 1, at Penn National Policies 000036; Covil Trial Ex. 2, at Penn National Policies 0000081.

Thus, the Penn National Policies are triggered not only by “disease,” but also by “bodily injury” (as well as other events) that happen during the policy period. Limiting coverage to periods in which there is clinically diagnosable disease only effectively reads out of the policies the express grant of coverage for “bodily injury” that happens during the policy period. That interpretation, which would render the coverage grant for “bodily injury” superfluous, should be avoided. See *Stevens Aviation*, 407 S.C. at 417, 756 S.E.2d at 153.

Inherent in the definition of “bodily injury” for which the Penn National Policies promise to provide coverage are subclinical injuries at the cellular or molecular level that happen during the policy period and eventually progress into a clinical injury or disease.¹⁶⁹ This is common sense. A person who experiences an unknown, subclinical injury that later progresses into a clinical injury is plainly worse off on the day he or she experienced the subclinical injury than he or she was the day before. The natural meaning of “bodily injury” encompasses such subclinical injury because the person’s body has been hurt or damaged at the cellular or molecular level. See *Injury*, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/injury>) (last accessed Jan. 11, 2024) (injury means “hurt, damage, or loss sustained”). Absent language limiting “bodily injury” to injury that is known or diagnosed during the policy period, there is no basis for this Court to impose such a limitation. *Stevens Aviation, Inc.*, 407 S.C. at 417, 756 S.E.2d at 153.¹⁷⁰

¹⁶⁹ Whether “bodily injury” under the Penn National Policies extends to subclinical injuries from exposures to asbestos but do not eventually result in a diagnosed disease is not at issue here because Covil is not seeking coverage for such cases.

¹⁷⁰ See also *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d. 760, 756-66 (2d. Cir. 1984) (refusing to impose a requirement that injury be “diagnosable” or “compensable”); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 46 (1996) (“The trial court’s continuous trigger decision, then, is based upon factual findings that for asbestos claimants an injury-in-fact took place during each triggered policy period, even though the injury was not diagnosable or compensable during the policy period.”); *Associated Aviation*

There is no merit to any argument that the coverage grant for “bodily injury” during the policy period under the Penn National Policies is limited to *clinical* disease. Indeed, in prior similar litigation, “the medical evidence regarding the carcinogenic mechanisms of asbestos sufficiently establishes an insidious disease process involving billions of cellular mutations that constitute injuries.” *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1198 (2d Cir. 1995). Similarly, the medical evidence regarding non-cancer asbestos-related diseases in other litigation shows that “there is a period of time prior to the point at which asbestosis and pleural plaques are clinically diagnosable when the condition is evolving cumulatively or incrementally. . . . [And] [t]he disease process . . . begins within days of initial exposure to asbestos and continues for decades.” *Id.* Reading the coverage grant for “bodily injury” to include subclinical cellular mutations and lung tissue scarring is consistent with South Carolina principles of insurance-contract interpretation, which require that coverage grants be interpreted broadly and in favor of coverage. See *McPherson* 310 S.C. at 319, 426 S.E.2d at 771 (“rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed.”). Accordingly, the unmodified term “bodily injury” in the Penn National Policies includes subclinical injuries and disease.

Also unfounded is the argument that the coverage grant for “bodily injury” during the policy period is limited to the initial exposure to asbestos. Such an argument would require the Court to “interpret ‘bodily injury’ to mean *only* the exposure to a toxic substance and the cellular damage resulting therefrom.” *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 166, 98 P.3d 572, 601 (Ct. App. 2004) (emphasis in original). This would either require the Court to give

Underwriters v. Wood, 209 Ariz. 137, 166, 98 P.3d 572, 601 (Ct. App. 2004) (“Based on its plain and ordinary meaning, the term, “bodily injury,” in this context is not limited to a fully manifested, diagnosable condition.”) (internal citations omitted).

the same meaning to both “bodily injury” and “disease” or render the coverage grant for “disease” superfluous. “Neither result is supportable.” *Id.*

Even though these arguments lack merit, insurers have consistently sought to avoid or limit coverage by adopting a “manifestation” or “exposure” position. *See, e.g., Stonewall*, 73 F.3d at 1192–93. Under the “manifestation” position, coverage is only triggered under the policy in effect “at the point in time when the asbestos-related diseases were either manifested or became fully developed,” thereby limiting coverage to a single policy period. *Id.* Under the “exposure” position, coverage is triggered only under policies “in effect during the period of a claimant’s exposure to asbestos,” thereby limiting coverage to the policy or policies in effect when asbestos was inhaled. *Id.* Both rules would preclude coverage under those policies in effect during the post-exposure latency period, in which “the progressive [and subclinical] asbestos injury process is developing.” *Id.*

Considering the principles of insurance contract interpretation in South Carolina and the plain language of the Penn National Policies, this Court adopts the “continuous trigger” theory “to establish that occurrences have taken place at any or all points from exposure to manifestation, on the ground that identifiable injuries have been proved to have occurred at each point to a reasonable degree of medical certainty.” *American Home*, 565 F. Supp. 1485, 1498 (S.D.N.Y. 1983). This interpretation is consistent with decades of court interpretations of this policy language.¹⁷¹

¹⁷¹ *See, e.g., Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (holding that insurance coverage in the context of asbestos-related diseases is triggered by exposure, exposure in residence, and manifestation); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1197 (2d Cir. 1995) (where the medical evidence establishes that successive injuries are recurring, all policies in effect at any time during the period between exposure and date of claim or death are triggered); *AC & S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985) (the time of exposure through manifestation constituted “bodily injury” within the meaning of the contracts); *Alcan Aluminum Corp. v. Prudential Ins. Co. Ltd.*, 173 F.3d 859 (9th Cir. 2000) (under the continuous trigger theory, an insurer may allocate costs to the policyholder for

b. Applying the continuous trigger theory is consistent with existing South Carolina law established by *Joe Harden*.

The South Carolina Supreme Court adopted the continuous trigger of coverage in the context of a construction defect claim in *Joe Harden Builders, Inc. v. Aetna Casualty & Surety Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997). The case involved a defect in a brick wall, where the brick mason knew that the brick wall was defective, but the defect did not manifest itself for some time after the construction because the damage was progressive in nature, and the homeowner did not become aware of the defect until the brick wall failed. *Id.* Considering a certified question on the issue, the Court held, “coverage is triggered at the time of an injury-in-fact and continuously

uninsured periods); *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 98 P.3d 572, 602 (2005) (rejecting the exposure and manifestation theories and finding the continuous trigger theory to be appropriate in the context of personal injury damages resulting from exposure to a toxic substance); *Montrose Chemical Corp. of California v. Admiral Ins. Co.*, 10 Cal. 4th 645, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878 (Cal. 1995) (holding that the continuous injury trigger of coverage should be applied to third party claims of continuous or progressively deteriorating bodily injury or property damage); *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 171 Conn. App. 61, 156 A.3d 539 (2017), *aff’d*, 330 Conn. 343 (2019) (adopting the continuous trigger theory as a matter of law for asbestos bodily injury claims); *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 826 A.2d 107 (2003) (discussing with approval the trial court's finding of a continuous trigger approach); *In re Viking Pump, Inc.*, 148 A.3d 633 (Del. 2016) (“bodily injury first occurs, for policy purposes, upon cellular and molecular damage caused by asbestos inhalation, and such cellular and molecular damage occurs during each and every period of an asbestos claimant's significant exposure to asbestos and continues thereafter”); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985) (holding that contracts in effect from date of ingestion of drug through date of manifestation were triggered); *Graphic Arts Mutual Ins. Co. v. D.N. Lukens, Inc.*, 2013 WL 2384333 (D. Mass. May 29, 2013) (applying the continuous trigger theory); *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 478–79, 650 A.2d 974 (N.J. 1994) (adopting the continuous-trigger theory for activating insurers’ obligation to respond in the context of progressive indivisible injury resulting from exposure to asbestos products); *Owens-Corning Fiberglass Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc. 2d 183, 660 N.E.2d 770 (C.P. Lucas County 1995) (finding that all contracts in effect from initial exposure to diagnosis or death are triggered); *J.H. France Refractories Co. v. Allstate Ins. Co.*, PMA, 534 Pa. 29, 626 A.2d 502 (Pa. 1993) (holding that all stages of asbestosis disease process were “bodily injury” triggering insurers’ obligation to indemnify).

thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage.” *Id.* at 236, 486 S.E.2d at 91.

Although *Joe Harden* considered a property damage claim, the South Carolina Supreme Court “framed its subject broadly, as ‘coverage under an occurrence policy when there is progressive damage that is not apparent at the time of the underlying injury-causing event,’ . . . and it cited approvingly a case involving a policy covering bodily injury from asbestos, rather than merely property damage.” *Pharmacists Mut. Ins. Co. v. Scyster*, 232 F. App’x 217, 226 (4th Cir. 2007) (citing *Joe Harden*, 326 S.C. at 233, 236, 486 S.E.2d at 90–91).

In adopting the continuous trigger theory, the South Carolina Supreme Court specifically rejected the exposure trigger theory because it “conflicts with the plain language of the policy.” *Joe Harden*, 326 S.C. at 234, 486 S.E.2d at 90. As the Court explained, the policy “provides coverage for an occurrence that causes property damage ‘which occurs during the policy period.’” *Id.* (emphasis in original). The Court found that such policy language “clearly focuses on the time the *damage* occurs and not on the time of the underlying event that eventually caused the damage.” *Id.* (emphasis in original). Indeed, the Court observed that “[a]n overwhelming majority of jurisdictions have rejected the argument that coverage is triggered at the time of the injury-causing event because such an interpretation conflicts with this provision of a standard occurrence policy.” *Id.* This is true whether the claim is for property damage or bodily injury because both are implicated in the same provision.

The *Joe Harden* Court also rejected the manifestation trigger theory because “nothing in the standard occurrence policy requires that the property damage actually be manifested or discovered during the policy period.” *Id.* at 235, 486 S.E.2d at 90–91. And again, this is true for both property damage and bodily injury.

In the construction defect context, the *Joe Harden* Court adopted the continuous trigger theory and modified it to require an injury-in-fact during each policy period. *Crossmann*, 395 S.C. 40, 55–56, 717 S.E.2d 589, 597 (2011) (discussing *Joe Harden*’s holding). The Court reasoned that the continuous trigger theory “gives effect to the policy provision regarding a continuous or repeated exposure” but suffers from the problem that “it triggers coverage from the time of the injury-causing event even if no damage has yet occurred.” *Joe Harden*, 326 S.C. at 236, 486 S.E.2d at 91.

Adopting the continuous trigger theory without any modification in the context of progressive bodily injury from asbestos is consistent with *Joe Harden*’s ruling. The science is settled that injuries to body tissue from asbestos start almost immediately, within days to weeks, from the initial inhalation of asbestos fibers and continue until manifestation. *Owens-Illinois*, 650 A.2d at 983; *see also R.T. Vanderbilt Co., Inc. v. Hartford & Acc. & Indemn. Co.*, 156 A.3d 539, 567 (Conn. App. 2017) (“To the extent that a background understanding of the nature of asbestos related diseases is helpful in selecting among trigger of coverage theories, both courts and commentators have recognized that expert testimony is not required in this context because the relevant medical facts . . . are now so widely understood and incontrovertible that many courts simply assume their truth when resolving the trigger of coverage question.”).¹⁷²

¹⁷² Expert testimony proffered by insurers in other litigations where selection of coverage trigger theories was at issue consistently shows that injuries to body tissues, including inflammation and direct DNA damage or mutation, happen within days to weeks after inhalation of asbestos fibers. *See, e.g., Cannon Elec. Inc. v. Ace Property & Cas. Co.*, 2017 WL 10992340 at *16 (Cal. Super. Aug. 17, 2017) (“Dr. Weitzman agreed that inflammation and direct DNA cellular injury happened within hours or days after inhalation of asbestos fibers”); *R.T. Vanderbilt*, 159 A.3d at 569 (“Kratzke acknowledged that, under the prevailing medical model, the lungs begin to exhibit an inflammatory response within hours or days of exposure to asbestos fibers.”); *J.H. France*, 626 A.2d at 506 (“The process of macrophage accumulation, tissue scarring, and functional impairment of the lungs begins to occur within a month of exposure.”).

Notably, “[t]he overwhelming weight of authority elsewhere acknowledges the progressive nature of asbestos-induced disease[] and affirms that bodily injury occurs when asbestos is inhaled and retained in the lungs.” *Id.* (internal quotation marks omitted); *see, e.g., Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, 331 B.R. 652, 664 (D. Md. 2005) (“The undisputed medical evidence in this case establishes that exposure to and inhalation of asbestos fibers begins a cumulative process in which the body suffers virtually continuous injuries.”); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (“The medical evidence in this case unequivocally establishes that injuries occur during the development of asbestosis immediately upon exposure, and that the injuries continue to occur even after exposure ends during the progression of the disease right up until the time that increasing incapacitation results in manifestation as a recognizable disease.”).

Thus, in this context, this Court need not modify the continuous trigger theory because the concern that coverage will be triggered “from the time of the injury-causing event even if no damage has yet occurred” does not exist.

c. The drafting history of the relevant policies supports applying the continuous trigger theory.

“In 1966, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Board, the predecessor organizations to the Insurance Services Office (ISO), changed the standard form policy from an ‘accident-based’ to an ‘occurrence-based’ format.” *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 891 (Cal. 1995), *as modified on denial of reh’g* (Aug. 31, 1995). “By 1966, the insurance industry was also demonstrating its awareness of potential coverage issues involving continuous or progressively deteriorating bodily injury and property damage.” *Id.* at 892 (citing comments by Richard H. Elliott, then secretary of the National Bureau of Casualty

Underwriters). It is therefore “reasonable to infer that the insurance industry knew precisely what the change entailed.” *Id.* at 891.

The drafting history does not support the exposure trigger theory. “The reference to ‘injurious exposure to conditions [resulting in] . . . bodily injury [or property damage]’ eliminates any requirement that the injury result from a sudden event. Although it is most common that an injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident[.]” *Id.* at 892.

Nor does the drafting history support the manifestation trigger theory. Applying a manifestation trigger theory to an occurrence-based CGL policy would unduly transform it into a “claims made” policy. *Id.* at 903. As the *Montrose* court explained:

The insurance industry’s introduction of “claims made” policies into the area of comprehensive liability insurance itself attests to the industry’s understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period. That understanding is clearly reflected in the higher premiums that must be paid for occurrence-based coverage to offset the increased exposure.

Id.

d. Equitable considerations warrant applying the continuous trigger theory.

The continuous trigger theory provides certainty to policyholders and insurers. “[W]hen exposure is not discoverable until many years after the fact, the exposure [theory] will not provide a feasible method for insurers to monitor risks and charge appropriate premiums.” *Owens-Illinois*, 650 A.2d at 980. “[A] manifestation [theory] would reduce coverage: insurers would refuse to write new insurance for the insured when it became apparent that the period of manifestations, and hence a flood of claims, was approaching. The insured would be left without coverage for victims whose diseases were not yet manifested.” *Id.* at 981.

“Because [the continuous trigger theory] avoids the dangers of the manifestation rule, and because it encourages all insurers to monitor risks and charge appropriate premiums, the continuous trigger rule appears to be the most efficient doctrine” *Id.* at 981. In other words, “[d]efining ‘bodily injury’ as any stage of the disease process guarantees all possible injured victims will receive compensation and, in cases involving multiple insurance policies, spreads the risk to the largest possible group of policyholders or claimants.” *Associated Aviation Underwriters*, 98 P.3d at 602.

Importantly, the insurance industry itself on record has favored adoption of a continuous injury trigger of coverage in the third party liability insurance context, considering the uncertainties in other trigger theories: “the difficulty of applying [the manifestation] limitations or requirements in cases of continuing damage or injury over the course of successive policy periods, the uncertainty of who would bear the burden of a discovery requirement (i.e., the insured or third party claimants), the arbitrariness, from the carrier’s perspective, of telescoping all damage in a continuing injury case into a single policy period, and the fear that policyholders could be disadvantaged by such an approach.” *Montrose Chem. Corp.*, 913 P.2d at 903.

e. Penn National applied the continuous trigger theory when approving settlements for Covil Asbestos Suits.

The Court declares that the continuous trigger theory applies to the Penn National Policies at issue because Penn National itself applied the continuous trigger theory when approving settlements for Covil Asbestos Suits.

Penn National approved its indemnification of Covil’s settlements in fourteen Covil Asbestos Suits.¹⁷³ Nine out of the fourteen settlements approved by Penn National only involve

¹⁷³ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

evidence of asbestos exposure that occurred before 1986, when the Penn National Policies at issue became effective. For example, in one of the Covil Asbestos Suits, *Campbell v. Armstrong International, Inc.*, C/A No. 2021-CP-40-02286, Mr. Campbell worked for Duke Power Company at various of its locations, including Oconee Nuclear Plant, between 1969 and 1991.¹⁷⁴ Covil insulators were at the Oconee Nuclear Plant from 1969 to 1973 when Mr. Campbell was working there.¹⁷⁵ That is, any of Mr. Campbell's potential asbestos exposure due to Covil's operation could have only occurred from 1969 to 1973, *i.e.*, before 1986. Thus, Penn National itself applied the continuous trigger theory when approving the Campbell settlement and the other similar settlements.

Accordingly, the Court hereby finds that the continuous trigger theory applies to the Penn National Policies at issue. *See* S.C. Code Ann. § 36-1-303 (“A course of performance . . . between the parties . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”); *Fed. Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44, 691 N.Y.S.2d 508, 512 (1999) (noting that “the parties’ course of performance under the contract is considered to be the ‘most persuasive evidence of the agreed intention of the parties’”); *Gen. Refractories Co. v. First State Ins. Co.*, 94 F. Supp. 3d 649, 663 (E.D. Pa. 2015) (quoting the Restatement (Second) of Contracts § 202(4)) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”).

¹⁷⁴ *See* Covil Trial Ex. 18(c).

¹⁷⁵ *See* Covil Trial Ex. 18(l), 26:6–17; Ex. 18(m), 25:6–26:3.

Accordingly, the Court holds that the continuous trigger theory applies to the Covil Asbestos Suits.

C. Penn National Spoliated Evidence.

1. Legal Standard for Spoliation.

Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. Coll. of Charleston, No. 2:12-cv-0384, 2013 WL 6050324, *2 (D.S.C. Nov. 15, 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

2. Penn National admits that it spoliated historic occurrence-based liability insurance policies and policy-related documents during the pendency of the Covil litigation.

Penn National admits that it (1) issued multiple insurance policies to Covil, which included renewal policies;¹⁷⁶ (2) no longer has full, original copies of the policies or policy-related documents it issued to Covil;¹⁷⁷ (3) was first put on notice to search for “all liability policies” issued to Covil with a subpoena in the *Finch* asbestos lawsuit in 2018 and received subsequent discovery requests as a defendant in insurance coverage litigations to identify and search for “all policies” issued to Covil throughout 2019, 2020, and 2021;¹⁷⁸ (4) did not issue a single litigation hold to stop the destruction of Covil policies or policy-related documents *until over three years later* on December 17, 2021,¹⁷⁹ and only *after* this Court was forced to issue a November 5, 2021 Order for Covil’s underlying asbestos defense counsel, Ellis & Winters, to conduct an independent review of Penn National’s document repositories;¹⁸⁰ (5) destroyed historic liability policies that were contained on microfiche on an annual basis in 2018, 2019, and 2020;¹⁸¹ (6) did not search for Covil in the documents it destroyed in 2018, 2019, and 2020; and (7) has no record of the historic general liability insurance policies and policy-related documents it destroyed in 2018, 2019, and 2020. Penn National’s admissions warrant a finding of spoliation.

¹⁷⁶ See Covil Trial Exs. 1, 2, 3, 4, 5.

¹⁷⁷ See Covil Trial Ex. 99, Nov. 30, 2022 B. Wright Dep. Tr. at 13:1-14:17.

¹⁷⁸ See Covil Trial Ex. 13, Penn National Subpoena Resp., June 15, 2018; Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrog. and Resp. to Covil’s First Set of Req. for Admis.; Penn National Trial Ex. 1, Compl.

¹⁷⁹ See Covil Trial Ex. 97, Nov. 21, 2022 Scott Maier Dep. at 83:3–8.

¹⁸⁰ *Id.* at 169:1–22.

¹⁸¹ See Covil Trial Ex. 68, Penn National Resp. to RFA Nos. 2–7; Covil Trial Ex. 84, Nov. 2, 2022 B. Reifsnyder Dep. at 97:13–98:11.

a. Penn National had a duty to preserve Covil's insurance policy related documents at the time it was destroying historic, occurrence-based general liability policies.

As to the first element, Penn National had a duty to preserve this evidence. “A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.’” *Id.* at *3 (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

To support its contentions regarding the destruction of Covil policies and policy-related documents, the Receiver directed the Court to two points in time at which Penn National had notice as to the duty to preserve Covil's policies. First, as to the insurance industry's general awareness of the need to preserve historic occurrence-based general liability policies, the bankruptcy of Johns Manville, and subsequent litigation over the insurance proceeds that were contributed to the bankruptcy estate for use by the Manville Trust, as widely reported both in case law and by journalists, provided clear signals of the potential liability insurers faced in the wake of the asbestos litigation as early as 1986. *See infra* at 6–7. As a result, the insurance industry as a whole, and particularly those insurers who wrote occurrence-based general liability policies for insulation contractors, had notice that their insurance policies were potentially relevant evidence in future litigation related to long-tail liabilities, requiring preservation of those materials.

Second, setting aside the insurance industry's awareness of long-tail liabilities raised by historic occurrence-based policies, Penn National continued to purge its insurance records on an

annual basis between 2018 and 2021, despite the fact that Penn National faced subpoenas and active litigation in which it was a named party regarding the historic occurrence-based insurance policies it issued to Covil. The existence of active requests for policy information both in the form of subpoenas and in the form of Penn National's being named as a party to litigation involving the Covil asbestos cases and associated insurance established a clear and unequivocal duty on the part of Penn National to preserve its insurance policies.

The Court finds that Penn National was on notice starting in May 2018 that it should preserve any and all insurance policies issued to Covil.¹⁸² Specifically, in May 2018, Branham & Shirley, LLP ("Dean Omar"), the law firm representing Ann Finch in an asbestos case against Covil in the Middle District of North Carolina, served Penn National with a subpoena requesting Covil's insurance information (the "*Finch* subpoena"). The subpoena sought "[c]opies of all liability insurance policies and endorsements issued to Covil between 1969 and 1995, including without limitation, commercial general liability, umbrella, or other liability policies."¹⁸³ Dean Omar also provided Penn National with two specific policy numbers in the subpoena, but had no further information regarding the Covil's overall coverage program with Penn National.¹⁸⁴

In response to the *Finch* subpoena, Penn National located two historic, occurrence-based general liability policies potentially providing insurance coverage for asbestos bodily injury suits that it issued to Covil—the same two policies Dean Omar identified by policy number. Once Penn National received the *Finch* subpoena, there can be no genuine dispute that Penn National knew or should have known that the subpoena was not a one-off discovery issue to be ignored. Moreover, Penn National should have issued a litigation hold. Given the nature of asbestos litigation, Penn National, having issued historic, occurrence-based general liability insurance policies potentially responsive to asbestos bodily injury suits, should have reasonably expected to receive similar

¹⁸² Covil Trial Ex. 12.

¹⁸³ *Id.* at Ex. A.

¹⁸⁴ *Id.* at Ex. C.

discovery requests going forward. Penn National therefore had a duty to preserve any and all liability insurance policies in its possession, custody, or control potentially responsive to Covil's asbestos bodily injury lawsuits.¹⁸⁵

Continuously between 2018 and 2021, parties to litigation repeatedly requested all insurance policies issued to or covering Covil in discovery from Penn National, in the form of document requests, interrogatories, and third-party subpoenas. For example, the Receiver first tendered a Covil asbestos claim to Penn National in August 2019. In the Receiver's tender letter, the Receiver asked Penn National for coverage under the two known policies ***and any other policies issued to Covil.***

(1) Penn National destroyed microfiche containing commercial line insurance policies issued prior to 1992.

At the November 2023 evidentiary hearing on spoliation, Penn National failed to present a corporate representative who was prepared to testify competently regarding Penn National's document retention policy and/or its destruction of historic insurance policy documents on microfiche during the relevant timeframe of May 2018 to December 2021. Instead, Penn National presented Boyd Wright, who provided testimony directly contrary to facts known to this Court in this litigation.

A year before the hearing, on November 10, 2022, Penn National employee Brent Reifsnyder testified at the deposition as Penn National's corporate representative on document

¹⁸⁵ Penn National contends that because the subpoena identified two Penn National policy numbers specifically, and Penn National located and produced those two policies to the Dean Omar firm, Penn National was not required to search for and/or preserve any other Covil policies. This argument is without merit. Exhibit A to the Subpoena demands production of "all liability insurance policies and endorsements," not simply the policies identified in Exhibit C. The fact that Penn National chose to create a document indexing system that only lists policies by policy number and not by the name of its insured did not relieve Penn National of its discovery obligations, including but not limited to preserving material evidence.

retention and destruction issues. During his deposition, he conceded (i) that Penn National knowingly destroyed microfiche containing historic insurance policies issued prior to 1992,¹⁸⁶ (ii) that Penn National did in fact destroy such historic insurance policies without searching for any reference to Covil whatsoever before destroying the policies, and (iii) that Penn National failed to keep any records of which insurance policy documents were destroyed:

Q. To your recollection, microfiche cards were destroyed as part of the 2018 purge, correct?

A. Correct.¹⁸⁷

* * *

Q. And microfiche cards were destroyed as part of the purge in 2019?

A. I believe so, correct.¹⁸⁸

* * *

Q. As part of the pulling process in 2019, was any microfiche destroyed?

A. Yes.¹⁸⁹

* * *

Q. Are policies -- how are policies destroyed?

A. So paper is shredded. That is done at Iron Mountain. Microfiche is also shredded by Iron Mountain.¹⁹⁰

* * *

Q. Have you purged any microfiche with policies with a nonrenewal date prior to 1992?

¹⁸⁶ Penn National admits in its responses to interrogatories that “[a]ll commercial line policy-related documents that pre-dated 1992 were stored on microfiche and kept at Penn National’s headquarters in Harrisburg, Pennsylvania.” Covil Trial Ex. 69 at 2.

¹⁸⁷ Covil Trial Ex. 84, Rule 30(b)(6) Dep. Tr. at 97:13–18.

¹⁸⁸ *Id.* at 97:19–21.

¹⁸⁹ *Id.* at 45:10–12.

¹⁹⁰ *Id.* at 47:2–5.

A. So the answer is yes, we would have destroyed them.¹⁹¹

* * *

Q. Do you know of any policy at Penn National that would prohibit you from destroying policies that are on microfiche cards?

A. No. Subject to litigation hold, that's the only time I would pause.¹⁹²

* * *

Based on the admissions in Mr. Reifsnyder's corporate testimony on behalf of Penn National in November 2022, including but not limited to the above-referenced excerpts, this Court finds that Penn National destroyed historic insurance policies issued prior to 1992 on an annual basis from 2018 through 2021.¹⁹³ This Court also finds that Penn National failed to issue a timely litigation hold.

Notwithstanding Mr. Reifsnyder's deposition testimony that Penn National deliberately destroyed historic insurance policies issued to policyholders prior to 1992 that were stored on microfiche throughout the pendency of the Covil litigation, Penn National's corporate representative at the November 2023 evidentiary hearing voluntarily provided misleading and uninformed testimony when questioned by the Court: "From my experience, as much as they

¹⁹¹ *Id.* at 68:13–22.

¹⁹² *Id.* at 71:17–21.

¹⁹³ This Court notes that Penn National failed to produce any evidence at the hearing that the litigation hold issued in December 2021 was issued before Mr. Reifsnyder and his team at Penn National conducted their annual purge and destruction of microfiche for the year 2021–2022. For example, Penn National failed to provide the specific list of policy documents that Penn National used to collect insurance policies throughout 2021, which were scheduled for annual destruction at the beginning of the calendar year for 2022. Nor did Penn National provide any evidence that the insurance policies on that list or the policies that were "set aside" throughout 2022 were still in existence. What is clear is that Penn National keeps no records of what has been destroyed. Moreover, even though Mr. Reifsnyder was listed as a witness on Penn National's own witness list and testified repeatedly via affidavit and deposition testimony in this case, Penn National refused to make Mr. Reifsnyder available for cross-examination questioning at the hearing, either in person or remotely, or for direct questioning by this Court. Penn National offered no explanation for his absence from the proceedings.

would like to say that they were removing microfiche, I don't think they ever did it. I really don't."¹⁹⁴ Penn National's corporate representative went on to testify inaccurately that Penn National does not destroy microfiche.¹⁹⁵ This testimony mirrors Penn National's false interrogatory responses. Both are in direct conflict with Mr. Reifsnyder's unequivocal deposition testimony as Penn National's corporate representative on November 10, 2022.¹⁹⁶ Penn National's refusal to disclose or admit timely in written discovery that it was destroying microfiche containing Penn National's historic, pre-1992 commercial line policies, including occurrence-based general liability policies potentially responsive to ongoing asbestos litigation, is an independent and material discovery violation.

This Court also has serious concerns with the manner in which Penn National identified insurance policies contained on microfiche for destruction, failing to maintain any records of which documents were destroyed and failing to conduct any quality control over the process. This is particularly troubling considering Mr. Reifsnyder's admission that quality control issues arise during the process (*e.g.*, microfiche cards sticking together, inadvertently leading to the wrong microfiche cards being collected for destruction). Moreover, this Court does not find Mr.

¹⁹⁴ Trial Tr. at 112:9–11.

¹⁹⁵ Trial Tr. Day 2, Morning Session, at 112:12–16 (Court: "You think [the microfiche] just stayed there in those storage facilities? Answer: "Yeah. What we have to understand is what Mr. Reifsnyder does is every year he purges documents. He does not destroy what he's purged.")). Penn National's corporate representative at the hearing, however, admitted on cross-examination that he had not even bothered to read Mr. Reifsnyder's corporate representative testimony on these issues before offering such demonstrably incorrect testimony. *Id.* at 114:25–115:3.

¹⁹⁶ *See, e.g.*, Covil Trial Ex. 68, Feb. 17, 2022 Penn National Resp. to Req. for Admis. at RFA No. 5 ("With respect to microfiche, it is denied that any commercial line policy-related records that had a cancellation or non-renewal date that pre-dated 1992 were disposed of in 2019."); Covil Trial Ex. 69 at 4 ("With respect to Covil related policies, any Covil related policy documents would have pre-dated 1992, and therefore, were stored on microfiche, and would not have been purged or destroyed between 2018 to present date."). These discovery responses are demonstrably false and were never corrected by Penn National after Mr. Reifsnyder unambiguously corrected the record in November 2022.

Reifsnyder's testimony that Penn National has a true quality control process in place credible. Mr. Reifsnyder testified that he delegated responsibility for conducting the "quality control" review to the individual administrative personnel who conducted the search in the first place. In other words, these administrative employees were tasked with selecting the correct microfiche cards and then tasked with grading their own papers. That is not quality control. Perhaps most disturbing, Penn National delegated the crucial responsibility of making the decisions as to which historic CGL policies were destroyed, decisions with potentially billions of dollars in policyholder assets at stake, to unsupervised administrative staff. It is hard to envision a more reckless system.

Penn National offers no viable defense for its failure to issue a basic litigation hold at any point between May 2018 and December 2021.¹⁹⁷ Nor does it offer any viable defense for its failure to supervise and implement quality control procedures.

(2) Penn National destroyed at least one comprehensive general liability policy issued to Covil for the 1985-1986 policy period, which was "renewed" for the 1986-1987 and 1987-1988 policy periods.

The Court next turns to the issue of whether there is evidence that Penn National issued insurance policies to Covil that it has been unable to produce to the Receiver in discovery, potentially because of the above-referenced deficiencies. The answer is unequivocally, yes.

The 1986–1987 Policy contains a Change Endorsement establishing that the 1986–1987 Policy was not the original general liability policy issued to Covil. Rather, it was a "renewal" policy. The plain language of the Change Endorsement is clear and unambiguous that there were two errors on the declarations page of the 1986-1987 Policy—(1) the Completed Operations

¹⁹⁷ As established by the credible testimony of the Receiver's insurance industry expert witness, Charles Miller, Penn National failed to issue a timely litigation hold in accordance with insurance industry standards. Miller Trial Tr. 39:23–42:7.

Hazard and Products Hazard Exclusion was inadvertently left off and (2) the exclusion was left off **at renewal**. The term “renewal” has a specific meaning in an insurance contract.¹⁹⁸

One need look no further than the very next comprehensive general liability policy that Penn National issued to Covil—the 1987–1988 Policy. This was also a “renewal” policy, containing the same terms, conditions, and limits of the prior 1986–1987 Policy.¹⁹⁹

In response, Penn National raises two meritless arguments. First, Penn National claims that the term “renewal” in the Change Endorsement is actually just a “comment” that this Court should simply ignore. However, binding South Carolina law prohibits this Court from taking such a cavalier approach to contractual interpretation. This Court must give meaning to each and every term in the insurance contract. *See Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014).

¹⁹⁸ For a missing policy that has been renewed, the policyholder can use the subsequent renewal policy to prove the terms of the lost preceding policy. *See, e.g., Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 692–93 (W.D. Mich. 2003); *Ne. Utilities v. Century Indem. Co.*, No. X03CV 980495496S, 1999 WL 476274, at *7 (Conn. Super. Ct. June 21, 1999). It is well-settled that the renewal policy is presumed to adopt the same terms, conditions, and limits of liability of the existing or expiring policy absence of an agreement to the contrary. *See Ne. Utilities*, 1999 WL 476274, at *4 (citing cases from various jurisdictions); *Aero-Motive*, 254 F. Supp. 2d at 695 (“giving effect to the presumption that a renewal policy is on the same terms, conditions, and amounts as the original policy, Aero has established the material terms of coverage under [the missing policy]”); *Patel v. Northfield Ins. Co.*, 940 F. Supp. 995, 1000 (N.D. Tex. 1996) (“In the absence of an agreement to the contrary, the presumption is that renewals are on the same terms, conditions, and amounts as provided in the original policy.”); § 29:40. Continuation of original terms, 2 Couch on Ins. § 29:40 (“Except where there is a special agreement for different terms, the renewal of a policy continues the original stipulations, and the only change is in the time of its expiration.”). Here, the Receiver has presented sufficient evidence of the terms of the 1985–86 Policy through the terms of the 1986–87 Policy. Given that the Court concludes that 1986–87 Policy is a renewal policy (see Covil Trial Ex. 1), the 1985–86 Policy is presumed to have the same terms, conditions, and limits of liability as those of the 1986–87 Policy. Penn National failed to provide any evidence of agreement to the contrary to rebut the presumption. Thus, the Court finds that the 1985–86 Policy has the same terms, conditions, and limits of liability as those of the 1986–87 Policy.

¹⁹⁹ As established by the credible testimony of Charles Miller, the fact that an insurance policy references a prior policy is evidence that a prior policy was issued. Miller Trial Tr. 38:25–39:10.

Second, Penn National asserts that the declarations page lists the 1986–1987 Policy as a “New” policy and therefore it cannot be a “renewal” policy. But, again, this argument is wholly inconsistent with the plain terms of the Change Endorsement. The declarations page does not list a Product/Completed Operations Hazard Exclusion (GL2104) in the numerous endorsements listed on the declarations page either.²⁰⁰ But that was a mistake. Penn National not only acknowledges that was a mistake but also actively informed both underlying asbestos plaintiffs’ counsel and the Receiver and his counsel of this mistake in numerous instances of written correspondence.²⁰¹

The Court cannot fairly read the Completed Operations Hazard and Products Hazard Exclusion (GL 2104) into the 1986–1987 Policy through the Change Endorsement, but ignore the language in the Change Endorsement indicating that the error occurred at “renewal.” The Court finds that the plain and unambiguous language of the Change Endorsement supports the argument that the reference to a “New” policy was an inadvertent error at the time of renewal per the terms

²⁰⁰ See Covil Trial Ex. 1, at Penn National Policies 000001.

²⁰¹ Covil Exs. 13, 37, 45. To overcome this mistake, Penn National makes the meritless argument that a 2019 draft of an insurance coverage chart prepared by the Receiver’s outside counsel early in the investigatory stages of the case to support its position that it did not issue a 1985–1986 CGL policy. In addition to the fact that the 1986–1987 Penn National policy speaks for itself with the “renewal” language, this Court finds that a coverage chart created by outside counsel is not evidence of insurance coverage. See Trial Tr. Day 1, Morning Session at 134:20–135:3, 164:2–12. Penn National fails to direct this Court to any authority stating otherwise. In fact, the authority for which Penn National directed this Court for purposes of reconstruction of missing or lost policies makes plain that such evidence is wholly irrelevant and that it is Penn National’s burden to prove the existence and terms of the alleged policy. See Penn National’s Proposed Conclusions of Fact and Law, filed Dec. 5, 2022, at 17–19. Further, the insurer listed on the 2019 draft coverage chart, Hartford, disputed its coverage when the coverage chart was created and when Hartford entered into a settlement agreement with the Receiver. See Trial Tr. Day 1, Morning Session at 135:4–136:1; 168:21–169:11; 171:11–22. Additionally, the Receiver’s insurance industry expert witness Charles Miller testified credibly that, in his opinion, it is possible for a policyholder to have overlapping primary coverage for the same policy period. Mr. Miller, as an expert witness on this subject, testified that he had seen this happen in other matters. See Covil Trial Ex. 98, Covil’s Expert Witness Charles Miller Dep. at 122:17–123:22.

of the Change Endorsement.²⁰² The 1986–1987 Policy should have indicated that it was a “renewal” policy on the declarations page.

In light of the plain and undisputed meaning of the term “renewal” in the 1986–1987 Policy, and the complete and identical terms, conditions, and limits of the subsequent renewal policies for the policy periods of March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 contained in the record,²⁰³ this Court finds there is no genuine dispute of material fact in this action regarding the existence of a Penn National comprehensive general liability policy issued to Covil for the policy period of March 31, 1985 to March 31, 1986. Moreover, the Court finds there is no genuine dispute of material fact regarding the terms, conditions, and limits of the 1985–1986 CGL Policy, which were identical to the 1986–1987 and 1987–1988 CGL Policies.

This Court believes there is overwhelming evidence, taken in totality, that Penn National’s litigation misconduct in this case severely harmed the Receiver’s ability to marshal Covil’s insurance coverage programing, including locating a full and complete copy of the 1985–1986 CGL Policy. The Court finds that Penn National acted with gross negligence when it destroyed this material evidence.

For these reasons, the Court finds that Penn National issued a comprehensive general liability insurance policy to Covil for the policy period of March 31, 1985 to March 31, 1986.

²⁰² Tellingly, even Penn National’s own proffered expert witness, Bernd Heinze, admitted on cross-examination that there are no ambiguities in the 1986–1987 insurance policy. Trial Tr., Day 2, Morning Session, at 52:19–53:10.

²⁰³ Additionally, the evidence shows that Covil purchased liability policies from Penn National responsive to auto claims for the March 31, 1985 to March 31, 1988 policy periods (the Auto Policies) as well as liability policies issued to Covil responsive to inland marine claims for the for the March 31, 1985 to March 31, 1988 policy periods (the Inland Marine Policies). Covil Trial Exs. 4–6.

(3) Insurance policies that provide Covil with coverage as an additional, supplemental, or special named insured may also have been destroyed.

The 1986–1987 CGL Policy provides evidence that Covil Corporation was identified not only as a Named Insured on the declarations page of Penn National policies but also on a list of persons and organizations named in the “Special Named Insured Endorsement.”²⁰⁴ Penn National, however, did nothing to search the historic, occurrence-based liability policies it destroyed for identification of Covil prior to destruction. This is especially concerning in light of Penn National’s often repeated discovery response that such policies may in fact exist. For example, Interrogatory Number 1 requested Penn National to “[i]dentify all insurance policies that YOU issued to Covil or which otherwise include Covil as an insured.” In response, Penn National stated that it “does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents that *may be responsive to this Interrogatory*.”²⁰⁵ Given that Penn National admitted that there may have been responsive discovery in its microfiche archive, it should not have destroyed such microfiche without analyzing such policies for references to Covil.

b. Penn National destroyed historic, occurrence-based general liability policies with a culpable state of mind.

By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, Penn National had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil’s Receiver’s ability to reconstruct its insurance program and obtain information relevant to pending and future asbestos personal injury and insurance litigation.

²⁰⁴ Covil Trial Ex. 1 at 11.

²⁰⁵ Covil Trial Ex. 42 at 6–7 (emphasis added).

The “culpable” state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed “knowingly, even without intent [to breach the duty to preserve it], or negligently.” *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 109 (2d Cir. 2001). “[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions.” *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that Penn National’s conduct of destroying relevant documents satisfies the required level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires Penn National to have some degree of fault, which is the case in this matter.

Penn National knew or should have known that it should not have been destroying insurance policies on microfiche between May 2018 and December 2021 without reviewing those policies for mentions of Covil and in the absence of a litigation hold. Penn National’s Document Retention Policy advises:

It is imperative to remember that if the records retention schedule calls for the destruction of records and we have not destroyed some or all of them, without a compelling reason, courts may view this as “selective retention.” And, if selected records are destroyed as part of a retention program or destroyed outside the program, the courts may view this as “selective destruction.” **Either selective retention or selective destruction can subject the company to substantial fines, penalties, and the loss of rights.**²⁰⁶

Penn National also has Litigation Hold Procedure. The Litigation Hold Procedure directs:

Penn National Insurance is committed to fully complying with its discovery obligations. To do so, the Company and its employees will preserve and secure all information that may be potentially discoverable in relation to future litigation. If an employee receives a Litigation Hold notice from the Legal Department, then the employee should follow the procedures described below in the gathering and retention of such information. **A Litigation Hold shall override any other company policy**

²⁰⁶ Covil Trial Ex. 8 at 2 (emphasis added).

or procedure that would normally require the information be purged or destroyed. A Litigation Hold can only be terminated by the Legal Department.²⁰⁷

Therefore, Penn National had a Document Retention Policy that advised its employees not to destroy the historic, occurrence-based CGL policies contained on microfiche. Penn National did not comply with its own Policy. Penn National also had a Litigation Hold Procedure that advised that the Company was “committed” to complying with its discovery obligations and that “the Company and its employees will preserve and secure all information that may be potentially discoverable in relation to future litigation.” Penn National did not comply with its own Procedure. It waited until December 2021 to issue a basic litigation hold. On December 17, 2021, Scott Maier, Penn National’s in-house counsel, sent an email to Brent Reifsnyder, with specific directions to preserve, and not purge, any and all microfiche:

Penn National Insurance must now take immediate steps to preserve, and not purge, any and all paper policy related documents and **microfiche stored** by Penn National Insurance, and . . . microfiche that may be in your possession, custody, or area of control, or that may be maintained under your direction and supervision. . . .²⁰⁸

Penn National’s failure to issue the above-quoted Litigation Hold at any point between May 2018 and December 2021 resulted in Penn National’s continued, annual purge of microfiche containing historic, pre-1992 commercial line policies for over three and a half years.

In addition to Penn National’s violations of its own written policies and procedures, this Court has been forced to invest significant time and judicial resources to issue a series of escalating discovery and sanction orders against Penn National based on its litigation conduct in this case.²⁰⁹

Throughout the course of the Covil litigation, Penn National also sent a series of letters to Covil’s asbestos defense counsel in June 2018, the Receiver in August 2019, and the Receiver’s coverage counsel in November 2019 in which Penn National made the same material misstatement with respect to the number of CGL insurance policies issued by Penn National to Covil, claiming

²⁰⁷ Covil Trial Ex. 9 at 1 (emphasis added).

²⁰⁸ Covil Trial Ex.10 at 1 (emphases added).

