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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 9**

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8/7/2023	Edwards, B.	PARTNER	0.8			
8/7/2023	Nes, W. B.	PARTNER	4.3			
8/8/2023	Allen, T.	ASSOCIATE	7.2			
8/8/2023	McCulloch Semlinger, L. A.	PARTNER	1.4			
8/8/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
8/8/2023	McCulloch Semlinger, L. A.	PARTNER	0.5			
8/8/2023	McCulloch Semlinger, L. A.	PARTNER	2.1			
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8/8/2023	Patterson, N. L.	PARTNER	1.7			
8/8/2023	Pick, C.	ASSOCIATE	0.7			
8/9/2023	Allen, T.	ASSOCIATE	5.8			
8/9/2023	McCulloch Semlinger, L. A.	PARTNER	3.6			
8/9/2023	Nes, W. B.	PARTNER	5			
8/9/2023	Patterson, N. L.	PARTNER	5.7			
8/10/2023	Allen, T.	ASSOCIATE	7.1			
8/10/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
8/10/2023	McCulloch Semlinger, L. A.	PARTNER	1.6			

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8/10/2023	Patterson, N. L.	PARTNER	2.3			
8/11/2023	McCulloch Semlinger, L. A.	PARTNER	0.2			
8/11/2023	McCulloch Semlinger, L. A.	PARTNER	0.7			
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8/12/2023	Nes, W. B.	PARTNER	2.5			
8/14/2023	Edwards, B.	PARTNER	1.2			
8/14/2023	McCulloch Semlinger, L. A.	PARTNER	0.5			
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8/14/2023	Pick, C.	ASSOCIATE	0.6			
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8/15/2023	McCulloch Semlinger, L. A.	PARTNER	0.5			
8/15/2023	Nes, W. B.	PARTNER	4.3			
8/16/2023	Edwards, B.	PARTNER	1.5			
8/16/2023	Nes, W. B.	PARTNER	0.5			
8/16/2023	Patterson, N. L.	PARTNER	0.6			

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8/17/2023	Edwards, B.	PARTNER	1			
8/18/2023	Allen, T.	ASSOCIATE	5.1			
8/18/2023	Nes, W. B.	PARTNER	2.3			
8/19/2023	Allen, T.	ASSOCIATE	4.6			
8/20/2023	Allen, T.	ASSOCIATE	8.5			
8/20/2023	Edwards, B.	PARTNER	3			
8/20/2023	Nes, W. B.	PARTNER	3			
8/21/2023	Edwards, B.	PARTNER	3			
8/21/2023	Nes, W. B.	PARTNER	4			
8/22/2023	Edwards, B.	PARTNER	2			

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8/22/2023	Nes, W. B.	PARTNER	3.5			
8/23/2023	McCulloch Semlinger, L. A.	PARTNER	2.8			
8/23/2023	Nes, W. B.	PARTNER	2.2			
8/24/2023	Hu, L.	ASSOCIATE	2.2			
8/24/2023	McCulloch Semlinger, L. A.	PARTNER	0.7			
8/24/2023	Nes, W. B.	PARTNER	4.5			
8/25/2023	Guzzi, T. A.	PARALEGAL	0.7			
8/25/2023	Hu, L.	ASSOCIATE	3			

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8/25/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
8/25/2023	Nes, W. B.	PARTNER	5.5			
8/25/2023	Patterson, N. L.	PARTNER	1			
8/25/2023	Pick, C.	ASSOCIATE	2.1			
8/26/2023	Pick, C.	ASSOCIATE	0.5			
8/28/2023	Hu, L.	ASSOCIATE	0.8			
8/28/2023	Patterson, N. L.	PARTNER	0.3			
8/29/2023	Nes, W. B.	PARTNER	1.5			
8/30/2023	Nes, W. B.	PARTNER	2.5			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
8/30/2023	Pick, C.	ASSOCIATE	2.9			
8/31/2023	Edwards, B.	PARTNER	1			
8/31/2023	Nes, W. B.	PARTNER	0.3			
8/31/2023	Pick, C.	ASSOCIATE	1.8			
9/1/2023	McCulloch Semlinger, L. A.	PARTNER	3			
9/1/2023	McCulloch Semlinger, L. A.	PARTNER	0.6			
9/1/2023	McCulloch Semlinger, L. A.	PARTNER	1.7			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
9/1/2023	Nes, W. B.	PARTNER	4			
9/4/2023	Nes, W. B.	PARTNER	4.3			
9/4/2023	Pick, C.	ASSOCIATE	0.5			
9/5/2023	McCulloch Semlinger, L. A.	PARTNER	1.2			
9/5/2023	Nes, W. B.	PARTNER	0.3			
9/6/2023	Nes, W. B.	PARTNER	1.5			
9/7/2023	Nes, W. B.	PARTNER	1.8			
9/7/2023	Patterson, N. L.	PARTNER	0.1			

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9/8/2023	Nes, W. B.	PARTNER	1			
9/11/2023	Hu, L.	ASSOCIATE	1.6			
9/11/2023	McCulloch Semlinger, L. A.	PARTNER	2.1			
9/11/2023	Nes, W. B.	PARTNER	0.4			
9/12/2023	Guzzi, T. A.	PARALEGAL	0.3			
9/12/2023	Hu, L.	ASSOCIATE	3.7			
9/12/2023	McCulloch Semlinger, L. A.	PARTNER	1.1			
9/12/2023	Nes, W. B.	PARTNER	2			
9/13/2023	Hu, L.	ASSOCIATE	2.5			
9/13/2023	McCulloch Semlinger, L. A.	PARTNER	2.5			
9/13/2023	Nes, W. B.	PARTNER	2.1			
9/14/2023	McCulloch Semlinger, L. A.	PARTNER	4.1			

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9/14/2023	Nes, W. B.	PARTNER	2.5			
9/14/2023	Patterson, N. L.	PARTNER	0.2			
9/15/2023	Nes, W. B.	PARTNER	2.3			
9/16/2023	Nes, W. B.	PARTNER	2.6			
9/18/2023	Nes, W. B.	PARTNER	3			
9/19/2023	McCulloch Semlinger, L. A.	PARTNER	0.3			
9/19/2023	Nes, W. B.	PARTNER	2.3			
9/20/2023	Guzzi, T. A.	PARALEGAL	0.9			
9/20/2023	Hu, L.	ASSOCIATE	2.2			
9/20/2023	McCulloch Semlinger, L. A.	PARTNER	1.2			

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9/20/2023	McCulloch Semlinger, L. A.	PARTNER	0.2			
9/20/2023	Nes, W. B.	PARTNER	2.1			
9/21/2023	Nes, W. B.	PARTNER	3.5			
9/21/2023	Patterson, N. L.	PARTNER	0.5			
9/22/2023	Guzzi, T. A.	PARALEGAL	0.3			
9/22/2023	McCulloch Semlinger, L. A.	PARTNER	0.3			
9/22/2023	Nes, W. B.	PARTNER	3.4			
9/25/2023	Guzzi, T. A.	PARALEGAL	0.4			
9/26/2023	Guzzi, T. A.	PARALEGAL	0.2			
9/26/2023	Hu, L.	ASSOCIATE	0.7			
9/26/2023	Nes, W. B.	PARTNER	3.2			
9/28/2023	Nes, W. B.	PARTNER	1			
9/29/2023	Nes, W. B.	PARTNER	3.3			
10/2/2023	Hu, L.	ASSOCIATE	0.4			

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10/2/2023	McCulloch Semlinger, L. A.	PARTNER	1.4			
10/2/2023	Nes, W. B.	PARTNER	0.5			
10/3/2023	Nes, W. B.	PARTNER	6.5			
10/4/2023	Guzzi, T. A.	PARALEGAL	0.2			
10/4/2023	Nes, W. B.	PARTNER	1.2			
10/5/2023	Nes, W. B.	PARTNER	1.5			
10/6/2023	Hu, L.	ASSOCIATE	0.8			
10/6/2023	Nes, W. B.	PARTNER	0.3			
10/9/2023	Hu, L.	ASSOCIATE	3.5			
10/9/2023	McCulloch Semlinger, L. A.	PARTNER	0.5			
10/9/2023	Nes, W. B.	PARTNER	5			
10/9/2023	Patterson, N. L.	PARTNER	0.5			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
10/10/2023	Guzzi, T. A.	PARALEGAL	0.9			
10/10/2023	Hu, L.	ASSOCIATE	3.5			
10/10/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
10/10/2023	McCulloch Semlinger, L. A.	PARTNER	0.3			
10/10/2023	Nes, W. B.	PARTNER	4.5			
10/11/2023	Nes, W. B.	PARTNER	4			
10/11/2023	Patterson, N. L.	PARTNER	2.4			
10/12/2023	Hu, L.	ASSOCIATE	2.7			
10/12/2023	McCulloch Semlinger, L. A.	PARTNER	0.9			
10/12/2023	McCulloch Semlinger, L. A.	PARTNER	0.6			

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10/12/2023	Nes, W. B.	PARTNER	3.8			
10/12/2023	Patterson, N. L.	PARTNER	2.2			
10/13/2023	Nes, W. B.	PARTNER	4.5			
10/13/2023	Patterson, N. L.	PARTNER	0.1			
10/16/2023	Guzzi, T. A.	PARALEGAL	0.3			
10/16/2023	Hu, L.	ASSOCIATE	2.2			
10/16/2023	Nes, W. B.	PARTNER	2			
10/17/2023	Chirozzi, M. A	INSURANCE SPECIALIST	1			
10/17/2023	Guzzi, T. A.	PARALEGAL	0.4			
10/17/2023	Hu, L.	ASSOCIATE	3.4			
10/17/2023	McCulloch Semlinger, L. A.	PARTNER	0.6			

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10/17/2023	Nes, W. B.	PARTNER	4.5			
10/18/2023	Guzzi, T. A.	PARALEGAL	1.6			
10/18/2023	Hu, L.	ASSOCIATE	0.4			
10/18/2023	McCulloch Semlinger, L. A.	PARTNER	0.3			
10/18/2023	Nes, W. B.	PARTNER	1			
10/19/2023	Chirozzi, M. A	INSURANCE SPECIALIST	1			
10/19/2023	Nes, W. B.	PARTNER	2.5			
10/20/2023	Hu, L.	ASSOCIATE	1			
10/20/2023	Nes, W. B.	PARTNER	2.5			
10/23/2023	Chirozzi, M. A	INSURANCE SPECIALIST	4.2			
10/23/2023	Guzzi, T. A.	PARALEGAL	2.7			
10/23/2023	Hu, L.	ASSOCIATE	2.5			
10/23/2023	McCulloch Semlinger, L. A.	PARTNER	0.6			
10/23/2023	McCulloch Semlinger, L. A.	PARTNER	0.7			