²⁰⁹ Covil Trial Exs. 62, 63, 66, 71, 82, 121.

incorrectly that there was only one renewal policy when there were in fact two renewal policies.²¹⁰ Penn National also made a material omission regarding the specific terms and conditions of the Change Endorsement in the 1986–1987 Policy. Specifically, in its coverage letters, Penn National explained why the Completed Operations Hazard and Products Hazard Exclusion (GL 21 04) applied to bar coverage, despite the fact that GL 21 04 was not listed as an applicable exclusion on the declarations page: “As the attached records reflect, after the policy was effective on March 31, 1986, it was discovered endorsement GL 21 04 (07/66), Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”²¹¹

The Change Endorsement, however, has materially different language:

POLICY CHANGES

Amending policy to delete products form GL0031 (4/84), and Add GL2104(7/66)
Products hazard exclusion as it was **left off at renewal.**²¹²

The Court finds it significant that Penn National altered the material terms of the policy from the exclusion being “left off *at renewal*” to “left off *the policy.*” The later alteration of the policy language deliberately or recklessly fails to disclose to the reader that the 1986-1987 Policy was in fact a “renewal” policy and that there was not “one” renewal policy potentially triggered by asbestos lawsuits against Covil but “two” renewal policies.

Finally, the Court notes that Penn National’s misconduct toward South Carolina policyholders is not limited to Covil. On March 23, 2020, following a non-jury trial in *Portrait Homes v. Pennsylvania National Mutual Casualty Insurance Company*, Case No. 2014-CP-08-2757 (County

²¹⁰ Covil Trial Exs. 13, 37, 45.

²¹¹ Covil Trial Ex. 37 (emphasis added); *see also* Covil Trial Ex.13 (“As the records reflect, after the policy was issued for coverage effective March 31, 1986, it was discovered endorsement GL 21 04 (07/66) Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”); Covil Trial Ex. 45 (“The records reflect that after the policy was effective on March 31, 1986, it was discovered endorsement GL 21 04 (07/66) Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”) (emphasis added).

²¹² Covil Trial Ex. 1 at 29 (emphasis added).

of Berkeley), Judge Roger M. Young issued a Post-Trial Motions and Punitive Damages Order against Penn National. In his order, Judge Young explained Penn National's misconduct as follows:

The Court also finds that Penn National failed to perform a reasonable investigation of this claim and knowingly misrepresented coverages under the policies and failed to disclose important information that it had in its possession to Mr. Castillo. The evidence is clear and convincing that the conduct of Penn National was willful, wanton, and in reckless disregard of JJA's rights causing harm.²¹³

The South Carolina Court of Appeals affirmed Judge Young's order.²¹⁴ Judge Young's description of Penn National's conduct is similar to the circumstances that this court has faced here.

In sum, Penn National's institutional failures are significant. Penn National (1) never issued a timely litigation hold, (2) never suspended its annual purge process, (3) never reviewed its insurance policies for "Covil" prior to destruction, (4) never conducted quality control of the purge process, and (5) destroyed historic CGL policies on microfiche. Moreover, Penn National (1) violated its Document Retention Policy, (2) violated its Litigation Hold Procedure, (3) violated applicable law on retaining documents in anticipation of litigation, and (4) violated its discovery obligations by refusing to preserve and search for responsive insurance policies. This Court is convinced that Penn National had a culpable state of mind throughout these failures.

c. The destroyed historic, occurrence-based general liability policies were relevant to the Receiver's charge by this Court to marshall Covil's Insurance Assets.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

²¹³ Covil Trial Ex. 122 at 57 (emphasis added).

²¹⁴ See *Portrait Homes v. Pa. Nat'l Mutual Casualty Ins. Co.*, Op. No. 6038 (S.C. Ct. App. filed Sept. 13, 2023).

Thus, any evidence which assists a fact finder at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that Penn National destroyed such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, Penn National should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to Penn National's spoliation.

By destroying relevant evidence, Penn National has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court finds that Penn National spoliated relevant evidence and issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorneys' fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but

rather from the role that the spoliating party had in preventing it from being reviewed by the court. When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers*, 311 S.C. at 83, 427 S.E.2d at 689 (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. at 395, 396 S.E.2d at 372).

Based on the evidence established by the Receiver regarding the existence of Covil insurance coverage issued by Penn National, and based on the evidence demonstrating Penn National's spoliation of evidence regarding the existence of the coverage, this Court holds that Penn National issued primary general liability insurance coverage to Covil Corporation prior to the 1986–1987 policy period.

D. This Court Awards Attorneys' Fees To Covil.

1. Covil is entitled to attorneys' fees as the prevailing party in this declaratory judgment action.

Covil is entitled to recover its reasonable and necessary attorneys' fees expended in prosecution of its declaratory judgment action as the prevailing party. It is well-settled under South Carolina law that a prevailing insured in a declaratory action regarding coverage may recover attorneys' fees. *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 471–72, 265 S.E.2d 38, 40–41 (1980); *see also Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550, 243 S.E.2d 443, 444 (1978).

“There is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Id.* Accordingly, the South Carolina Supreme Court reasoned fees that are expended because of a declaratory judgment are themselves fees expended in defense of a claim. *See id.* And thus, said fees are recoverable. *See id.* “The legal fees incurred by [an insured], in successfully asserting [its] rights against [an insurer]’s attempt in

the declaratory judgment action to avoid its obligation to defend, were damages arising directly as a result of the breach of the contract[ual]" obligation to defend. *Id.* at 550-51, 243 S.E.2d at 244 (citing *Cohen v. Am. Home Assur. Co.*, 255 Md. 334, 258 A.2d 225 (1969)).

Thus, in *Hegler*, the South Carolina Supreme Court laid down a rule that an insured who defends against a declaratory action by its insurer can recover fees. Two years later, in *Gordon-Gallup*, the court applied that holding to a situation wherein the insured "was forced to prosecute [an] action to enforce its rights under the policy with its insurer." *Gordan-Gallup*, 274 S.C. at 472, 265 S.E.2d at 40. That is precisely what Penn Nation compelled Covil to do here.

These holdings have been reaffirmed and remain foundational jurisprudence in South Carolina. *See, e.g., First Fin. Ins. Co. v. Sea Island Sport Fishing Soc., Inc.*, 327 S.C. 12, 17, 490 S.E.2d 257, 259 (1997) ("We decline to overrule *Hegler*..."); *Portrait Homes - S.C., LLC v. Pa. Nat'l Mut. Cas. Ins. Co.*, No. 2020-000735, 2023 WL 8610277, at *33 (S.C. Ct. App. Dec. 13, 2023) (citing *Hegler*) (affirming attorneys' fees award in a declaratory judgment action brought by the insured against Penn National); *Jessco, Inc. v. Builders Mut. Ins. Co.*, No. 2:08-CV-1759-PMD, 2012 WL 1570015, at *2 (D.S.C. May 3, 2012) (citing *Hegler* and *Gordon-Gallup*) ("South Carolina courts have unanimously found that an insured may be entitled to reasonable attorney fees and costs for defending the underlying action brought against it as well for bringing a declaratory judgment action against the insurer.").

Any differences between this case and *Hegler* or *Gordon-Gallup* are not material. Penn National argues that "*Hegler* has no applicability here" because, unlike the insured in *Hegler*, Penn National has defended the underlying cases at issue. Nov. 28, 2023 Afternoon Tr. at 67:25–68:19. However, Penn National did not deny that it defended the underlying cases under a reservation of rights. As expressly discussed in *Hegler*, "[t]here is no material difference in the legal effect

between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Hegler*, 270 S.C. at 550–51, 243 S.E.2d at 444.

2. Covil is independently entitled to attorneys’ fees as a sanction for Penn National’s discovery misconduct and spoliation in this case.

The selection of a sanction for discovery violations is within the trial court’s discretion. *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* at 198, 511 S.E.2d at 719 (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

A court may award reasonable expenses, including attorneys’ fees, for a party’s failure to make or cooperate in discovery. Rule 37(b), SCRCPP; *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 270, 762 S.E.2d 535, 537 (2014) (affirming award of attorneys’ fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297-98, 609 S.E.2d 821, 836 (Ct. App. 2005), *affd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys’ fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys’ fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys’ fees for discovery abuses);

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

IV. ORDERING PARAGRAPHS

With respect to the Receiver's declaratory judgment claims, the Court enters judgment in favor of Plaintiff Peter D. Protopapas, as the Receiver for Covil Corporation, and declares as follows:

1. The aggregate limit of liability for bodily injury damage in the Penn National Policies does not apply to operations claims, but applies to completed operations and products claims only;
2. The aggregate limit of liability in the Penn National Policies does not apply to Covil Asbestos Suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite;
3. Penn National bears the burden of proving any exclusion or limitation of coverage, including the application of the aggregate limit of liability to particular Covil Asbestos Suits and the exhaustion of the aggregate limit of liability in its policies;
4. Penn National has not met its burden of proving that the bodily injury alleged in the covered Asbestos Suits in which Penn National contributed to settlement payments—*Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss*—are subject to and impair the Penn National Policies' aggregate limit of liability;

5. The Penn National Policies are required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits;
6. The “continuous trigger of coverage” applies to the Covil Asbestos Suits, such that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable;
7. Covil is entitled to multiple ‘per occurrence’ limits of liability to resolve each of the Covil Asbestos Suits;
8. Based on the plain and unambiguous terms of the 1986–1987 Policy, Penn National issued a previous comprehensive general liability insurance policy with a policy period of March 31, 1985 to March 31, 1986 (“the 1985–1986 Policy”); and
9. The 1985–1986 Policy contains the same terms, conditions, and limits of liability as its successive, renewal policies issued with policy periods of March 31, 1986 to March 31, 1987 (the 1986–1987 Policy) and March 31, 1987 to March 31, 1988 (the 1987–1988 Policy).

With respect to the Receiver’s request for a spoliation ruling, this Court finds that Penn National culpably spoliated historic occurrence-based liability insurance policies and policy-related documents stored on microfiche during the pendency of the Covil litigation. This Court holds that spoliation is an appropriate, alternative basis for issuing a declaration regarding the existence, terms, and conditions of the 1985–1986 Policy, which is likely a missing policy as a result of Penn National’s destruction of material evidence. The Court finds as follows:

1. Penn National issued one or more insurance policies protective of Covil that it can no longer produce, including at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits with a policy period of March 31, 1985 to March 31, 1986 (the 1985–86 Policy); and
2. The 1985–1986 Policy contains the same terms, conditions, and limits of liability as its successive, renewal policies issued with policy periods of March 31, 1986 to March 31, 1987 (the 1986–1987 Policy) and March 31, 1987 to March 31, 1988 (the 1987–1988).

This Court further finds that the Receiver is entitled to his reasonable attorneys’ fees and costs as the prevailing party on his declaratory judgment claim. Independently, this Court finds that the Receiver is entitled to his reasonable attorneys’ fees and costs as a sanction against Penn National for Penn National’s spoliation of relevant, material evidence in this case. The Receiver is ordered to produce within thirty (30) days from this order evidence of its reasonable attorneys’ fees and costs for this Court’s *in camera* review.

This Court further orders that Penn National shall complete the digitization of the microfiche cards described in its most recent February 27, 2024 Interim Report and provide a Final Report to the Court within seven (7) days of this Order.

Finally, this Court directs the Receiver to provide a copy of this Order to the Attorney General of the State of South Carolina as well as the Insurance Commissioners for the State of South Carolina and for the Commonwealth of Pennsylvania for their consideration and further action, as they may deem appropriate.²¹⁵

²¹⁵ To the extent that an alleged fact, opinion, or legal argument raised by Penn National is in conflict with this Court's findings but not specifically addressed in this Order, the assertion is hereby rejected.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company.; Sam J. Crain & Co.,
Inc.; and South Carolina Property and
Casualty Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**ORDER APPROVING COVIL
CORPORATION'S REPORT ON
ATTORNEY'S FEES AND COSTS**

Before the Court is Covil Corporation's ("Covil"), by and through its duly appointed Receiver Peter D. Protopapas, Report on the Receiver's Attorney's Fees and Costs ("Report"), and, along for *in camera* review, unredacted exhibits for fees and costs from the law firms of Morgan Lewis, Smith Robinson, John B. White JR. P.A. Law Firm, and Rikard & Protopapas, LLC. The Receiver requests the approval of reasonable attorney's fees and costs, following the bench trial of the above captioned matter. The non-jury trial against Pennsylvania National Mutual Casualty Insurance Company ("Penn National") by Covil concluded on November 28, 2023, and this Court entered a Final Order on March 1, 2024, resolving (1) disputes on the interpretation, meaning, and application of insurance policies issued by Penn National related to underlying asbestos claims; and (2) an evidentiary hearing on spoliation. The Court held the Receiver, on behalf of Covil, is entitled to judgment on his declaratory relief claims as well as a finding that Penn National has, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies, and thus justifying a spoliation order.

The Receiver now requests this Court approve the reasonable attorney's fees and costs requested. The Court is guided by the six-factor *Glasscock* analysis.¹ See *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). Additionally, this Court has the discretion to award attorney fees and costs. See *Taylor v. Taylor*, 333 S.C. 209, 215, 508 S.E.2d 50, 54 (Ct. App. 1998).

The Court adopts verbatim the *Glasscock* analysis as stated by the Receiver in its Report and is hereby incorporated in this Order. The *Glasscock* factors weigh heavily in favor of approving the requested amount of attorney's fees and costs. Further, the Court has reviewed the *in camera* submissions by the Receiver and the law firms involved in the litigation of this matter, and finds the requested amounts reasonable in light of the *Glasscock* analysis. Therefore, the Court GRANTS the Receiver's request for \$2,457,108.50 for attorney's fees and \$306,092.97 for costs.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]

¹ The Court considers: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3): professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Attorney Fees

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Company.; Sam J. Crain & Co.,
Inc.; and South Carolina Property and
Casualty Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**ORDER DENYING PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY'S POST-
TRIAL MOTIONS**

Before the Court is Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), Post-Trial Motions, pursuant to Rule 52(b) SCRCPP for a new trial, or in the alternative, for an amendment of the Court's findings of fact and conclusions of law pursuant to Rule 59(e), and/or for judgment notwithstanding the verdict pursuant to Rule 50(b) SCRCPP ("Post-Trial Motion").

The non-jury trial of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas ("Covil"), against Penn National resolved two matters: (1) the ongoing disputes regarding the interpretation, meaning, and application of insurance policies issued by Penn National related to underlying asbestos claim; and (2) an evidentiary hearing on spoliation. The non-jury trial commenced on November 27, 2023, and concluded on November 28, 2023. The Court entered its Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company ("Final Order") after taking into considerations all exhibits, trial testimony, depositions, submissions by the parties, and

proposed orders. As explained in the Final Order, the Receiver is entitled to judgment on his declaratory relief claims and the evidence before the Court demonstrates Penn National has, among other things, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies.

As explained below, the Court denies Penn National's Post-Trial Motion for a new trial, or in alternative, for an amendment of the Court's findings of fact and conclusions of law, and/or for judgment notwithstanding the verdict.

First, Penn National seeks a new trial based on a timely demand for a trial by jury. A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issues. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). If an action is at law, it retains this character, and the appellate courts must affirm where there is any evidence to support the judge's findings. *Id.* Further, a declaratory judgment action to interpret an insurance contract is an action at law. *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct.App.1997).

In this matter, the Receiver on behalf of Covil, asked this Court to declare the rights of the parties under two Penn National general liability insurance policies issued to Covil by Penn National. The nature of these declaratory judgments was to determine any question of construction or validity arising under the insurance contracts, an action at law, and as ultimately found and held in the Final Order. Additionally, Covil's Notice That it Seeks Only Declarations Concerning its Policies with Penn National,¹ made it clear to this Court the only causes of actions were declaratory judgments. For the reasons set forth in its December 6, 2022 Order on Penn National's Motion to Confirm Jury Trial Demand, the Court denies Penn National's request for a new trial before a jury, as these matters were properly before the Court to make factual determinations on complex issues.

¹ Covil's Notice was filed December 6, 2022.

Second, Penn National seeks amendments to the Final Order. Penn National contends the Court failed to address the uncontradicted evidence that Penn National's Document Retention Policy would not have led to the destruction of any Covil-related policies from May 2018 to December 2021. *See* Post-Trial Mot. at 4. Further, Penn National incorrectly states "the uncontradicted evidence in the record shows that, during the period from 2018 to 2021, Penn National would have only destroyed policies that canceled or non-renewed in the years 1993 to 1996, *and nothing earlier than that.*" *Id.* at 5. Yet, the testimony provided to the Court proved Penn National did in fact destroy microfiche containing commercial line insurance policies issued prior to 1992, per Penn National's employee Brent Reifsnnyder's testimony. *See* Final Order, at 82-86. Additionally, there was no quality control by Penn National in overseeing their process of destruction of records, as this was simply tasked to an unsupervised administrative staff employee. *Id.* at 86.

Next, Penn National argues this Court's reliance upon the phrase "left off at renewal" on the Change Endorsement to the 1986-87 Policy in the absence of other secondary evidence that Penn National issued a policy to Covil for 1985-86, is unwarranted. *See* Post-Trial Mot. at 5. However, the Court disagrees as the record contains reasonable factual support to demonstrate the 1986-87 Policy was a renewal and not the initial policy of insurance issued by Penn National to Covil. It is undisputed the 1986-87 Policy included language to indicate it was a "renewal." Specifically, Covil's Trial Exhibit 1, at page 29 stated: "Amending policy to delete products from GL0031 (4-84), and Add GI2104 (7/66) Product hazard exclusion as it was left off at renewal." This alone was sufficient for the Court to make a reasonable reliance of the term "left of at renewal" and make a factual finding the 1986-87 Policy was a renewal. Further, the Court also considered

the meaning of “renewal” in the context of insurance contracts and subsequent renewal policies to make the factual determination the 1986-87 Policy was a renewal policy. *See* Final Order, at 86.

Penn National also asserts the case by Covil presented nonjusticiable issues and this Court’s Final Order is an advisory opinion. *See* Post-Trial Mot. at 7. The Court disagrees. The Court made factual determinations pursuant to S.C. Code Ann. § 15-53-30, the Uniform Declaratory Judgment Act, which allows “[a]ny person interested under a ...written contract or other writings constituting a contract whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder.” Further, as this Court stated in footnote 7 of the Final Order, an insurance contract may be construed before a breach occurs. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595-96, 748 S.E.2d 781, 787 (2013). This Court did not provide an advisory opinion but rather under the Uniform Declaratory Judgment Act, this Court made determinations of the rights of Covil based on insurance policies issued by Penn National for settled asbestos lawsuits, including pending and future claims.

Additionally, Penn National argues the award of attorney’s fees and cost has no legal basis and as a sanction for discovery violations, it is unconscionable. *See* Post-Trial Mot. at 8. First, the Court disagrees with Penn National’s assertion that both *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 28 (1980) and *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978), do not support the Court’s decision to award attorney’s fees and costs. In *Hegler*, “attorney’s fees are not recoverable unless authorized by contract or statute,” yet a party may recover, “if at all, upon some contractual right” such as an insurance policy. *Hegler*, 270 S.C. at 549, 243 S.E.2d at 444. The respondent in *Hegler* defended the underlying action, but a declaratory judgment was brought by the respondent “to avoid any obligation to continue to

defend.” *Id.* at 550, 243 S.E.2d at 445. Therefore, it became necessary “for [the] appellant to employ counsel to resist the contention by respondent of lack of coverage.” Further, as *Hegler* explains, “[t]here is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Id.* at 550, 243 S.E.2d 444.

Similarly, Penn National has not denied a duty to defend, but has taken certain positions on the existence of certain insurance policies issued to Covil which directly impacts Penn National’s continuous obligation to defend. Therefore, the Receiver on behalf of Covil has been forced to employ counsel to contend the existence of insurance policies and the terms of those policies pursuant to a declaratory judgment action. The award of attorney’s fees and costs in the Final Order does have a legal basis.

Additionally, the amount is not unconscionable as this Court has discretion in the imposition of sanctions, but of course is not without bounds or limits. *See Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). Further, this Court may award reasonable expenses, including attorney’s fees, for a party’s failure to cooperate in discovery. *See* Rule 37(b), SCRCPP. In the Final Order, this Court made findings regarding the spoliation charge. *See* Final Order, at 100-02. Among the findings is Penn National’s destruction of material evidence of at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits. Based on this Court’s findings, the imposition of attorney’s fees and costs are warranted in light of the finding Penn National spoliated relevant and material evidence. This Court will not eliminate from the Final Order the award of attorney’s fees and costs.

Last, Penn National seeks a judgment notwithstanding the verdict and/or further amendment of the Final Order. *See* Post-Trial Mot. at 11. The Court denies adopting the proposed conclusions as offered by Penn National.

For the foregoing reasons, the Court DENIES Penn National's Post-Trial Motions.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Case Number:

Plaintiff,

In Re:

Vs.

Asbestos Personal Injury Litigation
Coordinated Docket

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

SUMMONS

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1329 Blanding Street, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

1329 Blanding Street Columbia, SC 29201

803.978.6111

jspitz@rplegalgroup.com

Attorney for the Receiver

This 27th Day of April, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Case Number:

Plaintiff,

In Re:

Vs.

Asbestos Personal Injury Litigation
Coordinated Docket

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

**COMPLAINT FOR DECLARATORY
JUDGMENT AND
BREACH OF CONTRACT**

Defendants.

COMES NOW Covil Corporation by and through its duly appointed Receiver, Peter D. Protopapas (“Plaintiff” or “Covil”), complaining of the defendants Pennsylvania National Mutual Casualty Insurance Company (“Penn National”); Sam J. Crain & Co., Inc. (“Crain Agency”); and South Carolina Property and Casualty Guaranty Association (“Guaranty Association”), who through undersigned counsel respectfully shows unto the Court as follows:

PARTIES

1. Covil Corporation, appearing by and through its duly appointed receiver, Peter D. Protopapas (the “Receiver”), who maintains his principal place of business in Richland County, South Carolina, brings this action. This Court appointed the Receiver to undertake actions to administer all assets of Covil Corporation, including without limitation its insurance policies. See Exhibit A, Receiver Order, at 1 (“This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil

Corporation as well as any claims related to the actions of failure to act of Covil's insurance carriers").

2. Plaintiff is informed and believes that defendant Penn National is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in the Commonwealth of Pennsylvania.
3. Plaintiff is informed and believes that the Crain Agency is a South Carolina corporation.
4. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.

JURISDICTION

5. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers. This Court appointed the plaintiff as Receiver of Covil.

VENUE

6. Venue is proper in this Court as it is the Receiver Court with cases pending and anticipated new filings in this Court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Honorable Jean H. Toal was appointed to have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestos and asbestos litigation filed within the state court system. Thus, the Honorable Jean H. Toal will have jurisdiction over this matter.

FACTUAL BACKGROUND

7. Covil's operations from 1954 through 1991 included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials. Those

operations allegedly exposed persons to asbestos who thereby suffered bodily injury (the “Asbestos Allegations”). The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil (“Covil Asbestos Suits”).

8. Penn National issued general liability policies to Covil (the “Penn National Policies”). The Penn National Policies have standard terms and conditions. It is the burden of Penn National to prove any limitation on or exclusion of coverage. Specifically, Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 with an annual \$1,000,000 combined single limit per occurrence for covered claims, with no limit to the number of occurrences, as follows:

<u>Policy Period</u>	<u>Policy Number</u>	<u>Limits of Liability</u>
March 31, 1986 – March 31, 1987	515 50 28 53 7	\$1,000,000 per occurrence; \$1,000,000 aggregate where applicable
March 31, 1987 – March 31, 1988	515 50 28 53 8	\$1,000,000 per occurrence; \$1,000,000 aggregate where applicable

9. Penn National has failed fully to acknowledge or accept its insuring obligations under the Penn National Policies, has reserved its rights, failed to acknowledge or respond to tender of covered Covil Asbestos Suits, and otherwise breached its contracts of insurance.
10. On information and belief, Mission Insurance Company (“Mission”) issued umbrella coverage that Covil contends “drops down” to provide “first dollar” coverage or coverage above a retained limit of less than \$25,000, for which the Receiver is not responsible, in

the event that there is no available primary coverage. The Mission policy is missing but was written on a standard form that provides for the payment or reimbursement of defense and indemnity costs, as those terms are understood in the insurance business. The Mission policy was issued for the period June 16, 1986 to March 31, 1987. Covil has experienced losses that “trigger” the Mission policy and would be sufficient in size to invoke the policy, which Covil contends, on information and belief, has a limit of liability of \$5,000,000.

11. On information and belief, Mission was liquidated on September 12, 1987.
12. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Mission. The Guaranty Association “is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.” S.C. Code Ann. § 38-31-60(b).
13. On November 2, 2018, Plaintiff was appointed Receiver of Covil, giving him the power and authority fully to administer all assets of Covil, accept service on behalf of Covil, engage counsel on behalf of Covil, and take any and all steps necessary to protect the interests of Covil, whatever they may be. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Covil Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Covil Asbestos Suits.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

14. An actual and justiciable controversy exists between the Receiver for Covil and Penn National concerning Penn National's obligations to Covil, including its obligation to pay for the Receiver's defense of Covil.
15. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that plaintiff may ascertain his rights against Penn National.
16. Pursuant to S.C. Code Ann. § 15-65-100, the Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.
17. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, 289 S.C. 1, 344 S.E.2d 151 (1986), a Receiver's fee is based on the value of the Receiver's services and at the appointing Court's discretion.
18. Plaintiff dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Covil, including in connection with the defense of asbestos suits against Covil. The Receiver is continuing to devote such time to the defense of Covil and will continue to incur expenses in his role as Receiver, which defense obligations are those of Penn National.
19. Plaintiff respectfully requests this Court to declare that Penn National must fairly compensate Plaintiff for the substantial time, effort, and expenses Plaintiff expended in connection with the defense of asbestos suits potentially covered under the Penn National policies and to further declare that this obligation is unlimited and shall continue as long as there are Covil Asbestos Suits pending.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

20. Pursuant to *Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989), a Receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.
21. Upon information and belief, Covil purchased insurance policies from Penn National during the period 1986 to 1987 and 1987 to 1988. These policies are the property of Covil.
22. Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including but not limited to such documents in the possession of Penn National are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

23. The Receiver seeks a declaration and order that Penn National issued primary general liability coverage (policy nos. 515 50 28 53 7 and 515 50 28 53 8) to Covil for the policy periods March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988; that each policy has a \$1,000,000 annual limit; that each policy has a \$1,000,000 combined single limit per occurrence for covered claims, with no limit to the number of occurrences; and that Penn National has an unlimited supplemental duty to defend and to pay or reimburse defense costs.
24. The Receiver seeks a declaration and order that Mission issued umbrella coverage to Covil (policy no. MA 002840) to Covil for the policy period June 16, 1986 to March 31, 1987.
25. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Penn National and Mission issued to Covil (the “Covil Insurance

Policies”), as follows:

- a. The Covil Insurance Policies cover all Covil Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the Penn National Policy periods;
- b. Each Covil asbestos suit “triggers” the Covil Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Covil may select the policy or policy years to which to assign or allocate in full each Covil Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Covil Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Covil Insurance Policies;
- e. Defense costs for the Covil asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Covil Insurance Policies;
- f. If any allegation or cause of action in a Covil Asbestos Suit is potentially covered under the Covil Insurance Policies, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
- g. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits;
- h. Each Covil Insurance Policy must indemnify covered Covil Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Covil Asbestos Suits that allege exposure to asbestos during Covil’s work are subject only to the “per occurrence” limits of the Covil Insurance Policies;

- j. Any aggregate limit on coverage in any of the Covil Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Covil Asbestos Suit is subject to the aggregate limit in the Covil Insurance Policies, if any; and
 - k. Each insurer has the burden to prove, based on the evidence, that any particular Covil Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order for the insurer to disclaim coverage for a Covil Asbestos Suit against Covil otherwise alleging injury during any Covil Insurance policy period.
26. Actual and justiciable controversies therefore exist between Covil and defendants Penn National and the Guaranty Association concerning their obligations under the Covil Insurance Policies.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

27. Defendant Crain Agency had a duty to exercise reasonable skill, care, and diligence to procure appropriate insurance coverage for Covil.
28. Upon information and belief, the Crain Agency was negligent and breached its duty to procure appropriate insurance coverage for Covil during each of the years Crain Agency was obligated to procure insurance.
29. This failure on the part of Defendant Sam Crain includes the failure to procure products/completed operations coverage for Covil, if it is determined that such coverage is provided by the Penn National and/or Mission Policies.
30. Defendant the Crain Agency is responsible for any shortfall or deficiency in coverage for Covil Asbestos Suits.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

31. Covil contracted with the Crain Agency to procure appropriate insurance for Covil.
32. Upon information and belief, Covil's insurance coverage is inadequate and inappropriate for its operations during the years in which the Crain Agency was contracted with to procure Covil's insurance.
33. Among other items, upon information and belief, the Crain Agency may not have secured products/completed operations coverage for Covil under the Penn National and/or Mission Policies.
34. As a direct and proximate result of the Crain Agency's breach of contract, Covil has suffered direct, indirect and consequential damages in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

35. At the time that Mission was liquidated on September 12, 1987, the Guarantee Association became statutorily required to take on the liabilities of Mission.
36. Plaintiff seeks a declaration that the Guarantee Association is responsible for any and all amounts Mission owes to Covil under the terms of the Mission insurance policy.

PRAYER FOR RELIEF

WHEREFORE, Covil Corporation, by and through its duly-appointed Receiver, demands judgment against defendants as follows:

- A. For plaintiff's compensation in connection with the defense of asbestos suits against Covil potentially covered under the Penn National and Mission Policies, in an amount set by this Court;

- B. For an order requiring that Penn National and the Guarantee Association provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Covil together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files;
- C. For an order requiring Penn National and the Guarantee Association to defend Covil in full against all asbestos suits alleging bodily injury during the Penn National and Mission policy periods unless and until either Penn National or the Guarantee Association can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in their respective policies otherwise bars coverage for a suit;
- D. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies:
 - i. The Covil Insurance Policies cover all Covil Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods;
 - ii. Each Covil asbestos suit “triggers” at least one Covil Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;
 - iii. Covil may select the policy or policy years to which to assign or allocate in full each Covil asbestos loss;
 - iv. In the case of a claimed ambiguity in any Covil Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Penn National Policies and Penn National bears the burden of proof as to any such ambiguity;
 - v. Defense costs for the Covil asbestos suits are supplemental, and the payment of

defense costs does not erode or impair any limit of liability of any of the Covil Insurance policies;

- vi. If any allegation in a Covil Asbestos Suit is potentially covered under the Covil Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
 - vii. Each Covil Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Covil Asbestos Suits;
 - viii. Each Covil Insurance Policy must indemnify covered Covil Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods;
 - ix. The Covil Asbestos Suits that allege exposure to asbestos during Covil’s work are subject only to the “per occurrence” limits of the Covil Insurance policies;
 - x. Any aggregate limit on coverage in any of the Covil Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Covil Asbestos Suit is subject to the aggregate limit in the Covil Insurance Policies, if any; and
 - xi. Each insurer has the burden to prove, based on the evidence, that any particular Covil Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Covil Insurance Policies, in order for the insurer to disclaim coverage for a Covil Asbestos Suit against Covil otherwise alleging injury during the Covil insurance policy period.
- E. Defendant the Crain Agency breached its obligations by not procuring the appropriate insurance for Covil and is liable to the Receiver for money damages in an amount to be proven at trial.

- F. Defendant Guarantee Association is responsible for any and all amounts Mission owes to Covil under the terms of the Mission insurance policy.
- G. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

Jescelyn T. Spitz

Jescelyn T. Spitz (SC Bar 101880)

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Attorney for the Receiver

This 27th Day of April, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
DENVER D. TAYLOR and	)	
JANICE TAYLOR,	)	CASE NO. 2018-CP-40-04940
	)	
Plaintiffs,	)	Order Appointing a Receiver for Covil
	)	Corporation
v.	)	
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

This matter comes before the Court by way of Plaintiff's Motion for Appointment of a Receiver pursuant to South Carolina Code § 15-65-10. This Court finds that the application is meritorious under the applicable statute because Covil Corporation has dissolved. Therefore, Plaintiff's motion is GRANTED.

This Court hereby appoints Attorney Peter Protopapas as Receiver at such rate of compensation as may be approved by the Court. Mr. Protopapas is hereby appointed Receiver in this case pursuant to § 15-65-10 with the power and authority to fully administer all assets of Covil Corporation ("Covil"). This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any

mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

IT IS SO ORDERED.

SIGNED this _____ day of _____, 2018.

JEAN TOAL, CHIEF JUSTICE (Ret.)



Richland Common Pleas

Case Caption: Denver D Taylor , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al
Case Number: 2018CP4004940
Type: Order/Appointment of Receiver

IT IS SO ORDERED.

s/ Jean H. Toal #2758

4. Admitted, upon information and belief.

5. Denied.

6. Denied.

7. The allegations of paragraph 7 are vague and lack clarity in that they allege certain allegations have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 7 are denied.

8. It is admitted that Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

9. Denied.

10. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 10. To the extent a response is required, denied.

11. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 11. To the extent a response is required, denied.

12. The allegations of paragraph 12 state legal conclusions to which a response is not required. To the extent a response is required, denied.

13. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

14. The allegations of paragraph 14 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without

any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether an actual or justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether “judicial declarations are necessary or appropriate at this time” with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 state legal conclusions to which a response is not required. To the extent a response is required, denied.

17. The allegations of paragraph 17 state legal conclusions to which a response is not required. To the extent a response is required, denied.

18. The allegations of paragraph 18 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 19 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which

such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

20. The allegations of paragraph 20 state legal conclusions to which a response is not required. To the extent a response is required, denied.

21. It is admitted Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

22. The allegations of paragraph 22 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 22 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

23. The allegations of paragraph 23 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 23 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

24. The allegations of paragraph 24 simply state a request for a declaration of this Court to which a response is not required. To the extent a response is required, Penn National does not have information or knowledge sufficient to either admit or deny the allegations of paragraph 24,

and therefore, denies such allegations. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

25. The allegations of paragraph 25, including each subpart, simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 25, including each subpart, are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

26. The allegations of paragraph 26 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether a justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and the allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are not directed to Penn National. To the extent a response is required, denied.

28. The allegations of paragraph 28 are not directed to Penn National. To the extent a response is required, denied.

29. The allegations of paragraph 29 are not directed to Penn National. To the extent a response is required, denied.

30. The allegations of paragraph 30 are not directed to Penn National. To the extent a response is required, denied.

31. The allegations of paragraph 31 are not directed to Penn National. To the extent a response is required, denied.

32. The allegations of paragraph 32 are not directed to Penn National. To the extent a response is required, denied.

33. To the extent the allegations of paragraph 33 assert or imply that certain coverage existed under the Penn National's insurance policy, such allegations are specifically denied. The allegations of paragraph 33 otherwise appear not be directed to Penn National. To the extent a response to such allegations is required, denied.

34. The allegations of paragraph 34 are not directed to Penn National. To the extent a response is required, denied.

35. The allegations of paragraph 35 are not directed to Penn National. To the extent a response is required, denied.

36. The allegations of paragraph 36 simply state a request for a declaration of this Court to which a response is not required. Further, the allegations of paragraph 36 are not directed to Penn National. To the extent a response is required, denied.

GENERAL DENIAL

Except as specifically admitted above, Penn National denies each and every allegation of Plaintiff's Complaint.

FIRST DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure in that there is no subject matter jurisdiction over the claims asserted inasmuch as (1) the Receiver does not have legal standing to pursue such claims, and (2) the Plaintiff has failed to comply with the conditions precedent to filing suit under Penn National's policy

issued to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988 (the “Penn National Policy”).

SECOND DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in that the Complaint fails to state a claim upon which relief can be granted. Specifically, Plaintiff fails to allege actual factual allegations to support a claim for a declaration by this Court as to coverage under Penn National’s policies. Plaintiff’s Complaint does not aver any policy language that it contends affords coverage for the claims at issue or the manner in which the claims asserted against Covil in the “Covil Asbestos Suits” could trigger coverage under the Penn National Policy or identify any of the “Covil Asbestos Suits” for which it seeks declarations from this Court as to coverage under the Penn National Policy.

THIRD DEFENSE

The Plaintiff failed to tender or submit the underlying lawsuits referenced in Plaintiff’s Complaint in a timely manner under the Penn National Policy and otherwise failed to comply with the provisions of the Penn National Policy. Therefore, Plaintiff’s claims in this action are barred.

FOURTH DEFENSE

Penn National’s rights, liabilities, and obligations are defined and controlled by the terms and provisions of the Penn National Policy. The terms and provisions of the Penn National Policy, including, but not limited to, any and all applicable policy definitions, conditions, exclusions, limitations, and endorsements, do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff’s Complaint. Accordingly, Plaintiff’s claims against Penn National in this action, which are grounded on the theory that Penn National had an obligation to provide coverage to

Covil under the Penn National Policy for the claims, lawsuits, or matters asserted against Covil should be dismissed.

FIFTH DEFENSE

Plaintiff's claims may be barred by failure to reduce or mitigate its damages as required by law.

SIXTH DEFENSE

Penn National pleads the equitable doctrines of waiver, estoppel, and laches in bar of the claims against Penn National in this action.

SEVENTH DEFENSE

Penn National pleads the applicable statute of limitations and/or statute of repose in bar of any claims or recovery against Penn National in this action.

WHEREFORE, Penn National respectfully prays the Court as follows:

1. That Plaintiff have and recover nothing of it in this action;
2. That the Plaintiff's claims against it be dismissed, with prejudice;
3. That the costs of this action be taxed against the Plaintiff;
4. For a trial by jury on all issues so triable; and
5. For such other and further relief as to the Court may seem just and proper.

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II (S.C. Bar No. 101951)

Federal I.D. No. 12039

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Greensboro, NC 27408

Telephone: 336.419.4900

Facsimile: 336.419.4950

Attorneys for Defendant Penn National

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II (S.C. Bar No. 101951)

Federal I.D. No. 12039

dharris@goldbergsegalla.com

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Greensboro, NC 27408

Telephone: 336.419.4900

Facsimile: 336.419.4950

Attorney for Defendant Penn National

5. Denied.

6. Denied.

7. The allegations of paragraph 7 are vague and lack clarity in that they allege certain allegations have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 7 are denied.

8. It is admitted that Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

9. Denied.

10. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 10. To the extent a response is required, denied.

11. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 11. To the extent a response is required, denied.

12. The allegations of paragraph 12 state legal conclusions to which a response is not required. To the extent a response is required, denied.

13. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

14. The allegations of paragraph 14 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which

such allegations have been asserted. As such, it is unclear as to whether an actual or justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether “judicial declarations are necessary or appropriate at this time” with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 state legal conclusions to which a response is not required. To the extent a response is required, denied.

17. The allegations of paragraph 17 state legal conclusions to which a response is not required. To the extent a response is required, denied.

18. The allegations of paragraph 18 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 19 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

20. The allegations of paragraph 20 state legal conclusions to which a response is not required. To the extent a response is required, denied.

21. It is admitted Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

22. The allegations of paragraph 22 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 22 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

23. The allegations of paragraph 23 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 23 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

24. The allegations of paragraph 24 simply state a request for a declaration of this Court to which a response is not required. To the extent a response is required, Penn National does not have information or knowledge sufficient to either admit or deny the allegations of paragraph 24, and therefore, denies such allegations. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

25. The allegations of paragraph 25, including each subpart, simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 25, including each subpart, are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

26. The allegations of paragraph 26 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether a justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and the allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are not directed to Penn National. To the extent a response is required, denied.

28. The allegations of paragraph 28 are not directed to Penn National. To the extent a response is required, denied.

29. The allegations of paragraph 29 are not directed to Penn National. To the extent a response is required, denied.

30. The allegations of paragraph 30 are not directed to Penn National. To the extent a response is required, denied.

31. The allegations of paragraph 31 are not directed to Penn National. To the extent a response is required, denied.

32. The allegations of paragraph 32 are not directed to Penn National. To the extent a response is required, denied.

33. To the extent the allegations of paragraph 33 assert or imply that certain coverage existed under the Penn National's insurance policy, such allegations are specifically denied. The allegations of paragraph 33 otherwise appear not be directed to Penn National. To the extent a response to such allegations is required, denied.

34. The allegations of paragraph 34 are not directed to Penn National. To the extent a response is required, denied.

35. The allegations of paragraph 35 are not directed to Penn National. To the extent a response is required, denied.

36. The allegations of paragraph 36 simply state a request for a declaration of this Court to which a response is not required. Further, the allegations of paragraph 36 are not directed to Penn National. To the extent a response is required, denied.

GENERAL DENIAL

Except as specifically admitted above, Penn National denies each and every allegation of Plaintiff's Complaint.

FIRST DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure in that there is no subject matter jurisdiction over the claims asserted inasmuch as (1) the Receiver does not have legal standing to pursue such claims, and (2) the Plaintiff has failed to comply with the conditions precedent to filing suit under Penn National's policy issued to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988 (the "Penn National Policy").

SECOND DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure in that the Complaint fails to state a claim upon which relief can be granted. Specifically, Plaintiff fails to allege actual factual allegations to support a claim for a declaration by this Court as to coverage under Penn National's policies. Plaintiff's Complaint does not aver any policy language that it contends affords coverage for the claims at issue or the manner in which the claims asserted against Covil in the "Covil Asbestos Suits" could trigger coverage under the Penn National Policy or identify any of the "Covil Asbestos Suits" for which it seeks declarations from this Court as to coverage under the Penn National Policy.

THIRD DEFENSE

The Plaintiff failed to tender or submit the underlying lawsuits referenced in Plaintiff's Complaint in a timely manner under the Penn National Policy and otherwise failed to comply with the provisions of the Penn National Policy. Therefore, Plaintiff's claims in this action are barred.

FOURTH DEFENSE

Penn National's rights, liabilities, and obligations are defined and controlled by the terms and provisions of the Penn National Policy. The terms and provisions of the Penn National Policy, including, but not limited to, any and all applicable policy definitions, conditions, exclusions, limitations, and endorsements, do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff's Complaint. Accordingly, Plaintiff's claims against Penn National in this action, which are grounded on the theory that Penn National had an obligation to provide coverage to Covil under the Penn National Policy for the claims, lawsuits, or matters asserted against Covil should be dismissed.

FIFTH DEFENSE

Plaintiff's claims may be barred by failure to reduce or mitigate its damages as required by law.

SIXTH DEFENSE

Penn National pleads the equitable doctrines of waiver, estoppel, and laches in bar of the claims against Penn National in this action.

SEVENTH DEFENSE

Penn National pleads the applicable statute of limitations and/or statute of repose in bar of any claims or recovery against Penn National in this action.

WHEREFORE, Penn National respectfully prays the Court as follows:

1. That Plaintiff have and recover nothing of it in this action;
2. That the Plaintiff's claims against it be dismissed, with prejudice;
3. That the costs of this action be taxed against the Plaintiff;
4. For a trial by jury on all issues so triable; and
5. For such other and further relief as to the Court may seem just and proper.

This the 31st day of March, 2021.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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Attorneys for Defendant Penn National

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

**COVIL CORPORATION'S NOTICE OF
MOTION AND MOTION TO COMPEL**

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Covil Corporation, by and through its Receiver Peter D. Protopapas ("Covil"), respectfully moves this Court for an order compelling defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to comply with this Court's orders to search Penn National's policies. Despite two hearings before this Court, Penn National has repeatedly refused to conduct a reasonable search of its microfilm and paper records for relevant documents in response to Covil's discovery requests.

The recent deposition of Penn National's Brent Reifsnyder demonstrates that Penn National has refused to comply with its discovery obligations. Mr. Reifsnyder admitted that he spent *less than five minutes* trying to locate documents responsive to the Court's Order.¹ Despite Mr. Reifsnyder's repeated claims that these records are only searchable by policy number—made twice by affidavit, and over a dozen times in his deposition—he conceded that a manual search is

¹ Ex. 1, Reifsnyder Dep. at 65:3–11.

possible.² He failed to conduct a manual search or investigate other plausible alternative search methods.³ Covil therefore seeks an order compelling Penn National to perform any and all searches necessary to identify documents responsive to Covil's requests.

BACKGROUND

Since 2018, Covil has sought discovery of its insurance policies and related documentation from Penn National. The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. *See, e.g.*, Ex. 2, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003.

After the January 7, 2021 deposition of Penn National's corporate representative revealed the inadequacy of Penn National's policy search efforts, Covil moved to compel Penn National to perform a complete search of its records relating to insurance policies covering Covil. At the first hearing in January 2021 on this motion, the Court gave each party clear instructions. The Court ordered Covil to provide lists of relevant job sites, owners, and agents to Penn National for further searches, and it ordered Penn National to promptly respond with its findings. Ex. 3, Jan. 25, 2021 Hrg. Tr. at 138–42. The Court admonished Penn National not to “ask for something that's just as ridiculous as what you say [Covil] asked for from you. They are not going to know policyholder's numbers, or policyholders.” *Id.* at 143.

Subsequently, despite Covil's compliance with the Court's orders, Penn National's conduct raised serious questions. Covil informed the Court of these problems in a Supplemental Motion to Compel on April 22, 2021.

² *See* Ex. 4, July 9 Reifsnyder Aff. ¶ 16; Ex. 5, July 23 Reifsnyder Aff. ¶ 5; Ex. 1, Reifsnyder Dep. at 22:6–10, 23:2–16, 27:9–20, 31:2–20, 33:4–15, 35:15–21, 36:4–7, 45:2–5, 47:10–17, 53:25–54:8, 64:2–7 (unable to search without policy number); *id.* at 50:20–51:3 (manual search).

³ *See* Ex. 1, Reifsnyder Dep. at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–61:2, 62:17–63:3 (never explored alternatives).

The Court held a second hearing on June 25, 2021. It later granted Covil's motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records *and its hard copy paper records* for the information and documents sought by the Receiver." Ex. 2, July 1, 2021 Order on Motions to Compel at 6 (emphasis added). The Court specifically noted that it was "not satisfied that Penn National is only able to search its paper records by policy number." *Id.* The Court ordered Penn National to "***thoroughly search its paper records using the list of contractors and facilities provided by the Receiver*** in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.* (emphasis added). Yet again, Penn National failed to comply with the Court's Order, as shown below.

Per the Court's order, Penn National provided Covil with an affidavit from Mr. Reifsnyder, its Director of Administrative Services, on July 9, 2021. *See* Ex. 4, July 9 Reifsnyder Aff. It states, "Policy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system" that marks each file with the last two digits of a policy number. *Id.* ¶¶ 8, 16.

Mr. Reifsnyder provided another affidavit on July 23, 2021. He did not state that Penn National conducted the ordered search. *See* Ex. 5, July 23 Reifsnyder Aff. Instead, he stated that he "considered other alternative means of searching Penn National's non-electronically-stored paper documents[.]" *Id.* ¶ 6. He asserted, "the only alternative means of searching such [non-electronic] documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured." *Id.* ¶ 7.

Covil deposed Mr. Reifsnyder on August 3, 2021. Mr. Reifsnyder testified, among other things:

- a) Mr. Reifsnyder spent ***less than five minutes*** trying to locate documents responsive to the Court's Order. Ex. 1, Reifsnyder Dep. at 65:3–11.
- b) He did not take *any* steps to search for policy-related documents based on the contractor or job site lists provided by Covil. *Id.* at 49:20–50:1.
- c) He did not consult with anyone at Penn National or outside Penn National about how he might be able to search for documents other than by policy number. *Id.* at 50:2–9.
- d) Until preparing for his deposition, he had never reviewed the list of job sites the Receiver provided to Penn National to facilitate Penn National's searches. *Id.* at 47:10–24.
- e) Penn National itself designed the system of organizing its records by policy number. *Id.* at 43:11–16.
- f) Regarding his affidavit statement that he considered alternative means of searching for documents, *see* Ex. 5 July 23 Reifsnyder Aff. ¶ 7, he testified that he only considered one alternative means of searching: “[S]omebody would need to coordinate having somebody physically pull up and look through every conceivable record from microfilm and paper storage.” Ex. 1, Reifsnyder Dep. at 50:20–51:3.
- g) He never consulted with anyone how a manual search could be conducted, never determined how long such a search would take, never determined how many individuals it would take to conduct such a search, never discussed procuring additional staff or resources for a search, and never determined how much the search would cost, whether conducted internally or by an outside vendor. *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.
- h) He never investigated how much it would cost to have Penn National's paper or microfilm records converted into a digitally searchable format. *Id.* at 60:11–61:2.

Mr. Reifsnyder further testified, when asked why he did not investigate how much it would cost to engage an outside vendor:

Honestly, at the end of the day, I'm actually shocked that the Court would want to do something like that. I'm actually shocked that there would be a request of that nature. We go by policy number. That's what we go by. That's what the industry goes by.

Now, if you ask me, we're going to do this, then I will go out and get all the information.

Id. at 63:4–13 (emphasis added).

ARGUMENT

Penn National has refused to comply with the Court's Order of July 1, 2021, which required it to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver[.]" Ex. 2, Order on Motions to Compel at 6. Indeed, Mr. Reifsnyder's testimony shows that Penn National has made no effort at all to comply with the Order, or even to investigate how it might do so.

Penn National's non-compliance is merely the latest example of its obstructionist tactics in discovery. Since 2018, Covil has sought policy documentation from Penn National in this and other cases. Yet despite extensive discussions between the parties, two motions to compel, and clear instructions from the Court at the January 25 hearing and in the July 1 Order, Penn National has failed to take even the most basic steps to locate responsive documents.

Penn National offers no legitimate reason why it refused to perform the court-ordered search. Despite the foreseeability of having to search its policy records by other methods, Penn National chose to index its policy records using a system that identifies files only by policy number. *See* Ex. 1, Reifsnyder Dep. at 43:11–16. Penn National cannot rely on the inefficiencies of its own filing system to avoid its discovery obligations. "[W]here one party has an inefficient filing system, '[t]he mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden.'" *Columbian Chems. Co. v. AIG Specialty Ins. Co.*, No. 14-CV-00166, 2015 WL 12755711, at *3 (N.D. W. Va. Sept. 18, 2015) (quoting *Fagan v. D.C.*, 136 F.R.D. 5, 7 (D.D.C. 1991)). The *Columbian Chemicals* court granted the plaintiff's motion to compel over the defendant insurer's objection that, in the court's words, "*its own filing system is*

such that retrieving [the requested information] would be unduly burdensome.” *Id.* at *5. “To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.” *Id.* at *4 (quoting *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976)). Accordingly, Penn National should be required to comply with the Court’s order and search its paper and microfilm records for documents responsive to Covil’s requests.

CONCLUSION

Based on the foregoing, Covil respectfully requests an order requiring Penn National to take any and all steps necessary to perform the search ordered by this Court on July 1, 2021, including but not limited to (a) manually searching its paper and microfilm records, or (b) electronically searching the records after digitizing the paper and microfilm records. Covil also requests that the Court require Penn National, within fourteen days of the order, to file for Court approval a proposed plan and timetable for completing these searches. Covil further requests that Penn National reimburse all costs associated with filing this motion, and that this Court grant Covil all other relief at law or equity to which it is justly entitled. Pursuant to Rule 11, SCRCPP, counsel for Covil certifies that they had discussions with counsel for Penn National but were unable to resolve the matters contained herein and further consultation would serve no useful purpose

Respectfully submitted,

/s/ Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar No. 66263)
Jonathan M. Robinson (S.C. Bar No. 68285)
Shanon N. Peake (S.C. Bar No. 102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, 3rd Floor
Columbia, SC 29205
Phone: (803) 254-5445
Counsel for the Receiver for Covil Corporation

This 20th day of August, 2021.

EXHIBIT 1



Deposition of:
Brent Reifsnyder

August 3, 2021

In the Matter of:
**Covil Corporation Vs. Pennsylvania
National Mutual Insurance Et Al**

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1 Q. Have you ever --

2 A. And the only -- excuse me. Go ahead.

3 Q. Have you ever been asked to search
4 accounting records?

5 A. No, never.

6 Q. Have you ever been asked to search for
7 a record other than by policy number or accounting
8 records?

9 A. No. Policy number is it. No policy
10 number, no record.

11 Q. You were involved in responding to the
12 subpoena from Covil Corporation to Penn National;
13 is that correct?

14 A. The one that I'm currently deposed for?

15 Q. Yes.

16 A. Yes.

17 Q. When did you first become involved in
18 searching for documents responsive to the subpoena
19 served by Covil Corporation?

20 A. I don't remember the date.

21 Q. Would it have been before February of
22 2021?

23 A. I don't remember Covil. I remember
24 policy numbers. So if something occurred prior to
25 February and it was Covil-related, I wouldn't

1 remember.

2 Q. What is the first thing you remember
3 getting involved with in terms of the Covil
4 searches?

5 A. Covil -- let me clarify. When somebody
6 asks for a record, they say, I'm looking for Policy
7 Number X. They do not provide to me, necessarily,
8 that this is regarding a litigation, a subpoena, or
9 whatever, because that has no bearing on the
10 ability to search for a record by policy number. I
11 just need a policy number.

12 So if somebody said -- if you said to
13 me, Brent, I need -- or Mr. Reifsnyder, however you
14 want to address me -- I need a policy -- I need a
15 policy for this company, that means nothing to me.
16 My response is, I need a policy number.

17 Q. So sitting here today, you don't recall
18 when you were first asked to identify policies that
19 were potentially covering Covil Corporation; is
20 that a fair statement?

21 A. That would be a fair statement, that I
22 don't recall it, yes.

23 Q. I'd like to show you first a document
24 which was sent to us, the receiver for Covil
25 Corporation, on July 9, 2021. It's a letter

1 documents.

2 What did you mean by the fact that he
3 coordinated the investigation?

4 A. That Boyd would have looked up policy
5 data, is my -- he's the one responsible for
6 providing me policy number data to look up. If he
7 said, I need this policy number, then I looked for
8 that policy number.

9 Q. Other than looking for policy numbers
10 that Mr. Wright provided you, what other role, if
11 any, did you have in looking for responsive
12 documents or information?

13 A. I look up a policy number. That's all
14 I can do.

15 Q. And that's my question, is other than
16 looking up the policy number, did you do anything
17 to look for responsive documents in Penn National's
18 archives?

19 A. There's no other way for me to look for
20 anything other than a policy number.

21 Q. So is that that you did not do anything
22 other than look up by policy number?

23 A. That's what I said. Yes, sir.

24 Q. I'd like to turn to Paragraph 4. It
25 states, I am aware of the Court's order on the

1 recall that I didn't.

2 Q. Let's look at first request number one,
3 all insurance policies of any type that Penn
4 National issued to Covil Corporation or that
5 include Covil Corporation as an additional insured.

6 What steps do you recall taking to
7 locate documents that were issued to Covil
8 Corporation?

9 A. Steps that I would take that were
10 issued to Covil. Again, I need to be provided a
11 policy number. I do not have access to any systems
12 or technology that allows me to look up anything
13 related to Covil. Alls I have is the ability to
14 look up a policy number in our database to see
15 where it may be located in a box or in microfilm.
16 Then I go to that location, I take out what policy
17 number which has been requested, and I provide
18 that. I cannot physically look up anything related
19 to Covil. I do not have access to any of those
20 systems.

21 Q. And I appreciate that.

22 My question is slightly different, and
23 that is, what do you recall doing specifically to
24 find documents responsive to this request number
25 one?

1 information saying, I'm looking for this policy
2 number; I look and see, and respond back. The only
3 relevance to me is policy number.

4 Q. Do you recall Mr. Wright sending you
5 any type of email or otherwise requesting for you
6 to do any type of search for Covil documents other
7 than by policy number?

8 A. No. He would -- Mr. Wright knows that
9 I need a policy number; there's no other way for me
10 to search other than policy number. He may have
11 asked me -- he may have asked me, can I search for
12 it in any other way from a clarification
13 perspective. He's done that on multiple occasions
14 throughout the years. The reality of it is, I can
15 only search on policy number.

16 Q. So other than searching by policy
17 number, you don't recall doing any additional
18 searches for policies that may cover Covil
19 Corporation as either a named insured or an
20 additional insured; is that correct?

21 MR. YNTEMA: Objection to form.

22 Q. I'm sorry. I didn't hear your answer.
23 Could you...

24 A. I think Brady offered something.

25 MR. YNTEMA: I'm sorry. I just said,

1 just the actual copy of the insurance policy?

2 A. Again, what's in the file -- if it's an
3 underwriting file, it's an underwriting file.
4 What's in the contents of that file, I can't speak
5 to. It's under that policy number. Are there
6 microfilm records? Yes. What's in them in detail?
7 Underwriting files. The devil in the detail of it,
8 don't know.

9 Q. So let's take underwriting files as an
10 example.

11 An underwriting file may have
12 documentation in addition to a copy of the actual
13 policy, correct?

14 A. From the best of my knowledge, yes.

15 Q. But it's your understanding that the
16 way that Penn National organizes and indexes its
17 underwriting files, the only way you can find a
18 copy of that underwriting file is by policy number;
19 is that correct?

20 A. Correct. For those records in this
21 case, yes.

22 Q. So unless you have a copy of the actual
23 policy number, it's your understanding that you
24 couldn't actually locate a copy of that
25 underwriting file either in paper copy or

1 microfilm; is that right?

2 A. It's more than my understanding.

3 It's -- that's the way it works, yes.

4 Q. Can you find an underwriting file or a
5 hard copy paper file where the policyholder is
6 known, but not an actual policy number?

7 A. I cannot, no.

8 Q. I'd like to turn back to your affidavit
9 of July 9th, Exhibit 1. Paragraph 5 states, quote,
10 I am the person in charge of and responsible for
11 records that are archived or otherwise stored for
12 Penn National.

13 Do you see that?

14 A. Yep.

15 Q. I believe we -- you talked about this
16 earlier, but I just want to make sure I'm clear.

17 A. Sure.

18 Q. What role, if any, did you have in
19 designing the system for the way in which documents
20 are archived at Penn National?

21 A. None.

22 Q. Do you know who was responsible for
23 designing the system in which the documents are
24 archived or otherwise stored for Penn National?

25 A. How they originally decided terminal

1 you had offered, decs or other underwriting
2 material therein.

3 Q. The next paragraph, Paragraph 12,
4 states, quote, any paper policy documents stored at
5 Iron Mountain's facility is stored by policy number
6 in the same sequence as stored on Penn National's
7 microfilm, the digital -- the terminal digit
8 system.

9 Do you see that?

10 A. Yes, sir.

11 Q. It is my understanding from your
12 earlier testimony that it's Penn National that
13 designed the system for how it would store
14 documents at Iron Mountain. Is that correct?

15 A. Yes, sir. Yes. Yeah, it's all by
16 policy number.

17 Q. I'd like to turn to Paragraph 14. It
18 says, quote, to obtain paper policy documents from
19 the Iron Mountain facility, Penn National must
20 submit a request to Iron Mountain, typically by
21 electronic communication, with the specific policy
22 numbers requested.

23 Do you see that?

24 A. Yes, sir.

25 Q. And again, this is a process that was

1 A. Yes, sir.

2 Q. Are you aware of any other way to
3 search for policy-related documents other than by
4 the policy number?

5 A. No.

6 Q. Have you ever been asked by anyone to
7 search for policy documents by any other way other
8 than policy number?

9 A. Have I been asked? I've been asked,
10 can I search any other way, just like you just
11 asked me. And the answer is, no, I need a policy
12 number.

13 Q. I'd like to turn back to Exhibit 2,
14 which was the Court's order on the motion to compel
15 that we talked about a little while ago --

16 A. Mm-hmm (affirmatively).

17 Q. -- specifically, paragraph -- I'm
18 sorry -- Page 3. We were looking at these requests
19 that Covil -- the receiver for Covil Corporation
20 issued to Penn National and that the Court was
21 addressing, specifically with respect to request
22 number one on Page 3. It has in brackets, list of
23 potential contractors.

24 Do you see that?

25 A. I see that.

1 which is, all certificates of insurance or other
2 documents evidencing any insurance coverage that
3 Penn National provided to Covil Corporation,
4 including certificates of insurance or documents
5 that identify or concern the following entities,
6 and then in brackets it says, list of potential job
7 sites.

8 Do you see that?

9 A. Yes, sir.

10 Q. Do you recall receiving from Mr. Wright
11 or anyone else a list of potential job sites to
12 search?

13 A. Again, I think that was part of the
14 conversation I had with Mr. Wright. He said -- I
15 think he put both of those together. And the
16 answer is, again, no, I cannot; I need a policy
17 number.

18 Q. And in preparation for your deposition
19 yesterday did you actually see the list of
20 potential job sites?

21 A. I did click through and see that, yes.

22 Q. But prior to yesterday, do you recall
23 seeing the actual list of potential job sites?

24 A. I do not recall so, no.

25 MR. NES: I'd like to pull up what will

1 motion to compel against Penn National filed on
2 July 1, 2021, which orders Penn National to
3 thoroughly search its paper records using the list
4 of contractors and facilities provided by the
5 receiver's subpoena.

6 Do you see that?

7 A. Yes, I do.

8 Q. And is it your understanding that the
9 list of contractors and facilities that were
10 provided by the receiver were the lists provided to
11 you on the phone by Mr. Wright?

12 A. That would be my understanding, yes,
13 sir.

14 Q. But you didn't actually see a physical
15 copy of either the contractor list or the facility
16 list when you executed this affidavit on July 23rd,
17 2021; is that correct?

18 A. As I recall, I do not. Again, it
19 wouldn't matter. I need policy numbers.

20 Q. Once Mr. Wright had that call with you
21 regarding the Court's order, what steps, if any,
22 did you take to do additional searches for policy
23 documents?

24 MR. YNTEMA: Objection to form.

25 A. So none additional, because without a

1 policy number, there's nothing for me to search.

2 Q. Did you consult with anyone at Penn
3 National about how you may be able to search for
4 additional documents other than by policy number?

5 A. No.

6 Q. Did you consult with anyone outside of
7 Penn National as to how you might be able to search
8 for policy documents other than by policy number?

9 A. No, I did not.

10 Q. I'd like to turn your attention to
11 Paragraph 6. It says, quote, in order to comply
12 with the Court's order, I have considered other
13 alternative means of searching Penn National's
14 non-electronically-stored paper documents due to
15 the fact that the receiver's list of 240
16 contractors and 650 facilities does not provide any
17 potential policy number information.

18 Do you see that?

19 A. Yes, sir.

20 Q. What alternative means of searching did
21 you consider?

22 A. There is only one other alternative
23 means to consider, and that would be that at a
24 considerable expense and a considerable amount of
25 time, somebody would need to coordinate having

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1 somebody physically pull up and look through every
2 conceivable record from microfilm and paper
3 storage.

4 Q. And what steps did you take to
5 determine how many individuals it would take to
6 conduct such a search?

7 A. My database gives me an indication, and
8 just from experience with that database, that we
9 have several hundred thousand records. Each record
10 could contain untold number of pages. I would
11 imagine that if it was to look through a policy,
12 one would have to look at every page.

13 So I can't even begin to tell you how
14 long it would take to look through all of that, but
15 it could not possibly be done in two weeks. I
16 would surmise months, if not into the year-plus
17 realm, without consulting somebody to see how much
18 money and how much labor and how much effort it
19 would take.

20 Q. When you say, without consulting
21 somebody, who would you consult?

22 A. Presently I have no idea. I would have
23 to research the industry to see who would
24 conceivably even do something like that. And they
25 would need to be bonded --

1 Q. So as the --

2 A. -- and insured, because all this is
3 sensitive data that has -- that has no bearing on
4 Covil. So there are lots of records that they
5 would be looking at that would have nothing to do
6 with Covil.

7 Q. So sitting here today, is it fair to
8 say that you have not consulted with anyone as to
9 how such a search would be conducted?

10 A. That would be a fair statement, yes.

11 Q. And is it fair to say that sitting here
12 today, you have not determined precisely how long
13 such a search would take?

14 A. That is correct.

15 Q. And is it true that sitting here today,
16 you have not determined how many individuals it
17 would take to conduct such a search?

18 A. That's correct.

19 Q. Sitting here today, you have not
20 determined how much it would cost to conduct a
21 search for policies -- policy documents based on
22 the receiver's list of 240 contractors and 650
23 facilities, correct?

24 A. Correct. It's never been asked for in
25 the history of me being here, that I've been aware

1 of, so...

2 Q. I'd like to turn your attention to
3 Paragraph 8.

4 A. Sure.

5 Q. Oh, I'm sorry. Before we get to
6 Paragraph 8, I believe in response to one of my
7 earlier questions, you were talking about what's
8 actually in a policy document file and that you
9 weren't actually sure what in a policy file would
10 have to be reviewed --

11 A. Right.

12 Q. -- to determine whether there's
13 responsive information; is that correct?

14 A. That is 100 percent correct.

15 Q. When you were speaking with Mr. Wright
16 regarding Penn National's response to the Covil
17 subpoena, did you talk to Mr. Wright at all about
18 what specific documents your team would be looking
19 for within any policy file?

20 A. As I had offered earlier, we don't look
21 for documents. We look for policy number. We
22 print the contents and provide that to the
23 underwriting or claims people, who are the document
24 experts. We are not.

25 Q. So in talking to Mr. Wright, though,

1 you didn't discuss any ways to narrow a review of a
2 policy document -- if you were to review the
3 documents on a claim -- on a file-by-file basis,
4 you didn't talk to Mr. Wright about any way to
5 narrow that search; is that correct?

6 A. I need a policy number, period. That's
7 it. So other than that, no, we didn't talk about
8 anything else other than I need a policy number.

9 Q. Now I'd like to turn your attention to
10 Paragraph 8 of Exhibit 3. It says, quote, with
11 respect to Penn National's microfilm records, my
12 research has shown that Penn National's microfilm
13 records contain in excess of 200,000 separate
14 policies, with each policy containing multiple
15 pages of policy documents.

16 Do you see that?

17 A. Yes, sir.

18 Q. The microfilm records that you're
19 referencing in Paragraph 8, are those only
20 insurance policies or is there other policy-related
21 documents on the microfilm as well?

22 A. So the detail -- so the answer is, to
23 me, it is a policy number. What's contained in
24 there can be a dec or whatever other policy
25 information may or may not be contained that was

1 deemed necessary by those document experts that
2 handle those policies. So whatever --

3 Q. You stated -- I'm sorry. Go ahead.

4 A. You're good. Go.

5 Q. When you said there were 200,000
6 separate policies, is that more accurate to say
7 there were 200,000 separate policy files?

8 MR. YNTEMA: Objection to form.

9 A. There are policy numbers. If you want
10 to call them a file, it's a policy number. Each
11 policy number -- again, it's -- I -- it's a policy
12 number to me. I provide what's there.

13 Q. Well, that's not what -- that's not
14 what Paragraph 8 says, though. So I'm just trying
15 to understand what your affidavit says.

16 It says there were in excess of 200,000
17 separate policies. What does that mean?

18 A. Separate policy files is probably --
19 you know, I have individual -- individual policy
20 numbers. Is that more clear?

21 Q. Yes. Thank you.

22 A. Okay.

23 Q. Did you do anything to determine how
24 much it would cost to have an outside vendor review
25 those 200,000 separate policy files?

1 A. As we just discussed, no.

2 Q. Did Mr. Wright ask you to inquire as to
3 how much it would cost to have an outside vendor
4 review those 200,000 separate policy files?

5 A. There was no request.

6 Q. I'd like to look at Paragraph 9. It
7 says, quote, the paper documents stored at the Iron
8 Mountain facility are contained in approximately
9 5,800 boxes, which include approximately 4,300
10 boxes of commercial line paper, policy documents;
11 based on my research, at last count, the number of
12 separate policies stored in these boxes numbered
13 approximately 615,000.

14 Do you see that?

15 A. Yes, sir.

16 Q. First, when you -- again, when you're
17 referring to separate policies stored in these
18 boxes, what do you mean by, separate policies --

19 A. Policy --

20 Q. -- stored the boxes?

21 A. Policy numbers.

22 Q. So again, the separate policies are
23 more -- more clearly, they're separate policy files
24 based on policy number; is that correct?

25 A. Yes, sir. That would be -- that --

1 that sounds the best way of putting it.

2 Q. With respect to the boxes referred to
3 in Paragraph 9 of your affidavit, did Mr. Wright
4 ask you to find out how much it would cost to have
5 an outside vendor review the 5,800 boxes of
6 documents in paper copy for responsive material?

7 A. No, sir.

8 Q. And have you done anything separately
9 to determine how much it would cost to have an
10 outside vendor review your 5,800 boxes of paper
11 files?

12 A. No, I have not.

13 Q. I'd like to look at Paragraph 10.
14 Paragraph 10 of your affidavit says, quote, for
15 security reasons, a manual search of the paper
16 policy documents could not be conducted at Iron
17 Mountain, unquote.

18 Do you see that?

19 A. Yes, sir.

20 Q. What did you mean by, for security
21 reasons?

22 A. Iron Mountain has strict security
23 protocols, so -- and generally very limited
24 location to review things. We're talking about a
25 substantial quantity of boxes.

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1 away from doing their day-to-day job to service and
2 support our clients, our insured, everybody else.
3 It's just beyond our capabilities.

4 Q. And when you say, beyond our
5 capabilities, you're referring to your department
6 of administrative services; is that right?

7 A. That's correct, sir.

8 Q. Did you speak with Mr. Wright about
9 procuring additional staff or resources from
10 anywhere else to try to respond to the subpoena by
11 doing this manual search that you reference in
12 Paragraph 11?

13 A. No, sir.

14 Q. I'd like to look at the last sentence
15 of Paragraph 11 on Page 4. It says, the amount of
16 time necessary -- sorry. I'll let Tiffany put it
17 up.

18 It says, the amount of time necessary
19 to conduct such a search would take many months to
20 conduct, and Penn National would incur significant
21 expenses that are currently incalculable to me.

22 Do you see that?

23 A. Yes, sir.

24 Q. With respect to that statement in
25 Paragraph 11, you have not done anything to

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1 determine approximately how much time it would take
2 to conduct such a search, though; is that correct?

3 A. That is correct. I can share that many
4 years ago we wrote down the policy numbers before
5 we shipped everything to Iron Mountain. Just
6 writing down policy numbers took three people nine
7 months, just writing down a policy number. I can't
8 imagine the amount of time it would take somebody
9 to go through every file and look at every page,
10 knowing what I know there.

11 Q. Have you inquired how much it would
12 cost for an outside vendor to convert the 200,000
13 separate microfilm records into a digitally
14 searchable format?

15 A. No, I have not.

16 MR. YNTEMA: Objection to form.

17 Sorry, Mr. Reifsnyder.

18 A. And no, I have not.

19 Q. Have you inquired as to whether or not
20 it was possible to convert the microfilm records
21 into a digitally searchable format?

22 A. I have not inquired, no.

23 Q. Have you inquired as to whether it
24 would be possible for an outside vendor to convert
25 the 5,800 boxes of policy documents into an

1 electronically searchable format?

2 A. No, I have not.

3 Q. Why is it that Penn National, if you
4 know, keeps documents, these 5,800 boxes of
5 documents, in paper copy, but not in an
6 electronically searchable format?

7 A. Why? I can't answer the why.

8 Q. And do you know why Penn National keeps
9 the 200,000 separate policies on microfilm in a
10 format that's not digitally searchable?

11 A. Again, I cannot answer that.

12 Q. I'd like to look at Paragraph 12. It
13 says, quote, to conduct a search -- such a search,
14 an outside vendor would have to be retained to
15 conduct a manual search of all of Penn National's
16 non-electronically-stored policy documents as Penn
17 National does not have the capacity to conduct such
18 a search internally.

19 Do you see that?

20 A. Yes, sir.

21 Q. When you say, an outside vendor would
22 have to be retained, what did you mean by, an
23 outside vendor?

24 A. Somebody who is knowledgeable --
25 anybody who's capable of actually reviewing these

1 documents who would meet the required
2 specifications of the Court to know what they're
3 looking for and understand what they're looking
4 for. That vendor would have to also be insured and
5 bonded, and we'd have to have nondisclosure
6 agreements.

7 Q. Does -- in your experience, does Penn
8 National use outside vendors to conduct any type of
9 reviews of documents?

10 A. Not that I'm aware of, no.

11 Q. So why is it that your suggestion in
12 Paragraph 12 is to use an outside vendor?

13 A. This is the first time ever that I'm
14 aware of that anybody's requested us to go through
15 this capacity of records. I have no other solution
16 than that's the option. That's my opinion.

17 Q. And then in paragraph -- the last
18 sentence of Paragraph 12 says, given the
19 unprecedented nature of such a search for Penn
20 National, I cannot currently provide an estimate of
21 how much an outside vendor would charge for the
22 search of all Penn National's
23 non-electronically-stored policy documents.

24 Do you see that?

25 A. Yes, sir.

1 Q. And why is it that you cannot provide
2 an estimate of how much would be charged?

3 A. Because I haven't gone out to ask.

4 Q. And why did you not go out to ask?

5 A. Honestly, at the end of the day, I'm
6 actually shocked that the Court would want to do
7 something like that. I'm actually shocked that
8 there would be a request of that nature. We go by
9 policy number. That's what we go by. That's what
10 the industry goes by.

11 Now, if you ask me, we're going to do
12 this, then I will go out and get all the
13 information.

14 Q. How much time did you personally spend,
15 Mr. Reifsnyder, looking for responsive documents in
16 response to the motion to compel by the Court?

17 A. I have no idea.

18 Q. Would it be more than five minutes?

19 A. Oh, absolutely. But again, I have no
20 idea. I don't keep track of my time and how long
21 it takes me to go look for something.

22 Q. Well, the Court ordered Penn National
23 to do a search, and you've told us today on
24 numerous occasions that you can't do a search
25 unless you have the policy number.

1 A. Correct.

2 Q. So without the policy number, what did
3 you do to search in response to the Court's motion
4 to compel?

5 A. I'm required -- I need a policy number.
6 Without a policy number, there's nothing else I can
7 do.

8 Q. Right. I understand that. And that's
9 why I asked you how much time you had spent in
10 response to the Court's motion to compel to look
11 for documents.

12 You were not provided any policy
13 numbers; is that correct?

14 A. Whatever was -- whatever was listed
15 previously in other attachments.

16 Q. Well, let's start with just since
17 July 1st.

18 A. Okay.

19 Q. July 1st, the Court ordered a motion to
20 compel. And you have reviewed that motion to
21 compel and talked about it in your affidavits; is
22 that correct?

23 A. That's correct.

24 MR. YNTEMA: Objection to form.

25 You can answer if you can, Mr. Reifsnyder. Thank

1 you.

2 A. Okay. That -- that's correct.

3 Q. And so my question is, other than
4 preparing for the deposition today, about how much
5 time would you say you spent trying to locate
6 documents responsive to the Court's order?

7 A. Without a policy number, minimal.

8 Q. Is it fair to say it would be less than
9 five minutes?

10 A. Arguably, I would say that, without a
11 policy number.

12 MR. NES: Thank you, Mr. Reifsnyder. I
13 have no further questions at this time.

14 Pass the witness.

15 MR. YNTEMA: If we could take a break
16 for one second, Mr. Nes, and just give me like five
17 minutes, and I -- I may have one or two questions.
18 I don't know.

19 MR. NES: Sure.

20 VIDEOGRAPHER: We are going off the
21 record at 11:39 a.m.

22 (After a recess, proceedings were
23 continued as follows:)

24 VIDEOGRAPHER: We are back on the
25 record at 11:44 a.m.

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Ann Finch, Individually and as Executor of
the Estate of Franklin Finch; and Peter D.
Protopapas as Court-Appointed Receiver
for Covil Corporation,

C.A. No. 2019-CP-40-03003

Plaintiffs,

v.

United States Fidelity & Guaranty
Company,

Defendant.

**ORDER ON THE RECEIVER FOR COVIL
CORPORATION'S MOTION TO COMPEL AND
SUPPLEMENTAL MOTION TO COMPEL
AGAINST PENNSYLVANIA NATIONAL
MUTUAL CASUALTY INSURANCE COMPANY**

This discovery dispute is before the Court on the January 15, 2021, Motion to Compel and the April 22, 2021, Supplemental Motion to Compel filed by the Receiver for Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). Penn National filed Responses in Opposition on January 26, 2021, and June 21, 2021. The Court originally conducted a fully remote hearing using video conferencing technology on the Receiver's first Motion to Compel on January 25, 2021, and it issued certain directives to the Receiver and Penn National. Thereafter, the Receiver filed the Supplemental Motion to Compel, and the Court conducted a hearing in person, on June 25, 2021. After detailed review and consideration of the motions, the responses in opposition, the exhibits and evidence submitted, and the arguments of counsel, the Court makes the following rulings.

BACKGROUND

This Court appointed Peter D. Protopapas as the Receiver for Covil Corporation on November 2, 2018, and it tasked the Receiver with "the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of

ELECTRONICALLY FILED - 2021 Jul 01 9:04 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4003003
ELECTRONICALLY FILED - 2021 Aug 20 4:02 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098

Covil's insurance carriers.” Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). Covil is a now-defunct entity that conducted business in South Carolina until it was administratively dissolved in the early 1990s. Because it was an insulation contractor, Covil has been named as a defendant in many personal injury and wrongful death cases that have been filed in state court in South Carolina alleging liability based on asbestos exposure. However, Covil does not have a robust system of corporate records, and the Receiver has been required to spend considerable time and effort searching for Covil's assets, which primarily consist of insurance policies. In this case, the Receiver has filed declaratory judgment claims related to policies issued to Covil, and the Receiver has attempted to obtain information and documents from Penn National via subpoena and deposition testimony regarding any insurance policies Penn National issued that provide coverage to Covil. The Receiver has been attempting to obtain these materials from Penn National in this and other proceedings involving Covil since at least February of 2020.

On December 17, 2020, the Receiver served an amended notice of deposition on Penn National pursuant to Rule 30(b)(6), SCRCPP, the topics of which related to Penn National's efforts to search for insurance policies protective of Covil. The deposition took place on January 7, 2021, after which the Receiver filed his January 15 Motion to Compel, wherein he asked this Court to order (among other things) “Penn National to perform a complete search of its records relating to insurance policies covering Covil, including but not limited to insurance policies covering Covil as an ‘additional insured.’” (Jan. 15 Mot. ¶ 13.) In response to the Receiver's motion, Penn National argued that unless it had “the name of the entity or the entity's policy number that listed Covil as an insured,” it could not search its records for policies protecting Covil as an additional insured without expending significant time and expense. (Jan. 26 Resp. in Opp'n 7–8.)

At the January 25, 2021, hearing on the Receiver's motion, the Court heard and considered arguments from the Receiver about why such a search is necessary and from Penn National about the claimed difficulties inherent in such a search. Attempting to strike a middle ground that reduced the burden on Penn National, the Court instructed the Receiver's counsel to, within fifteen days of the hearing, provide a list of potential jobsites, owners, and contractors to Penn National to facilitate Penn National's search of its records. (*See* Jan. 25 Hr'g Tr. 138–42.) This Court also directed Penn National to respond with its search results within fifteen days after receiving this information from the Receiver. (*Id.* at 141.) The Court also suggested that the Receiver serve a new subpoena on Penn National to effectuate the Court's instructions, and the Court held the Receiver's motion in abeyance pending the parties' compliance with its instructions. (*Id.* at 142–44.)

The Receiver complied with this Court's instructions, issuing and serving a new subpoena on Penn National on February 8, 2021, which sought production of the following information:

1. All insurance policies, of any type, that [Penn National] issued to Covil Corporation or that include Covil Corporation as an additional insured, including policies that identify the following entities as the named insured or as an additional insured: [List of potential contractors];
2. All certificates of insurance or other documents evidencing any insurance coverage that [Penn National] provided to Covil Corporation, including certificates of insurance or documents that identify or concern the following entities: [List of potential job sites]; and
3. All documents that relate to the steps taken by [Penn National] to locate information and documents responsive to these requests.

Following a series of correspondence, a meet and confer, and the Receiver's agreement to extend Penn National's deadline to respond, Penn National served its supplemental responses and objections to the Receiver's subpoena on March 9, 2021. Penn National's subpoena response consisted largely of objections, and Penn National claimed that its search in response to the subpoena only

yielded two comprehensive general liability policies, which Penn National previously provided in 2018.

Unsatisfied with Penn National's incomplete responses and improper objections, the Receiver filed a supplemental motion to compel on April 22, 2021. Then, nearly two months after that supplemental motion to compel was filed—and nearly three years after Penn National was put on notice that Covil was its insured and had been named as a defendant in asbestos litigation—Penn National produced copies of never-before-disclosed insurance policies it issued to Covil.

On June 15, 2021, the Receiver filed The Receiver's Notice of Filing of Late-Produced Policies, which included copies of other property, auto, inland marine, and workers' compensation policies that Penn National issued to Covil (the "newly produced policies"). Those policies were not produced in Penn National's response to the Receiver's subpoena, even though Penn National's responses to Request Nos. 1 and 2 expressly stated:

Penn National has performed the necessary due diligence in researching [these] request[s], despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in searching its files, Penn National has not located any documents responsive to this request, with the exception of comprehensive general liability policies issued to Covil for the periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988, bearing policy number 515 50 28 53, which have previously been produced to the Plaintiffs.

(Receiver's Supp. Mot. to Compel, Ex. E, at 5, 6.) The newly produced policies were likewise not identified in Penn National's response to Request No. 3. (*See id.* at 7–8.) Instead, those policies were produced as part of Penn National's supplemental discovery responses on June 11, 2021, in a separate case involving Covil and Penn National.

On June 21, 2021, just four days before the scheduled hearing on these issues, Penn National filed a response in opposition to the Receiver's supplemental motion to compel, which included the June 3 affidavit of Boyd Wright, a Senior Home Office Claim Examiner for Penn National. (June 21 Resp. in Opp'n, Ex. 13.)

CONCLUSIONS AND FINDINGS

This Court concludes that the Receiver has complied with its instructions by providing Penn National with a list of contractors, owners, and jobsites that could help Penn National narrow its search for documents. The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have “performed the necessary due diligence” and “exercised reasonable diligence in searching its files,” yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case. The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

Moreover, although Penn National asserts it has “exercised reasonable diligence in searching its files,” Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. The affidavit submitted by Penn National does not cure the deficiencies in Penn National’s subpoena responses, since Mr. Wright provides very little detail about how Penn National’s records are maintained other than asserting that paper documents “are stored by policy number only.” (June 21 Resp. in Opp’n, Ex. 13 ¶ 10.) It also appears that Penn National did not conduct a thorough, complete search of its paper records for coverage protective of Covil, only physically pulling two policies from its archives. (*See id.* ¶¶ 17–18.) Although Mr. Wright asserts in his affidavit that he spent more than 60 hours conducting Penn National’s search, it is unclear

how much time he spent on each aspect of the search, and he apparently spent a significant amount of time running an electronic search for facilities despite the fact that Penn National's electronic system does not list, store, or save information about jobsites or facilities. (*See id.* ¶ 14.)

This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National's efforts to search for coverage.

RELIEF ORDERED

THEREFORE, the Court ORDERS that Penn National must provide the Receiver with a detailed description of how Penn National maintains its paper records. Penn National's description should include, but not be limited to, physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized. Penn National shall provide this detailed description to the Receiver within two weeks of the June 25 hearing, making the description due on or before **July 9, 2021**.

Additionally, the Court further ORDERS that within two weeks of the above deadline, Penn National must thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with its February 8, 2021, subpoena to Penn National. Penn National's deadline to complete this search and provide any results to the Receiver is **July 23, 2021**.

IT IS SO ORDERED.

Judge's Electronic Signature Page Follows

ELECTRONICALLY FILED - 2021 Jul 01 9:04 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4003003
ELECTRONICALLY FILED - 2021 Aug 20 4:02 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098



Richland Common Pleas

Case Caption: Ann Finch , plaintiff, et al vs Sentry Casualty Company , defendant,
et al
Case Number: 2019CP4003003
Type: Order/Compel

So Ordered

Jean H. Toal

EXHIBIT 3



Deposition of:

Hearing

January 25, 2021

In the Matter of:

**Finch, Ann Vs. US Fidelity and
Guaranty Co., Et Al.**

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1 y'all are telling me, that an adequate search has
2 been made.

3 What is this background noise that I
4 keep hearing? Is everybody muted expect me and the
5 two lawyers?

6 Okay. I am not satisfied from what
7 both of y'all are saying that Penn National has
8 done what it could do.

9 What I want you to do for me is I want
10 to be sent information about what you sent -- you
11 the Receiver -- sent to Penn National.

12 I want -- if it's one policy, if it's
13 the same for all years, that's fine. If it's not,
14 I want to see them. I want to see the years for
15 which they're sent, I want to see who they were
16 issued to.

17 And it has been my experience in these
18 cases that if you've got that, in several
19 years I've had more coverage and policies found
20 with a heck of a lot less than this information,
21 which is direct information that could go to the
22 company.

23 Mr. Harris, I want another search to be
24 made of Covil's records. And if it takes going to
25 wherever the policies for the year 1980 are stored

Page 139

1 and going through them for a year, or wherever the
2 adjoining years are, you know what the years for
3 which there's liability in this case is, or a broad
4 outline of it, and those years need to be searched.
5 And I'm convinced that unless y'all are different
6 from everybody else in the world, they can be
7 searched. When it's to your interest, you search
8 and you find them. So I want that done now.

9 MR. HARRIS: Your Honor, just some
10 clarification for me.

11 Are you saying search for additional
12 insured policies in a certain time period or are
13 you saying search for the policies that we have
14 been provided information for in terms of being
15 given policy numbers and policy name?

16 THE COURT: Mr. Harris, I am talking
17 about searching for any policies that you've got
18 that cover Covil.

19 They've found a few of them, or at
20 least they found enough about numbers for you to go
21 find the ones they told you about. But you didn't
22 find anything but the ones that they've told you
23 about.

24 And what I'm asking you to do is make a
25 more comprehensive search that will embody that

1 period of time and a period of time that brackets
2 it so that you can see if there are other policies
3 other than the ones they gave you that cover Covil.
4 That's what they're hunting for.

5 MR. ZEVIK: Your Honor, Paul Zevnik.

6 I'm not arguing this motion but I hear
7 the Court and I've got perhaps a way to do what the
8 Court wants, which is to thread this needle.

9 We need Penn National to search for
10 policies where Covil has rights as an additional
11 insured.

12 One thing that we might be able to
13 do -- and I'm just going to suggest this -- is to
14 give Penn National a list of the sites and the
15 owners of those sites and the identity of who owned
16 those sites that we, Covil, might have worked on.

17 And from what I heard about this oral
18 argument here, there's no problem with Penn
19 National doing a search for all of those
20 contractors that Covil knows about that it did work
21 for.

22 THE COURT: Mr. Zevnik, I think that's
23 a swell idea, and I would add to it this, not only
24 for the various job sites, but also if Covil
25 has -- if Covil's Receiver has any other

1 information about what agents were used to purchase
2 this, that's another way of going about it.

3 I mean, y'all don't ever like for me to
4 refer to the famous Wizard of Oz article that
5 Mr. Buffler [phonetic] wrote a couple of years ago,
6 a Good Defense Lawyer, but it's a good one, and it
7 ticks down the list of things that you can do to
8 look for legacy policies for a defunct corporation.
9 That needs to be done.

10 MR. ZEVIK: Yes, Your Honor.

11 THE COURT: What I'm going to do about
12 this, I'm not going to spend any more time with
13 this argument.

14 I am going to give the Receiver 15 days
15 to develop a more complete list of job sites and
16 possible agents that might have been involved in
17 procuring this coverage from Penn National.

18 MR. ZEVIK: And owners that Covil
19 worked for.

20 THE COURT: And owners that Covil
21 worked for. Exactly right.

22 I'm going to give the Plaintiff 15 days
23 to get that up. And I am going to give Penn
24 National 15 days to respond to it.

25 And the quicker, Plaintiff, you can get

1 to it, the quicker Penn National can get to looking
2 at that and making a search.

3 And I am going to suspend this hearing.
4 I'm not going to rule on the motion to compel, but
5 I am going to require that this be done and then
6 let's see where we go.

7 I sympathize with Penn National to this
8 extent very much, Mr. Harris, and that is this:
9 Plaintiff is sometimes just as bad on one end as
10 you are on the other. They take this enormous
11 sledgehammer with this enormous volume of requests
12 for everything from the beginning of the world to
13 the day hereof.