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10/23/2023	Nes, W. B.	PARTNER	3.5			
10/23/2023	Patterson, N. L.	PARTNER	0.3			
10/24/2023	Chirozzi, M. A	INSURANCE SPECIALIST	0.5			
10/24/2023	Edwards, B.	PARTNER	3			
10/24/2023	Guzzi, T. A.	PARALEGAL	2			
10/24/2023	Hu, L.	ASSOCIATE	2.3			
10/24/2023	Marks, K.	LIBRARY	1.1			
10/24/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
10/24/2023	Nes, W. B.	PARTNER	6			
10/24/2023	Patterson, N. L.	PARTNER	4			
10/25/2023	Chirozzi, M. A	INSURANCE SPECIALIST	1.1			
10/25/2023	Chirozzi, M. A	INSURANCE SPECIALIST	0.3			
10/25/2023	Edwards, B.	PARTNER	1			

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10/25/2023	Guzzi, T. A.	PARALEGAL	1.3			
10/25/2023	Hu, L.	ASSOCIATE	1.7			
10/25/2023	Nes, W. B.	PARTNER	6			
10/25/2023	Patterson, N. L.	PARTNER	7			
10/26/2023	Guzzi, T. A.	PARALEGAL	0.9			
10/26/2023	Hu, L.	ASSOCIATE	1.8			
10/26/2023	McCulloch Semlinger, L. A.	PARTNER	3.2			
10/26/2023	Nes, W. B.	PARTNER	4.3			
10/26/2023	Patterson, N. L.	PARTNER	2.2			
10/27/2023	Guzzi, T. A.	PARALEGAL	0.7			
10/27/2023	Hu, L.	ASSOCIATE	1			

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10/27/2023	Nes, W. B.	PARTNER	3.2			
10/28/2023	Nes, W. B.	PARTNER	2			
10/29/2023	Nes, W. B.	PARTNER	3.5			
10/30/2023	Hu, L.	ASSOCIATE	0.7			
10/30/2023	McCulloch Semlinger, L. A.	PARTNER	3.2			
10/30/2023	McCulloch Semlinger, L. A.	PARTNER	0.3			
10/30/2023	Nes, W. B.	PARTNER	6.4			
10/30/2023	Patterson, N. L.	PARTNER	1.6			
10/31/2023	Allen, T.	ASSOCIATE	1.2			
10/31/2023	Hu, L.	ASSOCIATE	0.5			

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10/31/2023	McCulloch Semlinger, L. A.	PARTNER	3.4			
10/31/2023	Nes, W. B.	PARTNER	6.5			
10/31/2023	Patterson, N. L.	PARTNER	4.3			
11/1/2023	Bonina, N.	NONEXEMPT	0.9			
11/1/2023	Bonina, N.	NONEXEMPT	2.2			
11/1/2023	Hu, L.	ASSOCIATE	5.6			
11/1/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
11/1/2023	Nes, W. B.	PARTNER	7			

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11/1/2023	Patterson, N. L.	PARTNER	1.1			
11/2/2023	Bonina, N.	NONEXEMPT	0.4			
11/2/2023	Hu, L.	ASSOCIATE	5.3			
11/2/2023	McCulloch Semlinger, L. A.	PARTNER	0.9			
11/2/2023	McCulloch Semlinger, L. A.	PARTNER	1.3			
11/2/2023	Nes, W. B.	PARTNER	6.5			
11/2/2023	Patterson, N. L.	PARTNER	3.3			

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11/3/2023	Hu, L.	ASSOCIATE	1.5			
11/3/2023	McCulloch Semlinger, L. A.	PARTNER	1.2			
11/3/2023	McCulloch Semlinger, L. A.	PARTNER	1.3			
11/3/2023	Nes, W. B.	PARTNER	7			
11/3/2023	Patterson, N. L.	PARTNER	4.6			
11/4/2023	Nes, W. B.	PARTNER	3.5			
11/5/2023	Nes, W. B.	PARTNER	3			
11/6/2023	Allen, T.	ASSOCIATE	2.7			
11/6/2023	Hu, L.	ASSOCIATE	3.8			
11/6/2023	McCulloch Semlinger, L.	PARTNER	0.8			

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	A.					
11/6/2023	Nes, W. B.	PARTNER	5.2			
11/6/2023	Patterson, N. L.	PARTNER	3.2			
11/7/2023	Allen, T.	ASSOCIATE	6.1			
11/7/2023	Allen, T.	ASSOCIATE	1.6			
11/7/2023	Guzzi, T. A.	PARALEGAL	0.6			
11/7/2023	Hu, L.	ASSOCIATE	2.5			
11/7/2023	McCulloch Semlinger, L. A.	PARTNER	0.4			
11/7/2023	Nes, W. B.	PARTNER	2.5			
11/7/2023	Patterson, N. L.	PARTNER	4.1			

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11/8/2023	Allen, T.	ASSOCIATE	3.2			
11/8/2023	Allen, T.	ASSOCIATE	3.7			
11/8/2023	Hu, L.	ASSOCIATE	0.5			
11/8/2023	Nes, W. B.	PARTNER	2.7			
11/9/2023	Allen, T.	ASSOCIATE	1.2			
11/9/2023	Edwards, B.	PARTNER	0.5			
11/9/2023	Guzzi, T. A.	PARALEGAL	1.6			
11/9/2023	Nes, W. B.	PARTNER	3.8			
11/10/2023	Nes, W. B.	PARTNER	5.2			
11/11/2023	Nes, W. B.	PARTNER	3.5			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
11/13/2023	Guzzi, T. A.	PARALEGAL	0.4			
11/13/2023	Hu, L.	ASSOCIATE	2.3			
11/13/2023	McCulloch Semlinger, L. A.	PARTNER	2.1			
11/13/2023	Nes, W. B.	PARTNER	6.5			
11/13/2023	Pick, C.	ASSOCIATE	0.5			
11/14/2023	Allen, T.	ASSOCIATE	5.7			
11/14/2023	Hu, L.	ASSOCIATE	1			
11/14/2023	McCulloch Semlinger, L. A.	PARTNER	0.8			
11/14/2023	Nes, W. B.	PARTNER	5.4			
11/14/2023	Patterson, N. L.	PARTNER	2.6			
11/15/2023	Hu, L.	ASSOCIATE	1			

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11/15/2023	Nes, W. B.	PARTNER	7.2			
11/15/2023	Patterson, N. L.	PARTNER	1.4			
11/16/2023	Guzzi, T. A.	PARALEGAL	0.2			
11/16/2023	McCulloch Semlinger, L. A.	PARTNER	1			
11/16/2023	Nes, W. B.	PARTNER	6.8			
11/16/2023	Patterson, N. L.	PARTNER	3.2			
11/17/2023	Guzzi, T. A.	PARALEGAL	0.9			
11/17/2023	Hu, L.	ASSOCIATE	4.1			
11/17/2023	McCulloch Semlinger, L. A.	PARTNER	3.2			
11/17/2023	Nes, W. B.	PARTNER	7.5			
11/17/2023	Patterson, N. L.	PARTNER	0.5			
11/18/2023	McCulloch Semlinger, L.	PARTNER	0.9			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
	A.					
11/18/2023	Nes, W. B.	PARTNER	6			
11/19/2023	McCulloch Semlinger, L. A.	PARTNER	1.5			
11/19/2023	Nes, W. B.	PARTNER	7.5			
11/20/2023	Chirozzi, M. A	INSURANCE SPECIALIST	1.1			
11/20/2023	Edwards, B.	PARTNER	1			
11/20/2023	Guzzi, T. A.	PARALEGAL	4			
11/20/2023	Hu, L.	ASSOCIATE	4.5			
11/20/2023	McCulloch Semlinger, L. A.	PARTNER	4.6			
11/20/2023	Nes, W. B.	PARTNER	8			
11/20/2023	Rubin, H. C.	LIBRARIAN	0.8			
11/21/2023	Chirozzi, M. A	INSURANCE SPECIALIST	0.3			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
11/21/2023	Guzzi, T. A.	PARALEGAL	1.3			
11/21/2023	Hu, L.	ASSOCIATE	1.1			
11/21/2023	McCulloch Semlinger, L. A.	PARTNER	4.3			
11/21/2023	Nes, W. B.	PARTNER	10.7			
11/22/2023	Guzzi, T. A.	PARALEGAL	0.5			
11/22/2023	McCulloch Semlinger, L. A.	PARTNER	0.2			
11/22/2023	McCulloch Semlinger, L. A.	PARTNER	0.6			
11/22/2023	Nes, W. B.	PARTNER	9.5			
11/22/2023	Patterson, N. L.	PARTNER	2.6			
11/23/2023	Nes, W. B.	PARTNER	6.5			
11/24/2023	McCulloch Semlinger, L. A.	PARTNER	2.7			

Date of Printing: 03/28/24
Time & Disbursements through 03/20/24

Matter Currency: US Dollar
Responsible Attorney: Edwards, Brady

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
11/24/2023	Nes, W. B.	PARTNER	9			
11/25/2023	Guzzi, T. A.	PARALEGAL	11			
11/25/2023	McCulloch Semlinger, L. A.	PARTNER	1.8			
11/25/2023	Nes, W. B.	PARTNER	9.5			
11/25/2023	Patterson, N. L.	PARTNER	8			
11/26/2023	Guzzi, T. A.	PARALEGAL	10			
11/26/2023	McCulloch Semlinger, L. A.	PARTNER	0.8			
11/26/2023	Nes, W. B.	PARTNER	10.5			
11/26/2023	Patterson, N. L.	PARTNER	12.5			
11/27/2023	Guzzi, T. A.	PARALEGAL	9			
11/27/2023	McCulloch Semlinger, L.	PARTNER	0.7			

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Time & Disbursements through 03/20/24

Matter Currency: US Dollar
Responsible Attorney: Edwards, Brady

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
	A.					
11/27/2023	Nes, W. B.	PARTNER	12.5			
11/27/2023	Patterson, N. L.	PARTNER	13.3			
11/28/2023	Guzzi, T. A.	PARALEGAL	8			
11/28/2023	Nes, W. B.	PARTNER	7			
11/28/2023	Patterson, N. L.	PARTNER	9			
11/29/2023	Nes, W. B.	PARTNER	3			
11/29/2023	Patterson, N. L.	PARTNER	2.8			
11/30/2023	Allen, T.	ASSOCIATE	5.1			
11/30/2023	Nes, W. B.	PARTNER	2.5			
12/1/2023	Nes, W. B.	PARTNER	2			
12/4/2023	Nes, W. B.	PARTNER	2.8			
12/5/2023	Nes, W. B.	PARTNER	2.5			
12/6/2023	Nes, W. B.	PARTNER	3.3			
12/7/2023	Hu, L.	ASSOCIATE	0.3			
12/7/2023	Nes, W. B.	PARTNER	2.5			
12/11/2023	Nes, W. B.	PARTNER	1.7			