14 And if there are ways to be more
15 specific, particularly when you're dealing with a
16 defunct corporation, it's to everybody's advantage
17 to have that done.

18 So I appreciate, Mr. Zevnik, your
19 observations. I want the Receiver to develop the
20 kind of inquiry that is specific. And if there are
21 defects in this subpoena -- I don't know that there
22 are -- I don't know why Covil would not be able to
23 pursue its rights under the other subpoena -- but
24 if there is some defect that can be cured by
25 hatching up a new Subpoena that's got this material

EXHIBIT 4



July 9, 2021

VIA E-MAIL – mshisko@spartanlaw.com

Marghretta H. Shisko
Harrison | White PC
178 West Main Street
Spartanburg, South Carolina 29306

RE: *Finch v. United States Fidelity and Guaranty Company et al.*
Civil Action No. 2019-CP-40-03003 (S.C. Com. Pl., Richland Cty.)

Dear Marghretta:

Please find enclosed Affidavit of Brent Reithsnyder, pursuant to the Court's Order on the Receiver for Covil's Motion to Compel and Supplemental Motion to Compel against Pennsylvania National Mutual Casualty Insurance Company. Please do not hesitate to contact us to discuss this matter.

With best regards,

GOLDBERG SEGALLA, LLP

A handwritten signature in black ink, appearing to read 'BY' followed by a stylized flourish.

Brady A. Yntema
David G. Harris II

BY/jlc
Enclosure

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

1. I am over 18 years of age, of sound mind, and under no mental disability.
2. I am fully competent to make this declaration, and I make this declaration upon personal knowledge of the facts herein, and they are true and accurate.
3. I am currently, and was at all times relevant herein, employed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) as Director – Administrative Services, in which capacity I have been involved with Penn National’s investigation and search for the documents requested by the Subpoena *Duces Tecum* issued on February 8, 2021 on behalf of the Receiver for Covil Corporation in this action (“Receiver’s Subpoena”). Boyd Wright, Senior Home Office Claim Examiner

for Penn National, coordinated Penn National's investigation for the documents requested by the Receiver's Subpoena.

4. I am aware of the Court's Order on the Receiver for Covil Corporation's Motion to Compel and Supplemental Motion to Compel Against Pennsylvania National Mutual Casualty Insurance Company filed on July 1, 2021, which ordered Penn National's description of how it maintains its paper records, including physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized.

5. I am the person in charge of and responsible for records that are archived or otherwise stored for Penn National.

6. Penn National's archived non-electronically stored documents consist of (1) microfilm records, and (2) paper records.

7. Records on microfilm consist of records from the mid to late 1970's and were saved on microfilm up to various time periods depending on the category of coverage provided (as discussed below). The microfilm records are stored at Penn National's headquarters located at 2 North 2nd Street, Harrisburg, Pennsylvania, 17101.

8. Penn National's microfilm records are stored in boxes identified by box number. With respect to insurance policy documents, such documents are stored on microfilm within the microfilm boxes and are organized within each box by using a terminal digit system. The terminal digit system organizes each policy in a sequential order by the terminal number for each of the policies stored in the microfilm boxes. The terminal number of every policy stored consists of the final two digits of each policy. The policy number can be manually searched

within the microfilm boxes by first locating the terminal number. If there are other policies with the same terminal number, the policy documents are then stored in sequential order based on each digit that precedes the policy's terminal number.

9. For example, the insurance policy documents relating to Penn National's Comprehensive General Liability Policy for Covil Corporation, effective from March 31, 1986 to March 31, 1988, had policy number 515 50 28 53. The terminal number for this policy is 53. The policy was sequentially stored by its terminal number, and then was manually located by sequentially searching for each preceding policy digit until it was located. An example of the manner in which this policy was sequentially organized by the terminal digit system is illustrated by the photographs attached hereto as Exhibit A.

10. With respect to the documents stored on microfilm, Penn National maintains an electronic database that lists the policy numbers stored and the box in which the microfilm containing the policy documents can be located. This database is referred to as the 2K10 database. However, even if the policy number requested is not in the database, it is my practice to manually search the microfilm boxes based on the terminal digit number system to confirm whether the policy documents exist in Penn National's microfilm records.

11. Penn National's archived paper policy records are stored by Iron Mountain, an outside document and information storage company, at its facility located at 6 Lee Boulevard, Pennsylvania, 19355. The dates of the paper policy documents stored by Penn National depend on the category of the policy (as discussed below). Penn National's current contact at Iron Mountain is Matthew Fischer, Customer Development Executive.

12. Any paper policy documents stored at Iron Mountain's facility is stored by policy number in the same sequence as stored on Penn National's microfilm—the terminal digit system.

13. Penn National maintains a record of the paper policy documents stored at Iron Mountain's facility by policy number on the 2K10 database maintained by Penn National.

14. To obtain paper policy documents from the Iron Mountain facility, Penn National must submit a request to Iron Mountain (typically by electronic communication) with the specific policy number(s) requested. Any paper policy document(s) found by Iron Mountain are delivered by Iron Mountain to Penn National.

16. Policy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system.

17. Penn National initially implemented an electronic storage system referenced as ImageRight that began in 1992, but Penn National stopped using this version of the electronic storage system in 1995. The documents that were electronically stored during this period of time were eventually saved to the second electronic system that Penn National transitioned to beginning in 2003, which is also referenced as ImageRight.

18. The categories of policy documents stored by Penn National on microfilm or paper are separated and organized as follows:

a. Surety bonds – Surety bond documents are stored in paper form for documents dated prior to 2004, and surety bond documents dated 2004 or after are stored electronically.

b. Commercial Lines – Commercial line policies consist of workers compensation policies, inland marine policies, property policies, commercial general liability policies, automobile liability policies, and excess liability policies. Commercial line policies dated prior to 1992 are contained on microfilm. Commercial line policies dated between 1992 to 1995 were saved electronically. Commercial line policies dated between 1995 to 2003 were stored in paper

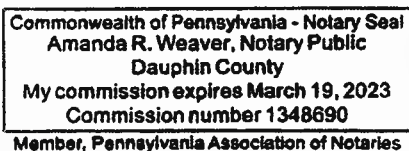
form at the Iron Mountain facility. When Penn National began to transition to its second electronic storage system beginning in 2003, some commercial policies dated after 2003 were still stored in paper form while others may have been stored electronically until the transition to full electronic storage was complete in 2005. Thereafter, all commercial policies dated after 2005 were stored electronically.

c. Personal Lines – Personal line policies dated prior to 10/1/2003 are stored on microfilm. Personal line policies dated after 10/1/2003 are stored electronically.

19. Penn National maintains a Document Retention Policy. With respect to workers compensation policy documents, such documents must be retained as follows: (1) for 25 years from cancellation or non-renew date if such date occurred prior to 3/18/1990; and (2) for 50 years from cancellation or non-renew date if such occurred on or after 3/18/1990. As for all other policy documents, all such documents must be retained for 25 years from cancellation or non-renew date.

20. The information and assertions contained in this Affidavit are based and made upon my own personal knowledge.

Further, the affiant sayeth not.




Brent Reifsnyder
Director - Administrative Services
Pennsylvania National Mutual Insurance Company

Sworn to and subscribed before me,
this the 9th day of July, 2021.


Notary Public

My commission expires: 3/19/23

EXHIBIT A



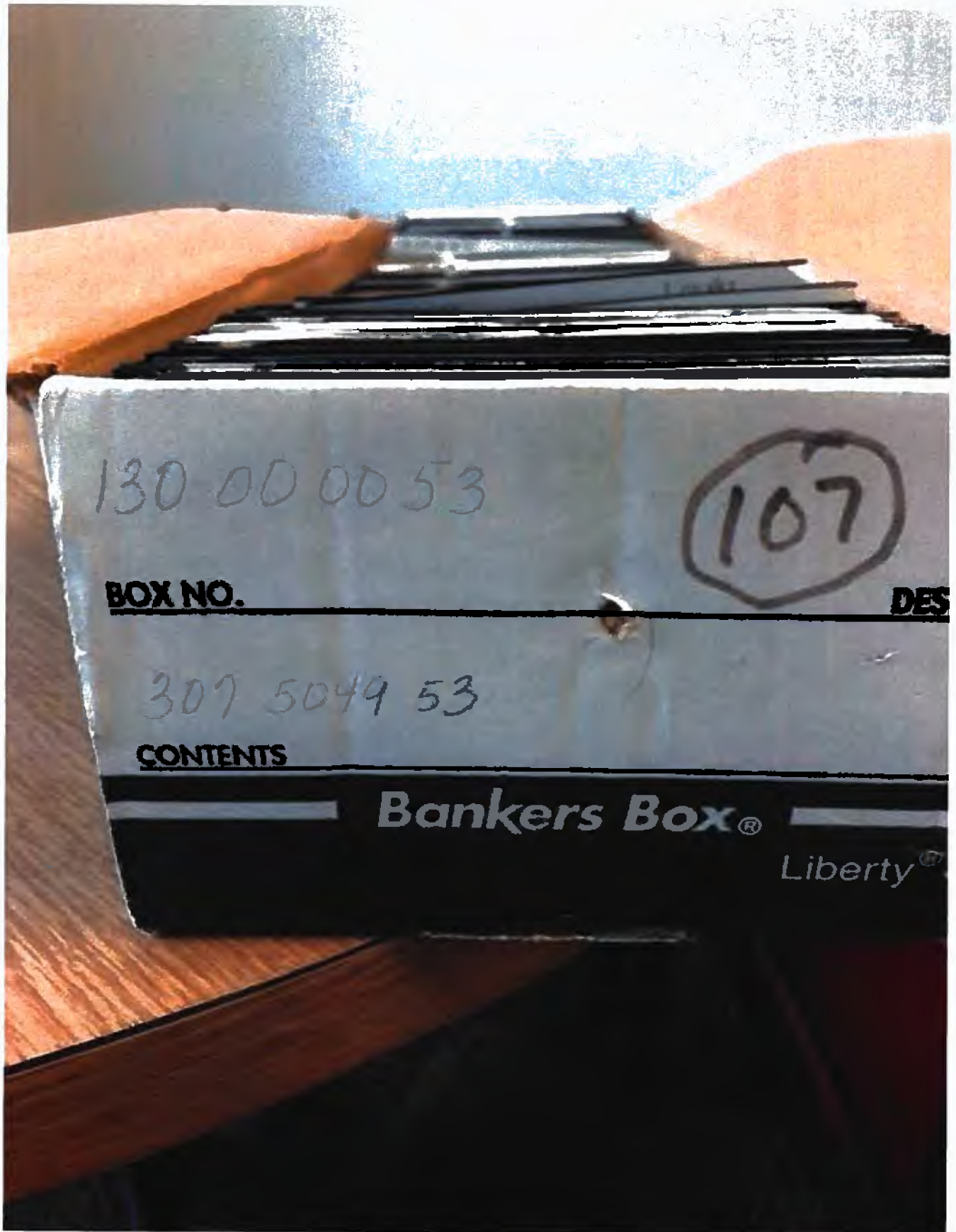


EXHIBIT 5



July 23, 2021

VIA E-MAIL – mshisko@spartanlaw.com

Marghretta H. Shisko
Harrison | White PC
178 West Main Street
Spartanburg, South Carolina 29306

RE: *Finch v. United States Fidelity and Guaranty Company et al.*
Civil Action No. 2019-CP-40-03003 (S.C. Com. Pl., Richland Cty.)

Dear Marghretta:

Please find enclosed Affidavit of Brent Reifsnyder, pursuant to the Court's Order on the Receiver for Covil's Motion to Compel and Supplemental Motion to Compel against Pennsylvania National Mutual Casualty Insurance Company. Please do not hesitate to contact us to discuss this matter.

With best regards,

Sincerely,

GOLDBERG SEGALLA, LLP

A handwritten signature in blue ink, appearing to be 'BYntema', written over a faint circular stamp.

Brady A. Yntema
David G. Harris II

BY/jlc
Enclosure

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

ANN FINCH, Individually and as
Executor of the Estate of Franklin
Finch; PETER PROTOPAPAS as
Court Appointed Receiver for
Covil Corporation,

Plaintiffs,

V.

SENTRY CASUALTY COMPANY,
UNITED STATES FIDELITY &
GUARANTY COMPANY, *et al.*,

Defendants.

C.A. No. 2019-CP-40-03003

AFFIDAVIT OF BRENT REIFSNYDER

Brent Reifsnyder, being first duly sworn, deposes and says:

1. I am over 18 years of age, of sound mind, and under no mental disability, and I am fully competent to make this declaration.

2. I am currently, and was at all times relevant herein, employed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) as Director – Administrative Services, in which capacity I have been involved with Penn National’s investigation and search for the documents requested by the Subpoena *Duces Tecum* issued on February 8, 2021 on behalf of the Receiver for Covil Corporation in this action (“Receiver’s Subpoena”). Boyd Wright, Senior Home Office Claim Examiner

for Penn National, coordinated Penn National's investigation for the documents requested by the Receiver's Subpoena.

3. I am the person in charge of and responsible for records that are archived or otherwise stored for Penn National.

4. I am aware of the Court's Order on the Receiver for Covil Corporation's Motion to Compel and Supplemental Motion to Compel Against Penn National filed on July 1, 2021, which orders Penn National to thoroughly search its paper records using the list of contractors and facilities provided by the Receiver's Subpoena.¹

5. As set forth in my prior Affidavit, Penn National's archived non-electronically stored documents consist of (1) microfilm records, and (2) paper records, and such documents are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system, which can only be searched by policy number.

6. In order to comply with the Court's order, I have considered other alternative means of searching Penn National's non-electronically stored paper documents due to the fact that the Receiver's list of 240 contractors and 650 facilities does not provide any potential policy number information. My consideration was for alternative searches that would be in addition to the search that was conducted by Penn National in responding to the Receiver's Subpoena, which was detailed in the Affidavit of Boyd Wright and (to my understanding) filed with the Court on June 21, 2021.

¹ I previously executed an Affidavit on July 9, 2021, in compliance with the Court's Order providing a detailed description of how Penn National maintains its paper records, including physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized.

7. Given that Penn National's non-electronically stored archived documents have historically been saved and organized by using the terminal digit system, the only alternative means of searching such documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form at the Iron Mountain facility referenced in my prior Affidavit. This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured.

8. With respect to Penn National's microfilm records, my research has shown that Penn National's microfilm records contain in excess of 200,000 separate policies with each policy containing multiple pages of policy documents.

9. The paper documents stored at the Iron Mountain facility are contained in approximately 5,800 boxes, which includes approximately 4,300 boxes of commercial line paper policy documents. Based on my research, at last count, the number of separate policies stored in these boxes numbered approximately 615,000. Each box of paper policy documents measures 2.4 cubic feet, 24 inches in length, 12 inches in width, and 10 inches high. The boxes can store approximately 170 to 200 pages per inch.

10. For security reasons, a manual search of the paper policy documents could not be conducted at Iron Mountain. Rather, the boxes containing the paper policy documents would have to be shipped to Penn National in order to be manually searched.

11. A manual search of all of Penn National's non-electronic policy records for any policy records that may pertain to any of the 240 contractors and 650 facilities that identify Covil

as an additional insured would be an endeavor that would overwhelm and be well beyond the capacity of Penn National's current internal staff. To my knowledge, a manual search of this nature is unprecedented at Penn National. During my 29 years of employment at Penn National, Penn National has never been ordered, directed, or otherwise caused to inspect all of its non-electronically saved archived paper policy documents. The amount of time necessary to conduct such a search would take many months to conduct, and Penn National would incur significant expenses that are currently incalculable to me.

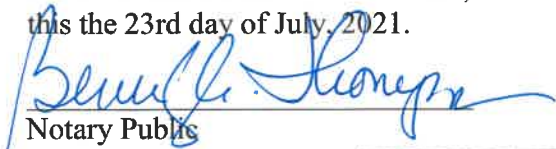
12. To conduct such a search, an outside vendor would have to be retained to conduct a manual search of all of Penn National's non-electronically stored policy documents as Penn National does not have the capacity to conduct such a search internally. Given the unprecedented nature of such a search for Penn National, I cannot currently provide an estimate of how much an outside vendor would charge for the search of all of Penn National's non-electronically stored policy documents.

13. The information and assertions contained in this Affidavit are based and made upon my own personal knowledge.

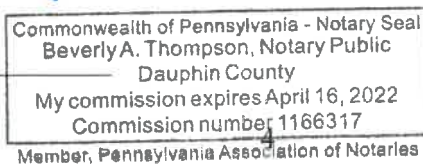
Further, the affiant sayeth not.


Brent Reifsnyder
Director – Administrative Services
Pennsylvania National Mutual Insurance Company

Sworn to and subscribed before me,
this the 23rd day of July, 2021.


Notary Public

My commission expires:



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**COVIL CORPORATION'S NOTICE OF
SECOND SUPPLEMENTAL MOTION
TO COMPEL AND MOTION FOR
SANCTIONS**

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Covil Corporation, by and through its Receiver Peter D. Protopapas ("Covil"), respectfully files its Second Supplemental Motion to Compel and Motion for Sanctions based on the supplemental August 26, 2021 Rule 30(b)(6) deposition of Penn National. What is now clear is that Penn National has paper records that it could and must search to comply with both the spirit and the letter of this Court's order. But it refuses to do so. Rather than considering the best and most orderly fashion in which to comply with this Court's clear orders, Penn National has spent months fighting the Order and has caused the Receiver to incur substantial costs to litigate this issue multiple times before this Court.

BACKGROUND

Covil has sought discovery of its insurance policies and related documentation from Penn National since 2018. The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. *See, e.g.*, Ex. 1, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003.

Penn National continues to willfully ignore this Court's orders by refusing to search its records. It claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. It simply refuses to perform a manual search or to scan the documents so they can be searched electronically. Covil has thus been forced to litigate this issue since January, as summarized here:

1. After the January 7, 2021 deposition of Penn National's corporate representative revealed the inadequacy of Penn National's policy search, Covil moved to compel Penn National to perform a complete search.
2. At the January 2021 hearing, the Court *ordered* Covil to provide lists of relevant job sites, owners, and agents to Penn National for further searches, and it ordered Penn National to promptly respond with its findings. Ex. 2, Jan. 25, 2021 Hrg. Tr. at 138–42. Penn National did not comply with the Court's Order.
3. Covil was forced to file a Supplemental Motion to Compel on April 22, 2021. The Court granted Covil's motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." Ex. 1, July 1, 2021 Order on Motions to Compel at 6. The Court ordered Penn National to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.* Penn National again failed to comply with the Court's Order.
4. Covil was forced to file another motion on August 20, 2021, that is currently pending before the Court. It informs the Court that, among other things, Penn National's Brent Reifsnyder spent *less than five minutes* trying to locate documents responsive to the Court's Order, Ex. 3, Reifsnyder Dep. at 65:3–11, and he admitted that Penn National designed the system of organizing its records by policy number. *Id.* at 43:11–16.

Subsequently, on August 26, 2021, Covil deposed Penn National's 30(b)(6) deponent, Boyd Wright. Mr. Wright was responsible for coordinating Penn National's electronic search. Like Mr. Reifsnyder's complete refusal to search Penn National's *paper files*, Mr. Wright doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search *electronically* for an "additional insured," such as Covil, as well. Ex. 4, Wright Dep. at 23:22–24.

Without a policy number, Mr. Wright admitted, Penn National would “have to look in the policy documents to see if there was any supplemental insureds.” *Id.* at 23:22-24:1. But Penn National is adamant it will not do such a search regardless of this Court’s prior orders. Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for documents responsive to the Subpoena, let alone begin that task. *Id.* at 36:6–11. Penn National continues to stonewall, refusing to conduct the most basic of searches to determine whether Covil was an additional or supplemental insured with applicable coverage to defend and indemnify against asbestos suits.

ARGUMENT

Penn National has willfully refused to comply with legitimate discovery requests since 2018. It has willfully refused to comply with this Court’s orders since January. Penn National’s defense—that it has to have a policy number—is hogwash. Penn National has options: it could manually search its documents, it could hire someone to manually search its documents, or it could scan its documents, making them easily searchable. Penn National has not done so because it costs money. Also, it does not want other insureds to have easy access to their historical policies and related documents.

Penn National’s conduct stands in stark contrast to other insurers’ document searches. For example, one insurer readily agreed to search its paper files for responsive documents related to Covil. That insurer issues a status report to the Receiver every two weeks. Covil simply asks that Penn National also perform a reasonable search.

Penn National holds all the cards, leaving its additional insureds unable to access their own policies. Penn National and its 30(b)(6) representative have “fail[ed] to obey [this Court’s Orders] to provide or permit discovery.” Rule 37(b)(2), SCRCP. Covil thus requests that the Court require

Penn National, within fourteen days of any order, to file for Court approval a proposed plan and timetable for completing these searches that includes status reports every two weeks. If Penn National fails to show sufficient progress, Covil requests that this Court impose monetary sanctions on Penn National for each two-week period it does not make progress.

In addition, Covil seeks sanctions under Rule 37, SCRPC. Covil defers to the Court, of course, but respectfully suggests one or more of the following:

1. Per Rule 37(b)(2)(A), SCRPC, “an order that the matters regarding which the order was made . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[.]” Here, sanctions would establish that Covil was designated as an additional insured of Penn National’s policies for the contractors and job sites provided by Covil; or
2. Per Rule 37(b)(2)(D), SCRPC, “In lieu of any of the foregoing order[] or in addition thereto, an order treating as a contempt of court the failure to obey [its] orders[.]”

CONCLUSION

For these reasons, Covil respectfully requests that this Court sanction Penn National as it sees fit. Covil further requests that Penn National reimburse all costs associated with filing this motion, and that this Court grant Covil all other relief at law or equity to which it is justly entitled. Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel for Covil certifies that Covil’s counsel had discussions with counsel for Penn National but were unable to resolve the matters contained herein and further consultation would serve no useful purpose.

Respectfully submitted,

/s/ Jonathan M. Robinson

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Counsel for the Receiver for Covil Corporation

This 9th day of September, 2021.

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Ann Finch, Individually and as Executor of
the Estate of Franklin Finch; and Peter D.
Protopapas as Court-Appointed Receiver
for Covil Corporation,

C.A. No. 2019-CP-40-03003

Plaintiffs,

v.

United States Fidelity & Guaranty
Company,

Defendant.

**ORDER ON THE RECEIVER FOR COVIL
CORPORATION'S MOTION TO COMPEL AND
SUPPLEMENTAL MOTION TO COMPEL
AGAINST PENNSYLVANIA NATIONAL
MUTUAL CASUALTY INSURANCE COMPANY**

This discovery dispute is before the Court on the January 15, 2021, Motion to Compel and the April 22, 2021, Supplemental Motion to Compel filed by the Receiver for Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). Penn National filed Responses in Opposition on January 26, 2021, and June 21, 2021. The Court originally conducted a fully remote hearing using video conferencing technology on the Receiver's first Motion to Compel on January 25, 2021, and it issued certain directives to the Receiver and Penn National. Thereafter, the Receiver filed the Supplemental Motion to Compel, and the Court conducted a hearing in person, on June 25, 2021. After detailed review and consideration of the motions, the responses in opposition, the exhibits and evidence submitted, and the arguments of counsel, the Court makes the following rulings.

BACKGROUND

This Court appointed Peter D. Protopapas as the Receiver for Covil Corporation on November 2, 2018, and it tasked the Receiver with "the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of

ELECTRONICALLY FILED - 2021 Jul 01 9:04 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4003003
ELECTRONICALLY FILED - 2021 Sep 08 1:36 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098

Covil's insurance carriers.” Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). Covil is a now-defunct entity that conducted business in South Carolina until it was administratively dissolved in the early 1990s. Because it was an insulation contractor, Covil has been named as a defendant in many personal injury and wrongful death cases that have been filed in state court in South Carolina alleging liability based on asbestos exposure. However, Covil does not have a robust system of corporate records, and the Receiver has been required to spend considerable time and effort searching for Covil's assets, which primarily consist of insurance policies. In this case, the Receiver has filed declaratory judgment claims related to policies issued to Covil, and the Receiver has attempted to obtain information and documents from Penn National via subpoena and deposition testimony regarding any insurance policies Penn National issued that provide coverage to Covil. The Receiver has been attempting to obtain these materials from Penn National in this and other proceedings involving Covil since at least February of 2020.

On December 17, 2020, the Receiver served an amended notice of deposition on Penn National pursuant to Rule 30(b)(6), SCRCF, the topics of which related to Penn National's efforts to search for insurance policies protective of Covil. The deposition took place on January 7, 2021, after which the Receiver filed his January 15 Motion to Compel, wherein he asked this Court to order (among other things) “Penn National to perform a complete search of its records relating to insurance policies covering Covil, including but not limited to insurance policies covering Covil as an ‘additional insured.’” (Jan. 15 Mot. ¶ 13.) In response to the Receiver's motion, Penn National argued that unless it had “the name of the entity or the entity's policy number that listed Covil as an insured,” it could not search its records for policies protecting Covil as an additional insured without expending significant time and expense. (Jan. 26 Resp. in Opp'n 7–8.)

At the January 25, 2021, hearing on the Receiver's motion, the Court heard and considered arguments from the Receiver about why such a search is necessary and from Penn National about the claimed difficulties inherent in such a search. Attempting to strike a middle ground that reduced the burden on Penn National, the Court instructed the Receiver's counsel to, within fifteen days of the hearing, provide a list of potential jobsites, owners, and contractors to Penn National to facilitate Penn National's search of its records. (*See* Jan. 25 Hr'g Tr. 138–42.) This Court also directed Penn National to respond with its search results within fifteen days after receiving this information from the Receiver. (*Id.* at 141.) The Court also suggested that the Receiver serve a new subpoena on Penn National to effectuate the Court's instructions, and the Court held the Receiver's motion in abeyance pending the parties' compliance with its instructions. (*Id.* at 142–44.)

The Receiver complied with this Court's instructions, issuing and serving a new subpoena on Penn National on February 8, 2021, which sought production of the following information:

1. All insurance policies, of any type, that [Penn National] issued to Covil Corporation or that include Covil Corporation as an additional insured, including policies that identify the following entities as the named insured or as an additional insured: [List of potential contractors];
2. All certificates of insurance or other documents evidencing any insurance coverage that [Penn National] provided to Covil Corporation, including certificates of insurance or documents that identify or concern the following entities: [List of potential job sites]; and
3. All documents that relate to the steps taken by [Penn National] to locate information and documents responsive to these requests.

Following a series of correspondence, a meet and confer, and the Receiver's agreement to extend Penn National's deadline to respond, Penn National served its supplemental responses and objections to the Receiver's subpoena on March 9, 2021. Penn National's subpoena response consisted largely of objections, and Penn National claimed that its search in response to the subpoena only

yielded two comprehensive general liability policies, which Penn National previously provided in 2018.

Unsatisfied with Penn National's incomplete responses and improper objections, the Receiver filed a supplemental motion to compel on April 22, 2021. Then, nearly two months after that supplemental motion to compel was filed—and nearly three years after Penn National was put on notice that Covil was its insured and had been named as a defendant in asbestos litigation—Penn National produced copies of never-before-disclosed insurance policies it issued to Covil.

On June 15, 2021, the Receiver filed The Receiver's Notice of Filing of Late-Produced Policies, which included copies of other property, auto, inland marine, and workers' compensation policies that Penn National issued to Covil (the "newly produced policies"). Those policies were not produced in Penn National's response to the Receiver's subpoena, even though Penn National's responses to Request Nos. 1 and 2 expressly stated:

Penn National has performed the necessary due diligence in researching [these] request[s], despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in searching its files, Penn National has not located any documents responsive to this request, with the exception of comprehensive general liability policies issued to Covil for the periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988, bearing policy number 515 50 28 53, which have previously been produced to the Plaintiffs.

(Receiver's Supp. Mot. to Compel, Ex. E, at 5, 6.) The newly produced policies were likewise not identified in Penn National's response to Request No. 3. (*See id.* at 7–8.) Instead, those policies were produced as part of Penn National's supplemental discovery responses on June 11, 2021, in a separate case involving Covil and Penn National.

On June 21, 2021, just four days before the scheduled hearing on these issues, Penn National filed a response in opposition to the Receiver's supplemental motion to compel, which included the June 3 affidavit of Boyd Wright, a Senior Home Office Claim Examiner for Penn National. (June 21 Resp. in Opp'n, Ex. 13.)

CONCLUSIONS AND FINDINGS

This Court concludes that the Receiver has complied with its instructions by providing Penn National with a list of contractors, owners, and jobsites that could help Penn National narrow its search for documents. The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have “performed the necessary due diligence” and “exercised reasonable diligence in searching its files,” yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case. The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

Moreover, although Penn National asserts it has “exercised reasonable diligence in searching its files,” Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. The affidavit submitted by Penn National does not cure the deficiencies in Penn National’s subpoena responses, since Mr. Wright provides very little detail about how Penn National’s records are maintained other than asserting that paper documents “are stored by policy number only.” (June 21 Resp. in Opp’n, Ex. 13 ¶ 10.) It also appears that Penn National did not conduct a thorough, complete search of its paper records for coverage protective of Covil, only physically pulling two policies from its archives. (*See id.* ¶¶ 17–18.) Although Mr. Wright asserts in his affidavit that he spent more than 60 hours conducting Penn National’s search, it is unclear

how much time he spent on each aspect of the search, and he apparently spent a significant amount of time running an electronic search for facilities despite the fact that Penn National's electronic system does not list, store, or save information about jobsites or facilities. (*See id.* ¶ 14.)

This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National's efforts to search for coverage.

RELIEF ORDERED

THEREFORE, the Court ORDERS that Penn National must provide the Receiver with a detailed description of how Penn National maintains its paper records. Penn National's description should include, but not be limited to, physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized. Penn National shall provide this detailed description to the Receiver within two weeks of the June 25 hearing, making the description due on or before **July 9, 2021**.

Additionally, the Court further ORDERS that within two weeks of the above deadline, Penn National must thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with its February 8, 2021, subpoena to Penn National. Penn National's deadline to complete this search and provide any results to the Receiver is **July 23, 2021**.

IT IS SO ORDERED.

Judge's Electronic Signature Page Follows

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Richland Common Pleas

Case Caption: Ann Finch , plaintiff, et al vs Sentry Casualty Company , defendant,
et al
Case Number: 2019CP4003003
Type: Order/Compel

So Ordered

Jean H. Toal

EXHIBIT 2



Deposition of:
Hearing

January 25, 2021

In the Matter of:

**Finch, Ann Vs. US Fidelity and
Guaranty Co., Et Al.**

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1 y'all are telling me, that an adequate search has
2 been made.

3 What is this background noise that I
4 keep hearing? Is everybody muted expect me and the
5 two lawyers?

6 Okay. I am not satisfied from what
7 both of y'all are saying that Penn National has
8 done what it could do.

9 What I want you to do for me is I want
10 to be sent information about what you sent -- you
11 the Receiver -- sent to Penn National.

12 I want -- if it's one policy, if it's
13 the same for all years, that's fine. If it's not,
14 I want to see them. I want to see the years for
15 which they're sent, I want to see who they were
16 issued to.

17 And it has been my experience in these
18 cases that if you've got that, in several
19 years I've had more coverage and policies found
20 with a heck of a lot less than this information,
21 which is direct information that could go to the
22 company.

23 Mr. Harris, I want another search to be
24 made of Covil's records. And if it takes going to
25 wherever the policies for the year 1980 are stored

1 and going through them for a year, or wherever the
2 adjoining years are, you know what the years for
3 which there's liability in this case is, or a broad
4 outline of it, and those years need to be searched.
5 And I'm convinced that unless y'all are different
6 from everybody else in the world, they can be
7 searched. When it's to your interest, you search
8 and you find them. So I want that done now.

9 MR. HARRIS: Your Honor, just some
10 clarification for me.

11 Are you saying search for additional
12 insured policies in a certain time period or are
13 you saying search for the policies that we have
14 been provided information for in terms of being
15 given policy numbers and policy name?

16 THE COURT: Mr. Harris, I am talking
17 about searching for any policies that you've got
18 that cover Covil.

19 They've found a few of them, or at
20 least they found enough about numbers for you to go
21 find the ones they told you about. But you didn't
22 find anything but the ones that they've told you
23 about.

24 And what I'm asking you to do is make a
25 more comprehensive search that will embody that

1 period of time and a period of time that brackets
2 it so that you can see if there are other policies
3 other than the ones they gave you that cover Covil.
4 That's what they're hunting for.

5 MR. ZEVIK: Your Honor, Paul Zevnik.

6 I'm not arguing this motion but I hear
7 the Court and I've got perhaps a way to do what the
8 Court wants, which is to thread this needle.

9 We need Penn National to search for
10 policies where Covil has rights as an additional
11 insured.

12 One thing that we might be able to
13 do -- and I'm just going to suggest this -- is to
14 give Penn National a list of the sites and the
15 owners of those sites and the identity of who owned
16 those sites that we, Covil, might have worked on.

17 And from what I heard about this oral
18 argument here, there's no problem with Penn
19 National doing a search for all of those
20 contractors that Covil knows about that it did work
21 for.

22 THE COURT: Mr. Zevnik, I think that's
23 a swell idea, and I would add to it this, not only
24 for the various job sites, but also if Covil
25 has -- if Covil's Receiver has any other

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1 information about what agents were used to purchase
2 this, that's another way of going about it.

3 I mean, y'all don't ever like for me to
4 refer to the famous Wizard of Oz article that
5 Mr. Buffler [phonetic] wrote a couple of years ago,
6 a Good Defense Lawyer, but it's a good one, and it
7 ticks down the list of things that you can do to
8 look for legacy policies for a defunct corporation.
9 That needs to be done.

10 MR. ZEVNIK: Yes, Your Honor.

11 THE COURT: What I'm going to do about
12 this, I'm not going to spend any more time with
13 this argument.

14 I am going to give the Receiver 15 days
15 to develop a more complete list of job sites and
16 possible agents that might have been involved in
17 procuring this coverage from Penn National.

18 MR. ZEVNIK: And owners that Covil
19 worked for.

20 THE COURT: And owners that Covil
21 worked for. Exactly right.

22 I'm going to give the Plaintiff 15 days
23 to get that up. And I am going to give Penn
24 National 15 days to respond to it.

25 And the quicker, Plaintiff, you can get

1 to it, the quicker Penn National can get to looking
2 at that and making a search.

3 And I am going to suspend this hearing.
4 I'm not going to rule on the motion to compel, but
5 I am going to require that this be done and then
6 let's see where we go.

7 I sympathize with Penn National to this
8 extent very much, Mr. Harris, and that is this:
9 Plaintiff is sometimes just as bad on one end as
10 you are on the other. They take this enormous
11 sledgehammer with this enormous volume of requests
12 for everything from the beginning of the world to
13 the day hereof.

14 And if there are ways to be more
15 specific, particularly when you're dealing with a
16 defunct corporation, it's to everybody's advantage
17 to have that done.

18 So I appreciate, Mr. Zevnik, your
19 observations. I want the Receiver to develop the
20 kind of inquiry that is specific. And if there are
21 defects in this subpoena -- I don't know that there
22 are -- I don't know why Covil would not be able to
23 pursue its rights under the other subpoena -- but
24 if there is some defect that can be cured by
25 hatching up a new Subpoena that's got this material

EXHIBIT 3



Deposition of:
Brent Reifsnyder

August 3, 2021

In the Matter of:
**Covil Corporation Vs. Pennsylvania
National Mutual Insurance Et Al**

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1 you had offered, decs or other underwriting
2 material therein.

3 Q. The next paragraph, Paragraph 12,
4 states, quote, any paper policy documents stored at
5 Iron Mountain's facility is stored by policy number
6 in the same sequence as stored on Penn National's
7 microfilm, the digital -- the terminal digit
8 system.

9 Do you see that?

10 A. Yes, sir.

11 Q. It is my understanding from your
12 earlier testimony that it's Penn National that
13 designed the system for how it would store
14 documents at Iron Mountain. Is that correct?

15 A. Yes, sir. Yes. Yeah, it's all by
16 policy number.

17 Q. I'd like to turn to Paragraph 14. It
18 says, quote, to obtain paper policy documents from
19 the Iron Mountain facility, Penn National must
20 submit a request to Iron Mountain, typically by
21 electronic communication, with the specific policy
22 numbers requested.

23 Do you see that?

24 A. Yes, sir.

25 Q. And again, this is a process that was

1 motion to compel against Penn National filed on
2 July 1, 2021, which orders Penn National to
3 thoroughly search its paper records using the list
4 of contractors and facilities provided by the
5 receiver's subpoena.

6 Do you see that?

7 A. Yes, I do.

8 Q. And is it your understanding that the
9 list of contractors and facilities that were
10 provided by the receiver were the lists provided to
11 you on the phone by Mr. Wright?

12 A. That would be my understanding, yes,
13 sir.

14 Q. But you didn't actually see a physical
15 copy of either the contractor list or the facility
16 list when you executed this affidavit on July 23rd,
17 2021; is that correct?

18 A. As I recall, I do not. Again, it
19 wouldn't matter. I need policy numbers.

20 Q. Once Mr. Wright had that call with you
21 regarding the Court's order, what steps, if any,
22 did you take to do additional searches for policy
23 documents?

24 MR. YNTEMA: Objection to form.

25 A. So none additional, because without a

1 policy number, there's nothing for me to search.

2 Q. Did you consult with anyone at Penn
3 National about how you may be able to search for
4 additional documents other than by policy number?

5 A. No.

6 Q. Did you consult with anyone outside of
7 Penn National as to how you might be able to search
8 for policy documents other than by policy number?

9 A. No, I did not.

10 Q. I'd like to turn your attention to
11 Paragraph 6. It says, quote, in order to comply
12 with the Court's order, I have considered other
13 alternative means of searching Penn National's
14 non-electronically-stored paper documents due to
15 the fact that the receiver's list of 240
16 contractors and 650 facilities does not provide any
17 potential policy number information.

18 Do you see that?

19 A. Yes, sir.

20 Q. What alternative means of searching did
21 you consider?

22 A. There is only one other alternative
23 means to consider, and that would be that at a
24 considerable expense and a considerable amount of
25 time, somebody would need to coordinate having

1 you.

2 A. Okay. That -- that's correct.

3 Q. And so my question is, other than
4 preparing for the deposition today, about how much
5 time would you say you spent trying to locate
6 documents responsive to the Court's order?

7 A. Without a policy number, minimal.

8 Q. Is it fair to say it would be less than
9 five minutes?

10 A. Arguably, I would say that, without a
11 policy number.

12 MR. NES: Thank you, Mr. Reifsnyder. I
13 have no further questions at this time.

14 Pass the witness.

15 MR. YNTEMA: If we could take a break
16 for one second, Mr. Nes, and just give me like five
17 minutes, and I -- I may have one or two questions.
18 I don't know.

19 MR. NES: Sure.

20 VIDEOGRAPHER: We are going off the
21 record at 11:39 a.m.

22 (After a recess, proceedings were
23 continued as follows:)

24 VIDEOGRAPHER: We are back on the
25 record at 11:44 a.m.

EXHIBIT 4



Deposition of:
Boyd Wright , Penn National 30(b)(6)

August 26, 2021

In the Matter of:
**Covil Corporation v. Pennsylvania
National Mutual Insurance Et Al**

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1 A. Yes, but none of those documents
2 are -- extend to the time parameters that were listed
3 in the Subpoena.

4 Q. And what is the time frame, where there
5 are certain documents that are only electronic
6 documents?

7 A. There was a transition for those, which I
8 believe started in the early 2000s.

9 Q. So if I understand correctly, starting in
10 the early 2000s, there may be documents that were
11 created and stored electronically that are not
12 archived in hard copy; is that correct?

13 A. No. Starting in the early 2000s, active
14 accounts were being transitioned over time to
15 electronic format. Historical records were never
16 taken and converted.

17 Q. Let's go back to the PMS system, the
18 Policy Management System. You mentioned earlier that
19 you can only search by named insured, first named
20 insured; is that right?

21 A. Correct.

22 Q. Is there any way to search the electronic
23 system for any additional insured?

24 A. No. You'd have to have a policy number,
25 you'd have to look in the policy documents to see if

1 there was any supplemental named insureds. But
2 additional insureds are not traditionally listed. We
3 use what's called an automatic additional insured
4 endorsement, which is not contained on these
5 policies, that would -- that would provide whether
6 someone was an additional insured or not.

7 Q. Do you know why the electronic Policy
8 Management System is set up, so that you cannot
9 search by any other supplemental named insured or
10 additional insured?

11 A. Insurance companies, and Penn National is
12 no exception, issue policy numbers for a very
13 specific reason. Name similarity, locations, and
14 other things vary. Policy number is like a Social
15 Security number. It's the identifier for that
16 particular insured.

17 We have the ability to look electronically
18 for a policy number or an insured name, but a policy
19 number is what we need in order to find a historical
20 document.

21 Q. Your PMS system has a field to search by
22 insured name, correct?

23 A. Correct.

24 Q. But there's no field to search for a
25 supplemental named insured, correct?

1 numbers; is that correct?

2 A. Yes. And that's what was necessary, in
3 order to pull the historical documents.

4 Q. With respect to the contractor lists and
5 job sites, did you speak with Mr. Reifsnyder
6 regarding searches for paper documents using those
7 two lists?

8 A. Yes. And he told me that unless I had a
9 policy number, he had no -- no ability to locate any
10 of those by name.

11 Q. Did you speak with Mr. Reifsnyder about
12 any alternative means of searching the paper records,
13 other than by policy number?

14 A. I've asked about that and he -- his only
15 means of searching is by policy number.

16 Q. Did you speak with Mr. Reifsnyder about
17 the potential of hiring an outside vendor to do
18 searches for Covil documents in the hard copy
19 documents?

20 A. No, I did not.

21 Q. Did you speak with Mr. Reifsnyder about
22 having additional resources from Penn National
23 coordinated to do a paper search in-house for Covil
24 documents?

25 MR. YNTEMA: Objection to form.

1 THE WITNESS: As far as we know, we
2 located all the available Covil documents, and we
3 provided those.

4 BY MR. NES:

5 Q. I understand that. But my question is,
6 did you talk to Mr. Reifsnnyder about bringing in
7 additional assets within the company to manually
8 search for documents responsive to the Subpoena or
9 the document request?

10 MR. YNTEMA: Object to form.

11 THE WITNESS: The only -- no, I didn't,
12 because his only means of searching was by policy
13 number. And I believe he told me we were looking at
14 hundreds of thousands, if not millions of pages of
15 documents.

16 BY MR. NES:

17 Q. I'd like to turn back to Exhibit 2, which
18 is your Subpoena. I'm sorry, which is your
19 Affidavit. I'd like to turn your attention to
20 paragraph 10.

21 A. (Witness peruses document.)

22 Q. It states, quote, "In the event an
23 electronic search generates a result for a principal
24 named insured, the result will include the principal
25 insured's name and associated city and state, a

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver, Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**Stipulation of Dismissal of South Carolina
Property and Casualty
Insurance Guaranty Association
(Without Prejudice)**

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff Covil Corporation and Defendant South Carolina Property and Casualty Insurance Guaranty Association (“the Association”) stipulate to the dismissal, without prejudice, of the Association from this action. The parties further agree that this stipulation does not operate as an adjudication on the merits and that the parties will each bear their own costs.

WE SO STIPULATE:

s/Erik T. Norton

Erik T. Norton
S.C. Bar No. 73860
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*Attorney for South Carolina Property
and Casualty Insurance Guaranty
Association*

s/ Marghretta H. Shisko

Marghretta H. Shisko
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Attorney for the Receiver

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

**COVIL CORPORATION'S NOTICE OF
THIRD SUPPLEMENTAL MOTION TO
COMPEL**

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Covil Corporation, by and through its Receiver Peter D. Protopapas ("Covil"), respectfully files its Third Supplemental Motion to Compel. Covil needs its insurance policies to respond to routine discovery in numerous asbestos liability suits, and it has been forced to incur substantial costs to litigate the same discovery dispute multiple times before this Court due to Penn National's obstructionist tactics. Having demonstrated that Penn National repeatedly and willfully ignores orders of this Court, it cannot be trusted to participate in discovery without direct participation of independent counsel.

Covil therefore respectfully requests a hearing on this motion be scheduled, and that this Court order Penn National to fully review its entire repository of historical insurance policies with the supervision of its coverage counsel, Goldberg Segalla, and Covil's insurer-appointed defense counsel, Ellis & Winters LLP, for their review. Covil further requests that Penn National reimburse all costs associated with this discovery dispute, and that this Court grant Covil all other relief at law or equity to which it is justly entitled.

BACKGROUND

Covil has sought discovery of its insurance policies and related documentation from Penn National since 2018. The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. *See, e.g.*, Ex. 1, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003.

This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. However, Penn National repeatedly and brazenly ignores this Court's orders by refusing to search its records. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. And it refuses to perform a manual search or to scan the documents so they can be searched electronically. Covil has thus been forced to litigate this issue since January, as summarized here:

1. After the January 7, 2021 deposition of Penn National's corporate representative revealed the inadequacy of Penn National's policy search, Covil moved to compel Penn National to perform a complete search.
2. At the January 2021 hearing, the Court *ordered* Covil to provide lists of relevant job sites, owners, and agents to Penn National for further searches, and it *ordered* Penn National to promptly respond with its findings. Ex. 2, Jan. 25, 2021 Hrg. Tr. at 138–42. Penn National did not comply.
3. Covil was forced to file a Supplemental Motion to Compel on April 22, 2021. The Court granted Covil's motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." Ex. 1, July 1, 2021 Order on Motions to Compel at 6. The Court *ordered* Penn National to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.* Penn National again failed to comply.
4. Covil was forced to file another motion on August 20, 2021 that is currently pending before the Court. It informs the Court that, among other things, Penn National's Brent Reifsnyder spent *less than five minutes* trying to locate documents responsive to the Court's Order, Ex. 3, Reifsnyder Dep. at 65:3–11.

5. Covil was forced to file yet another motion on September 8, 2021, also currently pending before the Court. It informs the Court that, among other things, Penn National's Boyd Wright, who was responsible for coordinating Penn National's electronic search, doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search *electronically* for an "additional insured," such as Covil, as well. Ex. 4, Wright Dep. at 23:22–24. Without a policy number, Mr. Wright admitted, Penn National would "have to look in the policy documents to see if there was any supplemental insureds." *Id.* at 23:22–24:1. But Penn National is defiantly adamant it will not do such a search.

ARGUMENT

Penn National should open its repository of insurance policies to a review supervised by its own coverage counsel, Goldberg Segalla, and Covil's insurer-appointed defense counsel, Ellis & Winters LLP, for their review. *See* Rule 26(a), SCRCP ("Parties may obtain discovery by . . . permission to enter upon land or other property, for inspection and other purposes[.]").

Covil has been sued in numerous asbestos liability cases in federal courts and South Carolina state courts, and Covil needs its policies to respond to routine discovery. *See* Fed. R. Civ. P. 26(a)(1)(A)(iv) ("a party must . . . provide to the other parties . . . for inspection and copying . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment"); Rule 26(b)(2), SCRCP ("A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.").

Covil has diligently sought discovery of its own insurance policies from Penn National since 2018, but Penn National has willfully refused to comply with legitimate discovery requests. Penn National's defense—that it has to have a policy number—is nonsense. Penn National has

various options: it could manually search its documents, it could hire someone to do so, or it could scan its own documents, making them easily searchable. Penn National has done none of these.

Covil is now forced to seek additional relief. Covil asks that the Court order Penn National to open its repository to its coverage counsel, Goldberg Segalla, and Covil's defense counsel, Ellis & Winters LLP. In addition, Covil respectfully requests a hearing on this motion, and that Penn National reimburse all costs associated with this discovery dispute pursuant to Rule 37(a)(4), SCRCP.

CONCLUSION

For these reasons, Covil respectfully requests that this Court order Penn National to open its repository of insurance policies to its coverage counsel, Goldberg Segalla, and Covil's defense counsel, Ellis & Winters LLP, for their review, and that a hearing on this motion be scheduled before the Court. Covil further requests that Penn National reimburse all costs associated with this discovery dispute at issue, and that this Court grant Covil all other relief at law or equity to which it is justly entitled.

Respectfully submitted,

/s/ G. Murrell Smith

G. Murrell Smith, Jr. (S.C. Bar No. 66263)
Jonathan M. Robinson (S.C. Bar No. 68285)
Smith Robinson Holler DuBose and Morgan, LLC
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Counsel for the Receiver for Covil Corporation

This 5th day of October, 2021.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Ann Finch, Individually and as Executor of
the Estate of Franklin Finch; and Peter D.
Protopapas as Court-Appointed Receiver
for Covil Corporation,

C.A. No. 2019-CP-40-03003

Plaintiffs,

v.

United States Fidelity & Guaranty
Company,

Defendant.

**ORDER ON THE RECEIVER FOR COVIL
CORPORATION'S MOTION TO COMPEL AND
SUPPLEMENTAL MOTION TO COMPEL
AGAINST PENNSYLVANIA NATIONAL
MUTUAL CASUALTY INSURANCE COMPANY**

This discovery dispute is before the Court on the January 15, 2021, Motion to Compel and the April 22, 2021, Supplemental Motion to Compel filed by the Receiver for Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company ("Penn National"). Penn National filed Responses in Opposition on January 26, 2021, and June 21, 2021. The Court originally conducted a fully remote hearing using video conferencing technology on the Receiver's first Motion to Compel on January 25, 2021, and it issued certain directives to the Receiver and Penn National. Thereafter, the Receiver filed the Supplemental Motion to Compel, and the Court conducted a hearing in person, on June 25, 2021. After detailed review and consideration of the motions, the responses in opposition, the exhibits and evidence submitted, and the arguments of counsel, the Court makes the following rulings.

BACKGROUND

This Court appointed Peter D. Protopapas as the Receiver for Covil Corporation on November 2, 2018, and it tasked the Receiver with "the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of

ELECTRONICALLY FILED - 2021 Jul 01 9:04 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4003003
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Covil's insurance carriers.” Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). Covil is a now-defunct entity that conducted business in South Carolina until it was administratively dissolved in the early 1990s. Because it was an insulation contractor, Covil has been named as a defendant in many personal injury and wrongful death cases that have been filed in state court in South Carolina alleging liability based on asbestos exposure. However, Covil does not have a robust system of corporate records, and the Receiver has been required to spend considerable time and effort searching for Covil's assets, which primarily consist of insurance policies. In this case, the Receiver has filed declaratory judgment claims related to policies issued to Covil, and the Receiver has attempted to obtain information and documents from Penn National via subpoena and deposition testimony regarding any insurance policies Penn National issued that provide coverage to Covil. The Receiver has been attempting to obtain these materials from Penn National in this and other proceedings involving Covil since at least February of 2020.

On December 17, 2020, the Receiver served an amended notice of deposition on Penn National pursuant to Rule 30(b)(6), SCRCPP, the topics of which related to Penn National's efforts to search for insurance policies protective of Covil. The deposition took place on January 7, 2021, after which the Receiver filed his January 15 Motion to Compel, wherein he asked this Court to order (among other things) “Penn National to perform a complete search of its records relating to insurance policies covering Covil, including but not limited to insurance policies covering Covil as an ‘additional insured.’” (Jan. 15 Mot. ¶ 13.) In response to the Receiver's motion, Penn National argued that unless it had “the name of the entity or the entity's policy number that listed Covil as an insured,” it could not search its records for policies protecting Covil as an additional insured without expending significant time and expense. (Jan. 26 Resp. in Opp'n 7–8.)

At the January 25, 2021, hearing on the Receiver's motion, the Court heard and considered arguments from the Receiver about why such a search is necessary and from Penn National about the claimed difficulties inherent in such a search. Attempting to strike a middle ground that reduced the burden on Penn National, the Court instructed the Receiver's counsel to, within fifteen days of the hearing, provide a list of potential jobsites, owners, and contractors to Penn National to facilitate Penn National's search of its records. (*See* Jan. 25 Hr'g Tr. 138–42.) This Court also directed Penn National to respond with its search results within fifteen days after receiving this information from the Receiver. (*Id.* at 141.) The Court also suggested that the Receiver serve a new subpoena on Penn National to effectuate the Court's instructions, and the Court held the Receiver's motion in abeyance pending the parties' compliance with its instructions. (*Id.* at 142–44.)

The Receiver complied with this Court's instructions, issuing and serving a new subpoena on Penn National on February 8, 2021, which sought production of the following information:

1. All insurance policies, of any type, that [Penn National] issued to Covil Corporation or that include Covil Corporation as an additional insured, including policies that identify the following entities as the named insured or as an additional insured: [List of potential contractors];
2. All certificates of insurance or other documents evidencing any insurance coverage that [Penn National] provided to Covil Corporation, including certificates of insurance or documents that identify or concern the following entities: [List of potential job sites]; and
3. All documents that relate to the steps taken by [Penn National] to locate information and documents responsive to these requests.

Following a series of correspondence, a meet and confer, and the Receiver's agreement to extend Penn National's deadline to respond, Penn National served its supplemental responses and objections to the Receiver's subpoena on March 9, 2021. Penn National's subpoena response consisted largely of objections, and Penn National claimed that its search in response to the subpoena only

yielded two comprehensive general liability policies, which Penn National previously provided in 2018.

Unsatisfied with Penn National's incomplete responses and improper objections, the Receiver filed a supplemental motion to compel on April 22, 2021. Then, nearly two months after that supplemental motion to compel was filed—and nearly three years after Penn National was put on notice that Covil was its insured and had been named as a defendant in asbestos litigation—Penn National produced copies of never-before-disclosed insurance policies it issued to Covil.

On June 15, 2021, the Receiver filed The Receiver's Notice of Filing of Late-Produced Policies, which included copies of other property, auto, inland marine, and workers' compensation policies that Penn National issued to Covil (the "newly produced policies"). Those policies were not produced in Penn National's response to the Receiver's subpoena, even though Penn National's responses to Request Nos. 1 and 2 expressly stated:

Penn National has performed the necessary due diligence in researching [these] request[s], despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in searching its files, Penn National has not located any documents responsive to this request, with the exception of comprehensive general liability policies issued to Covil for the periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988, bearing policy number 515 50 28 53, which have previously been produced to the Plaintiffs.

(Receiver's Supp. Mot. to Compel, Ex. E, at 5, 6.) The newly produced policies were likewise not identified in Penn National's response to Request No. 3. (*See id.* at 7–8.) Instead, those policies were produced as part of Penn National's supplemental discovery responses on June 11, 2021, in a separate case involving Covil and Penn National.

On June 21, 2021, just four days before the scheduled hearing on these issues, Penn National filed a response in opposition to the Receiver's supplemental motion to compel, which included the June 3 affidavit of Boyd Wright, a Senior Home Office Claim Examiner for Penn National. (June 21 Resp. in Opp'n, Ex. 13.)

CONCLUSIONS AND FINDINGS

This Court concludes that the Receiver has complied with its instructions by providing Penn National with a list of contractors, owners, and jobsites that could help Penn National narrow its search for documents. The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have “performed the necessary due diligence” and “exercised reasonable diligence in searching its files,” yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case. The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

Moreover, although Penn National asserts it has “exercised reasonable diligence in searching its files,” Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. The affidavit submitted by Penn National does not cure the deficiencies in Penn National’s subpoena responses, since Mr. Wright provides very little detail about how Penn National’s records are maintained other than asserting that paper documents “are stored by policy number only.” (June 21 Resp. in Opp’n, Ex. 13 ¶ 10.) It also appears that Penn National did not conduct a thorough, complete search of its paper records for coverage protective of Covil, only physically pulling two policies from its archives. (*See id.* ¶¶ 17–18.) Although Mr. Wright asserts in his affidavit that he spent more than 60 hours conducting Penn National’s search, it is unclear

how much time he spent on each aspect of the search, and he apparently spent a significant amount of time running an electronic search for facilities despite the fact that Penn National's electronic system does not list, store, or save information about jobsites or facilities. (*See id.* ¶ 14.)

This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National's efforts to search for coverage.

RELIEF ORDERED

THEREFORE, the Court ORDERS that Penn National must provide the Receiver with a detailed description of how Penn National maintains its paper records. Penn National's description should include, but not be limited to, physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized. Penn National shall provide this detailed description to the Receiver within two weeks of the June 25 hearing, making the description due on or before **July 9, 2021**.

Additionally, the Court further ORDERS that within two weeks of the above deadline, Penn National must thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with its February 8, 2021, subpoena to Penn National. Penn National's deadline to complete this search and provide any results to the Receiver is **July 23, 2021**.

IT IS SO ORDERED.

Judge's Electronic Signature Page Follows

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Richland Common Pleas

Case Caption: Ann Finch , plaintiff, et al vs Sentry Casualty Company , defendant,
et al
Case Number: 2019CP4003003
Type: Order/Compel

So Ordered

Jean H. Toal



Deposition of:
Hearing

January 25, 2021

In the Matter of:

**Finch, Ann Vs. US Fidelity and
Guaranty Co., Et Al.**

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1 y'all are telling me, that an adequate search has
2 been made.

3 What is this background noise that I
4 keep hearing? Is everybody muted expect me and the
5 two lawyers?

6 Okay. I am not satisfied from what
7 both of y'all are saying that Penn National has
8 done what it could do.

9 What I want you to do for me is I want
10 to be sent information about what you sent -- you
11 the Receiver -- sent to Penn National.

12 I want -- if it's one policy, if it's
13 the same for all years, that's fine. If it's not,
14 I want to see them. I want to see the years for
15 which they're sent, I want to see who they were
16 issued to.

17 And it has been my experience in these
18 cases that if you've got that, in several
19 years I've had more coverage and policies found
20 with a heck of a lot less than this information,
21 which is direct information that could go to the
22 company.

23 Mr. Harris, I want another search to be
24 made of Covil's records. And if it takes going to
25 wherever the policies for the year 1980 are stored

1 and going through them for a year, or wherever the
2 adjoining years are, you know what the years for
3 which there's liability in this case is, or a broad
4 outline of it, and those years need to be searched.
5 And I'm convinced that unless y'all are different
6 from everybody else in the world, they can be
7 searched. When it's to your interest, you search
8 and you find them. So I want that done now.

9 MR. HARRIS: Your Honor, just some
10 clarification for me.

11 Are you saying search for additional
12 insured policies in a certain time period or are
13 you saying search for the policies that we have
14 been provided information for in terms of being
15 given policy numbers and policy name?

16 THE COURT: Mr. Harris, I am talking
17 about searching for any policies that you've got
18 that cover Covil.

19 They've found a few of them, or at
20 least they found enough about numbers for you to go
21 find the ones they told you about. But you didn't
22 find anything but the ones that they've told you
23 about.

24 And what I'm asking you to do is make a
25 more comprehensive search that will embody that

1 period of time and a period of time that brackets
2 it so that you can see if there are other policies
3 other than the ones they gave you that cover Covil.
4 That's what they're hunting for.

5 MR. ZEVNIK: Your Honor, Paul Zevnik.

6 I'm not arguing this motion but I hear
7 the Court and I've got perhaps a way to do what the
8 Court wants, which is to thread this needle.

9 We need Penn National to search for
10 policies where Covil has rights as an additional
11 insured.

12 One thing that we might be able to
13 do -- and I'm just going to suggest this -- is to
14 give Penn National a list of the sites and the
15 owners of those sites and the identity of who owned
16 those sites that we, Covil, might have worked on.

17 And from what I heard about this oral
18 argument here, there's no problem with Penn
19 National doing a search for all of those
20 contractors that Covil knows about that it did work
21 for.

22 THE COURT: Mr. Zevnik, I think that's
23 a swell idea, and I would add to it this, not only
24 for the various job sites, but also if Covil
25 has -- if Covil's Receiver has any other

1 information about what agents were used to purchase
2 this, that's another way of going about it.

3 I mean, y'all don't ever like for me to
4 refer to the famous Wizard of Oz article that
5 Mr. Buffler [phonetic] wrote a couple of years ago,
6 a Good Defense Lawyer, but it's a good one, and it
7 ticks down the list of things that you can do to
8 look for legacy policies for a defunct corporation.
9 That needs to be done.

10 MR. ZEVNIK: Yes, Your Honor.

11 THE COURT: What I'm going to do about
12 this, I'm not going to spend any more time with
13 this argument.

14 I am going to give the Receiver 15 days
15 to develop a more complete list of job sites and
16 possible agents that might have been involved in
17 procuring this coverage from Penn National.

18 MR. ZEVNIK: And owners that Covil
19 worked for.

20 THE COURT: And owners that Covil
21 worked for. Exactly right.

22 I'm going to give the Plaintiff 15 days
23 to get that up. And I am going to give Penn
24 National 15 days to respond to it.

25 And the quicker, Plaintiff, you can get

1 to it, the quicker Penn National can get to looking
2 at that and making a search.

3 And I am going to suspend this hearing.
4 I'm not going to rule on the motion to compel, but
5 I am going to require that this be done and then
6 let's see where we go.

7 I sympathize with Penn National to this
8 extent very much, Mr. Harris, and that is this:
9 Plaintiff is sometimes just as bad on one end as
10 you are on the other. They take this enormous
11 sledgehammer with this enormous volume of requests
12 for everything from the beginning of the world to
13 the day hereof.

14 And if there are ways to be more
15 specific, particularly when you're dealing with a
16 defunct corporation, it's to everybody's advantage
17 to have that done.

18 So I appreciate, Mr. Zevnik, your
19 observations. I want the Receiver to develop the
20 kind of inquiry that is specific. And if there are
21 defects in this subpoena -- I don't know that there
22 are -- I don't know why Covil would not be able to
23 pursue its rights under the other subpoena -- but
24 if there is some defect that can be cured by
25 hatching up a new Subpoena that's got this material



Deposition of:
Brent Reifsnyder

August 3, 2021

In the Matter of:
**Covil Corporation Vs. Pennsylvania
National Mutual Insurance Et Al**

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1 you.

2 A. Okay. That -- that's correct.

3 Q. And so my question is, other than
4 preparing for the deposition today, about how much
5 time would you say you spent trying to locate
6 documents responsive to the Court's order?

7 A. Without a policy number, minimal.

8 Q. Is it fair to say it would be less than
9 five minutes?

10 A. Arguably, I would say that, without a
11 policy number.

12 MR. NES: Thank you, Mr. Reifsnyder. I
13 have no further questions at this time.

14 Pass the witness.

15 MR. YNTEMA: If we could take a break
16 for one second, Mr. Nes, and just give me like five
17 minutes, and I -- I may have one or two questions.
18 I don't know.

19 MR. NES: Sure.

20 VIDEOGRAPHER: We are going off the
21 record at 11:39 a.m.

22 (After a recess, proceedings were
23 continued as follows:)

24 VIDEOGRAPHER: We are back on the
25 record at 11:44 a.m.



Deposition of:
Boyd Wright , Penn National 30(b)(6)

August 26, 2021

In the Matter of:
**Covil Corporation v. Pennsylvania
National Mutual Insurance Et Al**

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1 A. Yes, but none of those documents
2 are -- extend to the time parameters that were listed
3 in the Subpoena.

4 Q. And what is the time frame, where there
5 are certain documents that are only electronic
6 documents?

7 A. There was a transition for those, which I
8 believe started in the early 2000s.

9 Q. So if I understand correctly, starting in
10 the early 2000s, there may be documents that were
11 created and stored electronically that are not
12 archived in hard copy; is that correct?

13 A. No. Starting in the early 2000s, active
14 accounts were being transitioned over time to
15 electronic format. Historical records were never
16 taken and converted.

17 Q. Let's go back to the PMS system, the
18 Policy Management System. You mentioned earlier that
19 you can only search by named insured, first named
20 insured; is that right?

21 A. Correct.

22 Q. Is there any way to search the electronic
23 system for any additional insured?

24 A. No. You'd have to have a policy number,
25 you'd have to look in the policy documents to see if

1 there was any supplemental named insureds. But
2 additional insureds are not traditionally listed. We
3 use what's called an automatic additional insured
4 endorsement, which is not contained on these
5 policies, that would -- that would provide whether
6 someone was an additional insured or not.

7 Q. Do you know why the electronic Policy
8 Management System is set up, so that you cannot
9 search by any other supplemental named insured or
10 additional insured?

11 A. Insurance companies, and Penn National is
12 no exception, issue policy numbers for a very
13 specific reason. Name similarity, locations, and
14 other things vary. Policy number is like a Social
15 Security number. It's the identifier for that
16 particular insured.

17 We have the ability to look electronically
18 for a policy number or an insured name, but a policy
19 number is what we need in order to find a historical
20 document.

21 Q. Your PMS system has a field to search by
22 insured name, correct?

23 A. Correct.

24 Q. But there's no field to search for a
25 supplemental named insured, correct?

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through its
duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO
COMPEL**

COMES NOW Pennsylvania National Mutual Casualty Insurance Company ("Penn National") and hereby respectfully submits this memorandum in opposition to Plaintiff's Motion to Compel ("Motion"). For the reasons set forth herein, Penn National respectfully requests this Court deny the Plaintiff's Motion and order the requested discovery not be had.

FACTUAL BACKGROUND

Plaintiff's Motion to Compel (and subsequent supplements to same) all pertain to the July 1, 2021 Order ("the Order") entered by the Court in *Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D. Protopapas as Court-Appointed Receiver for Covil Corporation v. United States Fidelity & Guaranty Company*, C.A. No. 2019-CP-40-03003. The Order relates to a subpoena issued in that action. First, the Order required Penn National provide additional information regarding its policy document filing system and

how it operates within eight (8) days of entry of the Order. Second, Penn National was to thoroughly search its records using the list of contractor and facilities provided by the Receiver by July 23, 2021. Penn National complied with the Order, filing an affidavit describing its document filing system and making a representative available to answer questions about same in a deposition. Further, Penn National filed an additional affidavit on July 23, 2021, outlining in detail the extensive efforts it took to comply with the Order to “thoroughly search” its records to the best of its ability, given the information provided to it to date.

Following these filings, Plaintiff filed its current Motion and supplements, seeking to expand what was required pursuant to the Order, while ignoring the efforts undertaken by Penn National to comply with the Order. Plaintiff’s current Motion to Compel is nothing more than the latest iteration of its abusive and oppressive discovery tactics as to Penn National. Although Penn National has expended significant, good faith effort to comply with Plaintiff’s overbroad and unreasonable discovery, Plaintiff nevertheless ignores these efforts and attempts to cast the manner in which Penn National has historically stored its paper policy documents as some type of nefarious plot by Penn National to avoid the ability to reasonably locate its archived paper policy documents for any given insured, which has been decades in the making. Such contention by Plaintiff is without merit.

Plaintiff simply attempts to paint Penn National as some sort of “bad actor” with respect to the discovery process in this case. Rather, Plaintiff is in fact the party using the discovery process in this case to create an undue and oppressive burden on Penn National. This is shown by the fact that Plaintiff is demanding that Penn National go to extraordinary lengths to manually search or digitally convert hundreds of thousands of policy documents in an attempt to find additional insured coverage for Covil that may theoretically exist under insurance policies that

Penn National may or may not have issued for any of 650 non-Covil entities for which Plaintiff refuses to provide any evidence of any relationship to Covil.¹ Plaintiff now wants Covil to initiate this unprecedented search for insurance documents that pertain to any of 650 non-Covil entities without any effort by Plaintiff to show that Covil indeed had a substantive relationship with any of the entities. While Plaintiff is interested in finding insurance coverage for Covil for asbestos claims, Plaintiff's search has now turned into a blind attempt to make Penn National conduct further searches for additional insured coverage where there is not even a hint that such coverage may exist even if Penn National insured any of the 650 entities listed by Plaintiff.

Plaintiff seeks its order without any expectation as to what, if anything, may reasonably be accomplished by it. Despite multiple requests by counsel for Penn National for information about the origins of the entities on Plaintiff's List, Plaintiff has refused to provide this information.² Plaintiff has provided no information as to whether it has subpoenaed any of these entities for information regarding alleged policies with Penn National, or the dates or policy numbers of same; no information as to whether and what discussions have been conducted with these companies, their insurance brokers, or their counsel about such information; no information as to whether any contracts existed between the entities on the List and Covil; and no information as to the relationship between Covil and any of these entities.

¹ Plaintiff has served discovery requests in this case that request Penn National to identify and produce insurance policies of any of 650 entities under which Covil may have been an additional insured ("List").

² A copy of the letter provided from counsel for Penn National to Covil's Receiver's counsel, along with the response email, noting an additional call with between counsel for Penn Nation and counsel for Plaintiff and Plaintiff's counsel's lack of response, is attached hereto as **Exhibit 1**. This information is also the subject of pending discovery from Penn National to Plaintiff in this action.

Instead of working with Penn National to gather additional information that could assist Penn National in locating any policies Covil seeks, Plaintiff makes unsupported assertions regarding an alleged lack of effort on the part of Penn National. This is despite the uncontroverted testimony that:

1. Boyd Wright, Senior Home Office Claim Examiner for Penn National, spent sixty-four (64) hours searching Penn National's files for any policies or documents relevant to Plaintiff's List, Wright Aff. 19;³
2. Brent Reifsnyder, Director of Administrative Services for Penn National, spent in excess of forty (40) hours, including vacation time, assisting in searching and preparing affidavits relating to this action, including researching potential methods of searching policies, as well as the type, location, and number of policies held by Penn National, and in responding to the Court's July 1, 2021 Order, Reifsnyder Dep., 66:25-67:8; 68:16-21, Aug. 3, 2021;⁴
3. Mr. Wright and Mr. Reifsnyder spent additional hours preparing for and providing testimony in this action and related actions as to the policies and procedures of Penn National as to policy searches and document retention, among other issues, Wright Dep. 8:16-22, Aug. 26, 2021;⁵ Reifsnyder Dep. 6:9-7:14;
4. There are approximately 615,000 separate Penn National paper policies stored by the terminal digit system in a third-party storage facility, along with approximately

³ The affidavit of Boyd Wright is attached hereto as **Exhibit 2**.

⁴ Mr. Reifsnyder's deposition transcript is attached hereto as **Exhibit 3**.

⁵ Mr. Wright's Deposition Transcript is attached hereto as **Exhibit 4**.

200,000 separate policies stored on microfilm by Penn National, also utilizing the terminal digit system, for a total of more than 800,000 separate policies, Second Reifsnyder Aff. 8-9⁶;

5. When the 615,000 paper policies were shipped to the third-party storage facility a number of years ago, it took Penn National employees nine (9) months just to write down the policy numbers for all the files being transported to storage, Reifsnyder Dep. 60:3-10;
6. Given that the information sought pertains to alleged additional insured status and, therefore, policies would need to be reviewed in their entirety in order to determine whether each contained any relevant information, the effort involved would take significantly longer than the nine (9) months of effort by the three (3) employees, Reifsnyder Dep. 51:13-19; 60:3-10; and
7. In fact, additional insured endorsements were rarely issued during the time in question and, even if they were, they were typically not issued by name but rather as a blanket endorsement, Wright Dep. 15:8-10; 23:22-24:6; 27:11-19; 29:1-14.

Contrary to Plaintiff's unfounded assertions that the storage method utilized by Penn National was designed to make it difficult to locate policy information, the fact is that the storage method utilized by Penn National is the industry standard. Reifsnyder Dep. 63:5-10 ("We go by policy number. That's what we go by. That's what the industry goes by."). Further, Mr. Reifsnyder testified that in his approximately thirty (30) years working at Penn National⁷ and

⁶ Mr. Reifsnyder's Affidavit, dated July 23, 2021, is attached hereto as **Exhibit 5**.

⁷ Mr. Reifsnyder testified in his deposition that he began working at Penn National in April 1992. Reifsnyder Dep. 8:22.

what are certainly countless litigation matters involving Penn National's insureds during that time, "[t]his is the first time ever that I'm aware of that anybody's requested us to go through this capacity of records." Reifsynder Dep. 62:13-15. Simply put, there is nothing unusual about Penn National's storage practices. Instead it is the unprecedented scope of Plaintiff's request that is out of the ordinary and unreasonable.

Additionally, despite its continued insistence that Penn National is somehow withholding relevant policies, Plaintiff has not even bothered to review the policies Penn National discovered through its search of the entities on the List. Penn National has agreed to make these documents available for review pursuant to a protective order, should they be deemed discoverable, but Plaintiff has yet to request access to same.⁸ Given Plaintiff's apparent lack of interest in the information discovered to date, it is difficult to see what it hopes to accomplish through additional searching, other than imposing undue burden on Penn National.

ARGUMENT

I. Penn National has complied with the Court's July 1, 2021 Order

Initially, Plaintiff's Motion to Compel is procedurally improper, as it pertains to a failure to comply with an order *in a separate action*. Further, despite Plaintiff's contentions to the contrary, Plaintiff never consulted with counsel for Penn National about the issues addressed in its Motion prior to filing same, which is required pursuant to Rule 11, SCRCP. Nevertheless, Penn National has complied with the Order in question and, therefore, Plaintiff's Motion should be denied.

⁸ Penn National's Supplemental Objections and Responses to Subpoena Duces Tecum setting forth the additional documents discovered and offering to provide pursuant to a protective order is attached hereto as **Exhibit 6**.

As noted above, the Order was entered in *Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D. Protopapas as Court-Appointed Receiver for Covil Corporation v. United States Fidelity & Guaranty Company*, C.A. No. 2019-CP-40-03003 and relates to a subpoena issued in that action.⁹ There are two categories of relief provided in the Order. First, Penn National was required to provide additional information regarding its paper policy document filing system and how it operates within eight (8) days of the Order. Second, Penn National was to “thoroughly search its paper records using the list of contractor and facilities provided by the Receiver” by July 23, 2021.

Pursuant to the first portion of the Order, on July 9, 2021, Penn National provided an affidavit from Mr. Reifsnnyder to the Plaintiff, setting forth in detail the company’s record storage and retention policies. Penn National then made Mr. Reifsnnyder available for a deposition on August 3, 2021 to answer any additional questions Plaintiff had regarding the information in his affidavit. Penn National has complied with this part of the Order, and Plaintiff, despite claiming that Penn National “made no effort at all to comply with the Order,” does not appear to assert in its Motion that Penn National has failed to comply with this part of the Order.

While Plaintiff makes no argument that Penn National has violated the first part of the Order, Plaintiff nevertheless makes the bald allegation that “Penn National has made no effort at all to comply with the Order, or even to investigate how it might do so.” Pl’s Mot. to Compel 5. Plaintiff also asserts that Penn National has “offer[ed] no legitimate reason” for refusing to “perform the court-ordered search.” *Id.* These allegations appear to relate to the second part of the Order. Perhaps unsurprisingly, Plaintiff cites no factual support for its “argument.” Instead,

⁹ Given this, the Motion should have been filed in that action. However, Penn National has complied with the Order, regardless of the action in which the Motion was filed.

the undisputed facts belie Plaintiff's disingenuous claims, which are merely the latest example of the abusive and oppressive discovery conduct pursued by Plaintiff against Penn National.

Plaintiff's contentions regarding Penn National's alleged conduct are demonstrably false. As set forth above, Penn National's representatives have spent, to date, in excess of one hundred (100) hours attempting to resolve the issues that form the basis of Plaintiff's Motion. *See* Wright Aff. 19; Reifsnyder Dep., 66:25-67:8; 68:16-21. By contrast, Plaintiff has not even requested to review additional policies located by Penn National during its searches of its policies. *See* **Ex. 1**. Nor has Plaintiff been willing to provide any additional information regarding any of the 650 entities in Plaintiff's List. *Id.*¹⁰ This despite the fact that Plaintiff is aware that such information would perhaps suggest some rational basis for making Penn National search the entirety of its paper records, by providing at least some support for the idea that any relevant evidence is located therein.

The Order requires Penn National "thoroughly search its paper records using the list of contractor and facilities provided by the Receiver." As set forth in the affidavits and testimony of Penn National's representatives, Penn National has made as thorough a search as is possible *given the limited information provided by Plaintiff*. *E.g.* Wright Dep. 17:6-17 (pulled Covil's general liability policies and searched to see if continuation of coverage on years on either side of information provided (none)); 21:8-13; 32:20-33:3; 41:25-42:6 (describing process utilized to search for entities on the List as well as supplemental insureds on Covil policies); 39:20-40:18

¹⁰ Receiver's counsel's response refers Penn National to separate defense counsel for Covil. Receiver's counsel cannot shirk their responsibility to provide requested information in this fashion, and Penn National trusts their discovery responses will provide a substantive response, instead of a reference to other counsel. *See, e.g., Nat'l Fire Ins. Co. v. Jose Trucking Corp.*, 264 F.R.D. 233, 238 (W.D.N.C. 2010) (holding that referral by counsel in response to discovery to other counsel in a related action was "not considered by this court to be a full and sufficient answer" to discovery).

(describing why additional information needed to determine whether any policy located would potentially afford additional insured coverage to Covil). Further, Penn National has considered whether any alternatives, aside from a page-by-page physical search of each of the more than 800,000 paper and microfilm policies in its possession, could achieve what has been requested by Plaintiff, and has concluded there is no other viable option. Reifsnyder Aff. 6-7; *see also* Wright Dep. 35:11-15; 38:15-17 (discussed whether other options existed and utilized only search methods available); Reifsnyder Dep. 27:13-20; 35:15-21 (terminal number system requires policy number). Simply put, Penn National has conducted as thorough a search as possible with the information provided and, therefore, has complied with the Court's July 1, 2021 Order.

II. Plaintiff's discovery requests and subpoenas are facially overbroad, unduly burdensome, oppressive, and not reasonably calculated to lead to the discovery of admissible evidence

Despite Penn National's compliance with the Order, Plaintiff now asks that Penn National be ordered to "manually search its paper and microfilm records" or, in the alternative "electronically search[] the records after digitizing the paper and microfilm records." Pl's Mot. to Compel 6.¹¹ Plaintiff's request that Penn National manually search each page of over 800,000 paper and microfilm insurance policies is nothing more than a fishing expedition and an attempt to utilize abusive discovery tactics to force Penn National into settling with Plaintiff on favorable terms. Such actions are beyond the pale and are inappropriate under South Carolina law. *See Oncology and Hematology Assocs. of S.C., LLC v. Dep't of Health and Envtl. Control*, 387 S.C. 380, 692 S.E.2d 920 (2010) (holding that abusive discovery and a "scorched-earth

¹¹ Plaintiff has since requested that Penn National not only manually perform this search of millions of pages of paper records with no evidence to support an expectation of any relevant findings, but also do so in the presence of two separate sets of counsel. Such a request even more abusive than the relief in Plaintiff's initial motion and, therefore, should be denied.

approach” to the discovery process were inappropriate and vacating the trial court’s orders as to same). Therefore, Penn National respectfully requests that the Court deny Plaintiff’s Motion, and enter an order protecting Penn National from Plaintiff’s abusive discovery requests. See Rule 37(a)(2), SCRCP (“If the court denies the motion [to compel] in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).”).

Although South Carolina law “allows broad pre-trial discovery,” trial courts have “broad latitude in limiting the scope of discovery” where “the discovery process threatens to become abusive or to create a particularized harm to a litigant.” *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (citing *Palmetto Alliance v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984)). See also Rule 26(c), SCRCP (trial court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense”). A party seeking protection from proposed discovery must “show good cause by alleging a particularized harm which will result if the challenged discovery is had,” typically “in the form of a motion . . . or a return to a motion to compel production.” *Hamm*, 312 S.C. at 241, 439 S.E.2d at 854 (citing 4 JAMES W. MOORE, ET. AL., MOORE’S FEDERAL PRACTICE P 26.75 (2nd ed. 1993)). Once the party has alleged a particularized harm, the party seeking discovery must demonstrate that the information sought “is both relevant and necessary to the case.” *Hamm*, 312 S.C. at 241, 439 S.E.2d at 854 (quoting 4 JAMES W. MOORE, ET.AL., MOORE’S FEDERAL PRACTICE P 26.402 (2nd ed. 1993)). If both parties are able to meet their burden, court must still “weigh the opposing factors” and determine whether or how any such discovery should be had. *Id.*

Here, Penn National is able to articulate a particularized harm. Its representatives have testified that the search sought by Plaintiff will likely take months, if not in excess of a year. Reifsynder Dep. 51:13-19. In fact, Mr. Reifsynder testified that simply writing down the policy numbers of the 615,000 paper policies Plaintiff requests Penn National search (not including the additional 200,000 microfilm policies) when those policies were being moved to third-party storage took three (3) Penn National employees nine (9) months. Reifsynder Dep. 60:3-10. Given this undue burden, Penn National has easily established a particularized harm under South Carolina law.

On the other hand, Plaintiff cannot meet its burden that the information sought is both relevant and necessary. To date, Plaintiff has refused to provide any information as to why it believes there are policies held by Penn National for the entities and locations on the list provided to Penn National that would provide coverage for Covil. Of the policies that Penn National was able to locate in its search utilizing the List, none contained an additional insured endorsement. Wright Dep. 40:14-18. Plaintiff has provided no contracts, certificates of insurance, correspondences, or other documents evidencing the existence of any coverage for Covil, or even for the entities on the list provided to Penn National. Further, Plaintiff's Complaint pertains *only to the Penn National Insurance Policies already in its possession*, and Plaintiff has made no allegations or requests for relief in its pleadings relating to other insurance.¹² Therefore, even assuming that any policies exist for the entities on Plaintiff's List, those policies are not relevant or necessary to the outcome of this litigation. *See, e.g. Hollman v. Woolfson*, 384 S.C. 571, 578,

¹² In fact, Plaintiff has established the existence of insurance policies covering Covil in a continuous line from 1954 through 1988. Thus, Plaintiff's Motion constitutes nothing more than a disallowed "fishing expedition." *See Oncology and Hematology Assocs.*, 387 S.C. at 386, 692 S.E.2d at 923 (holding that trial court improperly allowed discovery despite recognizing it was nothing more than a fishing expedition).

683 S.E.2d 495, 498 (2009) (determination of whether information sought is relevant and necessary requires party seeking evidence “demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is real, rather than a merely possible threat”) (citations omitted); *Oncology and Hematology Assocs.*, 387 S.C. at 389, 692 S.E.2d at 925 (vacating discovery orders relating to abusive and overly broad discovery materials not relevant to “the central issue in the case before it” and quoting the Texas Supreme Court for the proposition that “the trial court must make an effort to impose reasonable discovery limits”).

Even assuming, *arguendo*, that the information sought by Plaintiff could be relevant to the issues in this case, the value of the discovery is heavily outweighed by the harm to Penn National, as set forth above. The information sought is unrelated to the central issues in this case, there is a significant question as to whether any of the sought policies even exist, as Plaintiff has provided no evidence of their existence, and the burden on Penn National in conducting such a search is extraordinary. Reifsynder Dep. 51:13-19; 60:3-10. *See also Coleman v. Am. Red Cross*, 23 F.3d 1091, 1098 (6th Cir. 1994) (upholding refusal to compel Defendant to produce documents/information “that would have required the [Defendant] to search every file that exists at National Headquarters for any documents that might be of any relevance to any matter in the case,” as such a request was “overly burdensome”); *Jenkins v. Dekalb Cnty.*, 2007 U.S. Dist. LEXIS 117046 (N.D. Ga., Jan. 30, 2007) (holding that where Plaintiff already had information regarding some witnesses to jailhouse incident, burden resulting from requiring jail employees to search 98,725 inmate paper files and 240,000 inmate computer files for other inmates present in the pod where incident occurred outweighed need for information); *Fox Broad Co. v. Dish Network, LLC*, 2014 U.S. Dist. LEXIS 182473 (C.D. Cal., Aug. 11, 2014) (denying motion to

compel production of documents that would “require hundreds of hours and cost tens to hundreds of thousands of dollars” as unduly burdensome and outweighing benefit, even where expert for other party claimed need to assess damages claim). Therefore, Penn National requests that the Court deny Plaintiff’s Motion and enter an order that protects Penn National from the discovery sought by Plaintiff.

To the extent Plaintiff asserts that Penn National should be required to manually search every page of the more than 800,000 paper and microfilm policies because Penn National designed the terminal number filing system it utilizes and should have foreseen problems with this system, such a contention is unavailing. Initially, the system utilized by Penn National is standard in the insurance industry. Reifsynder Dep. 63:5-10. Additionally, while Plaintiff’s Motion alleges “the foreseeability of having to search its policy records by other methods,” Mr. Reifsnnyder testified that the company has never been asked to search the entirety of its paper and microfilm records in the approximately thirty (30) years he has been with the company. Reifsynder Dep. 62:13-15. Plaintiff has offered no evidence aside from its own discovery overreach to support this claim.

CONCLUSION

As set forth above, Penn National has complied with the Court’s July 1, 2021 Order. Despite this, Plaintiff’s Motion, without any factual or legal basis, requests that Penn National be required to perform a manual, 800,000 policy search for nebulously identified policy information and without providing any information as to the basis for its request. This request is oppressive, abusive, and well beyond the bounds of South Carolina’s discovery rules. Therefore, the Court should deny Plaintiff’s Motion.

This the 25th day of October, 2021.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II
David G. Harris II
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Brady A. Yntema (admitted *pro hac vice*)
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EXHIBIT 1



David G. Harris | Partner
Direct 336.419.4910 | dharris@goldbergsegalla.com

February 12, 2021

VIA E-MAIL ONLY – mshisko@spartanlaw.com

Marghretta H. Shisko
Harrison | White, PC
178 West Main Street
Spartanburg, South Carolina 29304

RE: *Ann Finch, Individually and as Executor of the Estate of Franklin Finch v.
United States Fidelity and Guaranty Company, et al.*
C.A. No.: 2019-CP-40-03003

Dear Ms. Shisko:

This letter follows my acceptance of service of the Receiver's Subpoena *Duces Tecum* ("Subpoena") on behalf of Penn National in the above-referenced matter. Penn National is currently making best efforts to conduct a search of its records to respond to the Subpoena on or before February 23, 2021. However, after initiating its search for documents, we would like to bring your attention to some requests for information that Penn National has with respect to the Subpoena.

Attached to the Subpoena is Exhibit A, which contains three separate requests for documents and/or records of Penn National. The first request is for "[a]ll insurance policies, of any type, that Penn National issued to [Covil] or that include [Covil] as an additional insured, including policies that identify the following entities as the named insured or as an additional insured." The request then identifies 250 "Contractors". These Contractors are identified either by company name only or by company name and a state and city associated with the company.

The request does not provide any information that indicates how any of the "Contractors" were connected to or associated with Covil. Indeed, based on the Subpoena, it is unclear whether any of the identified Contractors had any known connection to Covil. Further, the request is not limited to any specific time period, and it does not provide any potential policy numbers that may relate to coverage for Covil for any of the Contractors listed. Penn National requests that the Receiver provide: (1) a specific time period for which it is seeking a policy search for Covil relating to the *Finch* action, (2) any information or documents that show Covil's connection or association with each of the Contractors listed, including whether each such contractor was a subcontractor for Covil and the timeframe(s) that such relationship existed with Covil, and (3) to the extent known to the Receiver, a policy number for any policy that may relate to Covil or the Contractors listed.

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February 12, 2021

Page 2

The requested information and documents will aid Penn National in its search for policies issued by Penn National to the Contractors and under which Covil may have been named as an additional insured, which was the focus of our recent hearing before Chief Justice Toal. For example, although the Subpoena as currently drafted is not limited to any specific time period, we understand that Covil forfeited its corporate authority to transact business in 1993, and therefore, was no longer conducting business after that date. As a result, it is highly unlikely that Covil would be named as an "additional insured" after 1993. Additionally, although the Subpoena was served in the above-referenced action on Penn National (a non-party to the action), it is Penn National's understanding that this action involves an underlying asbestos case that involved potential asbestos exposure to decedent Franklin Finch that allegedly commenced in 1969. As such, it seems a search prior to 1969 would not be necessary in this action.