Date of Printing: 03/28/24
Time & Disbursements through 03/20/24

Matter Currency: US Dollar
Responsible Attorney: Edwards, Brady

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
12/11/2023	Rubin, H. C.	LIBRARIAN	1			
12/13/2023	Nes, W. B.	PARTNER	1.5			
12/13/2023	Patterson, N. L.	PARTNER	1.3			
12/14/2023	Nes, W. B.	PARTNER	4.2			
12/18/2023	Hu, L.	ASSOCIATE	2.1			
12/18/2023	Nes, W. B.	PARTNER	3			
12/18/2023	Nes, W. B.	PARTNER	3			
12/19/2023	Hu, L.	ASSOCIATE	5.2			
12/20/2023	Patterson, N. L.	PARTNER	0.1			
12/21/2023	Hu, L.	ASSOCIATE	0.2			
12/21/2023	Nes, W. B.	PARTNER	3			
12/27/2023	Nes, W. B.	PARTNER	0.3			
12/28/2023	Guzzi, T. A.	PARALEGAL	0.5			
12/28/2023	Nes, W. B.	PARTNER	4			
12/28/2023	Nes, W. B.	PARTNER	0.5			
12/29/2023	Allen, T.	ASSOCIATE	3.2			

Date of Printing: 03/28/24

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
12/29/2023	Hu, L.	ASSOCIATE	2.2			
12/29/2023	Nes, W. B.	PARTNER	0.5			
12/29/2023	Nes, W. B.	PARTNER	4			
12/30/2023	Nes, W. B.	PARTNER	2.5			
12/31/2023	Allen, T.	ASSOCIATE	6.2			
1/2/2024	Allen, T.	ASSOCIATE	3.6			
1/2/2024	Hu, L.	ASSOCIATE	1.3			
1/2/2024	Patterson, N. L.	PARTNER	0.5			
1/3/2024	Allen, T.	ASSOCIATE	1.2			
1/3/2024	Guzzi, T. A.	PARALEGAL	0.2			
1/3/2024	Hu, L.	ASSOCIATE	3.7			
1/3/2024	McCulloch Semlinger, L. A.	PARTNER	0.3			
1/4/2024	Allen, T.	ASSOCIATE	4.3			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
1/4/2024	Hu, L.	ASSOCIATE	3.2			
1/4/2024	Nes, W. B.	PARTNER	1			
1/5/2024	Hu, L.	ASSOCIATE	3.2			
1/5/2024	Nes, W. B.	PARTNER	1.5			
1/5/2024	Patterson, N. L.	PARTNER	7.9			
1/6/2024	Nes, W. B.	PARTNER	3			
1/7/2024	Nes, W. B.	PARTNER	3			
1/8/2024	Hu, L.	ASSOCIATE	3.6			
1/8/2024	McCulloch Semlinger, L. A.	PARTNER	0.3			
1/9/2024	Hu, L.	ASSOCIATE	3.2			
1/9/2024	Nes, W. B.	PARTNER	4			
1/10/2024	Nes, W. B.	PARTNER	5.9			
1/11/2024	Allen, T.	ASSOCIATE	12.2			
1/11/2024	Hu, L.	ASSOCIATE	8.2			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
1/11/2024	Nes, W. B.	PARTNER	8.5			
1/12/2024	Allen, T.	ASSOCIATE	3.8			
1/12/2024	Edwards, B.	PARTNER	2			
1/12/2024	Hu, L.	ASSOCIATE	3.2			
1/12/2024	Nes, W. B.	PARTNER	7			
1/12/2024	Patterson, N. L.	PARTNER	4.2			
1/15/2024	McCulloch Semlinger, L. A.	PARTNER	0.5			
1/15/2024	Patterson, N. L.	PARTNER	0.9			
1/16/2024	Guzzi, T. A.	PARALEGAL	0.2			
1/17/2024	Guzzi, T. A.	PARALEGAL	0.3			
1/17/2024	Hu, L.	ASSOCIATE	0.2			
1/17/2024	McCulloch Semlinger, L. A.	PARTNER	0.3			
1/17/2024	Nes, W. B.	PARTNER	1			

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Work Date	Timekeeper	Title	Hours	Rate	Amount	Entry Description
1/30/2024	Nes, W. B.	PARTNER	0.4			
2/14/2024	Nes, W. B.	PARTNER	0.3			
2/15/2024	Nes, W. B.	PARTNER	0.3			
2/20/2024	McCulloch Semlinger, L. A.	PARTNER	0.4			
3/1/2024	Hu, L.	ASSOCIATE	0.5			
3/1/2024	Nes, W. B.	PARTNER	1.5			
3/4/2024	Hu, L.	ASSOCIATE	0.1			
3/5/2024	Hu, L.	ASSOCIATE	0.1			
3/7/2024	McCulloch Semlinger, L. A.	PARTNER	0.8			
3/7/2024	Nes, W. B.	PARTNER	0.5			
3/8/2024	Nes, W. B.	PARTNER	0.7			

Summary of Expenses ended March 20, 2024

Re: Pennsylvania National Mutual Casualty Insurance company

Expenses

Total charges

\$284,567.28

Detail for Expenses Rendered

Work Date	Timekeeper	Title	Amount	Entry Description
1/7/2021	Nes, W. B.	PARTNER		
8/17/2021	Nes, W. B.	PARTNER		
8/17/2021	Nes, W. B.	PARTNER		
10/13/2021	Nes, W. B.	PARTNER		
10/13/2021	Nes, W. B.	PARTNER		
10/13/2021	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/13/2021	Nes, W. B.	PARTNER		
10/15/2021	Nes, W. B.	PARTNER		
10/15/2021	Nes, W. B.	PARTNER		
10/18/2021	Nes, W. B.	PARTNER		
10/18/2021	Nes, W. B.	PARTNER		
10/18/2021	Nes, W. B.	PARTNER		
10/18/2021	Nes, W. B.	PARTNER		
10/18/2021	Nes, W. B.	PARTNER		
10/19/2021	Nes, W. B.	PARTNER		
10/19/2021	Nes, W. B.	PARTNER		
10/20/2021	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/22/2021	Nes, W. B.	PARTNER		
10/22/2021	Nes, W. B.	PARTNER		
10/22/2021	Nes, W. B.	PARTNER		
10/22/2021	Nes, W. B.	PARTNER		
10/25/2021	Nes, W. B.	PARTNER		
10/25/2021	Nes, W. B.	PARTNER		
10/25/2021	Nes, W. B.	PARTNER		
10/26/2021	Nes, W. B.	PARTNER		
10/26/2021	Nes, W. B.	PARTNER		
12/10/2021	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/4/2022	Nes, W. B.	PARTNER		
1/5/2022	Nes, W. B.	PARTNER		
1/7/2022	Nes, W. B.	PARTNER		
1/7/2022	Nes, W. B.	PARTNER		
1/10/2022	Nes, W. B.	PARTNER		
1/11/2022	Nes, W. B.	PARTNER		
1/11/2022	Nes, W. B.	PARTNER		
1/11/2022	Nes, W. B.	PARTNER		
1/11/2022	Nes, W. B.	PARTNER		
1/11/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/11/2022	Nes, W. B.	PARTNER		
1/20/2022	Nes, W. B.	PARTNER		
2/18/2022	Moriarty, P.	ASSOCIATE		
2/25/2022	Nes, W. B.	PARTNER		
3/3/2022	Hu, L.	ASSOCIATE		
3/4/2022	Hu, L.	ASSOCIATE		
3/4/2022	Nes, W. B.	PARTNER		
3/8/2022	Hu, L.	ASSOCIATE		
3/11/2022	Nes, W. B.	PARTNER		
3/16/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
3/21/2022	Pick, C.	ASSOCIATE		
3/31/2022	Nes, W. B.	PARTNER		
4/6/2022	Nes, W. B.	PARTNER		
4/6/2022	Nes, W. B.	PARTNER		
4/6/2022	Nes, W. B.	PARTNER		
4/7/2022	Nes, W. B.	PARTNER		
4/8/2022	Nes, W. B.	PARTNER		
4/8/2022	Nes, W. B.	PARTNER		
4/8/2022	Nes, W. B.	PARTNER		
4/8/2022	Nes, W. B.	PARTNER		
4/8/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
4/10/2022	Edwards, B.	PARTNER		
4/11/2022	Nes, W. B.	PARTNER		
4/11/2022	Nes, W. B.	PARTNER		
4/11/2022	Nes, W. B.	PARTNER		
4/11/2022	Nes, W. B.	PARTNER		
4/11/2022	Nes, W. B.	PARTNER		
4/12/2022	Edwards, B.	PARTNER		
4/14/2022	Nes, W. B.	PARTNER		
4/18/2022	Nes, W. B.	PARTNER		
4/18/2022	Nes, W. B.	PARTNER		
4/18/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
4/18/2022	Nes, W. B.	PARTNER		
4/18/2022	Nes, W. B.	PARTNER		
4/18/2022	Nes, W. B.	PARTNER		
5/17/2022	Hu, L.	ASSOCIATE		
5/25/2022	Pick, C.	ASSOCIATE		
5/31/2022	Nes, W. B.	PARTNER		
6/7/2022	Nes, W. B.	PARTNER		
6/7/2022	Nes, W. B.	PARTNER		
6/10/2022	Nes, W. B.	PARTNER		
6/14/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
6/15/2022	Pick, C.	ASSOCIATE		
6/16/2022	Pick, C.	ASSOCIATE		
6/21/2022	Pick, C.	ASSOCIATE		
6/28/2022	Pick, C.	ASSOCIATE		
6/30/2022	Nes, W. B.	PARTNER		
7/26/2022	Nes, W. B.	PARTNER		
8/22/2022	Nes, W. B.	PARTNER		
8/22/2022	Pick, C.	ASSOCIATE		
8/30/2022	Nes, W. B.	PARTNER		
8/30/2022	Pick, C.	ASSOCIATE		
8/30/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
8/31/2022	Nes, W. B.	PARTNER		
9/2/2022	Pick, C.	ASSOCIATE		
9/6/2022	Edwards, B.	PARTNER		
9/7/2022	Nes, W. B.	PARTNER		
9/7/2022	Nes, W. B.	PARTNER		
9/7/2022	Nes, W. B.	PARTNER		
9/7/2022	Patterson, N. L.	PARTNER		
9/8/2022	Edwards, B.	PARTNER		
9/8/2022	Nes, W. B.	PARTNER		
9/8/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
9/8/2022	Nes, W. B.	PARTNER		
9/8/2022	Nes, W. B.	PARTNER		
9/8/2022	Nes, W. B.	PARTNER		
9/8/2022	Patterson, N. L.	PARTNER		
9/8/2022	Patterson, N. L.	PARTNER		
9/8/2022	Patterson, N. L.	PARTNER		
9/9/2022	Nes, W. B.	PARTNER		
9/12/2022	Nes, W. B.	PARTNER		
9/19/2022	Pick, C.	ASSOCIATE		
9/29/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
9/30/2022	Nes, W. B.	PARTNER		
9/30/2022	Pick, C.	ASSOCIATE		
10/3/2022	Pick, C.	ASSOCIATE		
10/4/2022	Patterson, N. L.	PARTNER		
10/4/2022	Pick, C.	ASSOCIATE		
10/5/2022	Nes, W. B.	PARTNER		
10/5/2022	Nes, W. B.	PARTNER		
10/5/2022	Pick, C.	ASSOCIATE		
10/7/2022	Pick, C.	ASSOCIATE		
10/12/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/24/2022	Horwitz, N. M.	ASSOCIATE		
10/24/2022	Nes, W. B.	PARTNER		
10/24/2022	Nes, W. B.	PARTNER		
10/24/2022	Nes, W. B.	PARTNER		
10/24/2022	Pick, C.	ASSOCIATE		
10/25/2022	Horwitz, N. M.	ASSOCIATE		
10/25/2022	Nes, W. B.	PARTNER		
10/25/2022	Nes, W. B.	PARTNER		
10/26/2022	Horwitz, N. M.	ASSOCIATE		
10/26/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/26/2022	Nes, W. B.	PARTNER		
10/26/2022	Nes, W. B.	PARTNER		
10/26/2022	Nes, W. B.	PARTNER		
10/26/2022	Pick, C.	ASSOCIATE		
10/27/2022	Horwitz, N. M.	ASSOCIATE		
10/27/2022	Pick, C.	ASSOCIATE		
10/28/2022	Horwitz, N. M.	ASSOCIATE		
10/31/2022	Nes, W. B.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
10/31/2022	Patterson, N. L.	PARTNER		
11/1/2022	Nes, W. B.	PARTNER		
11/1/2022	Nes, W. B.	PARTNER		

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Fax: +1.713.890.5001
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Work Date	Timekeeper	Title	Amount	Entry Description
11/1/2022	Patterson, N. L.	PARTNER		
11/1/2022	Patterson, N. L.	PARTNER		
11/1/2022	Patterson, N. L.	PARTNER		
11/1/2022	Patterson, N. L.	PARTNER		
11/1/2022	Patterson, N. L.	PARTNER		
11/2/2022	Nes, W. B.	PARTNER		
11/2/2022	Nes, W. B.	PARTNER		
11/2/2022	Patterson, N. L.	PARTNER		
11/2/2022	Patterson, N. L.	PARTNER		
11/2/2022	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/3/2022	Nes, W. B.	PARTNER		
11/4/2022	Patterson, N. L.	PARTNER		
11/4/2022	Patterson, N. L.	PARTNER		
11/8/2022	Dillingham, J. L.	SECRETARY		

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Fax: +1.713.890.5001
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Work Date	Timekeeper	Title	Amount	Entry Description
11/8/2022	Horwitz, N. M.	ASSOCIATE		
11/8/2022	Pick, C.	ASSOCIATE		
11/9/2022	Dillingham, J. L.	SECRETARY		
11/10/2022	Nes, W. B.	PARTNER		
11/10/2022	Nes, W. B.	PARTNER		
11/10/2022	Nes, W. B.	PARTNER		
11/10/2022	Nes, W. B.	PARTNER		
11/11/2022	Horwitz, N. M.	ASSOCIATE		
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		
11/11/2022	Nes, W. B.	PARTNER		
11/13/2022	Edwards, B.	PARTNER		
11/13/2022	Edwards, B.	PARTNER		
11/13/2022	Edwards, B.	PARTNER		
11/13/2022	Edwards, B.	PARTNER		
11/13/2022	Horwitz, N. M.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/13/2022	Nes, W. B.	PARTNER		
11/13/2022	Nes, W. B.	PARTNER		
11/13/2022	Patterson, N. L.	PARTNER		
11/13/2022	Patterson, N. L.	PARTNER		
11/13/2022	Patterson, N. L.	PARTNER		
11/14/2022	Edwards, B.	PARTNER		
11/14/2022	Horwitz, N. M.	ASSOCIATE		
11/15/2022	Patterson, N. L.	PARTNER		
11/15/2022	Patterson, N. L.	PARTNER		
11/16/2022	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/16/2022	Patterson, N. L.	PARTNER		
11/17/2022	Nes, W. B.	PARTNER		
11/17/2022	Nes, W. B.	PARTNER		
11/17/2022	Patterson, N. L.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		
11/18/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/18/2022	Patterson, N. L.	PARTNER		
11/18/2022	Patterson, N. L.	PARTNER		
11/18/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/20/2022	Patterson, N. L.	PARTNER		
11/21/2022	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/21/2022	Patterson, N. L.	PARTNER		
11/21/2022	Patterson, N. L.	PARTNER		
11/21/2022	Patterson, N. L.	PARTNER		
11/22/2022	Horwitz, N. M.	ASSOCIATE		
11/22/2022	Patterson, N. L.	PARTNER		
11/23/2022	Horwitz, N. M.	ASSOCIATE		
11/24/2022	Horwitz, N. M.	ASSOCIATE		
11/25/2022	Horwitz, N. M.	ASSOCIATE		
11/25/2022	Patterson, N. L.	PARTNER		
11/26/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/27/2022	Horwitz, N. M.	ASSOCIATE		
11/28/2022	Horwitz, N. M.	ASSOCIATE		
11/28/2022	Patterson, N. L.	PARTNER		
11/28/2022	Pick, C.	ASSOCIATE		
11/29/2022	Horwitz, N. M.	ASSOCIATE		
11/29/2022	Nes, W. B.	PARTNER		
11/30/2022	Horwitz, N. M.	ASSOCIATE		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Nes, W. B.	PARTNER		
11/30/2022	Patterson, N. L.	PARTNER		
11/30/2022	Patterson, N. L.	PARTNER		
12/1/2022	Burroughs, J. E.	SECRETARY		
12/1/2022	Horwitz, N. M.	ASSOCIATE		
12/1/2022	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/2/2022	Pick, C.	ASSOCIATE		
12/2/2022	Pick, C.	ASSOCIATE		
12/3/2022	Horwitz, N. M.	ASSOCIATE		
12/3/2022	Nes, W. B.	PARTNER		
12/4/2022	Edwards, B.	PARTNER		
12/4/2022	Nes, W. B.	PARTNER		
12/4/2022	Nes, W. B.	PARTNER		
12/4/2022	Nes, W. B.	PARTNER		
12/4/2022	Pick, C.	ASSOCIATE		
12/4/2022	Pick, C.	ASSOCIATE		
12/4/2022	Pick, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/4/2022	Pick, C.	ASSOCIATE		
12/4/2022	Pick, C.	ASSOCIATE		
12/4/2022	Pick, C.	ASSOCIATE		
12/5/2022	Nes, W. B.	PARTNER		
12/5/2022	Nes, W. B.	PARTNER		
12/5/2022	Pick, C.	ASSOCIATE		
12/6/2022	Edwards, B.	PARTNER		
12/6/2022	Edwards, B.	PARTNER		
12/6/2022	Horwitz, N. M.	ASSOCIATE		
12/6/2022	Nes, W. B.	PARTNER		
12/6/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/6/2022	Nes, W. B.	PARTNER		
12/6/2022	Nes, W. B.	PARTNER		
12/6/2022	Nes, W. B.	PARTNER		
12/6/2022	Pick, C.	ASSOCIATE		
12/7/2022	Horwitz, N. M.	ASSOCIATE		
12/7/2022	Nes, W. B.	PARTNER		
12/7/2022	Nes, W. B.	PARTNER		
12/7/2022	Nes, W. B.	PARTNER		
12/7/2022	Pick, C.	ASSOCIATE		
12/7/2022	Razeen, S.	LIBRARIAN		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/8/2022	Edwards, B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Nes, W. B.	PARTNER		
12/8/2022	Pick, C.	ASSOCIATE		
12/8/2022	Pick, C.	ASSOCIATE		
12/9/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/12/2022	Edwards, B.	PARTNER		
12/12/2022	Nes, W. B.	PARTNER		
12/15/2022	Pick, C.	ASSOCIATE		
12/17/2022	Nes, W. B.	PARTNER		
12/20/2022	Nes, W. B.	PARTNER		
12/26/2022	Edwards, B.	PARTNER		
12/29/2022	Nes, W. B.	PARTNER		
12/30/2022	Blair, T.	COUNSEL		
12/30/2022	Data Services	SPECIAL CASE		
12/30/2022	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/10/2023	Nes, W. B.	PARTNER		
1/10/2023	Nes, W. B.	PARTNER		
1/12/2023	Nes, W. B.	PARTNER		
1/14/2023	Eschbach, C.	ASSOCIATE		
1/15/2023	Eschbach, C.	ASSOCIATE		
1/17/2023	Eschbach, C.	ASSOCIATE		
1/19/2023	Nes, W. B.	PARTNER		
1/19/2023	Nes, W. B.	PARTNER		
1/19/2023	Nes, W. B.	PARTNER		
1/19/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/20/2023	Nes, W. B.	PARTNER		
1/24/2023	Nes, W. B.	PARTNER		
1/24/2023	Nes, W. B.	PARTNER		
1/24/2023	Nes, W. B.	PARTNER		
1/24/2023	Nes, W. B.	PARTNER		
1/24/2023	Nes, W. B.	PARTNER		
1/26/2023	Nes, W. B.	PARTNER		
1/26/2023	Nes, W. B.	PARTNER		
1/26/2023	Nes, W. B.	PARTNER		
1/26/2023	Nes, W. B.	PARTNER		
1/26/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/28/2023	Nes, W. B.	PARTNER		
1/28/2023	Nes, W. B.	PARTNER		
1/28/2023	Nes, W. B.	PARTNER		
1/28/2023	Nes, W. B.	PARTNER		
1/28/2023	Nes, W. B.	PARTNER		
1/30/2023	Blair, T.	COUNSEL		
1/31/2023	Blair, T.	COUNSEL		
1/31/2023	Data Services	SPECIAL CASE		
1/31/2023	Nes, W. B.	PARTNER		
2/2/2023	Eschbach, C.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
2/28/2023	Blair, T.	COUNSEL		
2/28/2023	Data Services	SPECIAL CASE		
3/8/2023	Garbutt III, BJ	PARTNER		
3/31/2023	Data Services	SPECIAL CASE		
3/31/2023	Nes, W. B.	PARTNER		
4/12/2023	Nes, W. B.	PARTNER		
4/16/2023	Edwards, B.	PARTNER		
4/16/2023	Edwards, B.	PARTNER		
4/16/2023	Edwards, B.	PARTNER		
4/17/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
4/17/2023	Nes, W. B.	PARTNER		
4/17/2023	Nes, W. B.	PARTNER		
4/18/2023	Nes, W. B.	PARTNER		
4/18/2023	Nes, W. B.	PARTNER		
4/18/2023	Nes, W. B.	PARTNER		
4/20/2023	Nes, W. B.	PARTNER		
4/20/2023	Nes, W. B.	PARTNER		
4/20/2023	Nes, W. B.	PARTNER		
4/20/2023	Nes, W. B.	PARTNER		
4/21/2023	Edwards, B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
4/28/2023	Data Services	SPECIAL CASE		
5/3/2023	McCulloch Semlinger, L. A.	PARTNER		
5/26/2023	Nes, W. B.	PARTNER		
5/31/2023	Data Services	SPECIAL CASE		
5/31/2023	Edwards, B.	PARTNER		
6/1/2023	Nes, W. B.	PARTNER		
6/6/2023	Burroughs, J. E.	SECRETARY		
6/6/2023	Nes, W. B.	PARTNER		
6/6/2023	Nes, W. B.	PARTNER		
6/6/2023	Nes, W. B.	PARTNER		
6/6/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
6/6/2023	Nes, W. B.	PARTNER		
6/6/2023	Nes, W. B.	PARTNER		
6/6/2023	Nes, W. B.	PARTNER		
6/7/2023	Nes, W. B.	PARTNER		
6/7/2023	Nes, W. B.	PARTNER		
6/7/2023	Nes, W. B.	PARTNER		
6/8/2023	Nes, W. B.	PARTNER		
6/8/2023	Nes, W. B.	PARTNER		
6/8/2023	Nes, W. B.	PARTNER		
6/8/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
6/8/2023	Nes, W. B.	PARTNER		
6/8/2023	Nes, W. B.	PARTNER		
6/18/2023	Edwards, B.	PARTNER		
6/21/2023	Dyckman, M.	LIBRARIAN		
6/21/2023	Dyckman, M.	LIBRARIAN		
6/21/2023	Dyckman, M.	LIBRARIAN		
6/21/2023	Dyckman, M.	LIBRARIAN		
6/21/2023	Dyckman, M.	LIBRARIAN		
6/28/2023	Hu, L.	ASSOCIATE		
6/30/2023	Data Services	SPECIAL CASE		
7/6/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
7/13/2023	Hu, L.	ASSOCIATE		
7/17/2023	Hu, L.	ASSOCIATE		
7/31/2023	Data Services	SPECIAL CASE		
7/31/2023	Nes, W. B.	PARTNER		
7/31/2023	Nes, W. B.	PARTNER		
7/31/2023	Nes, W. B.	PARTNER		
7/31/2023	Nes, W. B.	PARTNER		
8/1/2023	Edwards, B.	PARTNER		
8/20/2023	Edwards, B.	PARTNER		
8/20/2023	Edwards, B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
8/20/2023	Edwards, B.	PARTNER		
8/20/2023	Nes, W. B.	PARTNER		
8/20/2023	Nes, W. B.	PARTNER		
8/20/2023	Nes, W. B.	PARTNER		
8/21/2023	Nes, W. B.	PARTNER		
8/21/2023	Nes, W. B.	PARTNER		
8/22/2023	Nes, W. B.	PARTNER		
8/22/2023	Nes, W. B.	PARTNER		
8/22/2023	Nes, W. B.	PARTNER		
8/22/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
8/22/2023	Nes, W. B.	PARTNER		
8/31/2023	Data Services	SPECIAL CASE		
8/31/2023	Nes, W. B.	PARTNER		
9/5/2023	Edwards, B.	PARTNER		
9/6/2023	Nes, W. B.	PARTNER		
9/6/2023	Nes, W. B.	PARTNER		
9/13/2023	Hu, L.	ASSOCIATE		
9/29/2023	Data Services	SPECIAL CASE		
9/29/2023	eData Services	NONEXEMPT		
9/30/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/3/2023	Nes, W. B.	PARTNER		
10/3/2023	Nes, W. B.	PARTNER		
10/4/2023	Guzzi, T. A.	PARALEGAL		
10/9/2023	Hu, L.	ASSOCIATE		
10/10/2023	Hu, L.	ASSOCIATE		
10/16/2023	Nes, W. B.	PARTNER		
10/17/2023	Hu, L.	ASSOCIATE		
10/24/2023	Nes, W. B.	PARTNER		
10/24/2023	Nes, W. B.	PARTNER		
10/24/2023	Nes, W. B.	PARTNER		