The Receiver's second request is for documents "evidencing any insurance coverage that Penn National provided to Covil, including certificates of insurance or documents that identify or concern" over 650 facilities listed in the Subpoena. We have been advised Penn National never provided "project-site" or "wrap-up" type policies that provide liability coverage relating to designated facilities or locations. As such, Penn National is very unlikely to possess any documents evidencing insurance coverage provided by Penn National to Covil that identify or concern the listed Facilities. Nonetheless, Penn National will perform the necessary due diligence in researching this request, despite the immense amount of time expected to complete this task. However, based on the Subpoena, it is unclear whether any of the identified Facilities had any known connection to Covil. For this reason, Penn National requests that the Receiver provide: (1) a specific time period for which it is seeking a policy search for Covil relating to the Facilities referenced, (2) each identified Facility's relationship to any alleged asbestos exposure to Franklin Finch, (3) any information or documents that show Covil's connection or association with each of the Facilities listed, including the time period that such connection or association existed with Covil, and (4) to the extent known to the Receiver, a policy number for any policy that may relate to Covil or to the Facilities listed.

Due to the current February 23, 2021, deadline to respond to the Receiver's Subpoena, Penn National requests that the Receiver provide the information and documents requested above as soon as possible to assist Penn National in its continuing search for the documents requested by the Subpoena. Penn National also reserves any and all rights to object to the Subpoena.

Please do not hesitate to contact me to discuss this matter.

Very truly yours,

GOLDBERG SEGALLA, LLP

/s/ David G. Harris II

/s/ Brady A. Yntema

From: Shisko, Marghretta <mshisko@spartanlaw.com>
Sent: Monday, February 22, 2021 11:39 AM
To: byntema@goldbergsegalla.com
Cc: dharris@goldbergsegalla.com; jcarter@goldbergsegalla.com; brady.edwards@morganlewis.com; CJones@spartanlaw.com
Subject: RE: Ann Finch, Individually and as Executor of the Estate of Franklin Finch v. United States Fidelity and Guaranty Company, et al.

Brady,

Thank you for the telephone call a few minutes ago. During the call, Brady Edwards explained that you may direct any questions you have to Covil's defense counsel, which is Ellis & Winters, and Ashley Braithwaite is the lead attorney. The scope of Penn's search should be from 1954-1993 and should not be limited to just Finch exposure allegations. Additionally, Brady explained that the Receiver is not just looking for wrap up or site specific policies and we are attempting to locate any coverage protective of Covil (direct or otherwise). You requested and we agreed to a 15-day extension from today for Penn to complete this search, but that extension was granted with the understanding that Penn would actually conduct a search and not just respond with additional roadblocks. We understand that you will be submitting some objections today to preserve them, and we look forward to receiving your responses after Penn completes its search on or before March 9, 2021.

Thank you,

Marghretta H. Shisko

HARRISON|WHITE, P.C.

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From: Yntema, Brady A.

Sent: Friday, February 19, 2021 10:35 AM

To: Shisko, Marghretta ; Harris, David G.

Cc: Carter, Jane ; Edwards, Brady

Subject: RE: Ann Finch, Individually and as Executor of the Estate of Franklin Finch v. United States Fidelity and Guaranty Company, et al.

Hi Marghretta. We can talk on Monday after 10:00 a.m.

Thanks.

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through its
duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

AFFIDAVIT OF BOYD WRIGHT

Boyd Wright, being first duly sworn, deposes and says:

1. I am over 18 years of age, of sound mind, and under no mental disability.
2. I am fully competent to make this declaration, and I make this declaration upon personal knowledge of the facts herein, and they are true and accurate.
3. I am currently, and was at all times relevant herein, employed by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") as a Senior Home Office Claim Examiner, in which capacity I have been involved with, coordinated, and have firsthand knowledge of Penn National's investigation for the documents requested by the Receiver of Covil Corporation's Request for Production Numbers 31 and 32 in this case ("Receiver's

Document Requests”) and the Subpoena *Duces Tecum* issued on February 8, 2021 on behalf of the Receiver in the *Finch* coverage action (“Receiver’s Subpoena”) to which Penn National is not a party.

4. Prior to this action and the Receiver’s Subpoena, a Subpoena was issued to Penn National in May 2018 by Plaintiffs’ counsel in the case of *Ann Finch, Individually and as Executrix of the Estate of Franklin Delenor Finch v. BASF Catalysts, LLC, et al.* in the United States District Court for the Middle District of North Carolina (Case No. 1:16CV1077) (“*Finch* Subpoena”), which requested all insurance policies issued to Covil and provided certain policy information, including certain potential policy numbers. Penn National conducted a policy document search, and on June 15, 2018, Penn National was able to produce all insurance policy documents in its possession based on the Subpoena. The documents produced consisted of policy information that Penn National was able to locate from over 30 years ago.

5. Penn National was initially served in the *Finch* coverage action with a Rule 30(b)(6) Notice in December 2020 (“Rule 30(b)(6) Notice”). Prior to such Rule 30(b)(6) Notice, Penn National had not received any Subpoena in the *Finch* coverage action requesting any policy information or documents for Covil, and Penn National was never informed of any question or issue that Covil or the Receiver had with respect to Penn National’s response to the *Finch* Subpoena, including whether Penn National conducted a search for other insureds’ policies that may have provided “additional insured” coverage to Covil.

6. I served as Penn National’s designee for the Rule 30(b)(6) deposition that was conducted in the *Finch* coverage action on January 7, 2021, and I provided testimony with respect to Penn National’s policy document search in response to the *Finch* Subpoena given that

I was the Penn National employee who coordinated and had firsthand knowledge of the search that Penn National conducted in response to the *Finch* Subpoena.

7. After the Rule 30(b)(6) deposition, Penn National received the Receiver's Subpoena and the Receiver's Document Requests, which collectively requested (1) all additional insured policies issued by Penn National that include Covil as an additional insured, including policies that identify any of 240 "Contractors" listed by the Receiver, (2) "certificates of insurance or other documents evidencing insurance coverage" for any of 650 "Facilities" listed by the Receiver, and (3) all documents that "relate to the steps taken" by Penn National to locate the information and documents requested. While the Facilities listed by the Receiver were identified with a city and state location, many of the "Contractors" were identified by name only without any associated city and state.

8. In general, when Penn National is provided with the potential name of an insured without any potential policy number, Penn National can conduct a search of its electronic underwriting records by entering the potential insured's name to determine if Penn National has any electronic record of an insurance policy issued to the potential insured. Policy information on Penn National's electronic search system is saved by the first named insured as the principal named insured on any given policy and is not saved by any sub-entity that could have been an additional insured under any given policy. Also, with respect to "certificates of insurance" (as requested by the Receiver for the Facilities), Penn National would not have issued any "certificates of insurance" for any insured, and for this reason, no certificate of insurance could be generated from any search conducted by Penn National.

9. An electronic search based solely on a potential insured's name (without a policy number) will many times generate results that list other Penn National insureds based on name

similarity that do not have any relationship to the potential insured for which the search is being conducted.

10. In the event an electronic search generates a result for a principal named insured, the result will include the principal insured's name, an associated city and state, a policy number, and the type of coverage provided (*i.e.* general liability, inland marine, workers compensation, *etc.*). When the electronic search generates such a result, Penn National can then conduct an electronic search for the insured's policy documents by way of the policy number. If no policy documents are generated by an electronic search, then a search can be conducted of Penn National's archived paper policy documents, which are stored by policy number only.

11. With respect to the Receiver's Subpoena, upon receiving it, I personally initiated Penn National's search for policy documents relating to the Contractors and Facilities listed in the Receiver's Subpoena. In addition to a search of the Contractors and Facilities, a search was conducted for any Penn National policy documents that related to any of the defendants named in the underlying asbestos *Finch* case ("*Finch* Defendants"), which appears to be the subject of this action (although such search was not specifically requested by the Receiver's Subpoena). While the Receiver's Subpoena did not indicate a timeframe for the search, it was my understanding that Receiver's counsel stated the scope should be from 1954 to 1993. No other information was provided to Penn National with respect to any relationship that Covil had with respect to any of the Contractors or Facilities or any potential policy numbers that Penn National could use in conducting its search in order to respond to the Receiver's Subpoena.

12. I personally conducted an electronic search as to each of the Contractors, Facilities, and *Finch* Defendants.

13. With respect to the list of Contractors, the electronic search generated a result of 29 principal named insured entities; of which only four had a policy period within the scope of time of 1954 to 1993 (as requested by the Receiver's counsel). One of the four policies was an inland marine policy with a policy period of 08/01/1988 to 08/31/1994, and the other three policies were identified as general liability policies with policy periods of (1) 03/16/1992 to 11/01/1994; (2) 04/01/1992 to 04/01/1998; and (3) 04/01/1991 to 04/01/1992 ("General Liability Policies"). The inland marine policy would be inapplicable to any asbestos liability claim against Covil. As such, I conducted a policy document search of Penn National's electronic database based on the policy numbers of the three General Liability Policies, which showed that such policies were not saved electronically.

14. With respect to the list of Facilities, based on my investigation and discussions with Penn National's underwriting department, Penn National has never listed, stored, or saved policies by an insured's jobsite or worksite. However, I conducted an electronic search for each of the Facilities listed by the Receiver's Subpoena by using the name of each facility as listed in the Receiver's Subpoena, and no results were generated by such search.

15. With respect to the *Finch* Defendants, the electronic search did not generate any results for any such defendant.

16. After completing my electronic searches, I requested Brent Reifsnyder, Director – Administrative Services, to conduct a search of Penn National's archived paper policy documents for the General Liability Policies. Mr. Reifsnyder is the Penn National employee with the most knowledge regarding Penn National's archived policy documents and the manner for searching such documents. Prior to my Rule 30(b)(6) deposition in this case, and in discussions with Mr. Reifsnyder since my deposition, he has repeatedly confirmed that Penn

National's archived paper policy documents are stored by policy number only, and for this reason, the only way to search such paper files is by policy number.

17. Mr. Reifsnyder conducted a policy search for each of the General Liability Policies by using the policy numbers that were generated as a result of my electronic search. By e-mail on March 3, 2021, Mr. Reifsnyder confirmed that the paper documents relating to the policy with a policy term of 3/16/1993 to 11/01/1994 were purged in accordance with Penn National's Record Retention Policy. However, by the same e-mail communication, Mr. Reifsnyder confirmed he was able to find paper policy documents relating to the General Liability Policies with the policy terms of 04/01/1992 to 04/01/1998 and 04/01/1991 to 04/01/1992. These e-mails were produced with Penn National's responses to the Receiver's Subpoena.

18. In reviewing the paper policy documents obtained from the search of Penn National's archived paper files, there was no information or any document that indicated that such policies provided coverage for Covil as an additional insured or otherwise, and nor was there any indication that Covil had any relationship to the policies or to the respective insureds of such policies.

19. During my research and investigation for documents responsive to the Receiver's Subpoena, I recorded the time I expended in conducting such research and investigation, which totaled 64 hours.

20. The information and assertions contained in this Affidavit are based and made upon my own personal knowledge.

Further, the affiant sayeth not.



Boyd Wright
Senior Home Office Claim Examiner
Pennsylvania National Mutual Insurance Company

Sworn to and subscribed before me,
this the 11 day of June, 2021.

Jane L. Carter
Notary Public

My commission expires: 8-13-22

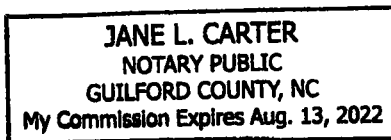


EXHIBIT 3

Page 1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Covil Corporation, by and
through its duly appointed
Receiver Peter D. Protopapas,
Plaintiff,

vs.

C/A NO. 2020-CP-40-02098

Pennsylvania National Mutual
Casualty Insurance Company;
Sam J. Crain & Co., Inc.; and
South Carolina Property and
Casualty Insurance Guaranty
Association,

Defendants.

VIDEOTAPE
VIDEOCONFERENCE

DEPOSITION OF: BRENT REIFSNYDER

DATE: August 3, 2021

TIME: 10:05 a.m.

LOCATION: 2 North 2nd Street
Harrisburg, PA

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: ERIC S. GLAZIER, Court Reporter

1 Is that okay?

2 A. Yes.

3 Q. Is there any reason preventing you from
4 giving full and accurate testimony today?

5 A. No.

6 Q. Are you under any medications currently
7 that would impair your testimony in any way?

8 A. I'm a diabetic. Other than that, no.

9 Q. Have you -- tell me what you've done to
10 prepare for your deposition today.

11 A. Met with counsel. We just reviewed
12 the --

13 MR. YNTEMA: Objection to what we
14 reviewed, if that's okay. Thank you.

15 BY MR. NES:

16 Q. You met with counsel. Did you meet
17 with anyone else in preparation for your deposition
18 today?

19 A. No.

20 Q. And when you say you met with counsel,
21 who specifically did you meet with?

22 A. Brady.

23 Q. And that's Brady Yntema, who's counsel
24 of record for Penn National?

25 A. Yes, sir.

1 Q. I'm sorry. Say that again?

2 A. Yes, sir. I'm sorry.

3 Q. Did you meet with anyone else?

4 A. No, not at all.

5 Q. How long did your -- or how many times
6 did you meet with Mr. Yntema?

7 A. We met yesterday. We've chatted for
8 other things during the past few weeks.

9 Q. How long did you meet yesterday?

10 A. About two and a half hours, if I
11 remember correctly.

12 Q. Did you review any documents?

13 A. We looked at some of the attachments
14 that were sent by your firm.

15 Q. Did you review any documents that were
16 not sent by our firm?

17 A. No.

18 Q. You mentioned that you spoke with
19 counsel more than once to prepare for your
20 deposition; did I hear that correctly?

21 A. No, you did not. I spoke with --

22 Q. So the only -- I'm sorry. Say that
23 again?

24 A. I spoke yesterday in preparation for
25 the deposition.

1 Q. So other than yesterday, you didn't
2 speak with counsel to prepare for the deposition at
3 any other times?

4 A. No, sir.

5 Q. And other than counsel for Penn
6 National, just to make sure I'm understanding you
7 clearly, you didn't speak with anyone else to
8 prepare for your deposition today, correct?

9 A. That is correct.

10 Q. When did you first learn that you were
11 going to be deposed in this case?

12 A. I believe it was last week.

13 Q. Other than the documents that you've
14 already mentioned and counsel for Penn National,
15 did you do anything else to prepare for your
16 deposition today?

17 A. No, sir.

18 Q. I'd like to take a step back and talk a
19 little bit about your background at Penn National.

20 When did you start working at Penn
21 National Mutual Casualty Insurance Company?

22 A. April of 1992.

23 Q. Do you have a college degree?

24 A. Yes, sir.

25 Q. Where did you go to college?

1 documents.

2 What did you mean by the fact that he
3 coordinated the investigation?

4 A. That Boyd would have looked up policy
5 data, is my -- he's the one responsible for
6 providing me policy number data to look up. If he
7 said, I need this policy number, then I looked for
8 that policy number.

9 Q. Other than looking for policy numbers
10 that Mr. Wright provided you, what other role, if
11 any, did you have in looking for responsive
12 documents or information?

13 A. I look up a policy number. That's all
14 I can do.

15 Q. And that's my question, is other than
16 looking up the policy number, did you do anything
17 to look for responsive documents in Penn National's
18 archives?

19 A. There's no other way for me to look for
20 anything other than a policy number.

21 Q. So is that that you did not do anything
22 other than look up by policy number?

23 A. That's what I said. Yes, sir.

24 Q. I'd like to turn to Paragraph 4. It
25 states, I am aware of the Court's order on the

1 just the actual copy of the insurance policy?

2 A. Again, what's in the file -- if it's an
3 underwriting file, it's an underwriting file.
4 What's in the contents of that file, I can't speak
5 to. It's under that policy number. Are there
6 microfilm records? Yes. What's in them in detail?
7 Underwriting files. The devil in the detail of it,
8 don't know.

9 Q. So let's take underwriting files as an
10 example.

11 An underwriting file may have
12 documentation in addition to a copy of the actual
13 policy, correct?

14 A. From the best of my knowledge, yes.

15 Q. But it's your understanding that the
16 way that Penn National organizes and indexes its
17 underwriting files, the only way you can find a
18 copy of that underwriting file is by policy number;
19 is that correct?

20 A. Correct. For those records in this
21 case, yes.

22 Q. So unless you have a copy of the actual
23 policy number, it's your understanding that you
24 couldn't actually locate a copy of that
25 underwriting file either in paper copy or

1 somebody physically pull up and look through every
2 conceivable record from microfilm and paper
3 storage.

4 Q. And what steps did you take to
5 determine how many individuals it would take to
6 conduct such a search?

7 A. My database gives me an indication, and
8 just from experience with that database, that we
9 have several hundred thousand records. Each record
10 could contain untold number of pages. I would
11 imagine that if it was to look through a policy,
12 one would have to look at every page.

13 So I can't even begin to tell you how
14 long it would take to look through all of that, but
15 it could not possibly be done in two weeks. I
16 would surmise months, if not into the year-plus
17 realm, without consulting somebody to see how much
18 money and how much labor and how much effort it
19 would take.

20 Q. When you say, without consulting
21 somebody, who would you consult?

22 A. Presently I have no idea. I would have
23 to research the industry to see who would
24 conceivably even do something like that. And they
25 would need to be bonded --

1 determine approximately how much time it would take
2 to conduct such a search, though; is that correct?

3 A. That is correct. I can share that many
4 years ago we wrote down the policy numbers before
5 we shipped everything to Iron Mountain. Just
6 writing down policy numbers took three people nine
7 months, just writing down a policy number. I can't
8 imagine the amount of time it would take somebody
9 to go through every file and look at every page,
10 knowing what I know there.

11 Q. Have you inquired how much it would
12 cost for an outside vendor to convert the 200,000
13 separate microfilm records into a digitally
14 searchable format?

15 A. No, I have not.

16 MR. YNTEMA: Objection to form.

17 Sorry, Mr. Reifsnyder.

18 A. And no, I have not.

19 Q. Have you inquired as to whether or not
20 it was possible to convert the microfilm records
21 into a digitally searchable format?

22 A. I have not inquired, no.

23 Q. Have you inquired as to whether it
24 would be possible for an outside vendor to convert
25 the 5,800 boxes of policy documents into an

1 documents who would meet the required
2 specifications of the Court to know what they're
3 looking for and understand what they're looking
4 for. That vendor would have to also be insured and
5 bonded, and we'd have to have nondisclosure
6 agreements.

7 Q. Does -- in your experience, does Penn
8 National use outside vendors to conduct any type of
9 reviews of documents?

10 A. Not that I'm aware of, no.

11 Q. So why is it that your suggestion in
12 Paragraph 12 is to use an outside vendor?

13 A. This is the first time ever that I'm
14 aware of that anybody's requested us to go through
15 this capacity of records. I have no other solution
16 than that's the option. That's my opinion.

17 Q. And then in paragraph -- the last
18 sentence of Paragraph 12 says, given the
19 unprecedented nature of such a search for Penn
20 National, I cannot currently provide an estimate of
21 how much an outside vendor would charge for the
22 search of all Penn National's
23 non-electronically-stored policy documents.

24 Do you see that?

25 A. Yes, sir.

1 Q. And why is it that you cannot provide
2 an estimate of how much would be charged?

3 A. Because I haven't gone out to ask.

4 Q. And why did you not go out to ask?

5 A. Honestly, at the end of the day, I'm
6 actually shocked that the Court would want to do
7 something like that. I'm actually shocked that
8 there would be a request of that nature. We go by
9 policy number. That's what we go by. That's what
10 the industry goes by.

11 Now, if you ask me, we're going to do
12 this, then I will go out and get all the
13 information.

14 Q. How much time did you personally spend,
15 Mr. Reifsnyder, looking for responsive documents in
16 response to the motion to compel by the Court?

17 A. I have no idea.

18 Q. Would it be more than five minutes?

19 A. Oh, absolutely. But again, I have no
20 idea. I don't keep track of my time and how long
21 it takes me to go look for something.

22 Q. Well, the Court ordered Penn National
23 to do a search, and you've told us today on
24 numerous occasions that you can't do a search
25 unless you have the policy number.

1 MR. YNTEMA: Mr. Nes, just kind of a
2 procedural thing, I will probably need to have the
3 assistance of your paralegal to help me navigate
4 through some of the exhibits, if that's okay.

5 MR. NES: Sure. As long as they're
6 ones that I've marked, that's fine.

7 MR. YNTEMA: Yes, I'll just be using
8 the ones that you've marked.

9 EXAMINATION

10 BY MR. YNTEMA:

11 Q. For the record, this is Brady Yntema,
12 Mr. Reifsnyder. As you know, I represent Penn
13 National in this -- in this case. I have just a
14 couple of things I would like to -- to ask you with
15 respect to your testimony today.

16 There was a question that was asked to
17 you with respect to your affidavits as to whether
18 you drafted either or both of the two affidavits.

19 Did you actually draft those two
20 affidavits?

21 A. I did not write them, no.

22 Q. Right. But did you assist in the
23 drafting of the affidavits?

24 A. I assisted with that, yes.

25 Q. And how much time do you think it took

1 you to assist in -- in talking with counsel and --
2 and -- and helping and assisting in drafting the
3 affidavits?

4 A. Quite a number of hours, including a
5 lot of vacation time.

6 Q. Is there any way you can give me an
7 estimate? Would it have been over 40?

8 A. I would imagine so, yes, sir.

9 Q. With respect to the Court's order --

10 MR. YNTEMA: If I could have Exhibit 1,
11 the affidavit of Mr. Reifsnyder.

12 Okay. Don't have any control over. So
13 if you could scroll down to the next page, please.
14 Let's see. Just be patient with me. If you'd go
15 up. Stop right there, please.

16 Q. Mr. Reifsnyder, on the screen there is
17 Paragraph 4?

18 A. Yes, sir.

19 Q. And I'll read that again to you. It
20 says, I am aware of the Court's order on the
21 receiver or Covil Corporation's motion to compel
22 and supplemental motion to compel against Penn
23 National Mutual Casualty Insurance Company filed on
24 July 1, 2021, which ordered Penn National's
25 description of how it maintains its paper records,

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1 including physical locations where Penn National's
2 paper records are kept, the identities of the
3 persons responsible for those records, the years
4 and locations of the records maintained, the
5 categories of policies maintained, and the manner
6 in which those records are stored and organized.

7 Do you see that?

8 A. Yes, sir.

9 Q. And do you agree with that statement
10 today?

11 A. Yes, sir.

12 Q. And did you -- did you comply with that
13 order of the Court?

14 A. To the best of my ability, I believe I
15 did.

16 Q. And so that -- and how much time would
17 you have -- would you have taken in -- in
18 responding to that order of the Court, do you know?

19 A. I do not know.

20 Q. Would it have been more than 40 hours?

21 A. It may have been, yes.

22 MR. YNTEMA: Okay. If we could go to
23 Exhibit 3, ma'am. And I think I'm looking more
24 towards the front end of the document. Thank you.

25 Right -- yes.

EXHIBIT 4

Page 1

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

COVIL CORPORATION, by and through
its duly appointed Receiver Peter D.
Protopapas,
Plaintiff,

vs. CASE NO.: 2020-cp-40-02098

PENNSYLVANIA NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY;
SAM J. CRAIN & CO., INC.; and
SOUTH CAROLINA PROPERTY and
CASUALTY INSURANCE GUARANTY
ASSOCIATION,

Defendants.

VIDEOTAPED (Appearing via Video Conference)

30(b)(6) DEPOSITION

OF: PENNSYLVANIA NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY BY
BOYD WRIGHT

DATE: August 26, 2021

TIME: 10:04 a.m.

LOCATION: Goldberg Segalla
701 Green Valley Road
Greensboro, North Carolina

TAKEN BY: Counsel for Plaintiff

REPORTED BY: Mary K. Stepp, Court Reporter
(Appearing via Video Conference)

1 case a couple weeks ago, have you spoken with Mr.
2 Reifsnyder about any of the issues involving Covil?

3 A. No.

4 Q. You mentioned in preparing for your
5 deposition that you reviewed certain documents
6 produced by Covil's counsel.

7 Did you review any other documents, other
8 than the documents that were produced by Covil's
9 counsel, to prepare for your deposition today?

10 A. No.

11 Q. Other than what we've discussed so far,
12 which is reviewing documents and speaking with
13 counsel for Penn National, did you do anything else
14 to prepare for your deposition today?

15 A. Not that I can think of.

16 Q. About how much time would you say you
17 spent in total preparing for today's deposition,
18 between speaking with counsel and reviewing
19 documents?

20 A. Uhm, that was a big stack of documents.
21 I -- I don't know. Somewhere between 8 and 12 hours,
22 probably.

23 MR. NES: I'd like to pull up what will be
24 marked as Exhibit 1. This is the August 2nd, 2021
25 Deposition Notice for Penn National that was served

1 as a named or primary insured; is that correct?

2 A. Yes.

3 Q. And to date Penn National has not
4 identified any coverage where Covil is covered as an
5 additional insured, correct?

6 MR. YNTEMA: Object to the form. You can
7 answer.

8 THE WITNESS: Well, No. Because an
9 additional insured is not typically named in the
10 policy.

11 BY MR. NES:

12 Q. Let me rephrase that.

13 Has Penn National identified any policies
14 that identify anywhere in the policy that Covil is an
15 additional insured?

16 A. An additional insured is not typically
17 named in a policy, so the answer is no.

18 Q. What was the last policy that was
19 identified by Penn National, which -- in which Covil
20 was a named insured?

21 A. Without looking at the policy documents, I
22 don't know. The documents would -- would identify
23 that for us.

24 Q. You're aware that Penn National didn't
25 identify all the policies in which Covil was

1 terms of the initial policy documents that were
2 identified and produced, what was the difference in
3 the searches that were done to identify the initial
4 general liability policies versus the subsequently
5 produced policies?

6 A. Well, the initial subpoena that came from
7 the Finch plaintiff firm provided a coverage chart
8 that had been prepared and listed all of Covil's
9 general liability insurers, and included Penn
10 National's policy number. So we were able to locate
11 Covil's general liability coverage from that chart.

12 We also checked to see if there were any
13 years on either side of that, that there may have
14 been some continuation of coverage. There was not.
15 It was consistent with the chart that was provided.
16 But we still continued to search further to see if
17 there were any other policies issued to Covil.

18 Q. Let's turn back to Exhibit 1. I'd like to
19 look at topic number 3. Quote, "All certificates of
20 insurance or other documents evidencing any insurance
21 coverage that Penn National provided to Covil,
22 including any Certificates of Insurance or documents
23 that identify or concern the job sites and/or
24 facilities listed in the Receiver's subpoena to Penn
25 National served on February 8, 2021."

1 A. That's our -- that is how we locate things
2 initially. We require a policy number to search
3 further.

4 Q. So your initial search for the vast
5 majority of the contractors and job sites only
6 utilized the Policy Management System; is that
7 correct?

8 A. The search was conducted by name, because
9 that's all we were given. So we looked to see if we
10 have a name or corresponding or similar name. And if
11 we did, it will provide us a policy number. Which we
12 then ask our document custodian to research, and he
13 did.

14 Q. And if it did not have a hit on the name,
15 then there's no other search that you did
16 electronically for that particular contractor or job
17 site; is that right?

18 A. There's -- there's no other search
19 possible.

20 Q. And if the contractor or job site list
21 that you put into the PMS system provided a hit, if
22 it had a policy number, then you were able to go to a
23 second set of systems; is that right?

24 A. No. If it had a policy number, I would
25 contact the document custodian, provide him the

1 A. Yes, but none of those documents
2 are -- extend to the time parameters that were listed
3 in the Subpoena.

4 Q. And what is the time frame, where there
5 are certain documents that are only electronic
6 documents?

7 A. There was a transition for those, which I
8 believe started in the early 2000s.

9 Q. So if I understand correctly, starting in
10 the early 2000s, there may be documents that were
11 created and stored electronically that are not
12 archived in hard copy; is that correct?

13 A. No. Starting in the early 2000s, active
14 accounts were being transitioned over time to
15 electronic format. Historical records were never
16 taken and converted.

17 Q. Let's go back to the PMS system, the
18 Policy Management System. You mentioned earlier that
19 you can only search by named insured, first named
20 insured; is that right?

21 A. Correct.

22 Q. Is there any way to search the electronic
23 system for any additional insured?

24 A. No. You'd have to have a policy number,
25 you'd have to look in the policy documents to see if

1 there was any supplemental named insureds. But
2 additional insureds are not traditionally listed. We
3 use what's called an automatic additional insured
4 endorsement, which is not contained on these
5 policies, that would -- that would provide whether
6 someone was an additional insured or not.

7 Q. Do you know why the electronic Policy
8 Management System is set up, so that you cannot
9 search by any other supplemental named insured or
10 additional insured?

11 A. Insurance companies, and Penn National is
12 no exception, issue policy numbers for a very
13 specific reason. Name similarity, locations, and
14 other things vary. Policy number is like a Social
15 Security number. It's the identifier for that
16 particular insured.

17 We have the ability to look electronically
18 for a policy number or an insured name, but a policy
19 number is what we need in order to find a historical
20 document.

21 Q. Your PMS system has a field to search by
22 insured name, correct?

23 A. Correct.

24 Q. But there's no field to search for a
25 supplemental named insured, correct?

1 MR. YNTEMA: Mr. Nes, he wasn't finished
2 with his answer. I'm sorry.

3 MR. NES: I appreciate -- I appreciate
4 that. I'm not trying to interrupt. It is hard in
5 this remote format. So whenever he keeps going, I
6 just stop. Go ahead.

7 MR. YNTEMA: Mr. Nes, I appreciate that,
8 that being a difficulty. I just want to -- he was
9 continuing to talk, so I just wanted to remind you.
10 Thank you.

11 THE WITNESS: It could be that they are
12 listed in an endorsement schedule in a policy, but
13 that has not been a usual practice by Penn National.

14 Penn National issues an endorsement that
15 is called an automatic additional insured. And it's
16 driven by the language of that endorsement, which
17 references the construct -- specific construction
18 project needs to be named. It does not list the
19 project. It never has.

20 BY MR. NES:

21 Q. If a -- if an insured is listed by name on
22 the endorsement, as you just mentioned as a potential
23 example, if you put that insured's name into your PMS
24 search, will it identify that they are listed by
25 endorsement?

1 THE WITNESS: Endorsements for additional
2 insured coverage are provided by the agent. They are
3 typically job specific. And those types of documents
4 are, at least back in the day, back in the late '80s,
5 early '90s, additional insured endorsements were not
6 unheard of, but were very infrequent.

7 And as I mentioned, Penn National has
8 issued an endorsement that's called an automatic
9 additional insured endorsement that has no names on
10 it, and is driven by whatever documents are available
11 when a claim arises, which include the construction
12 contract. So there would be no name, additional
13 insured name in any policy documents, except under
14 some unusual circumstances.

15 But the system does not pick up those
16 additional insured names. They are not entered.
17 It's an endorsement for a short period of time during
18 a project. So they don't pay a premium, so they are
19 not placed by name when an endorsement is issued.

20 MR. NES: I'd like to look at the next
21 document we're going to have as an exhibit. This is
22 -- will be Exhibit 2, the June 11, 2021 Affidavit of
23 Boyd Wright.

24 (Exhibit No. 2 was marked for
25 identification.)

1 that was Mr. Reifsnyder; is that right?

2 A. Yes.

3 Q. Other than Mr. Reifsnyder, did you speak
4 with anybody else regarding the response to Covil's
5 document request or the subpoena?

6 A. I believe that I may have initially talked
7 to some clerical people, just to get an idea of how
8 much time they would anticipate trying to spend -- it
9 would take. And that was mainly to gauge for myself
10 the time parameters that I was going to need to do
11 whatever research was necessary on my end.

12 Q. What specific research were you having to
13 coordinate that you are referring to?

14 A. Well, I took the list to a couple clerical
15 people and just asked them how much time did they
16 think it would take them to research this. They
17 looked over the list. They told me it would probably
18 take them several hours, if not days. That was --
19 that did not include the job site list. I thanked
20 them. And so I started to schedule my time to
21 perform the search by name of every entity that was
22 listed.

23 I also searched for the defendants that
24 were in Finch that were not part of the list
25 provided. I also researched all the supps- --

1 supplemental named insureds on the Covil policy to
2 ensure that there wasn't another policy out there for
3 one of them.

4 Q. So in terms of the supplemental named
5 insureds on the Covil policy, did you identify any
6 policies or hits for those entities?

7 A. No.

8 Q. And so using the PMS system, if you used
9 any of those names, and that's all you had, you
10 wouldn't actually identify the Covil policy; is that
11 right?

12 A. No. What I typed -- most of those
13 entities are entitled Covil whatever. So if I type
14 in Covil, I'm going to get a hit, if there is
15 anything out there, on everything in that name. Name
16 similarities and so forth. I go to that -- that is
17 the same policy number we already have. The
18 supplemental named insureds aren't named. I go to
19 the policy number and, yes, it's the same policy
20 number we have with that endorsement that lists all
21 the supplemental names. But each of those entities
22 are not -- don't show up.

23 Q. You mentioned that --

24 A. For instance -- for instance, the insured
25 is Covil Corp. If I type in Covil, I'll get Covil

1 numbers; is that correct?

2 A. Yes. And that's what was necessary, in
3 order to pull the historical documents.

4 Q. With respect to the contractor lists and
5 job sites, did you speak with Mr. Reifsnyder
6 regarding searches for paper documents using those
7 two lists?

8 A. Yes. And he told me that unless I had a
9 policy number, he had no -- no ability to locate any
10 of those by name.

11 Q. Did you speak with Mr. Reifsnyder about
12 any alternative means of searching the paper records,
13 other than by policy number?

14 A. I've asked about that and he -- his only
15 means of searching is by policy number.

16 Q. Did you speak with Mr. Reifsnyder about
17 the potential of hiring an outside vendor to do
18 searches for Covil documents in the hard copy
19 documents?

20 A. No, I did not.

21 Q. Did you speak with Mr. Reifsnyder about
22 having additional resources from Penn National
23 coordinated to do a paper search in-house for Covil
24 documents?

25 MR. YNTEMA: Objection to form.

1 up the archived paper documents by policy number
2 only?

3 A. No.

4 Q. I'd like to look at paragraph 11. It
5 says, quote, "With respect to the Receiver's
6 Subpoena, upon receiving it, I personally initiated
7 Penn National's search for policy documents relating
8 to the contractors and facilities listed in the
9 Receiver's Subpoena."

10 Other than the electronic searches that
11 you described today and speaking with Mr. Reifsnyder,
12 did you do anything else to search for policy
13 documents relating to the contractors and facilities
14 listed in the Receiver's Subpoena?

15 A. We used the search methods that are
16 available to us and those are the only search methods
17 available.

18 Q. Well, I'm just making sure that I have
19 caught everything that you've done. And you said you
20 used the searches available. So I'll ask you again.
21 Other than the searches, the electronic searches and
22 the paper searches that you've described so far
23 today, are you aware of any other searches for policy
24 documents relating to the contractors and facilities
25 listed in the Receiver's Subpoena that we haven't

1 talked about?

2 MR. YNTEMA: Object to form.

3 THE WITNESS: No.

4 BY MR. NES:

5 Q. And the last sentence of paragraph 11 it
6 says, quote, "No other information was provided to
7 Penn National with respect to any relationship that
8 Covil had with respect to any of the contractors or
9 facilities or any potential policy numbers that Penn
10 National could use in conducting its search, in order
11 to respond to the Receiver's Subpoena," close quote.

12 Do you see that?

13 A. Yes.

14 Q. You're noting here in this sentence that
15 there was no information provided about a
16 relationship between Covil and the contractors or the
17 facilities. How would understanding the relationship
18 between Covil and the contractors and the facilities,
19 aid in the search for responsive documents?

20 A. Well, the documents requested information
21 on whether Covil was an additional insured under any
22 policy issued by Penn National. Our policies, when
23 we're dealing with additional insureds, typically use
24 an automatic additional insured endorsement. There
25 are no contractor names on it. That document, in

1 order to determine coverage, requires certain
2 conditions be met, which is that there needs to be a
3 written contract that identifies the job or site or
4 project that would allow us to then evaluate that
5 endorsement, and if coverage applies to that
6 particular project and/or contractor.

7 Therefore, without any other documents,
8 even if we found a policy that belonged to someone,
9 we would still not know what Covil's relationship was
10 to the entity that was listed in that list, if they
11 were required to provide additional insured coverage
12 to that individual or were afforded coverage under
13 that entity's policy.

14 Now, all the --

15 Q. And --

16 A. -- policies that we were able to identify
17 from that list, none of them contained additional
18 insured endorsement.

19 Q. I'd like to look at paragraph 12 of your
20 Affidavit. It says, quote, "I personally conducted
21 an electronic search as to each of the contractors,
22 facilities, and Finch defendants."

23 Do you see that?

24 A. Yes.

25 Q. Other than what we talked about today, did

1 you do anything else to conduct the electronic search
2 for the contractors, facilities or Finch defendants?

3 A. No.

4 Q. I'd like to turn to paragraph 16.
5 Paragraph 16 of your Affidavit on page 5 says, quote,
6 "After completing my electronic searches, I requested
7 Brent Reifsnyder, Director of Administrative
8 Services, to conduct a search of Penn National's
9 archived paper policy documents for the general
10 liability policies.

11 Mr. Reifsnyder is the Penn National
12 employee with the most knowledge regarding Penn
13 National's archived policy documents and the manner
14 for searching such documents."

15 Do you see that?

16 A. Yes.

17 Q. How many conversations do you recall
18 having with Mr. Reifsnyder regarding the search for
19 paper documents, after the Court issued its Motion to
20 Compel, which was on July 1st of this year?

21 MR. YNTEMA: Objection to form.

22 THE WITNESS: Off the top of my head, I
23 don't know. I know that I haven't talked to Brent
24 since his deposition was conducted. And for this
25 particular paragraph, I was able to come up with some

1 accounts from the list that had either the names
2 lined up, whether they were truly related to anything
3 to do with Covil was unknown, just a name similarity.
4 But because of the archive nature of some of those
5 documents, I asked Mr. Reifsnyder to provide that
6 material to me.

7 I know I did it once or twice. Maybe I
8 had two different -- two different lists. I don't
9 remember. But I do know that anything that I came up
10 with that was archived, I asked him to provide it to
11 me.

12 BY MR. NES:

13 Q. Did you provide Mr. Reifsnyder with a
14 complete copy of the contractor list and the job site
15 facilities' list that were in the Subpoena for him to
16 search?

17 A. No.

18 Q. I'd like to look at paragraph 19 of your
19 Affidavit. It says, quote, "During my research and
20 investigation for documents responsive to the
21 Receiver's Subpoena, I recorded the time I expended
22 in conducting such research and investigation, which
23 totaled 64 hours."

24 Do you see that?

25 A. Yes.

EXHIBIT 5



Brady A. Yntema | Partner
Direct 336.419.4904 | byntema@goldbergsegalla.com

July 9, 2021

VIA E-MAIL – mshisko@spartanlaw.com

Marghretta H. Shisko
Harrison | White PC
178 West Main Street
Spartanburg, South Carolina 29306

RE: *Finch v. United States Fidelity and Guaranty Company et al.*
Civil Action No. 2019-CP-40-03003 (S.C. Com. Pl., Richland Cty.)

Dear Marghretta:

Please find enclosed Affidavit of Brent Reithsnyder, pursuant to the Court's Order on the Receiver for Covil's Motion to Compel and Supplemental Motion to Compel against Pennsylvania National Mutual Casualty Insurance Company. Please do not hesitate to contact us to discuss this matter.

With best regards,

GOLDBERG SEGALLA, LLP

A handwritten signature in black ink, appearing to read 'BY' followed by a stylized flourish.

Brady A. Yntema
David G. Harris II

BY/jlc
Enclosure

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

1. I am over 18 years of age, of sound mind, and under no mental disability.
2. I am fully competent to make this declaration, and I make this declaration upon personal knowledge of the facts herein, and they are true and accurate.
3. I am currently, and was at all times relevant herein, employed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) as Director – Administrative Services, in which capacity I have been involved with Penn National’s investigation and search for the documents requested by the Subpoena *Duces Tecum* issued on February 8, 2021 on behalf of the Receiver for Covil Corporation in this action (“Receiver’s Subpoena”). Boyd Wright, Senior Home Office Claim Examiner

for Penn National, coordinated Penn National's investigation for the documents requested by the Receiver's Subpoena.

4. I am aware of the Court's Order on the Receiver for Covil Corporation's Motion to Compel and Supplemental Motion to Compel Against Pennsylvania National Mutual Casualty Insurance Company filed on July 1, 2021, which ordered Penn National's description of how it maintains its paper records, including physical locations where Penn National's paper records are kept, the identities of the person(s) responsible for those records, the years and locations of the records maintained, the categories of policies maintained, and the manner in which those records are stored and organized.

5. I am the person in charge of and responsible for records that are archived or otherwise stored for Penn National.

6. Penn National's archived non-electronically stored documents consist of (1) microfilm records, and (2) paper records.

7. Records on microfilm consist of records from the mid to late 1970's and were saved on microfilm up to various time periods depending on the category of coverage provided (as discussed below). The microfilm records are stored at Penn National's headquarters located at 2 North 2nd Street, Harrisburg, Pennsylvania, 17101.

8. Penn National's microfilm records are stored in boxes identified by box number. With respect to insurance policy documents, such documents are stored on microfilm within the microfilm boxes and are organized within each box by using a terminal digit system. The terminal digit system organizes each policy in a sequential order by the terminal number for each of the policies stored in the microfilm boxes. The terminal number of every policy stored consists of the final two digits of each policy. The policy number can be manually searched

within the microfilm boxes by first locating the terminal number. If there are other policies with the same terminal number, the policy documents are then stored in sequential order based on each digit that precedes the policy's terminal number.

9. For example, the insurance policy documents relating to Penn National's Comprehensive General Liability Policy for Covil Corporation, effective from March 31, 1986 to March 31, 1988, had policy number 515 50 28 53. The terminal number for this policy is 53. The policy was sequentially stored by its terminal number, and then was manually located by sequentially searching for each preceding policy digit until it was located. An example of the manner in which this policy was sequentially organized by the terminal digit system is illustrated by the photographs attached hereto as Exhibit A.

10. With respect to the documents stored on microfilm, Penn National maintains an electronic database that lists the policy numbers stored and the box in which the microfilm containing the policy documents can be located. This database is referred to as the 2K10 database. However, even if the policy number requested is not in the database, it is my practice to manually search the microfilm boxes based on the terminal digit number system to confirm whether the policy documents exist in Penn National's microfilm records.

11. Penn National's archived paper policy records are stored by Iron Mountain, an outside document and information storage company, at its facility located at 6 Lee Boulevard, Pennsylvania, 19355. The dates of the paper policy documents stored by Penn National depend on the category of the policy (as discussed below). Penn National's current contact at Iron Mountain is Matthew Fischer, Customer Development Executive.

12. Any paper policy documents stored at Iron Mountain's facility is stored by policy number in the same sequence as stored on Penn National's microfilm—the terminal digit system.

13. Penn National maintains a record of the paper policy documents stored at Iron Mountain's facility by policy number on the 2K10 database maintained by Penn National.

14. To obtain paper policy documents from the Iron Mountain facility, Penn National must submit a request to Iron Mountain (typically by electronic communication) with the specific policy number(s) requested. Any paper policy document(s) found by Iron Mountain are delivered by Iron Mountain to Penn National.

16. Policy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system.

17. Penn National initially implemented an electronic storage system referenced as ImageRight that began in 1992, but Penn National stopped using this version of the electronic storage system in 1995. The documents that were electronically stored during this period of time were eventually saved to the second electronic system that Penn National transitioned to beginning in 2003, which is also referenced as ImageRight.

18. The categories of policy documents stored by Penn National on microfilm or paper are separated and organized as follows:

a. Surety bonds – Surety bond documents are stored in paper form for documents dated prior to 2004, and surety bond documents dated 2004 or after are stored electronically.

b. Commercial Lines – Commercial line policies consist of workers compensation policies, inland marine policies, property policies, commercial general liability policies, automobile liability policies, and excess liability policies. Commercial line policies dated prior to 1992 are contained on microfilm. Commercial line policies dated between 1992 to 1995 were saved electronically. Commercial line policies dated between 1995 to 2003 were stored in paper

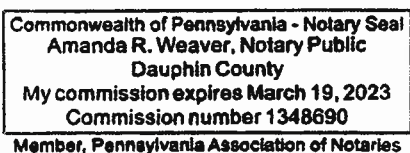
form at the Iron Mountain facility. When Penn National began to transition to its second electronic storage system beginning in 2003, some commercial policies dated after 2003 were still stored in paper form while others may have been stored electronically until the transition to full electronic storage was complete in 2005. Thereafter, all commercial policies dated after 2005 were stored electronically.

c. Personal Lines – Personal line policies dated prior to 10/1/2003 are stored on microfilm. Personal line policies dated after 10/1/2003 are stored electronically.