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Fax: +1.713.890.5001
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Work Date	Timekeeper	Title	Amount	Entry Description
10/24/2023	Nes, W. B.	PARTNER		
10/24/2023	Patterson, N. L.	PARTNER		
10/24/2023	Patterson, N. L.	PARTNER		
10/24/2023	Patterson, N. L.	PARTNER		
10/25/2023	Nes, W. B.	PARTNER		
10/25/2023	Nes, W. B.	PARTNER		
10/25/2023	Nes, W. B.	PARTNER		
10/25/2023	Patterson, N. L.	PARTNER		
10/25/2023	Patterson, N. L.	PARTNER		
10/25/2023	Patterson, N. L.	PARTNER		
10/25/2023	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
10/26/2023	Nes, W. B.	PARTNER		
10/26/2023	Nes, W. B.	PARTNER		
10/26/2023	Nes, W. B.	PARTNER		
10/26/2023	Patterson, N. L.	PARTNER		
10/26/2023	Patterson, N. L.	PARTNER		
10/27/2023	Hu, L.	ASSOCIATE		
10/31/2023	Data Services	SPECIAL CASE		
10/31/2023	eData Services	NONEXEMPT		
11/1/2023	Hu, L.	ASSOCIATE		
11/1/2023	Hu, L.	ASSOCIATE		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/1/2023	Nes, W. B.	PARTNER		
11/6/2023	Hu, L.	ASSOCIATE		
11/8/2023	Guzzi, T. A.	PARALEGAL		
11/8/2023	Nes, W. B.	PARTNER		
11/8/2023	Nes, W. B.	PARTNER		
11/9/2023	Nes, W. B.	PARTNER		
11/9/2023	Nes, W. B.	PARTNER		
11/9/2023	Patterson, N. L.	PARTNER		
11/20/2023	Guzzi, T. A.	PARALEGAL		
11/20/2023	Guzzi, T. A.	PARALEGAL		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/20/2023	Nes, W. B.	PARTNER		
11/20/2023	Nes, W. B.	PARTNER		
11/21/2023	Guzzi, T. A.	PARALEGAL		
11/22/2023	Nes, W. B.	PARTNER		
11/23/2023	Nes, W. B.	PARTNER		
11/24/2023	Guzzi, T. A.	PARALEGAL		
11/24/2023	Guzzi, T. A.	PARALEGAL		
11/24/2023	Nes, W. B.	PARTNER		
11/24/2023	Nes, W. B.	PARTNER		
11/25/2023	Guzzi, T. A.	PARALEGAL		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/25/2023	Guzzi, T. A.	PARALEGAL		
11/25/2023	Guzzi, T. A.	PARALEGAL		
11/25/2023	Nes, W. B.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		
11/25/2023	Patterson, N. L.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/25/2023	Patterson, N. L.	PARTNER		
11/26/2023	Guzzi, T. A.	PARALEGAL		
11/26/2023	Guzzi, T. A.	PARALEGAL		
11/26/2023	Patterson, N. L.	PARTNER		
11/27/2023	Guzzi, T. A.	PARALEGAL		
11/27/2023	Guzzi, T. A.	PARALEGAL		
11/27/2023	Nes, W. B.	PARTNER		
11/27/2023	Nes, W. B.	PARTNER		
11/27/2023	Nes, W. B.	PARTNER		
11/27/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/27/2023	Nes, W. B.	PARTNER		
11/27/2023	Patterson, N. L.	PARTNER		
11/28/2023	Guzzi, T. A.	PARALEGAL		
11/28/2023	Nes, W. B.	PARTNER		
11/28/2023	Nes, W. B.	PARTNER		
11/28/2023	Patterson, N. L.	PARTNER		
11/28/2023	Patterson, N. L.	PARTNER		
11/29/2023	Guzzi, T. A.	PARALEGAL		
11/29/2023	Guzzi, T. A.	PARALEGAL		
11/29/2023	Guzzi, T. A.	PARALEGAL		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/29/2023	Nes, W. B.	PARTNER		
11/29/2023	Nes, W. B.	PARTNER		
11/29/2023	Nes, W. B.	PARTNER		
11/29/2023	Patterson, N. L.	PARTNER		
11/29/2023	Patterson, N. L.	PARTNER		
11/29/2023	Patterson, N. L.	PARTNER		
11/29/2023	Patterson, N. L.	PARTNER		
11/29/2023	Patterson, N. L.	PARTNER		
11/30/2023	Data Services	SPECIAL CASE		
11/30/2023	eData Services	NONEXEMPT		
11/30/2023	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
11/30/2023	Nes, W. B.	PARTNER		
12/11/2023	Nes, W. B.	PARTNER		
12/12/2023	Nes, W. B.	PARTNER		
12/14/2023	Nes, W. B.	PARTNER		
12/18/2023	Nes, W. B.	PARTNER		
12/19/2023	Hu, L.	ASSOCIATE		
12/19/2023	Nes, W. B.	PARTNER		
12/27/2023	Nes, W. B.	PARTNER		
12/27/2023	Nes, W. B.	PARTNER		
12/29/2023	Data Services	SPECIAL CASE		

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Work Date	Timekeeper	Title	Amount	Entry Description
12/31/2023	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/2/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/3/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		
1/3/2024	Nes, W. B.	PARTNER		
1/4/2024	Burroughs, J. E.	SECRETARY		
1/4/2024	Hu, L.	ASSOCIATE		
1/5/2024	Hu, L.	ASSOCIATE		
1/9/2024	Nes, W. B.	PARTNER		
1/10/2024	Nes, W. B.	PARTNER		
1/17/2024	Nes, W. B.	PARTNER		
1/20/2024	Nes, W. B.	PARTNER		

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Work Date	Timekeeper	Title	Amount	Entry Description
1/31/2024	Data Services	SPECIAL CASE		
2/29/2024	Data Services	SPECIAL CASE		

EXHIBIT 2

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,	)	C/A NO.: 2020-CP-40-02098
	)	
vs.	)	
	)	
Pennsylvania National Mutual Casualty	)	
Insurance Co.,	)	
	)	
Defendant.	)	

DECLARATION OF SHANON N. PEAKE IN SUPPORT OF
THE RECEIVER'S MOTION FOR ATTORNEY'S FEES AND COSTS

I, Shanon N. Peake, declare on personal knowledge as follows:

1. My name is Shanon N. Peake, and I am an adult over the age of eighteen and am competent to testify to the matters herein. I am admitted to practice in the State of South Carolina, and I am an associate attorney at the law firm of Smith Robinson Holler DuBose and Morgan, LLC ("SMITH | ROBINSON"), counsel of record for the Receiver for Covil Corporation in this action.