19. Penn National maintains a Document Retention Policy. With respect to workers compensation policy documents, such documents must be retained as follows: (1) for 25 years from cancellation or non-renew date if such date occurred prior to 3/18/1990; and (2) for 50 years from cancellation or non-renew date if such occurred on or after 3/18/1990. As for all other policy documents, all such documents must be retained for 25 years from cancellation or non-renew date.

20. The information and assertions contained in this Affidavit are based and made upon my own personal knowledge.

Further, the affiant sayeth not.




Brent Reifsnyder
Director - Administrative Services
Pennsylvania National Mutual Insurance Company

Sworn to and subscribed before me,
this the 9th day of July, 2021.


Notary Public

My commission expires: 3/19/23

EXHIBIT A



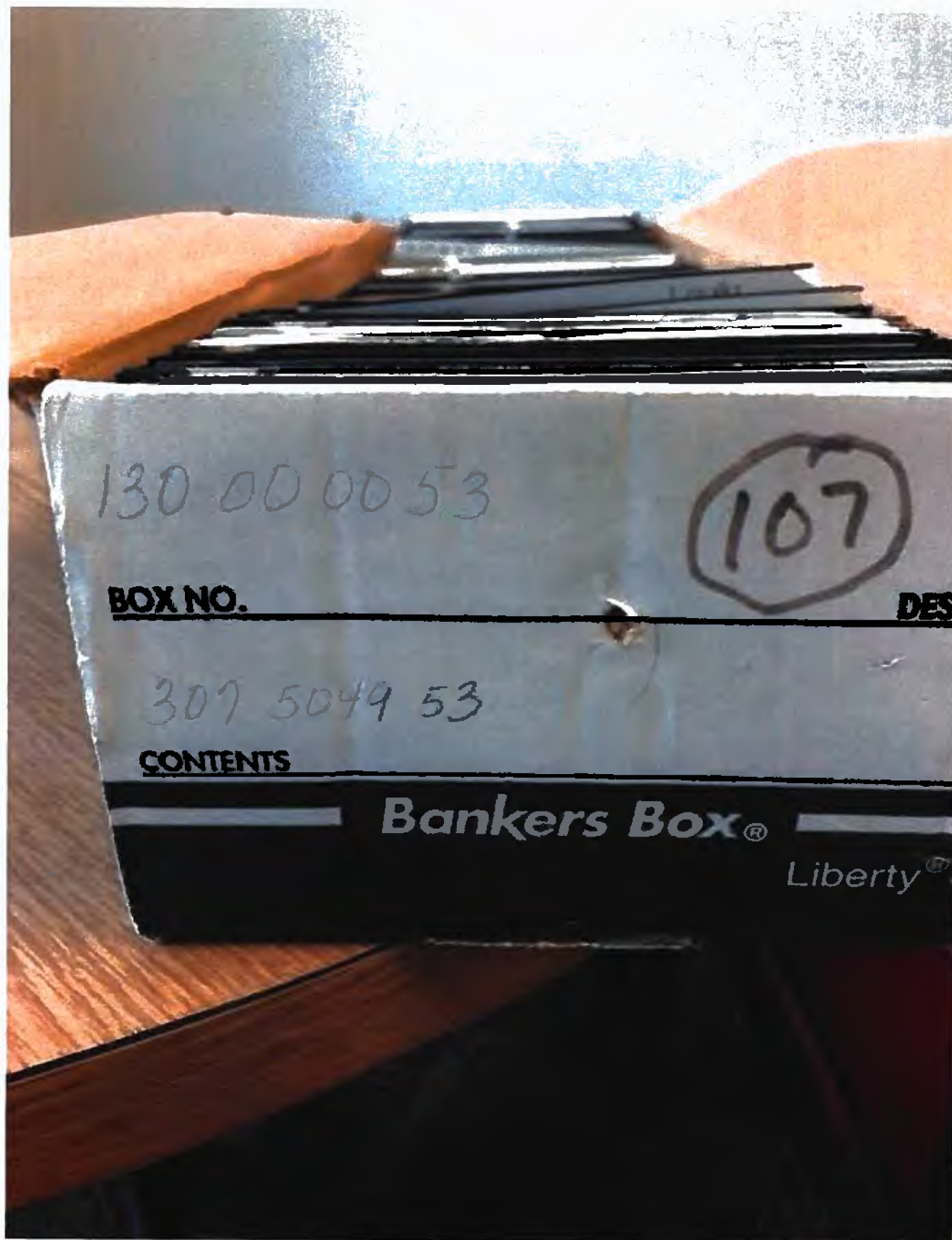


EXHIBIT 6

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Case Number: 2019-CP-40-03003

Ann Finch, Individually and as Executor)
of the Estate of Franklin Finch; Peter)
Protopapas as Court Appointed Receiver)
for Covil Corporation,)

Plaintiffs,)

v.)

Sentry Casualty Company, United States)
Fidelity & Guaranty Company, *et al.*,)

Defendant.)

**PENN NATIONAL’S SUPPLEMENTAL
OBJECTIONS AND RESPONSES
TO SUBPOENA *DUCES TECUM***

Pursuant to Rule 45(c)(1)(B) of the South Carolina Rules of Civil Procedure, Non-Party Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) provides the following supplemental objections and responses to the Subpoena *Duces Tecum* dated February 8, 2021 (the “Subpoena”), served upon it in the above-captioned civil action by counsel for Plaintiffs:

GENERAL OBJECTIONS

Penn National responds to each and every request subject to the General Objections set forth below. These limitations and objections form a part of the response to each and every request and are set forth to avoid the duplication and repetition of restating them for each response. Although these General Objections may be specifically referred to in a response to certain requests for the purpose of clarity, the failure to specifically incorporate a General Objection should not be construed as a waiver of these General Objections.

1. Penn National objects to each request to the extent that it is vague, ambiguous, cumulative, duplicative, overly broad, unduly burdensome or oppressive, or seeks information or documents that are not material and necessary to this action, or to the extent that it seeks documents or information beyond those permitted by the South Carolina Rules of Civil Procedure and to the extent it is not in accordance with the directive provided by Justice Jean H. Toal during the Court's January 25, 2021 hearing in this case. Specifically, while the Subpoena requests documents and/or records of Penn National for insurance policies for Covil Corporation that "identify" or "concern" over 900 "Contractors" and "Facilities", it does not provide (1) any specific time period for which it is seeking a search for such documents and/or records, (2) any information or documents that show Covil's connection or association with any of the Contractors listed, including whether each Contractor was a subcontractor for Covil, and the timeframe(s) that such relationship existed with Covil, (3) any information or documents that show Covil's connection or association with any of the Facilities listed, including the relationship that any of the identified Facilities had to any alleged asbestos exposure at issue in this case, or (4) any policy number, to the extent known to the Receiver, for any policy that may relate to Covil, or the Contractors and Facilities identified by the Subpoena. However, after the Subpoena was served, the undersigned counsel conferred with Plaintiffs' counsel who confirmed that Penn National's search should be limited to the time period of 1954 through 1993, and Plaintiffs' counsel stated that it had no policy numbers to provide to Penn National that would help it conduct a search for documents responsive to the Subpoena.

2. Based on the documents requested by the Subpoena, Penn National objects in that it does not appear that Plaintiffs have taken reasonable steps to avoid imposing undue burden or expense on Penn National, a non-party to this action, and Penn National preserves the right to seek

a protective order and request costs and reasonable attorney's fees incurred in responding to the Subpoena.

3. By objecting and/or responding to each request, Penn National does not in any way waive or intend to waive: (a) any objections as to the vagueness, ambiguity, or other immunity in the form of any request; (b) any objections based on the undue burden imposed by any request; (c) any objections to any further request involving or relating to the subject matter of the request; and (d) any privileges, rights, or immunity under the South Carolina Rules of Civil Procedure and/or other applicable laws.

4. No objection made, or lack of objection, is an admission by Penn National as to the existence or non-existence of any information or documents.

5. Penn National objects to each request to the extent it seeks confidential or proprietary business information, trade secrets, or other sensitive information.

6. Penn National objects to each request to the extent that it seeks documents that are not relevant to any party's claim or defense.

7. Penn National objects to each request to the extent that it seeks information that is privileged or otherwise protected from disclosure by the attorney/client privilege, the work product doctrine, or the joint defense or common interest doctrine.

8. Penn National objects on the ground that the Subpoena is procedurally defective for the additional reason that the Subpoena identifies a location for production that is inconvenient. To the extent that documents are produced, they will be produced at a reasonable location and in a manner that is agreeable to all involved entities.

9. Penn National objects that the Subpoena imposes undue burden and expense, because the scope of requested documents greatly exceeds what is potentially relevant in the case.

SPECIFIC SUPPLEMENTAL OBJECTIONS AND RESPONSES

Request #1

All insurance policies, of any type, that you issued to Covil Corporation or that include Covil Corporation as an additional insured, including policies that identify the [Contractors listed in Exhibit A attached to the Subpoena] as the named insured or as an additional insured:

In addition to the General Objections, Penn National objects to this Request on the following grounds:

a. Penn National objects to this Request on the basis that it asks Penn National to produce “all insurance policies, of any type that [Penn National] issued to Covil Corporation” for 250 Contractors for which the Subpoena fails to identify any relationship or association that each Contractor had with Covil Corporation (*i.e.* subcontractor) relevant to any subject claims in this action, or even that any relationship or association exists between Covil Corporation and such Contractors. Given the scope of the Subpoena and the lack of information provided to Penn National with respect to the Contractors, the Subpoena is not limited in any reasonable manner to avoid imposing undue burden or expense on Penn National.

b. Penn National further objects to this Request on the basis that it is overbroad, overly burdensome, and seeks documents and information not likely to lead to the discovery of admissible evidence, because the Request is not limited to the type of policies relevant to the claims and defenses in this action – liability policies – as opposed to other types of insurance.

c. Penn National objects to this Request to the extent it requests documents that are of a confidential or proprietary nature, including to the extent it requests documents containing confidential or proprietary information of Penn National and its insureds without a confidentiality agreement and protective order that would protect against disclosure of such documents or information related to such documents outside the necessary parties to this action.

Subject to, and without waiving these objections, Penn National has performed the necessary due diligence in researching this request, despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in searching its files, Penn National has not located any documents responsive to this request, with the exception of comprehensive general liability policies issued to Covil for the periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988, bearing policy number 515 50 28 53, which have previously been produced to the Plaintiffs.

Request #2

All certificates of insurance or other documents evidencing any insurance coverage that you provided to Covil Corporation, including certificates of insurance or documents that identify or concern the [Facilities listed in Exhibit A attached to the Subpoena].

In addition to the General Objections, Penn National objects to this Request on the following grounds:

a. Penn National objects to this Request on the basis that it asks Penn National to produce “all insurance policies, of any type that [Penn National] issued to Covil Corporation” for 250 Facilities for which the Subpoena fails to identify any relationship or association that each Facility had with Covil Corporation (*i.e.* subcontractor) relevant to any subject claims in this

action, or even that any relationship or association exists between Covil Corporation and such Facilities. Given the scope of the Subpoena and the lack of information provided to Penn National with respect to the Facilities, the Subpoena is not limited in any reasonable manner to avoid imposing undue burden or expense on Penn National.

b. Penn National objects to this Request on the basis that it is overbroad, overly burdensome, and seeks documents and information not likely to lead to the discovery of admissible evidence, because the Request is not limited to the type of policies relevant to the claims and defenses in this action – liability policies – as opposed to other types of insurance.

c. Penn National objects to this Request to the extent it requests documents that are of a confidential or proprietary nature, including to the extent it requests documents containing confidential or proprietary information of Penn National and its insureds without a confidentiality agreement and protective order that would protect against public disclosure of such documents or information related to such documents.

Subject to, and without waiving these objections, Penn National has performed the necessary due diligence in researching this request, despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in searching its files, Penn National has not located any documents responsive to this request, with the exception of comprehensive general liability policies issued to Covil for the periods of March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988, bearing policy number 515 50 28 53, which have previously been produced to the Plaintiffs.

Request #3

All documents that relate to the steps taken by you to locate information and documents responsive to these requests.

Penn National objects to this Request to the extent it requests documents protected by the attorney-client privilege and/or documents that are of a confidential or proprietary nature, which may include advice of Penn National's counsel.

Subject to, and without waiving these objections, Penn National has performed the necessary due diligence in researching the requests made by Plaintiffs' Subpoena, despite the immense amount of time needed to complete this task, and having exercised reasonable diligence in taking the steps necessary to locate information and documents responsive to these requests, Penn National identified insurance policies for certain "Contractors" listed in the Subpoena with the following policy periods: (1) 03/16/1992 to 11/01/1994; (2) 04/01/1992 to 04/01/1998; and (3) 04/01/1991 to 04/01/1992. Attached to these responses is redacted communication relating to Penn National's research of such policies. In researching such policies, there was no information or any document obtained that indicated such policies provided coverage for Covil Corporation as an additional insured or otherwise, and nor was there any indication that Covil Corporation had any relationship to the policies or to the respective insureds of such policies. While Penn National identified these policies during its research, such policies and documents relating to the policies are not relevant to this action because such policies do not provide coverage to Covil Corporation, and are confidential and proprietary in nature as to Penn National and the insureds covered by such policies. To the extent these policies and any relating documentation is deemed discoverable, Penn National requests that such policies and documentation be produced

only pursuant to a protective order of the Court limiting the production to be made in a confidential manner only to the Receiver and his legal counsel in this case.

This the 9TH day of March, 2021.

/s/ David G. Harris

David G. Harris II (S.C. State Bar # 101951)

Email: dharris@goldbergsegalla.com

Brady A. Yntema (N.C. State Bar #: 25771)

Email: byntema@goldbergsegalla.com

GOLDBERG SEGALLA LLP

701 Green Valley Road, Suite 310

Greensboro, NC 27408

Phone: 336.419.4900

Fax: 336.419.4950

Attorneys for Non-Party Penn National

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Penn National's Supplemental Objections and Responses to Subpoena *Duces Tecum* was duly served on the parties by mailing a copy of said document in an envelope with proper postage attached and deposited in an official depository under the exclusive care and custody of the U.S. Post Office Department as follows:

Marghretta H. Shisko
Harrison White, PC
P.O. Box 3547
Spartanburg, SC 29304
mshisko@spartanlaw.com

AND VIA EMAIL ONLY TO THE FOLLOWING COUNSEL OF RECORD:

Benjamin C. Bruner - bbruner@brunerpowell.com
Beverly A. Carroll - bev.carroll@mortongettys.com
Matthew Todd Carroll - todd.carroll@wbd-us.com
Chelsea Jaqueline Clark - cclark@brunerpowell.com
William Pearce Davis - wdavis@brblegal.com
Susan Drake DuBose - sdubose@brblegal.com
Peter H. Dworjanyn - pdworjanyn@ogc.sc.gov
Elizabeth Van Doren Gray - egray@robinsongray.com
Mark Weston Hardee - mwhardee@bellsouth.net
Jonathan Marshall Holder - jholder@dobslegal.com
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Jescelyn Tillman Spitz - jspitz@rplegalgroup.com
William Taylor Stanley - tstanley@turnerpadget.com
Vordman Carlisle Traywick III - ltraywick@robinsongray.com
John Belton White, Jr. - jwhite@spartanlaw.com
John S. Wilkerson III - jwilkerson@turnerpadget.com

This the 9TH day of March, 2021.

/s/ David G. Harris

David G. Harris II (S.C. State Bar # 101951)

Email: dharris@goldbergsegalla.com

Brady A. Yntema (N.C. State Bar #: 25771)

Email: byntema@goldbergsegalla.com

GOLDBERG SEGALLA LLP

701 Green Valley Road, Suite 310

Greensboro, NC 27408

Phone: 336.419.4900

Fax: 336.419.4950

Attorneys for Non-Party Penn National

Carter, Jane

To: Carter, Jane
Subject: RE: 089 52036 Covil Corp.

From: Reifsnyder, Brent <breifsnyder@pnat.com>
Sent: Wednesday, March 3, 2021 10:29 AM
To: Wright, Boyd <bwright@pnat.com>
Subject: RE: 089 52036 Covil Corp.

No Problem. I have also attached the paper policy file. Please pardon the last attachment, it was a mix of single and 2 sided paperwork in various arrangements. The 2nd attachment was part of the dec pages with the first attachment.

Have a great day.

Brent

From: Wright, Boyd <bwright@pnat.com>
Sent: Wednesday, March 3, 2021 10:21 AM
To: Reifsnyder, Brent <breifsnyder@pnat.com>
Subject: RE: 089 52036 Covil Corp.

Thanks! I appreciate the quick turnaround and the notations on purged documents. This really helps us greatly!

From: Reifsnyder, Brent <breifsnyder@pnat.com>
Sent: Wednesday, March 3, 2021 8:11 AM
To: Wright, Boyd <bwright@pnat.com>
Subject: RE: 089 52036 Covil Corp.

Boyd

Please note the following below.

Let me know if you have questions.

Have a wonderful day.

Brent

From: Wright, Boyd <bwright@pnat.com>
Sent: Tuesday, March 2, 2021 3:54 PM
To: Reifsnyder, Brent <breifsnyder@pnat.com>
Subject: 089 52036 Covil Corp.

Brent,

We are in the midst of answering a subpoena issued to Penn National on this case. We need to review the following underwriting files. Can you provide copies of the available documents, as follows?

██████████ - Period 03/16/1992 to 11/01/1994 ██████████ - These materials were purged. Their cancel/non-renew date was 11/1/1994 and had a 25 year retention. The purge date was 11/1/2019. These records have been destroyed in accordance with LE-0004.

██████████ - Period 04/01/1992 to 04/01/1998 ██████████ - The first attached is for 1992-1996. We have 1 paper file we are pulling. The copy of the paper file will be sent separately to you via email.

██████████ - Period 04/01/1991 to 04/01/1992 ██████████ - This is the 2nd attachment. It is not for the period however and this is all I have.

Thanks,

Boyd

Boyd Wright
CPCU, ARM-P, AIC, AMIM
Senior Home Office Claim Examiner
Penn National Insurance
P.O. Box 1961
Harrisburg, PA 17105

800-877-7366 ext 4297
866-496-4764 fax



PERSONAL & CONFIDENTIAL. THE E-MAIL MESSAGE (INCLUDING ANY ATTACHMENTS) FROM THIS SENDER IS FOR THE SOLE USE OF THE INTENDED RECIPIENT(S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, UNAUTHORIZED REVIEW, USE OR DISCLOSURE OF THIS E-MAIL IS PROHIBITED.

IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US, BY CONTACTING POSTMASTER@PNAT.COM, RETURNING THE ORIGINAL MESSAGE TO THE SENDER AND DELETING ANY COPIES FROM YOUR SYSTEM. THANK YOU.

Scanned by the Clearswift SECURE Email Gateway.



December 7, 2021

VIA E-MAIL AND FEDEX

Honorable Jean H. Toal
c/o Maya J. Weeks, M.A., J.D. (Circuit Court Law Clerk)
(mweeks@sccourts.org)
South Carolina Judicial Branch
1220 Senate Street, Suite 221
Columbia, SC 29201

RE: ***Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas v. Pennsylvania National Mutual Casualty Co., et al.***
Court of Common Pleas; County of Richland;
Case No. 2020-CP-40-02098

**INTERIM REPORT REGARDING PROGRESS OF DOCUMENT
SAMPLING/REVIEW OF PENN NATIONAL'S INSURANCE
POLICY RELATED DOCUMENTS, PURSUANT TO THE
NOVEMBER 5, 2021 ORDER OF THE COURT**

Dear Chief Justice Toal:

This is to provide you with an interim report providing a status of the efforts of Penn National to facilitate Ellis & Winters, LLP's review of Penn National's policy related documents as ordered by the Court in its Discovery Order Granting Covil Corporation's Motions to Compel Penn National filed on November 5, 2021 ("Order"). Below is a bullet point summary of the current status of such search.

- On November 9, 2021, Ellis & Winters, LLP ("Ellis & Winters") requested certain documents of record, hearing and deposition transcripts, and insurance policy documents previously produced by Penn National. These documents were provided by counsel for Penn National on November 12, 2021.
- After reviewing the initial set of documents provided to Ellis & Winters, Penn National coordinated a telephone conference with Ellis & Winters, Receiver's counsel, Penn National's counsel, and Penn National's Records Custodian (Brent Reifsnyder), which was conducted on November 19, 2021. The purpose of the telephone conference was to allow Ellis & Winters to have open discussion with Mr. Reifsnyder regarding Penn National's repository of microfiche and paper policy related documents, and to answer any questions Ellis & Winters may have with respect to Penn National's storage of such documents.

Please send mail to our scanning center at: PO Box 727, Buffalo, NY 14201

Honorable Jean H. Toal

December 7, 2021

Page 2 of 3

- Following the November 19, 2021 telephone conference, Ellis & Winters communicated with counsel for Penn National with respect to further questions it had regarding specific estimates of the number of individual files/cards of microfiche contained in Penn National's on-site storage, the number of boxes held at Penn National's off-site storage facility (Iron Mountain), including the specific number of boxes that contain commercial lines policy related documents, and the total number of file/images that are contained within Penn National's 1992-1995 electronic image system that may have been imported into Penn National's current electronic image system. Penn National provided Ellis & Winters with this information by December 3, 2021.
- Ellis & Winters has further requested (1) information regarding the format of how the images were stored on the microfiche, and the number of images that were stored on a single microfiche card, and (2) photographs of a sampling of the microfiche stored by Penn National. Penn National provided Ellis & Winters with the requested information and photographs by December 3, 2021.
- Based on the information currently provided to Ellis & Winters, it has requested two vendors to provide different hypotheticals that Ellis & Winters can consider to best assist it in its sampling/review of Penn National's microfiche.
- At the request of Ellis & Winters, Penn National is currently investigating potential underlying data that may support its electronic retention schedule, which may be provided to Ellis & Winters to coordinate its review/sampling of microfiche and paper policy related documents.
- Ellis & Winters also requested a "key" that was referenced by Penn National's Records Custodian that may exist to help read and associate Penn National's policy numbers with a particular line of coverage. The Records Custodian returned from vacation on December 7, 2021, and will be able to assist in locating and producing the "key" to the extent it indeed exists.
- Ellis & Winters and Penn National are currently coordinating an in-person meeting at Penn National's headquarters in Harrisburg, Pennsylvania, during the week of December 13, 2021, to allow Ellis & Winters to conduct a "hands-on" sampling/review of Penn National's microfiche and paper policy related documents, and to further discuss Penn National's storage of such documents, which will better assist Ellis & Winters in achieving its responsibilities under the Court's Order. The actual date(s) of this in-person visit is contingent on when Iron Mountain can deliver boxes of paper documents to Penn National's headquarters.

Ellis & Winters and counsel for Penn National have had open communication with respect to the facilitation and coordination of Ellis & Winters' document review/sampling to comply with the Court's Order. Ellis & Winters has reviewed this Interim Report. A second

Honorable Jean H. Toal

December 7, 2021

Page 3 of 3

interim report will be provided to the Court on or before January 7, 2022, unless the parties receive a different request from the Court.

With best regards,

Sincerely,

GOLDBERG SEGALLA, LLP

/s/ Brady A. Yntema

/s/ David G. Harris II

cc: Ellis & Winters (Ashley Brathwaite) – via e-mail
Plaintiff's counsel (Brad Nes, Brady Edwards) – via e-mail

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

**RECEIVER FOR COVIL
CORPORATION'S NOTICE OF
MOTION AND MOTION FOR
PROTECTIVE ORDER**

Peter D. Protopapas, as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel, files this Motion for Protective Order to prevent the further destruction of policy-related documents in the possession, custody or control of Pennsylvania National Mutual Casualty Insurance Co. ("Penn National"). Penn National has violated its document preservation duties by continuing to destroy, discard, or otherwise purge its policy-related records without reviewing them first, even though this Court has repeatedly ordered these records to be searched. The Receiver therefore requests an order requiring Penn National to immediately cease destroying, discarding, overriding and/or purging any of its historic insurance-policy-related documentation and to preserve all potentially relevant evidence for the review ordered by this Court.

BACKGROUND

It has been nearly *three years* since Penn National was first put on notice that Covil had been named as a defendant in asbestos litigation. Since that time, either the asbestos claimants or the Receiver have sought discovery of Covil's insurance policies and policy-related documentation from Penn National, including documents reflecting coverage for Covil as either a named or

additional insured under historic policies issued by Penn National. *See, e.g.*, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003. Time and again, Penn National has defied its obligations to meaningfully participate in discovery—even under orders by this Court. The Receiver is once again forced to request this Court’s intervention to require Penn National to comply with its discovery obligations.

A brief summary follows:

On January 15, 2021, the Receiver moved to compel Penn National “to perform a complete search of its records relating to insurance policies covering Covil, including but not limited to insurance policies covering Covil as an ‘additional insured.’” Jan. 15, Motion to Compel Penn National at 4, C.A. No. 2019-CP-40-03003. In response, Penn National argued that it could not search for such policies unless it had “the name of the entity or the entity’s policy number that listed Covil as an insured.” Jan. 26, 2021 Response to Motion to Compel at 7–8, C.A. No. 2019-CP-40-03003. At a hearing, the Court attempted to reduce the burden on Penn National by having the Receiver provide Penn National lists of potential job sites, owners, and contractors to facilitate its search. *See* Jan. 25, 2021 Hr’g Tr. at 138–42, C.A. No. 2019-CP-40-03003. The Receiver timely provided this list to Penn National. However, based on Penn National’s woefully deficient response, the Receiver was forced to file a supplemental motion to compel on April 22, 2021.

Nearly two months after that motion—and nearly *three years* after Penn National was put on notice that Covil had been named as a defendant in asbestos litigation—Penn National *in another case* produced copies of never-before-disclosed insurance policies it issued to Covil, despite having failed to identify those policies in its prior discovery responses and despite claiming to have exercised reasonable diligence in responding to the Receiver’s requests. The Court granted Covil’s motion to compel on July 1, 2021, specifically ordering Penn National to “thoroughly

search its paper records using the list of contractors and facilities provided by the Receiver” by July 23, 2021. July 1, 2021 Order on Motions to Compel at 6. The Court further noted that it was “not satisfied that Penn National is only able to search its paper records by policy number.” *Id.*

One month later, the Receiver was forced to file another motion after becoming aware that Penn National’s records custodian, Brent Reifsynder, spent ***less than five minutes*** trying to locate documents responsive to the Court’s order. See August 20, 2021 Notice of Motion and Motion to Compel, C.A. No. 2020-CP-40-02098.

The Receiver was forced to file yet another motion in September 2021 after Penn National reiterated its position that “[y]ou’d have to have a policy number” to perform an electronic search for policies covering Covil as an additional insured, and that it had not performed a physical search of its paper records despite the Court’s July 1, 2021 Order. See Sept. 8, 2021 Notice of Second Supplemental Motion to Compel and Motion for Sanctions, C.A. No. 2020-CP-40-02098.

The Receiver filed a third motion to compel on October 5, 2021, after it became clear that Penn National still had no intention of performing the searched ordered by this Court. See October 5, 2021 Notice of Third Supplemental Motion to Compel, C.A. No. 2020-CP-40-02098. To bypass Penn National’s obstructionism, the Receiver requested an order requiring Penn National “to open its repository to its coverage counsel, Goldberg Segalla, and Covil’s defense counsel, Ellis & Winters LLP, for their review[.]” *Id.* at 4. The Court granted the Receiver’s motion on November 5, 2021.

Therefore, in two hearings and two written orders over the span of nearly a year, the Court has given Penn National clear and specific instructions to search or produce its historic policy archives in response to the Receiver’s requests. Penn National is well aware of its obligations to preserve and produce its documents, and it has no excuse for further noncompliance.

Nevertheless, it has come to light that Penn National continues to brazenly defy its discovery duties. On November 19, 2021, the parties held a telephone conference to discuss Penn National's policy search efforts. During that call, Penn National's records custodian, Brent Reifsnyder, admitted when questioned that Penn National is regularly destroying or otherwise purging historic policy-related documents—and has continued to do so since this Court's November 5, 2021 Order. This routine purge includes destroying files in its repository of microfiche and paper policy documents without reviewing any of those documents to determine whether Covil is listed as an additional insured on those policies or whether the information is otherwise responsive to the sampling and review ordered by this Court.

Immediately upon the conclusion of the Parties' November 19, 2021 conference call, the Receiver prepared and served on Penn National a set of document requests seeking the litigation hold notices, if any, that Penn National issued related to the Covil litigation as well as all correspondence regarding such litigation holds. Exhibit A. The Receiver also served a Rule 30(b)(6) deposition notice seeking information regarding the steps taken, if any, by Penn National to preserve information and documents related to the Covil litigation. Exhibit B. The Receiver has noticed the deposition for December 29, 2021. To date, Penn National has not responded to either the document requests or the deposition notice.

ARGUMENT

Penn National must immediately cease destroying, discarding, overriding and/or purging any of its historic insurance-policy-related documentation and to preserve all potentially relevant evidence for the review ordered by this Court.

It is axiomatic that a party has a duty to preserve evidence during litigation and at any time “before the litigation when a party reasonably should know that the evidence may be relevant to

anticipated litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). Penn National has been on notice of asbestos claims against Covil since at least 2018. *See, e.g.*, July 1, 2021 Order on Motions to Compel at 4, C.A. No. 2019-CP-40-03003. In litigation against Penn National, the Receiver has specifically sought historical policy documents reflecting “additional insured” coverage for Covil for over a year. This Court has repeatedly ordered Penn National to search or open its archives to facilitate the discovery of documents responsive to the Receiver’s requests. It is therefore beyond dispute that Penn National is under a duty to preserve evidence relevant to this litigation.

Nevertheless, without informing the Receiver or Covil’s asbestos defense counsel, Penn National has continued to routinely destroy, discard, overwrite, or otherwise purge its historic policy archives without any inspection to determine whether the purged records reflect coverage for Covil or are otherwise responsive to the Receiver’s discovery requests. While the Receiver seeks additional discovery from Penn National to ascertain the impact of this purge on this litigation, Penn National’s apparent defiance of its duty to preserve evidence requires intervention from this Court.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court order Penn National to immediately cease destroying, discarding, overriding and/or purging any of its historic insurance policies and insurance-policy-related documentation, including but not limited to halting all auto-delete features within the company’s email systems as well as its electronic and hard copy storage systems and to preserve all potentially relevant evidence for Ellis & Winters’ sampling and review. Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel for Covil certifies that

Covil's counsel had discussions with counsel for Penn National but were unable to resolve the matters contained herein and further consultation would serve no useful purpose.

Respectfully submitted,

/s/ Jonathan M. Robinson

G. Murrell Smith, Jr. (S.C. Bar No. 66263)

Jonathan M. Robinson (S.C. Bar No. 68285)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, 3rd Floor

Columbia, SC 29205

Phone: (803) 254-5445

Counsel for the Receiver for Covil Corporation

This 10th day of December, 2021.

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Vs.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

Case Number: 2020-CP-40-02098

**RECEIVER FOR COVIL
CORPORATION
SECOND SET OF REQUESTS FOR
PRODUCTION TO DEFENDANT
PENNSYLVANIA NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY**

**TO: PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
VIA DAVID HARRIS AND BRADY YNTEMA, ATTORNEYS:**

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, The Receiver for Covil Corporation hereby propounds and serves the following written Requests for Production upon **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE CO.**, each to be answered separately, in writing and under oath, within thirty (30) days from the date of the service hereof and served upon the undersigned.

DEFINITIONS AND INSTRUCTIONS

“Documents” means all email correspondence and all written or printed matter of any kind, including all the originals and all non-identical copies, different from the originals by reason of any notation made on such copies or otherwise including, but not limited to, any correspondence, memoranda, notes, diaries, statistics, letters, telegrams, telexes, teletypes, telefax, telecopies, minutes, agendas, contracts, reports, studies, surveys, statements, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers, notations of

any sort of conversations, including telephone conversations and meetings, bulletins, computer printouts and records, mobile telephone and cell phone bills and statements, invoices, worksheets, accountant notes, work papers and all drafts, alterations, modifications, changes and amendments of any kind and, in addition thereto, any graphic or manual records, or representations of any kind including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tape, records, and motion pictures, and electronic or mechanical records or representations of any kind, including without limitation, tapes, cassettes, discs, and recordings or the hard copies thereof or other data compilations, whether preserved by magnetic transcription on hard drives, disks, etc. or otherwise. If such documents consist of other data compilation they shall be translated into a reasonably usable form through appropriate detection devices.

“All Documents” means every document as defined above, which is in your possession, custody or control and includes documents which are not in your possession, custody, or control, which are known to you and which can be located or discovered by reasonably diligent efforts.

“Including” means including but not by way of limitation.

“Related”, “relates”, or “relating to” means constituting, comprising, evidencing, containing, setting forth, showing, disclosing, describing, explaining, summarizing, concerning, or referring to, directly or indirectly.

“You” or “your” means the **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY**, any of its affiliates or subsidiaries, responding to this discovery request and any and all agents, attorneys, successors, or assigns or any person acting on behalf of such Defendant.

“Covil Corporation means the Plaintiff as identified in the caption as Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas.

The terms “and” and “or” shall be interpreted conjunctively and shall not be interpreted to exclude information otherwise within the scope of the request.

“Identify”, “identification”, or to “give the identity of” means:

- a. In the case of an individual to state his or her name, present or last known residence, present or last known telephone numbers (including home, work, and cell numbers when known), business affiliates, business address, job description, and, if different from the latter, the last position held and, if applicable, the date the individual was last employed by you.
- b. In the case of a document, whether or not such document is deemed to be privileged, objectionable, or subject to any claims of privilege, to provide the following information:
 - i. the title or other means of identification of each such document;
 - ii. the subject matter of each such document;
 - iii. the date each such document was prepared;
 - iv. the identity of the person or persons who prepared each such document;
 - v. the identity of the person or persons receiving the document or for whom such document was prepared as well as the identity of each person receiving copies of said documents;
 - vi. the present location of any and all copies of each such document in your possession, custody, or control;
 - vii. whether you claim any privilege or other reason for non-production with respect to each such document or copies thereof, and, if so, the factual and legal basis for the alleged privilege or non-production. In lieu of the foregoing, a copy of each such document may be supplied but said copy must indicate to which interrogatory it relates.
- c. If any requested document existed at one time and was in your possession, custody, or control, but has been lost, discarded or destroyed, or removed from your possession, custody or control, indicate for each such document:
 - i. the identity of the document and a description of its contents indicating its date, title and type of document;
 - ii. when the document was most recently in your possession, custody or control and what disposition was made of it;
 - iii. the identity of any person which currently possesses the document;

- iv. a statement indicating whether the document was transferred or destroyed. State the person who transferred or destroyed the document and the person who authorized its transfer or destruction or who knows of its transfer or destruction. State the reason why the document was transferred or destroyed, and
- v. the identities of all persons having knowledge of the contents of each document.

“Covil Litigation” means individually or collectively the *Covil Corporation v. Penn National* matters ending in 1226 and 2098 as well as the subpoenas served on Penn National in the *Hopper, Pavlish*, and *Finch* matters related to Covil Corporation.

REQUESTS FOR PRODUCTION

1. All litigation hold notices that YOU issued related to the Covil Litigation.
2. All correspondence regarding the litigation hold notices that YOU issued related to the Covil Litigation.

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn T. Spitz
Rikard & Protopapas, LLC
2110 N Beltline Blvd.
Columbia, SC 29204
803.978.6111
Jspitz@rplegalgroup.com

This 19th Day of November, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

CERTIFICATE OF SERVICE

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

I, Lindsay H. Valek, paralegal to Rikard & Protopapas, LLC, certify that I have served the
foregoing **RECEIVER FOR COVIL CORPORATION SECOND REQUESTS FOR
PRODUCTION TO PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE
COMPANY** upon the following counsel of record at the following addresses via email only
pursuant to ongoing COVID-19 protocols:

Davis Harris dharris@goldbergsegalla.com
Brady Yntema byntema@goldbergsegalla.com
Alexander Davis aedavis@goldbergsegalla.com

s/ Lindsay H. Valek

This 19th Day of November, 2021

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Vs.

Pennsylvania National Mutual Casualty Insurance
Co.; Sam J. Crain & Co., Inc.; and South Carolina
Property and Casualty Insurance Guaranty
Association,

Defendants.

Case Number: 2020-CP-40-02098

**RECEIVER FOR COVIL
CORPORATION
NOTICE OF VIDEOTAPED
DEPOSITION PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY PURSUANT
TO SOUTH CAROLINA RULE OF
CIVIL PROCEDURE 30(b)(6)**

**TO: PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
VIA DAVID HARRIS AND BRADY YNTEMA, ATTORNEYS:**

YOU WILL PLEASE TAKE NOTICE that on **December 29, 2021 at 10:00 a.m. and continuing day to day until completed**, at the offices of Rikard & Protopapas, LLC at 2110 N. Beltline Blvd. Columbia, SC 29201 the attorneys for the Receiver for Covil Corporation (hereinafter "Covil"), will take the deposition of **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY** (hereinafter "Penn National," "you," or "your"), on oral examination, pursuant to the South Carolina Rules of Civil Procedure, Rule 30, before a Notary Public or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. The individual or individuals representing Penn National should be the **person or persons most knowledgeable concerning the subjects of examination listed below.**

DEFINITIONS

1. The terms “Penn National,” “your,” or “your,” are defined to mean Pennsylvania National Mutual Casualty Insurance company, including its predecessors, parents, subsidiaries, and affiliate companies.

TOPICS

1. All litigation hold notices that YOU issued related to the Covil Litigation, including but not limited to the existence, contents, recipients and timing of any litigation holds.
2. All steps taken by YOU to preserve information and documents after any litigation hold notice was issued related to the Covil Litigation.
3. All automatic, routine, or otherwise systematic destruction or purging of YOUR insurance policy information, including but not limited to YOUR insurance policies, which has taken place since June 2018.
4. All correspondence regarding the litigation hold notices that YOU issued related to the Covil Litigation.
5. How YOUR litigation hold notices were implemented with respect to the Covil Litigation.
6. Identification of all insurance policies in Penn National’s possession, custody or control that have been destroyed, purged, or otherwise not retained since June 2018.
7. All steps taken to suspend or modify YOUR document retention or destruction policy in response to the Covil Litigation.
8. All steps taken to suspend or modify YOUR document retention or destruction policy in response to any and all orders issued by Chief Justice (ret.) Jean Hoefer Toal related to the Covil Litigation.

9. All steps taken by YOU to review documents subject to YOUR document retention or destruction policy for information related to the Covil Litigation prior to destruction.

PLEASE TAKE FURTHER NOTICE that:

1. The deposition will be conducted remotely, using audio-visual conference technology;
2. The court reporter will report the deposition from a location separate from the witness;
3. Counsel for the parties and their clients will be participating from various, separate locations;
4. The Court Reporter will administer the oath to the witness(es) remotely;
5. The witness(es) will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on camera;
6. All exhibits will be provided simultaneously and electronically to the witness(es) and all participants; and,

Counsel for all parties will be requested to stipulate on the record their consent to this manner of deposition and waive any objection thereto.

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn T. Spitz
Rikard & Protopapas, LLC
2110 N Beltline Blvd.
Columbia, SC 29204
803.978.6111
Jspitz@rplegalgroup.com

This 19th Day of November, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

CERTIFICATE OF SERVICE

Pennsylvania National Mutual Casualty Insurance
Co.; Sam J. Crain & Co., Inc.; and South Carolina
Property and Casualty Insurance Guaranty
Association,

Defendants.

I, Lindsay H. Valek, paralegal to Rikard & Protopapas, LLC, certify that I have served the
foregoing **RECEIVER FOR COVIL CORPORATION NOTICE OF VIDEOTAPED
DEPOSITION PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE
COMPANY TO SOUTH CAROLINA RULE OF CIVIL PROCEDURE 30(b)(6)** upon the
following counsel of record at the following addresses via email only pursuant to ongoing COVID-
19 protocols:

Davis Harris dharris@goldbergsegalla.com
Brady Yntema byntema@goldbergsegalla.com
Alexander Davis aedavis@goldbergsegalla.com

s/ Lindsay H. Valek

This 19th Day of November, 2021

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through its
duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY'S
RESPONSE TO PLAINTIFF'S
MOTION FOR PROTECTIVE
ORDER**

COMES NOW Pennsylvania National Mutual Casualty Insurance Company ("Penn National") and hereby respectfully submits this memorandum in response to Receiver for Covil's Motion for Protective Order ("Motion"). For the reasons set forth herein, Penn National respectfully asserts that this Motion is unnecessary, as the alleged conduct is not occurring. However, to the extent the Court and/or the Receiver for Covil ("Receiver") desire, Penn National is more than willing to consent to a continued hold on the purging of any policy-related documents currently in its possession while defense counsel for Covil Corporation ("Covil"), Ellis & Winters, LLP ("Ellis & Winters"), reviews the records in question pursuant to the Court's November 5, 2021 order. Indeed, Penn National has already taken steps to ensure such retention.

FACTUAL BACKGROUND

While a detailed recitation of the facts and procedural history of this case is unnecessary and duplicative based on the numerous prior filings in this action, Penn National would briefly

address one of the alleged “facts” set forth in the Receiver’s Motion. The Receiver repeatedly asserts misleadingly¹ that the issues relating to coverage that are the basis of its Motion have been ongoing for “three years.” In reality, the Motion relates exclusively to the Receiver’s recent demands that Penn National review *all policies in its possession* for entities and sites on a list first provided to Penn National by the Receiver *in 2021*.

Importantly, during the pendency of the discovery dispute relating to the Receiver’s broad request to search for any policy-related documents naming Covil as an additional insured—which requests, per the Receiver’s own motion, date back only January 2021—no policy-related documents have been destroyed by Penn National. Further, as noted above, Penn National intends to continue to place a hold on the destruction of any policy-related documents in Penn National’s possession, to include the issuance of a formal litigation hold for these documents during the pendency of the Ellis & Winter’s document review ordered by the Court on November 5, 2021.

RESPONSE

Simply put, the Receiver’s Motion seeks a solution to a non-existent problem. Apparently, during a telephone call to facilitate the very review sought by the Receiver, there was a miscommunication regarding Penn National’s document retention policy. Penn National intended to provide additional information regarding its retention policies in response to the recent discovery requests issued by the Receiver. However, as the Receiver filed its Motion prior to the deadline for Penn National’s response to the discovery requests, and without informally

¹ In fact, Penn National takes issues with a number of “factual” recitations in the Receiver’s Motion. However, as these claims have no bearing on this response, Penn National simply notes its disagreement with the description/characterization of the facts as asserted by the Receiver, for the record.

requesting additional information, Penn National did not have the opportunity to do so. As discussed further below, *no written or microfilm policy-related documents have been destroyed since the outset of this discovery dispute in January 2021.*

Pursuant to its document retention policy, Penn National identifies certain policies and policy-related documents that are beyond the scope of its retention timeframe during the course of each year. However, disposal of any documents identified over the course of the year does not occur on a rolling basis, but rather takes place during a single, consolidated time period at the conclusion of that year and/or the beginning of the following. In other words, any insurance policy-related documents, paper or microfilm, identified for possible discard in 2021 would be collected and disposed of at the conclusion of 2021/early in 2022, per Penn National's standard retention policy.

Given this standard procedure, *no policy-related documents that were in the possession of Penn National at the outset of this discovery dispute in January 2021 have been disposed of during the intervening time.* Penn National has already agreed to open its repository of policy-related documents and allow Ellis & Winters to review these documents pursuant to the Court's November 5, 2021 Order.² Based on this agreement, and pending the outcome of the inspection, Penn National has halted its standard document disposal policies and is not disposing of any policy-related documents while the review is ongoing.