I base this declaration on personal knowledge of the facts contained herein.

2. I am familiar with the customary billing practices of SMITH | ROBINSON and the time entries submitted in this matter. The time entries submitted were prepared from detailed, contemporaneously recorded time records of the kind customarily used by SMITH | ROBINSON in billing clients.

3. The Receiver seeks the following attorney's fees incurred on behalf of SMITH | ROBINSON in connection with the Motion for Attorney's Fees and Costs. Attached as **Exhibit A** is a true and correct summary of contemporaneous and detailed records of time billed and services rendered by SMITH | ROBINSON sought in connection with the Receiver's Motion for Attorney's Fees and Costs. Because this action remains pending, SMITH | ROBINSON has only submitted

the time summaries for which the Receiver seeks to recover attorney's fees in connection with the Motion for Attorneys' Fees and Costs. These fees exclude any attorneys' fees or costs previously granted. Detailed billing invoices are being made available for in camera review.

4. SMITH | ROBINSON has been providing legal representation to the Receiver for Covil Corporation since 2019. Through March 28, 2024, SMITH | ROBINSON has spent 413.3 hours on the issues that are the subject of the Receiver's Motion for Attorney's Fees for a total of \$190,784.24.

5. The preparation of this matter has required SMITH | ROBINSON to have numerous conferences with its client and co-counsel in this matter, prepare and file numerous motions to compel and other pleadings, and attend numerous hearings, as more specifically outlined in the Motion for Attorney's Fees and Costs.

6. This matter has involved complex and aggressive litigation that has demanded the expenditure of extraordinary time and resources.

7. SMITH | ROBINSON has expended considerable time on behalf of the Receiver as noted in billing statements attached as **Exhibit A** hereto.

8. Given Covil's lack of financial resources, the law firms representing the Receiver agreed to assume the risk of undertaking this representation on the basis of contingent fee contracts as permitted by this Court. However, the fees sought in the present Motion are fees directly associated with the pursuit of this action.

9. Counsel in this matter obtained beneficial results for the Receiver after a successful trial. The Final Order on Findings of Fact and Conclusions of Law holds, among other things, that 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. These results are extremely beneficial and long-ranging for victims of asbestos disease.

I declare under penalty of perjury under the laws of the United States of America and the State of South Carolina that the foregoing statements are true and correct.

Executed on March 28, 2024 in Columbia, South Carolina.


Shanon N. Peake



Post Office Drawer 39
Camden, SC 29021-0039
United States
Phone: 803.432.1992
Fax: 803.432.0784

Invoice

Invoice # 33956
Date: 03/28/2024

Covil Corporation

19-075A

19-075A Covil v Pennsylvania National Mutual Casualty Insurance Co.

Client Reference Number: unknown

Services

Date	Timekeeper		
08/24/2022	DF		
08/24/2022	SNP		
08/24/2022	SNP		
08/25/2022	SNP		
08/25/2022	SNP		
08/30/2022	SNP		
08/30/2022	SNP		
08/30/2022	SNP		
08/30/2022	SNP		
08/30/2022	SNP		

08/30/2022	DF		
08/30/2022	JMR		
08/31/2022	SNP		
08/31/2022	DF		
08/31/2022	SNP		
08/31/2022	JMR		
09/02/2022	SNP		
09/02/2022	SNP		
09/05/2022	SNP		
09/06/2022	SNP		
09/06/2022	JMR		
09/06/2022	DF		
09/07/2022	SNP		
09/07/2022	SNP		
09/07/2022	SNP		
09/08/2022	JMR		
09/08/2022	GMS		

09/12/2022	SNP		
09/15/2022	DF		
09/16/2022	SNP		
09/19/2022	DF		
09/19/2022	SNP		
09/21/2022	SNP		
10/03/2022	SNP		
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10/04/2022	SNP		
10/05/2022	SNP		
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10/06/2022	DF		
10/06/2022	SNP		
10/06/2022	SNP		
10/07/2022	SNP		
10/11/2022	SNP		
10/12/2022	SNP		

10/12/2022	SNP		
10/12/2022	SNP		
10/12/2022	DF		
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10/14/2022	SNP		
10/14/2022	SNP		
10/14/2022	DF		
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10/17/2022	SNP		
10/18/2022	SNP		
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10/21/2022	SNP		
10/21/2022	SNP		

10/24/2022	DF		
10/24/2022	SNP		
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10/27/2022	SNP		
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10/28/2022	SNP		
10/28/2022	SNP		
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10/28/2022	SNP		
10/28/2022	JMR		
10/31/2022	DF		
10/31/2022	SNP		
10/31/2022	SNP		
11/01/2022	DF		

11/01/2022	SNP		
11/01/2022	SNP		
11/01/2022	SNP		
11/01/2022	SNP		
11/01/2022	SNP		
11/02/2022	SNP		
11/02/2022	SNP		
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11/04/2022	SNP		
11/04/2022	SNP		
11/04/2022	SNP		
11/04/2022	AR		
11/07/2022	SNP		
11/07/2022	DF		

11/07/2022	SNP		
11/07/2022	FH		
11/07/2022	SNP		
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11/08/2022	AR		
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11/08/2022	SNP		
11/08/2022	AR		
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11/09/2022	DF		
11/09/2022	SNP		
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11/09/2022	SNP		
11/10/2022	AR		
11/10/2022	AR		
11/10/2022	FH		
11/10/2022	AR		
11/10/2022	AR		

11/10/2022	DF		
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11/10/2022	AR		
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11/10/2022	SNP		
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11/13/2022	AR		
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11/14/2022	DF		

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11/14/2022	SNP		
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11/15/2022	AR		
11/15/2022	AR		
11/15/2022	AR		
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11/18/2022	SNP		
11/21/2022	FH		
11/21/2022	DF		
11/21/2022	JMR		
11/22/2022	AR		