In sum, the Receiver's Motion lacks any factual basis, as the relief sought is already occurring – *i.e.* Penn National has already ceased “destroying, discarding, overriding and/or purging” any insurance policy-related documents, whether paper or microfilm. Further, none of

² Indeed, Penn National has been actively engaging with defense counsel for Covil regarding the details of this inspection and recently provided an update to the Court as to the status of same.

these documents have been purged since the issues relating to alleged additional insured policies first arose in early 2021 and, therefore, there is no need for Plaintiff's Motion or the relief sought therein.³

Without any discussion or reasoning in support thereof, the Receiver also includes an additional request for relief in the Conclusion section of its Motion that Penn National "halt[] all auto-delete features within the company's email systems." Penn National does object to this additional requested relief as the request is overly broad and bears no relation to the search for policy-related documents at issue in this action. In fact, the time period in question pre-dates the adoption of email at Penn National and, therefore, the burden of ordering Penn National to modify its procedures for retaining emails, none of which would have any relationship to or bearing on the policy review in this case, would heavily outweigh any benefit in retaining same. Such a request would cause annoyance, oppression, and undue burden by expense to Penn National and should be rejected by the Court. *See Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994)).

CONCLUSION

Based on the foregoing, Penn National respectfully asserts that the relief sought by the Receiver is moot, given Penn National is already preserving any and all paper and microfilm policy-related documents in its possession that are subject to review by Ellis & Winters. To the extent that the Receiver nevertheless desires an order reiterating what Penn National

³ The Receiver's Motion "certifies that Covil's counsel had discussions with counsel for Penn National but were unable to resolve the matters contained herein and further consultation would serve no useful purpose." The particular consultation referenced is unknown to undersigned counsel, who would have been happy to explain the information laid out in this response.

is already doing, and directing that Penn National continue not to dispose of its paper and microfilm policy-related documents, Penn National does not object to same.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

**RECEIVER FOR COVIL
CORPORATION'S SUPPLEMENTAL
MOTION FOR DISCOVERY ORDER
ON COSTS OF POLICY SEARCH**

Defendants.

Peter D. Protopapas, as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel, files this Supplemental Motion for Discovery Order requiring defendant Pennsylvania National Mutual Insurance Company ("Penn National") to pay the attorneys' fees and other costs of the policy search ordered by this Court in its November 5, 2021 Discovery Order Granting Covil Corporation's Motions to Compel.

After Penn National repeatedly refused to comply with its discovery obligations, the Court ordered Penn National "to open its repository of insurance policies and to facilitate a review supervised and performed by Covil's insurer-appointed defense counsel, Ellis & Winters LLP." *See* Nov. 5, 2021 Discovery Order at 2, C.A. No. 2019-CP-40-02098; *see also* Receiver for Covil Corporation's Notice of Motion and Motion for Protective Order, C.A. No. 2019-CP-40-02098 (Dec. 10, 2021) (recounting Penn National's history of failing to comply with its discovery obligations to the Receiver, despite multiple orders by the Court). The Court directed Ellis & Winters "to perform this document review, the scope of which is to be informed by Ellis &

Winters' own sound professional judgment, and to report back to the Court as to progress made . . . while not wasting Penn National's resources." *Id.*

To date, Ellis & Winters has already identified over 200 boxes of documents in Penn National's archives that need to be searched, in addition to Penn National's microfiche archives. *See* Ex. 1, Dec. 17, 2021 Correspondence from Ashley Braithwaite. Ellis & Winters has further informed the Receiver's counsel that Penn National has refused to pay Ellis & Winters' fees in conjunction with this policy search. *Id.* As Ms. Braithwaite stated, "[W]e were told [by Penn National] that the issue needs to be taken up with Covil, the Court, and Penn National coverage counsel." *Id.* Penn National's refusal to pay the costs of this court-ordered policy search once again requires this Court's intervention.

ARGUMENT

Penn National should bear the fees and other costs of Ellis & Winters' search of Penn National's archives. It is presumed that a party pays its own discovery costs absent a contrary order by a court. *See Melton v. Carolina Power & Light Co.*, No. 4:11-CV-00270, 2012 WL 4322520, at *4 (D.S.C. Sept. 19, 2012) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)). Still, Penn National has refused to pay the fees and costs of this court-ordered policy search: a search of *its own* archives, performed by counsel it chose on Covil's behalf, and necessitated only because of its prior neglect of its discovery obligations.

Indeed, the Court's November 5, 2021 Discovery Order already indicated that Penn National is responsible for Ellis & Winters' fees, noting that Ellis & Winters should perform the search "while not wasting *Penn National's* resources." Nov. 5, 2021 Discovery Order at 2 (emphasis added). The Court also indicated at the October 28, 2021 hearing on the policy search that "presumably, if there are costs attached to that [search], I can't believe Covil and its

receivership is going to be the only time Penn National is going to face this record. It will be of benefit to Penn National, in my view, to get in there and organize these records so that they can see what it is they are facing. I much prefer that to the blunt instrument of simply sanctioning the company, because these matters continue.” *See* Ex. 2, Hr’g Tr. at 46:9-18, C.A. No. 2019-CP-40-02098 (Oct. 28, 2021). Therefore, Penn National is the party responsible for the costs of searching its records.

Neither Covil, nor any of Covil’s other insurers, are responsible for the mismanagement of Penn National’s records that has made those records so time-consuming to search. Penn National, in keeping with the traditional rule in discovery, is solely responsible for the cost of searching its own archives.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court order Penn National to pay Ellis & Winters’ fees associated with the policy search ordered by this Court in its November 5, 2020 Discovery Order, without allocating those costs to Covil’s available policy limits.

Respectfully submitted,

[Signature Block to Follow]

/s/ Jescelyn T. Spitz

Jescelyn T. Spitz SC Bar 101880

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Counsel for the Receiver for Covil Corporation

This 21st day of December, 2021

From: Ashley Brathwaite <Ashley.Brathwaite@elliswinters.com>
Sent: Friday, December 17, 2021 1:43:46 PM
To: Yntema, Brady A. <byntema@goldbergsegalla.com>; 'Edwards, Brady' <brady.edwards@morganlewis.com>; Nes, W. Brad <brad.nes@morganlewis.com>; David G. Harris <dharris@goldbergsegalla.com>
Cc: Brian Flatley <Brian.Flatley@elliswinters.com>; Katherine Bandy <Katherine.Bandy@elliswinters.com>
Subject: Status: Penn National Review

[EXTERNAL EMAIL]

All,

Ellis & Winters requested that approximately 208 boxes stored at Iron Mountain be sent to Penn National's headquarters in Harrisburg, PA. We understand that they have all now arrived. We are waiting on more information regarding the microfiche and evaluating whether it makes sense to go review the boxes now and make a separate trip focused on the microfiche later.

We see two issues that need to be addressed before we go on site: (1) the scope of/parties to a protective order for this review; and (2) responsibility for payment of the fees and expenses of Ellis & Winters related to this matter. We have heard from Penn National's representative in the asbestos liability cases for Covil that our fees will not be paid in conjunction with the costs associated in Covil's asbestos liability defense. Rather, we were told that the issue needs to be taken up with Covil, the Court, and Penn National coverage counsel.

Thanks,
Ashley

Ashley Brathwaite | Attorney
ashley.brathwaite@elliswinters.com
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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
2020-CP-40-02098

Covil Corporation,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
Pennsylvania National Mutual)
Casualty Company,)
Defendant.)

October 28, 2021
Columbia, South Carolina

B E F O R E:

THE HONORABLE JEAN H. TOAL, Judge.

A P P E A R A N C E S:

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JONATHAN M. ROBINSON, ESQ.
PETER D. PROTOPAPAS, ESQ.
THEILE B. MCVEY, ESQ.
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M. TODD CARROLL, ESQ.
Attorney for USF&G
JOHN T. LAY, ESQ.
Attorney for the Arrowood

DEBORAH M. McCURDY, RPR
Official Court Reporter

1 the policy records of Pennsylvania National to
2 determine whether it is possible to organize the
3 records in such a way as to divine whether or not
4 there are policies that Covil was either the direct
5 or additional insured on.

6 MR. PROTOPAPAS: That is correct, Your Honor.
7 And I do believe it is part of their duty to
8 defend, so it should not be that controversial.

9 THE COURT: Right. And presumably, if there
10 are costs attached to that, I can't believe Covil
11 and its receivership is going to be the only time
12 Penn National is going to face this record. It
13 will be of benefit to Penn National, in my view, to
14 get in there and organize these records so that
15 they can see what it is they are facing. I much
16 prefer that to the blunt instrument of simply
17 sanctioning the company, because these matters
18 continue.

19 MR. PROTOPAPAS: I agree, Your Honor. And we
20 do work every day at the same time in the defense
21 and adjustment of cases.

22 THE COURT: Well, here is what I'd like to
23 have done. I would like you to collaborate with
24 Mr. Yntema and develop an order that will direct
25 this examination be done by Ellis & Winters. And

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through
its duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY'S MOTION
TO QUASH RECEIVER FOR COVIL
CORPORATION'S NOTICE OF
30(B)(6) DEPOSITION OR,
IN THE ALTERNATIVE,
FOR A PROTECTIVE ORDER**

COMES NOW Pennsylvania National Mutual Casualty Insurance Company ("Penn National") and hereby respectfully moves that this Court quash the Receiver for Covil Corporation[']s Notice of Videotaped Deposition [of] Pennsylvania National Mutual Casualty Insurance Company Pursuant to South Carolina Rule of Civil Procedure 30(b)(6), and issue a protective order as to same. The bases for this Motion, as set forth in detail below, are that the requested deposition, which would be the third 30(b)(6) deposition conducted by the Receiver, is in derogation of the South Carolina Rules of Civil Procedure and is unnecessarily cumulative, and will cause annoyance, oppression, and undue burden to Penn National.

FACTUAL BACKGROUND

Given the extensive history of this case and the significant number of motions filed by the parties, Penn National will not take up the Court's time with a detailed factual recitation relating to this action. However, a brief summary of the prior depositions and efforts made by

Penn National have important bearing on this Motion and, therefore, Penn National will briefly address these efforts.

The Receiver for Covil Corporation[’s] Notice of Videotaped Deposition [of] Pennsylvania National Mutual Casualty Insurance Company Pursuant to South Carolina Rule of Civil Procedure 30(b)(6) (hereinafter “the Notice”) seeks to depose a 30(b)(6) representative of Covil for *the third time* in this action. The Receiver has previously taken the deposition of Boyd Wright, senior home office claim examiner, as 30(b)(6) representative of Penn National, on January 7, 2021 and again on August 26, 2021. In relation to those depositions, Mr. Wright spent many hours preparing for and then testifying as to Penn National’s search for any Covil Corporation (“Covil”) policies or policy-related documents, storage and retention of those policy-related documents, policies and procedures relating to same, Penn Nationals’ involvement with Covil prior to the appointment of the Receiver, Penn Nationals’ prior involvement in litigation relating to Covil, and other topics. In fact, taking into account both depositions, Mr. Wright has been produced as Penn National’s representative to testify as to approximately (19) different topics.

In addition to the prior 30(b)(6) depositions, Penn National has also produced its director of administrative services, Brent Reifsnyder, for deposition. Mr. Reifsnyder is in charge of and responsible for the stored and archived records at Penn National. Thus, Penn National has already produced, on three (3) separate occasions, individuals to testify about the company, its policy-related documents as to Covil, and the location and storage of same.

Aside from the depositions, Penn National has been working cooperatively and diligently with defense counsel for Covil, Ellis & Winters, LLP (“Ellis & Winters”), to coordinate access and review of its paper and microfilm policies, per the Court’s Order of November 5, 2021, and

recently provided a status update to the Court regarding same on December 7, 2012. Additionally, during this time period, Penn National has agreed to suspend its standard document retention policy for policy-related documents. The initial step of Penn National's document retention policy involves the identification of certain policies and policy-related documents that are beyond the scope of its retention timeframe. However, disposal of any documents identified does not occur on a rolling basis, but rather takes place during a single, consolidated time period at the conclusion of each year and/or the beginning of the following. In other words, any policy-related documents, paper or microfilm, identified for possible discard in 2021 would be collected, but not disposed of until the conclusion of 2021 or early in 2022 pursuant to Penn National's standard retention policy.

Given this standard procedure, *no policy-related documents have been disposed of since the outset of this discovery dispute in January 2021.* Further, as noted above, Penn National has already agreed to open its repository of policy-related documents and allow Ellis & Winters to review these documents pursuant to the Court's November 5, 2021 Order. Based upon this agreement, and pending the outcome of the inspection, Penn National has halted its standard document disposal policies and is not disposing of any policy-related documents while the review is ongoing.

ARGUMENT

I. The Notice does not comply with Rule 30, SCRCP, and must be quashed

Rule 30(a)(2) of the South Carolina Rules of Civil Procedure sets forth certain limits on deposition-taking. Most relevant to the instant case, Rule 30(a)(2) states: "[t]he deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." As noted above, the Receiver

has already taken the 30(b)(6) deposition of Penn National on two (2) separate occasions. Therefore, based on the plain language of Rule 30(a)(2), the Receiver cannot notice the 30(b)(6) deposition of Penn National without the agreement of Penn National or an order from the Court. *See also Paschal v. Causey*, 309 S.C. 206, 209-10, 420 S.E.2d 863, 866 n.2 (Ct. App. 1992) (“Under Rule 30(a)(2), SCRCp, a witness’s deposition may only be taken one time in any case ‘except by agreement of the parties ... or by order of the court for good cause shown’); *St. John Haney v. Kavoukjian*, 2020 U.S. Dist. LEXIS 260867 at *13 (D.S.C. Dec. 20, 2020) (holding that, under the similar federal rule requiring party consent or leave of court to notice a deposition more than once, “Plaintiffs did not seek leave from the Court prior to scheduling a subsequent 30(b)(6) deposition pursuant to Rule 30, and thus the ... deposition notice is invalid”). As the Receiver has neither,¹ the Court should grant Penn National’s motion, quash the notice of deposition, and issue a protective order prohibiting the Receiver from issuing further duplicative deposition notices in the absence of agreement or court order.

Although the plain language of Rule 30 and Receiver’s failure to comply with same ends the inquiry, in the interest of judicial economy, Penn National will address additional reasons why there is no “good cause” for taking its representative’s deposition for a third time and why it is entitled to a protective order prohibiting same.

II. There is no good cause for allowing a third 30(b)(6) deposition of Penn National

Even assuming the Receiver were to make proper application to the Court for an additional deposition of Penn National’s representative, which the Receiver has not, the Receiver would have

¹ Indeed, as has been the Receiver’s habit in this litigation, not only did the Receiver not obtain the agreement of Penn National prior to noticing the third 30(b)(6) deposition, but failed to even consult Penn National about its desire to issue an additional 30(b)(6) deposition notice or the possible topics for same.

to demonstrate “good cause” for taking the deposition pursuant to Rule 30 of the South Carolina Rules of Civil Procedure. Penn National is not aware of any case law specifically addressing the good cause standard pursuant to Rule 30. However, South Carolina’s courts have articulated a good cause standard pursuant to Rule 26 of the South Carolina Rules of Civil Procedure, as discussed further, *infra*. Moreover, while Rule 30 does not make specific reference to Rule 26, unlike Rule 30 of the Federal Rules of Civil Procedure, given the similarity of both Rule 30 and Rule 26 of the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure, as well as the “good cause” standard utilized pursuant to Rule 26 by South Carolina’s appellate courts, the federal rule and its interpretation are instructive.

Under Rule 30 of the Federal Rules of Civil Procedure, to determine whether to allow additional depositions, a court considers the limits set forth in Rule 26 (b)(2)(c), whose language is similar to that set forth in Rule 26(a) of the South Carolina Rules of Civil Procedure. Specifically, federal courts examine whether:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

St. John Haney v. Kavoukjian, 2020 U.S. Dist. LEXIS 260867 at *13-14 (D.S.C. Dec. 20, 2020) (quoting Rule 26(b)(2)(C), Fed. R. Civ. P.). Rule 26(a) of the South Carolina Rules of Civil Procedure similarly tasks courts with limiting discovery methods where “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in

controversy, limitation on the parties' resources, and the importance of the issues at stake in the litigation."

Applying this standard to the instant case, the Receiver cannot make the required showing of good cause. The discovery sought is cumulative and duplicative, as Penn National has, through discovery responses and its recent response to Plaintiff's Motion to Compel, made clear its policies and procedures for document retention and has affirmed that no documents have been destroyed or purged by Penn National during the pendency of the discovery dispute relating to the Receiver's requests regarding "additional insured" coverage. Further, Penn National has affirmed that all document purging/destruction pursuant to its standard policies and procedures is on hold pending the outcome of the Ellis & Winters review. Given Penn National's discovery responses and response to the Receiver's motion, the Receiver has been provided with all relevant information sought as to Penn National's document retention policies. Given this, the burden and expense of a third deposition is outweighed by the need for the cumulative, duplicative evidence sought by the Receiver.

Thus, even if the Receiver were to make a procedurally proper motion pursuant to Rule 30 for a deposition, he is unable to demonstrate good cause. Therefore, the Court should grant Penn National's Motion and issue a protective order.

III. Penn National is entitled to a protective order pursuant to Rule 26, SCRPC

Further, even in the absence of the plain language of Rule 30, SCRPC, and the lack of good cause shown by the Receiver, Penn National is still entitled to have the notice quashed and a protective order issued pursuant to Rule 26, SCRPC. Under South Carolina law, trial courts have "broad latitude in limiting the scope of discovery" where "the discovery process threatens to become abusive or to create a particularized harm to a litigant." *Hamm v. S.C. Pub. Serv. Comm'n*,

312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994) (citing *Palmetto Alliance v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984)). *See also* Rule 26(c), SCRCP (trial court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense”). A party seeking protection from proposed discovery must “show good cause by alleging a particularized harm which will result if the challenged discovery is had,” typically “in the form of a motion . . . or a return to a motion to compel production.” *Hamm*, 312 S.C. at 241, 439 S.E.2d at 854 (citing 4 JAMES W. MOORE, ET. AL., MOORE’S FEDERAL PRACTICE P 26.75 (2nd ed. 1993)). Once the party has alleged a particularized harm, the party seeking discovery must demonstrate that the information sought “is both relevant and necessary to the case.” *Hamm*, 312 S.C. at 241, 439 S.E.2d at 854 (quoting 4 JAMES W. MOORE, ET.AL., MOORE’S FEDERAL PRACTICE P 26.402 (2nd ed. 1993)). If both parties are able to meet their burden, court must still “weigh the opposing factors” and determine whether or how any such discovery should be had. *Id.*

Here, there is a particularized harm to Penn National in forcing its representative to sit for a *third* 30(b)(6) deposition, including all the attendant costs and inconveniences of same. This is especially true where the South Carolina Rules of Civil Procedure specifically impose a single deposition limit. Additionally, the Receiver is unable to meet his burden here, as the deposition topics simply are not necessary to the case. As Penn National has already explained above and in its prior filed Response to Receiver’s Motion for a Protective Order, no documents have been purged by Penn National since the onset of the discovery dispute relating to the policy-related documents now being reviewed by counsel for Covil, Ellis & Winters. Further, Penn National has taken additional affirmative steps to confirm no policy-related documents, whether paper or microfilm, will be purged during this time.

There is simply no need for the requested deposition. The information sought is irrelevant as no documents to be reviewed have been destroyed or purged during the pendency of the discovery dispute. It is also unnecessary, not only because no documents have been destroyed or purged but also because sufficient safeguards have already been put in place to prohibit any such loss of documents pending the outcome of the Ellis & Winters review. Finally, any benefit is substantially outweighed by the burden on Penn National in being forced to have a representative sit for a third 30(b)(6) deposition. Therefore, the Court should grant Penn National's Motion, quash the deposition notice, and issue a protective order prohibiting re-noticing the deposition.

CONCLUSION

Based on the foregoing, Penn National respectfully requests that the Court quash the Receiver's 30(b)(6) deposition notice of Penn National, and issue a protective order that this third 30(b)(6) deposition of Penn National not be had. The notice does not comply with Rule 30 of the South Carolina Rules of Civil Procedure, is without good cause, and the request is oppressive, unnecessarily cumulative, and unduly burdensome. Therefore, the Court should grant Penn National's Motion.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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December 22, 2021

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL DISTRICT
CASE NUMBER: 2020-CP-40-02098

Covil Corporation, by and through
its duly appointed receiver Peter D.
Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual
Casualty Insurance Company; Sam J.
Crain & Co., Inc.; and South Carolina
Property & Casualty Insurance
Guaranty Association,

Defendants.

AFFIDAVIT OF BRENT REIFSNYDER

Brent Reifsnyder, being first duly sworn, deposes and says:

1. I am over 18 years of age, of sound mind, and under no mental disability, and
I am fully competent to make this declaration.

2. I am currently, and was at all times relevant herein, employed by
Pennsylvania National Mutual Casualty Insurance Company ("Penn National") as Director –
Administrative Services, in which capacity I am the person in charge of and responsible for
the paper and microfiche-policy related documents that are archived or otherwise stored for
Penn National.

3. As part of my responsibility for the paper and microfiche policy-related documents, I am in charge of the process of purging and ordering the eventual disposal of such documents, pursuant to Penn National's document retention policy.

4. This process involves an initial stage in which Penn National identifies certain policy-related documents by policy number that are beyond the scope of its retention timeframe.

5. After the policy-related documents have been identified by policy number, Penn National begins a process during which the documents are pulled from storage and consolidated in preparation for disposal. This process occurs over the course of the year given that Penn National cannot dedicate a staff to conduct such task on a full time basis. Also, disposal of the documents pulled from storage does not occur on an ongoing basis over the course of the year. Rather, disposal of the documents occurs at the conclusion of the year in which they were identified or, more typically, at the very beginning of the following year.

6. For example, based on this standard procedure, any insurance policy-related documents identified for possible disposal in 2021 would be collected and disposed of at the conclusion of 2021 or, more likely, early 2022.

7. I am aware of the Court's Order for Penn National to open its repository of insurance policies and to facilitate a review supervised and performed by Covil's defense counsel, Ellis & Winters, LLP.

8. With respect to the policy-related documents identified to be purged in 2021, no such documents have been disposed of in 2021. Further, Penn National has halted its standard record purge policy and practice, and it is not disposing of any policy-related documents while the Ellis & Winters, LLP review is ongoing.

9. No policy-related documents have been disposed of since at least January 2021.

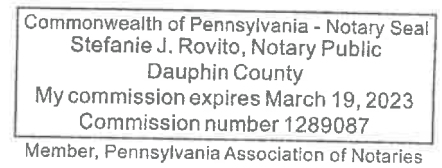
10. The information and assertions contained in this Affidavit are based and made upon my own personal knowledge.

Further, the affiant sayeth not.


Brent Reifsnyder
Director – Administrative Services
Pennsylvania National Mutual Insurance Company

Sworn to and subscribed before me,
this the 22nd day of December, 2021.

22, December, 2021 Stefanie J. Rovito
Notary Public



My commission expires: March 19, 2023

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

v.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2020-CP-40-02098

**RECEIVER FOR COVIL
CORPORATION'S OPPOSITION TO
PENN NATIONAL'S MOTION TO
QUASH RULE 30(b)(6) DEPOSITION
AND REPLY IN FURTHER SUPPORT
OF COVIL'S MOTION FOR
PROTECTIVE ORDER**

The Receiver for Covil Corporation ("Covil") is deeply concerned with Pennsylvania National Mutual Casualty Insurance Co.'s ("Penn National") stunning admission, first made in passing on a call with Ellis & Winters on November 19, 2021, and confirmed in its response to the Receiver's discovery requests on December 20, 2021, that *Penn National failed to issue any litigation hold notices related to the Covil litigation*.¹ As Penn National has been aware of Covil litigation pending in various forms for the past three years, there is simply no excuse for this failure. The Receiver served a Rule 30(b)(6) deposition notice to discover the scope of Penn National's potential spoliation in this case.² In light of this situation, Penn National's motion to quash the deposition lacks merit and should be denied.³

¹ Ex. 1 (Penn National's Responses and Obj. to Covil's Second Set of Discovery Requests).

² Ex. 2 (Covil's Rule 30(b)(6) Deposition Notice regarding Penn National's litigation hold notices and scope of purged documents).

³ For example, the *Finch* claimants served a subpoena on Penn National for all insurance policies issued to Covil in June 2018. See Ex. 3 (Aug. 26, 2021 Deposition of Boyd Wright at 46:13–47:11). In addition, Penn National responded to the Receiver's request for production of all insurance policies covering Covil in the Middle District of North Carolina Coverage Action in

Penn National's failure to issue a litigation hold at the outset of the Covil litigation has already had a demonstrable and potentially material impact on the Receiver's ability to marshal all of Covil's historic insurance assets. Penn National has an automatic document destruction policy in which Penn National admittedly "purges" historic insurance policies on an annual basis.⁴ Pursuant to that document destruction policy, Penn National destroyed policy-related documents in December 2018, December 2019, and December 2020, all during the pendency of the Covil litigation. Penn National apparently destroyed these insurance policies without conducting any review whatsoever to determine whether Covil was an additional insured under the policies before they were purged.

For example, in April 2020, Covil served its first requests for production of documents in this Court demanding production of all Penn National policies covering Covil. The request was modeled after the same request made to Penn National in the Middle District of North Carolina Coverage Action in October 2019. Penn National, however, refused to search its files for such documents in either case. Importantly, Penn National asserted in both its December 2019 and May 2020 written responses that it "does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no method of identifying all documents that are responsive to this Request."⁵ Penn National therefore was on notice at least as of October 2019 that the Receiver was searching for policies in which Covil was named as an additional insured and had a duty to preserve documents responsive to the Receiver's requests.

December 2019. *See* Ex. 4 (Penn National's Dec. 18, 2019 Responses to the Receiver's First Discovery Requests).

⁴ Mot. to Quash at 3; Dec. 20, 2021 Opp'n to Covil Mot. for Protective Order at 3.

⁵ *See* Ex. 5 (Penn National's Resp. to Plaintiff's First Set of Requests for Production) at 6–7.

Moreover, Penn National was on notice that asbestos claimants were seeking policies naming Covil as far back as the summer of 2018. Accordingly, notices were received by Penn National *well before* it deliberately purged its historic insurance policies in December 2018, December 2019 and December 2020, respectively. Penn National's admitted conduct in failing to issue litigation hold notices, and in purging historic insurance policies without reviewing them for responsiveness, is in direct violation of its discovery obligations in the Covil litigation. The Receiver's deposition notice is narrowly tailored to uncover the breadth and depth of Penn National's potential spoliation.

BACKGROUND

This Court charged the Receiver with "the right and obligation to administer any insurance assets of Covil." Order Appointing Receiver, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (Com. Pl. Nov. 2, 2018). Among these insurance assets are policies issued to Covil by Penn National, including any policies covering Covil as an additional insured. The Receiver has been diligent in seeking production of such historic insurance policies from Penn National.

As detailed in the Receiver's December 10, 2021 Motion for Protective Order, Penn National stated during a telephone conference with Ellis & Winters and the Receiver's counsel on November 19 that it purges its archival documents, including insurance policies, on an annual basis. Penn National also stated that no litigation hold was ever issued to prevent the purging of documents relevant to the Covil litigation.

The Receiver immediately served requests for production on Penn National for all litigation hold notices it issued related to the Covil litigation and any correspondence relating thereto. Penn National confirmed in its responses that it "has not issued any formal litigation hold notice at this time."⁶ The Receiver also served a Rule 30(b)(6) deposition notice covering nine topics related to

⁶ Ex. 1 at 5.

Penn National's document retention policies and annual document purges.⁷ Penn National now asks the Court to shield it from revealing the scope and consequences of its failure to issue a litigation hold notice when it first became a party in the Covil litigation (or several years before). For the following reasons, the Court should deny that request.

ARGUMENT

It is axiomatic that “[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). “[O]nce a party reasonably anticipates litigation, it is obligated to suspend its routine document retention/destruction policy and implement a ‘litigation hold’ to ensure the preservation of relevant documents.” *Evans v. Quintiles Transnational Corp.*, No. 4:13-CV-00987, 2015 WL 9455580, at *4 (D.S.C. Dec. 23, 2015) (citation omitted).

Accordingly, Penn National's duty to issue a litigation hold arose as early as June 2018, or at the very latest, in early 2020.⁸ The Receiver quickly served discovery in these cases requiring Penn National to preserve and search its historical documents.⁹ Penn National understood these requests to include policies covering Covil as an “additional insured.” *See id.* at 6–7 (“Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no method of identifying all documents that are responsive to this Request.”).

⁷ Ex. 2.

⁸ Covil filed two cases against Penn National in early 2020. *See* C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020); C.A. No. 2020-CP-40-02098 (Com. Pl. filed Apr. 27, 2020).

⁹ *See* Ex. 5 at 6 (requesting, for example, “All insurance policies, of any type, that [Penn National] issued to Covil or which otherwise include Covil as an insured”).

The thrust of Penn National's argument appears to be that it hasn't destroyed any documents since *January 2021*—when Covil filed its first motion to compel—so no harm, no foul.¹⁰ But, of course, its preservation obligations didn't arise when the Receiver filed its motion to compel in early 2021. Rather, Penn National's document preservation obligations were triggered in June 2018 when it received a subpoena in the *Finch* case, again in October 2019 when it was named as a defendant in the Middle District of North Carolina Coverage Action, and again in early 2020, when the Receiver filed suit and formally demanded all insurance policies covering Covil.¹¹ At each of these points, Penn National should have issued litigation holds to stop the destruction or purging of any historic insurance policies without reviewing those policies to determine whether Covil was an insured. Penn National failed to do so.

Based on Penn National's recent admission that it issued no litigation hold since the outset of the Covil litigation, and the fact that Penn National intentionally destroyed historic insurance policies on an annual basis in December 2018, December 2019, and December 2020, without reviewing the policies to determine whether Covil was an additional insured under those policies, the Receiver certainly has good cause to depose Penn National regarding its document purges and spoliation of evidence in order to begin to understand the scope of the harm and to fashion remedies to address that harm. Rule 30(a)(2), SCRCp.

A deposition to determine the extent of the possible spoliation in this case is neither duplicative nor cumulative of prior discovery undertaken by the Receiver in this case. It is based

¹⁰ Mot. to Quash at 3 (“[N]o policy-related documents have been disposed of since the outset of this discovery dispute in January 2021”).

¹¹ Penn National has been on notice of asbestos claims against Covil potentially triggering Penn National policies dating back at least as far as 2018, when it produced Penn National policy documents covering Covil in the *Finch* case.

on newly discovered information.¹² Moreover, the benefit of discovery on this topic far outweighs the minimal burden another deposition will place on Penn National. Penn National's representative can appear remotely, as has been the standard practice in this case. Further, the Receiver's deposition notice topics are limited to a narrow set of issues relating to Penn National's litigation hold correspondence and annual document purges.¹³ Therefore, the negligible burdens on Penn National are far outweighed by the benefit of determining whether relevant evidence has been destroyed.

CONCLUSION

For these reasons, the Receiver respectfully requests that the Court deny Penn National's Motion to Quash the Rule 30(b)(6) deposition. Furthermore, in light of Penn National's stunning admission that it still does not have a formal litigation hold in place, despite the existence of company-wide automatic document destruction policies, and in light of Penn National's statement that it has only "agreed to suspend its standard document retention policy" during the pendency of Ellis & Winters' review,¹⁴ whatever that means, the Receiver also requests that this Court grant Covil's motion for a protective order and issue a directive that Penn National must immediately cease destroying, discarding, overriding and/or purging any of its historic insurance policies and insurance-policy-related documentation, including both electronic and hard copy storage systems.

¹² In particular, Penn National's assertion that "the Receiver has been provided with all relevant information sought as to Penn National's document retention policies" is simply untrue. Penn National has failed to produce actual copies of its relevant document retention policies, despite multiple requests by the Receiver over the past eighteen months. *E.g.*, Ex. 5 at 13–15. As an example of relevant information that a deposition will uncover, Penn National has repeatedly referred to a "retention timeframe" after which documents are destroyed without ever specifying what that timeframe actually is. *See* Mot. to Quash at 3; Mot. to Quash Ex. 1 ¶ 4; Dec. 20, 2021 Opp'n to Covil Mot. for Protective Order at 3.

¹³ *See* Ex. 2.

¹⁴ Mot. to Quash at 3.

Respectfully submitted,

/s/ Jescelyn T. Spitz

Jescelyn T. Spitz SC Bar 101880

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AND

G. Murrell Smith, Jr. (S.C. Bar No. 66263)

Jonathan M. Robinson (S.C. Bar No. 68285)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, 3rd Floor

Columbia, SC 29205

Phone: (803) 254-5445

Counsel for the Receiver for Covil Corporation

This 28th day of December, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

vs.

Pennsylvania National Mutual Casualty
Insurance Co.; Sam J. Crain & Co., Inc.; and
South Carolina Property and Casualty
Insurance Guaranty Association,

Defendant.

Case Number: 2020-CP-40-02098

DEFENDANT'S RESPONSES TO
PLAINTIFF'S SECOND SET OF
REQUESTS FOR PRODUCTION

Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by its undersigned counsel, responds as follows to the Second Set of Requests for Production to the Defendant ("Requests") propounded by the Receiver of Covil Corporation ("Receiver").

GENERAL OBJECTIONS

1. Penn National objects to each Request to the extent it would require the provision of information that is protected by the attorney-client privilege, work product doctrine, or any other privilege recognized under applicable law. To the extent that any information that is properly the subject of any privilege is inadvertently provided, such provision is not to be construed as a waiver of such privilege.

2. In providing responses to each Request, Penn National does not waive any objections it may have to the use, or introduction into evidence, at any stage of this or any other proceeding, of any information provided in response to each Request. To the extent Penn National responds to each Request, Penn National does not concede that any of

the information sought or provided is relevant or material to this action, and Penn National expressly reserves and does not in any way waive or intend to waive: (a) objections as to relevancy, materiality and/or admissibility; (b) its right to object on any ground to the use of any of the responses herein, including herein, including at trial of this action or any other action; (c) objections as to vagueness or ambiguity; and (d) its right to object on any ground to any further requests for admission or other discovery requests involving or related to each Request.

3. Penn National does not waive objections to the truth or accuracy of any term, phrase, or characterization in each Request, and other than what is expressly admitted in response to each Request, nothing herein shall be construed as an admission by Penn National of any legal or factual contention contained in any individual Request.

4. Penn National objects to each Request to the extent it is vague, ambiguous, overly broad, unduly burdensome, or seeks information not relevant to the parties' claims or defenses or to the subject matter of this action.

5. Penn National objects to each Request to the extent it seeks information other than that which may be obtained through a reasonably diligent search or investigation. In responding to each Request, Penn National has made a reasonable and diligent inquiry and reasonable diligent search of information and materials within its possession, custody, or control.

6. Penn National objects to each Request to the extent it purports to require the provision of information that is not in Penn National's possession, custody, or control.

7. Penn National objects to each Request to the extent it seeks information that can be obtained from documents that (i) are in the possession, custody or control of the Receiver,

(ii) are a matter of public record or are publicly available; or (iii) are as easily obtained by the Receiver as by Penn National.

8. Penn National objects to each Request to the extent it requires the provision of information in a manner or form that is infeasible, unduly burdensome, vexatious, and/or oppressive.

9. Penn National objects to each Request to the extent it is unreasonably cumulative or duplicative of any other Request.

10. Penn National objects to each Request to the extent it is vague, ambiguous, and overly broad because it fails to specify an applicable time period or to the extent it purports to seek information from a time period not relevant to this action.

11. Penn National objects to each Request to the extent it seeks provision of trade secrets, confidential, proprietary, or competitively or financially sensitive business, personal, customer or client information relating to Penn National. Penn National will provide information only pursuant to the stipulation and protective order entered in this case.

12. Penn National objects to each Request to the extent it calls for the provision of information that is not reasonably accessible. Such requests are overbroad, and the burden and expense of complying with such requests is excessive and unjustified and is excessive and unjustified and is not reasonably calculated to lead to the discovery of admissible evidence.

13. Penn National objects to each Request to the extent it seeks information related to policyholders other than Covil Corporation ("Covil").

14. Penn National objects to each Request to the extent it seeks information that is not related to the claims or agreements at issue in this litigation.

15. Penn National objects to each Request to the extent it seeks to improperly shift the burden to Penn National to review documents that the Receiver asked that Penn National produce in this lawsuit.

16. Penn National objects to each Request to the extent it refers to Covil without defining this term.

17. With the exception of all policy documents previously produced with Penn National's Opposition to Covil's Motion for Partial Summary Judgment, Penn National will produce relevant, responsive, non-protected documents, and documents not otherwise subject to Penn National's objections stated herein and below, to the extent they exist and are in Penn National's possession, custody, or control, but such production, if any, will only occur after a protective order is entered in this action.

OBJECTIONS TO DEFINITIONS

1. Penn National objects to the Receiver's definitions to the extent they exceed, conflict with, or violate the requirements of the South Carolina Rules of Civil Procedure and/or any other applicable rules.

2. Penn National objects to the definition of "YOU" and "YOUR" on the ground that it is overly broad, unduly burdensome, oppressive, and seeks documents or information that are not relevant to any issue in this action nor proportional to the needs of this case. The Receiver's definition of "YOU" and "YOUR" purports to require Penn National to respond to these Requests on behalf of business entities "related" to Penn National, notwithstanding that such entities have

no past or present involvement in or relationship to the facts, issues or matters potentially relevant to any claims or defenses in this lawsuit.

RESPONSES

1. All litigation hold notices that YOU issued related to the Covil Litigation

RESPONSE: Penn National objects to the use of the defined term “YOU” in this Request to the extent it requires a response on behalf of business entities other than Penn National. Penn National responds to this Request on behalf of Penn National only and not on behalf of any other entity. Penn National also objects to this Request as not reasonably calculated to lead to the discovery of admissible evidence. Penn National has not failed to retain any potentially relevant documents since the onset of the discovery dispute in this matter and, therefore, the existence or non-existence of any “litigation hold notices” has no bearing on this litigation. Penn National also objects to this Request to the extent the term “litigation hold notices” is not defined and, therefore, the breadth/identity of the documentation sought is not immediately evident.

Not waiving these or any additional objections set forth above, Penn National has not issued any formal litigation hold notice at this time. However, per Penn National’s document retention policy, no policy-related documents have been destroyed or purged by Penn National since the onset of the discovery dispute in this matter. Pursuant to this retention policy, certain policy-related documents may be identified for purging throughout the course of the year. However, such a purge does not take place until the conclusion of that year/start of the following year. Because the discovery dispute at issue in this action relating to the assertion that Covil may have been listed as an “additional insured” on the policies of other Penn National insureds—

which dispute began in January 2021—no policy-related documents have been destroyed or purged since the onset of the discovery dispute in this matter.

Further, based on the ongoing discovery dispute as well as the pending review of Penn National's policy-related document repositories by Ellis & Winters, LLP, per the Court's November 5, 2021 order, Penn National has instructed its document custodians not to move forward with the yearly purge of documents per its standard retention policy.

2. All correspondence regarding the litigation hold notices that YOU issued related to the Covil Litigation.

RESPONSE: Penn National objects to the use of the defined term "YOU" in this Request to the extent it requires a response on behalf of business entities other than Penn National. Penn National responds to this Request on behalf of Penn National only and not on behalf of any other entity. Penn National also objects to this Request as not reasonably calculated to lead to the discovery of admissible evidence. Penn National has not failed to retain any potentially relevant documents since the onset of the discovery dispute in this matter and, therefore, the existence or non-existence of any "litigation hold notices" has no bearing on this litigation. Penn National also objects to this Request to the extent the term "litigation hold notices" is not defined and, therefore, the breadth/identity of the documentation sought is not immediately evident. Further, Penn National objects to this request on the ground it seeks documents protected from disclosure by the attorney-client privilege, work product doctrine, and/or any other applicable privileges and protections, as any such communications in Penn National's possession pertaining to discussions about same would have been with its counsel and in relation to this litigation.

Not waiving these objections or any additional objections set forth above, Penn National refers to its response to Request No.1.

This the 20th day of December, 2021.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Vs.

Pennsylvania National Mutual Casualty Insurance
Co.; Sam J. Crain & Co., Inc.; and South Carolina
Property and Casualty Insurance Guaranty
Association,

Defendants.

Case Number: 2020-CP-40-02098

**RECEIVER FOR COVIL
CORPORATION
NOTICE OF VIDEOTAPED
DEPOSITION PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY PURSUANT
TO SOUTH CAROLINA RULE OF
CIVIL PROCEDURE 30(b)(6)**

**TO: PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY
VIA DAVID HARRIS AND BRADY YNTEMA, ATTORNEYS:**

YOU WILL PLEASE TAKE NOTICE that on **December 29, 2021 at 10:00 a.m. and continuing day to day until completed**, at the offices of Rikard & Protopapas, LLC at 2110 N. Beltline Blvd. Columbia, SC 29201 the attorneys for the Receiver for Covil Corporation (hereinafter "Covil"), will take the deposition of **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY** (hereinafter "Penn National," "you," or "your"), on oral examination, pursuant to the South Carolina Rules of Civil Procedure, Rule 30, before a Notary Public or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. The individual or individuals representing Penn National should be the **person or persons most knowledgeable concerning the subjects of examination listed below.**

DEFINITIONS

1. The terms “Penn National,” “your,” or “your,” are defined to mean Pennsylvania National Mutual Casualty Insurance company, including its predecessors, parents, subsidiaries, and affiliate companies.

TOPICS

1. All litigation hold notices that YOU issued related to the Covil Litigation, including but not limited to the existence, contents, recipients and timing of any litigation holds.
2. All steps taken by YOU to preserve information and documents after any litigation hold notice was issued related to the Covil Litigation.
3. All automatic, routine, or otherwise systematic destruction or purging of YOUR insurance policy information, including but not limited to YOUR insurance policies, which has taken place since June 2018.
4. All correspondence regarding the litigation hold notices that YOU issued related to the Covil Litigation.
5. How YOUR litigation hold notices were implemented with respect to the Covil Litigation.
6. Identification of all insurance policies in Penn National’s possession, custody or control that have been destroyed, purged, or otherwise not retained since June 2018.
7. All steps taken to suspend or modify YOUR document retention or destruction policy in response to the Covil Litigation.
8. All steps taken to suspend or modify YOUR document retention or destruction policy in response to any and all orders issued by Chief Justice (ret.) Jean Hoefer Toal related to the Covil Litigation.

9. All steps taken by YOU to review documents subject to YOUR document retention or destruction policy for information related to the Covil Litigation prior to destruction.

PLEASE TAKE FURTHER NOTICE that:

1. The deposition will be conducted remotely, using audio-visual conference technology;
2. The court reporter will report the deposition from a location separate from the witness;
3. Counsel for the parties and their clients will be participating from various, separate locations;
4. The Court Reporter will administer the oath to the witness(es) remotely;
5. The witness(es) will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on camera;
6. All exhibits will be provided simultaneously and electronically to the witness(es) and all participants; and,

Counsel for all parties will be requested to stipulate on the record their consent to this manner of deposition and waive any objection thereto.

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn T. Spitz
Rikard & Protopapas, LLC
2110 N Beltline Blvd.
Columbia, SC 29204
803.978.6111
Jspitz@rplegalgroup.com

This 19th Day of November, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Covil Corporation, by and through its duly
appointed Receiver Peter D. Protopapas,

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

CERTIFICATE OF SERVICE

Pennsylvania National Mutual Casualty Insurance
Co.; Sam J. Crain & Co., Inc.; and South Carolina
Property and Casualty Insurance Guaranty
Association,

Defendants.

I, Lindsay H. Valek, paralegal to Rikard & Protopapas, LLC, certify that I have served the
foregoing **RECEIVER FOR COVIL CORPORATION NOTICE OF VIDEOTAPED
DEPOSITION PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE
COMPANY TO SOUTH CAROLINA RULE OF CIVIL PROCEDURE 30(b)(6)** upon the
following counsel of record at the following addresses via email only pursuant to ongoing COVID-
19 protocols:

Davis Harris dharris@goldbergsegalla.com
Brady Yntema byntema@goldbergsegalla.com
Alexander Davis aedavis@goldbergsegalla.com

s/ Lindsay H. Valek

This 19th Day of November, 2021