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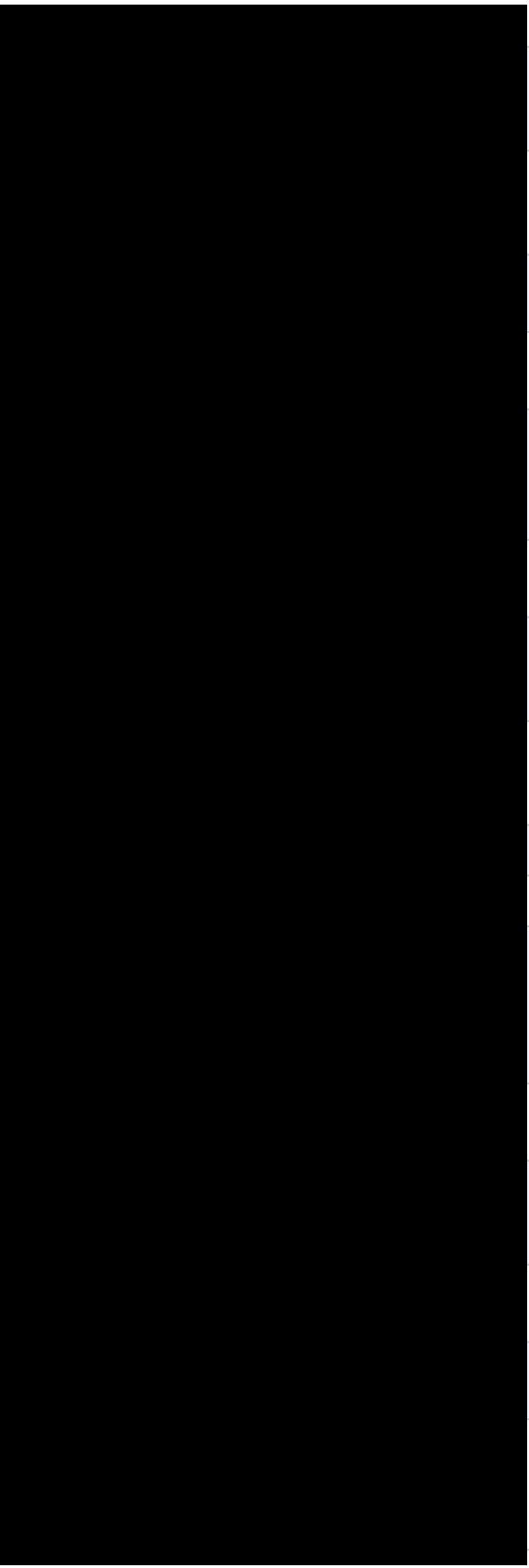
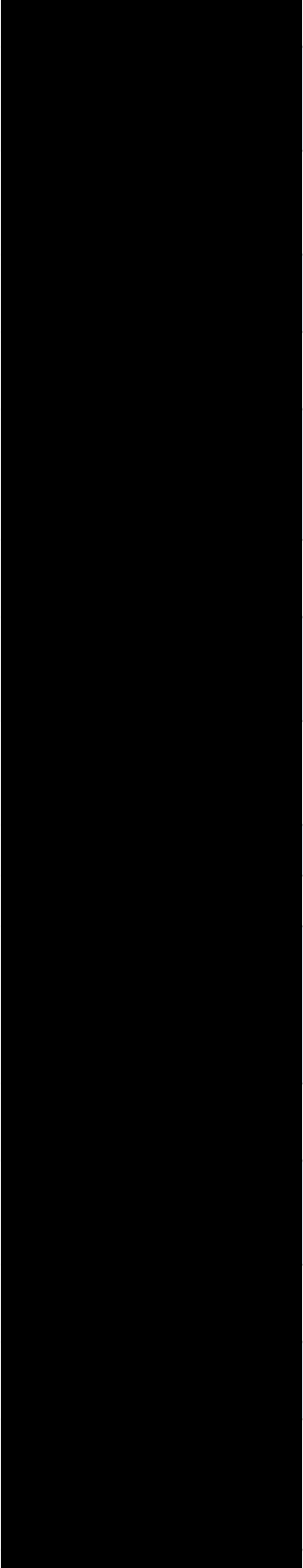
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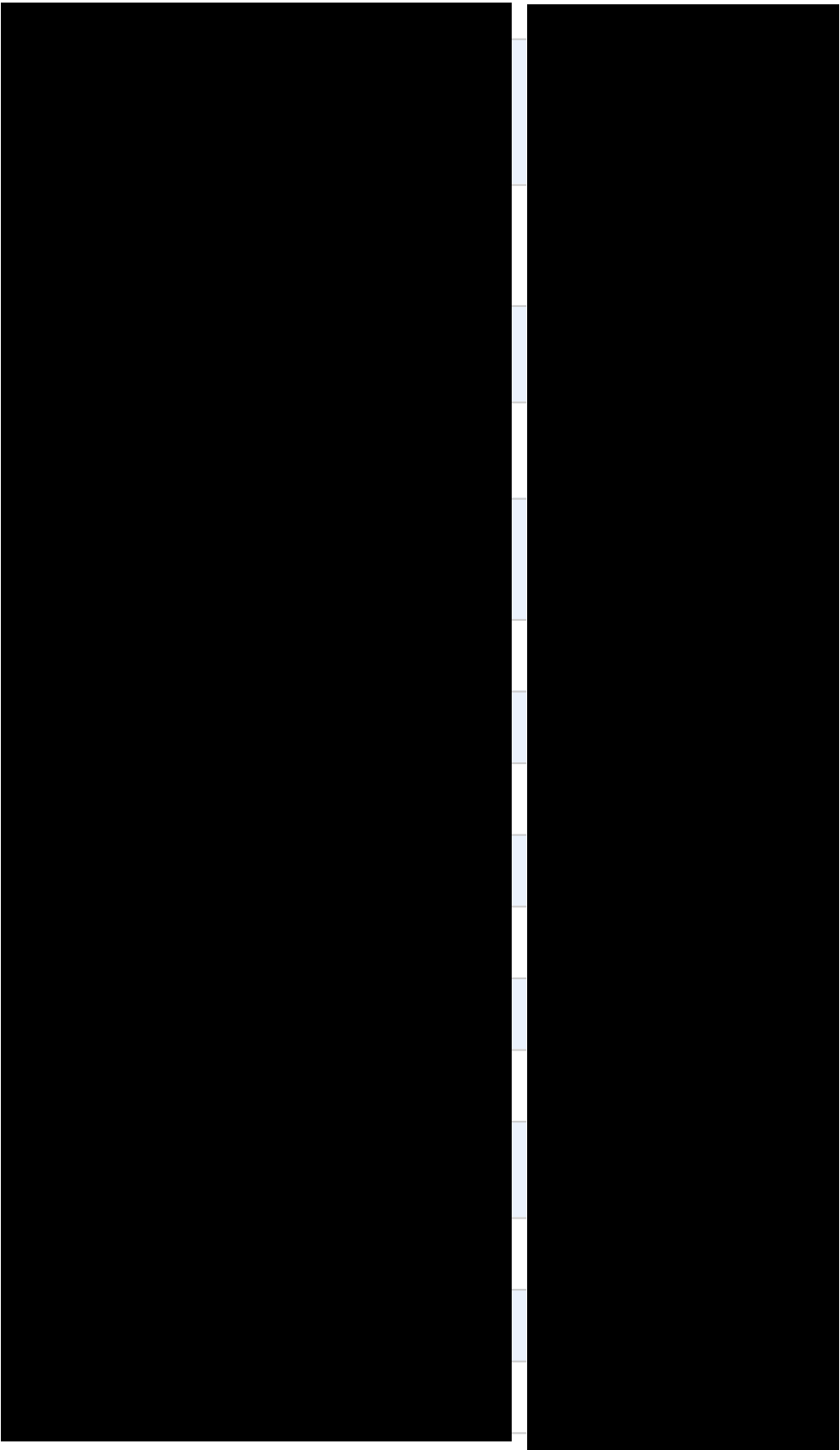
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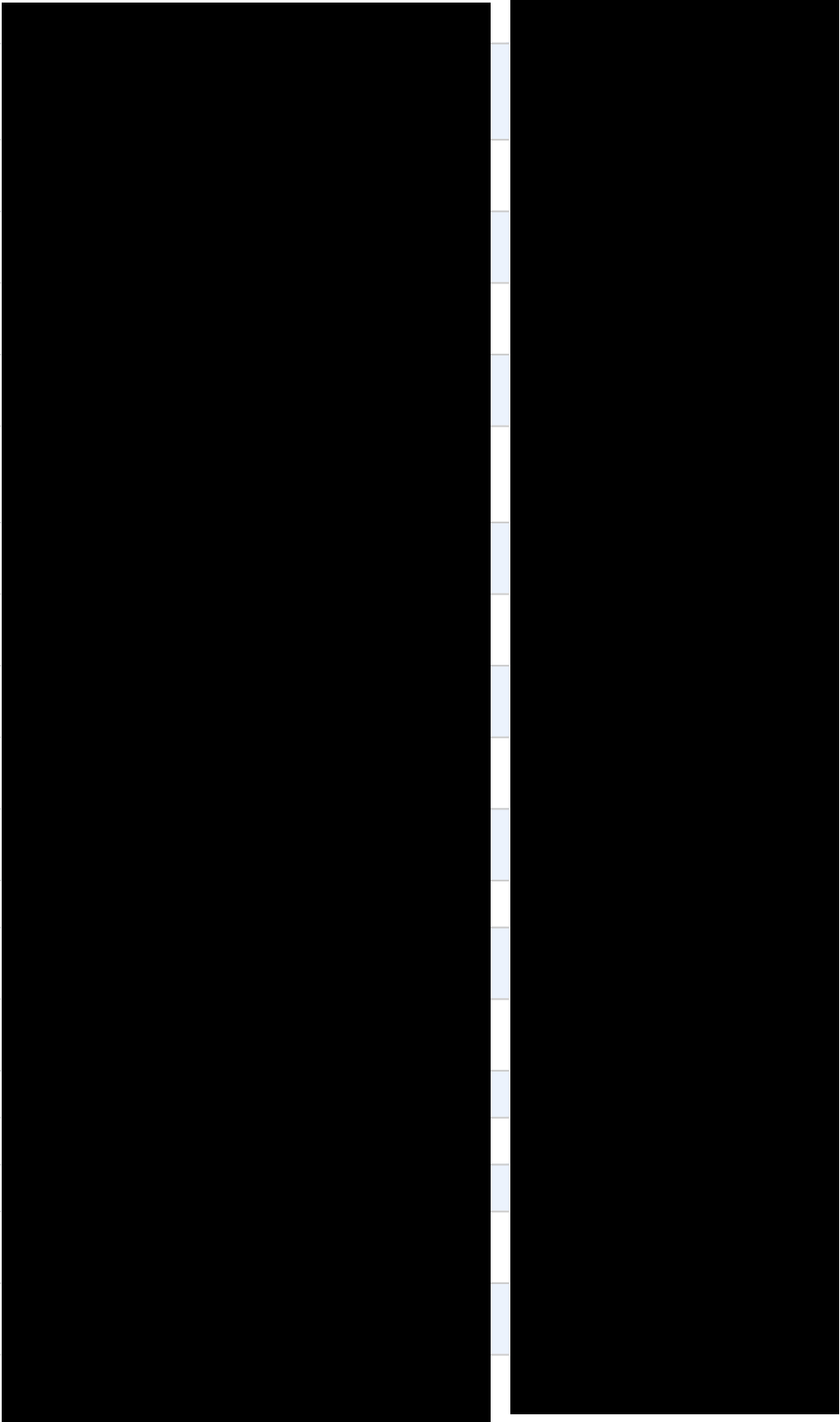
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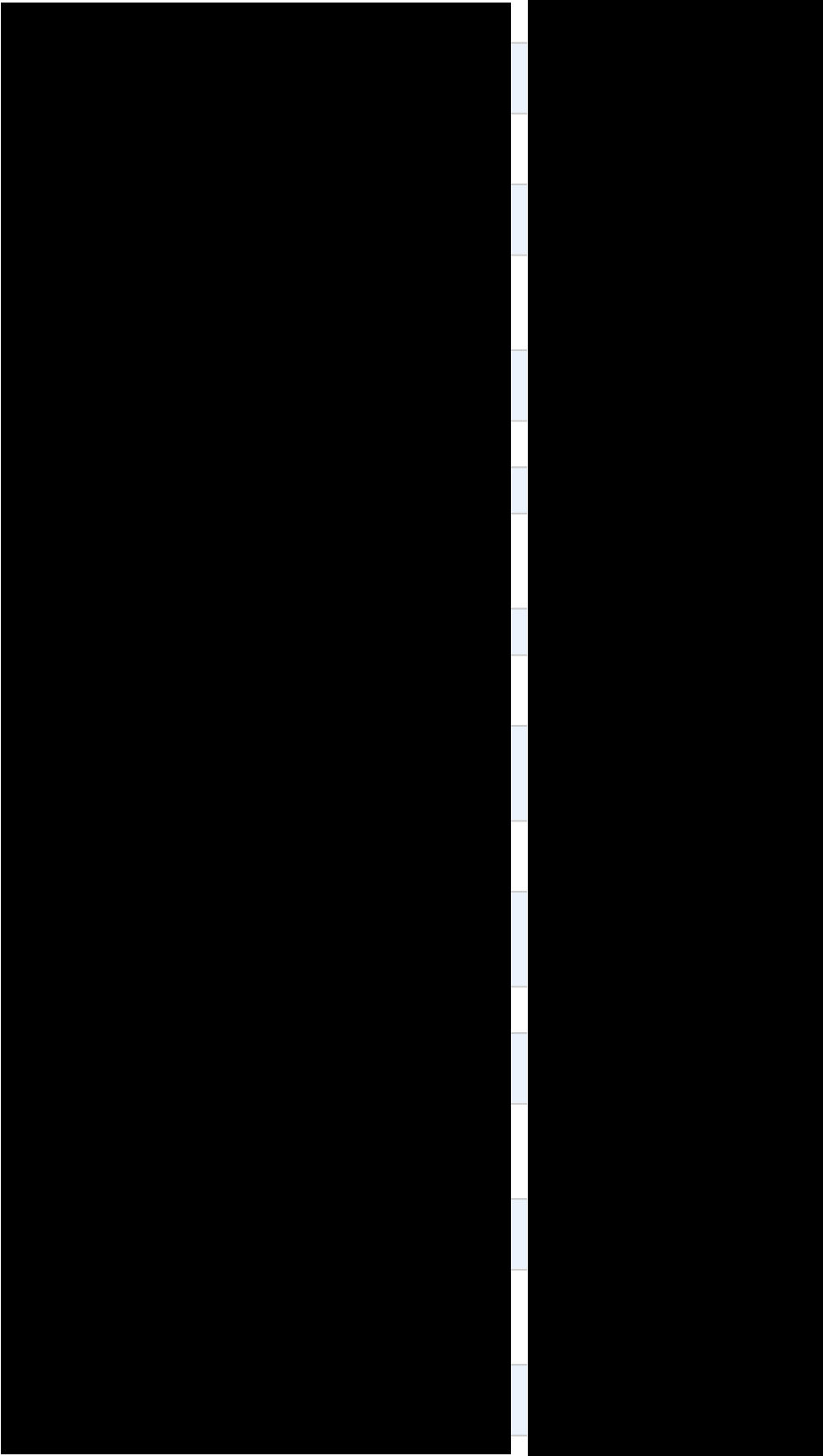
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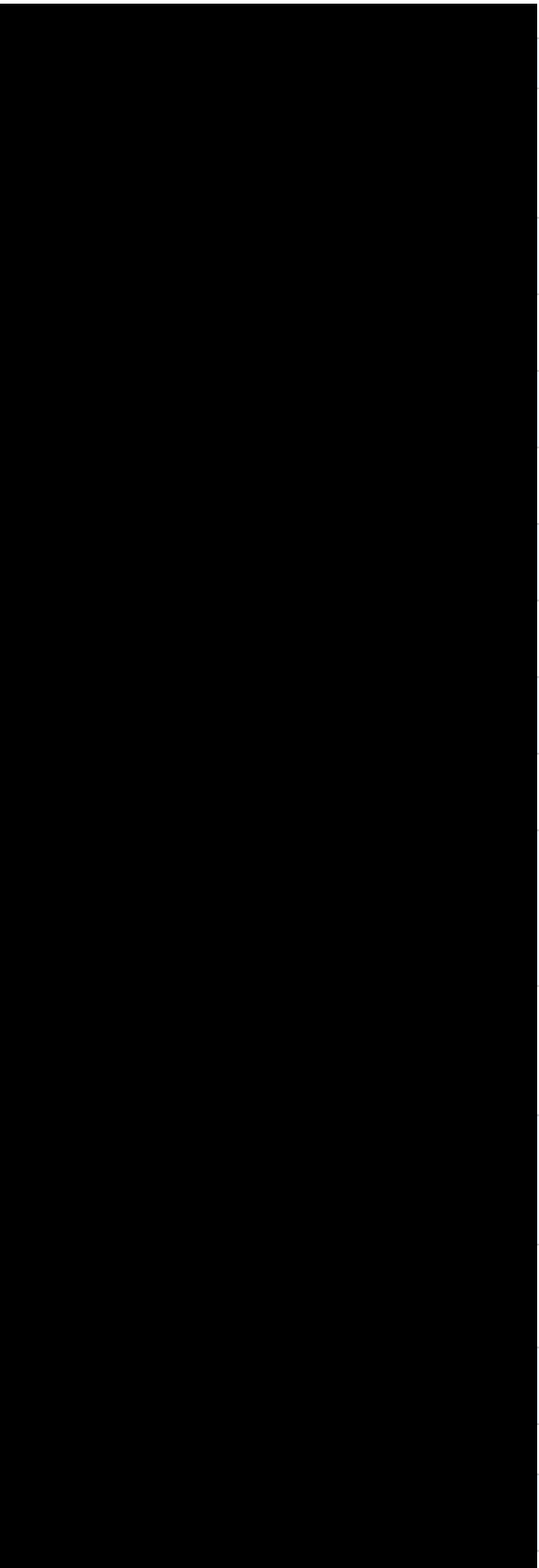
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03/22/2024	SNP		
03/28/2024	DF		
		Services Subtotal	\$190,702.50

Expenses

Date	Timekeeper	Notes
05/08/2023	JMR	
11/20/2023	JMR	

Expenses Subtotal \$81.74

Time Keeper	Position
Tina Cundari	Attorney
Fred Hanna	Associate
Shanon Peake	Associate
Austin Reed	Associate
Jon Robinson	Partner
Murrell Smith	Partner
Kim Atkinson	Paralegal
William Blankenship	Paralegal
Libby Campbell	Paralegal
Allison Driggers	Paralegal
Dot Faulkenberry	Paralegal

Subtotal \$190,784.24

Total \$190,784.24

Please make all amounts payable to: Smith Robinson Holler DuBose and Morgan, LLC
Tax Id: 83-4467070

EXHIBIT 3

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS
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.,

Defendant.

**DECLARATION OF CHRISTOPHER R. JONES IN SUPPORT OF
THE RECEIVER'S REPORT ON HIS ATTORNEY'S FEES AND COSTS
IN RESPONSE TO THIS COURT'S MARCH 1, 2024 ORDER**

1. My name is Christopher Rutledge Jones. I am an adult over the age of 18, and I am competent to testify to the matters herein. I represent the Receiver for Covil Corporation, and the matters stated in this declaration are based on my own personal knowledge.

2. I have been licensed to practice law since 2013, and I am an attorney with the law firm of John B. White, Jr. P.A. I am admitted to practice in South Carolina state court and the District of South Carolina. I graduated *magna cum laude* from the University of South Carolina School of Law, and since 2019 I have focused my practice on complex litigation, having represented both plaintiffs and defendants in a variety of matters.

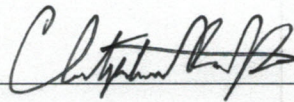
3. I am submitting this declaration in support of the Receiver's Report on his attorney's fees and costs in response to this Court's March 1, 2024 Order. Attached as Exhibit A is a true and correct listing of contemporaneous and detailed records of time billed and services rendered by John B. White, Jr., P.A. sought in connection with the Receiver's Report.

4. The rates shown in Exhibit A are the normal and customary hourly rates billed for work performed by timekeepers for complex litigation cases such as this. Additionally, the time records in Exhibit A were well-documented and descriptive. The lawyers and paralegals in my firm regularly maintain contemporaneous, detailed records of their time, whether they are working on a contingency fee case or an hourly billing matter.

5. I am informed and believe that the hourly rates shown in Exhibit A are reasonable and comparable to rates charged by other South Carolina firms for timekeepers with similar experience who are performing similarly complex work.

6. It is my opinion that the time spent is reasonable under the circumstances because the time was well-documented and reasonably budgeted. The hours worked were necessary to the furtherance of the Receiver's efforts in this matter, and the timekeepers worked efficiently.

7. I declare under penalty of perjury that the foregoing statements are true and correct.



Christopher R. Jones

March 29, 2024



JOHN B. WHITE JR. P.A.
L a w F i r m

Invoice

March 29, 2024

Re: Covil v. Penn National Mutual Casualty Insurance Co.

Total charges: \$85,202.50

Date	Att'y Initials	Att'y Hours	PL Initials	PL Hours	Rate	Amt.	Description
4/27/2020	CRJ	0.40					
5/22/2020	MHS	1.00					
5/28/2020	CRJ	0.30					
6/1/2020	MHS	0.50					
6/4/2020	MHS	0.50					
6/4/2020	CRJ	0.40					
6/11/2020	MHS	0.50					
6/16/2020	MHS	0.50					

JOHN B. WHITE, JR.

jwhite@johnbwhitelaw.com

GRIFFIN LITTLEJOHN LYNCH

glynch@johnbwhitelaw.com

MARGHRETTA SHISKO

mshisko@johnbwhitelaw.com

291 SOUTH PINE STREET
P.O. BOX 2465
SPARTANBURG S.C. 29304
(864) 594-5988

2

10/09/2020	MHS	0.10					
10/09/2020			NMR	0.10			
11/13/2020	MHS	1.5					
12/11/2020	CRJ	1.50					
12/14/2020	CRJ	3.50					
12/15/2020	MHS	1.50					
1/7/2021	MHS	0.50					
2/24/2021	MHS	0.50					
3/1/2021	MHS	0.50					
3/30/2021	MHS	1.00					
3/31/2021	CRJ	0.20					
1/5/2022	MHS	0.80					
1/5/2022	CRJ	0.40					
4/22/2022	CRJ	1.30					
5/17/2022	CRJ	0.20					
5/17/2022	MHS	0.40					
5/18/2022	MHS	0.20					
5/19/2022	MHS	0.50					
5/20/2022	GLL	0.30					

5/20/2022	JBW	0.20					
5/20/2022	MHS	0.20					
5/20/2022	CRJ	1.40					
5/20/2022			NMR	0.20			
5/26/2022	CRJ	0.40					
5/26/2022	MHS	0.20					
6/3/2022	MHS	0.30					
6/3/2022	MHS	0.20					
6/7/2022	MHS	0.50					
6/17/2022	GLL	0.20					
6/17/2022	MHS	0.50					
7/8/2022	CRJ	0.60					
7/8/2022			NMR	1.00			
7/19/2022			NMR	0.10			
7/20/2022	MHS	0.50					
7/20/2022			NMR	0.10			

8/31/2022	MHS	0.50			██████	██████	████████████████████
9/16/2022	MHS	0.20			██████	██████	██████████████████.
9/20/2022			NMR	0.50	██████	██████	████████████████████████████ ████████████████████████████
10/10/2022			NMR	0.10	██████	██████	████████████████████████████
10/10/2022	MHS	0.10			██████	██████	██████████████████
10/12/2022			NMR	0.20	██████	██████	████████████████████████████ ████████████████████████████
10/13/2022	MHS	0.10			██████	██████	██████████████████
10/14/2022	MHS	0.20			██████	██████	██████████████████
10/27/2022	MHS	0.50			██████	██████	████████████████████████████ ██████████████████
10/27/2022	CRJ	0.50			██████	██████	████████████████████████████ ██████████████████
11/4/2022	MHS	0.50			██████	██████	████████████████████
11/10/2022	MHS	0.50			██████	██████	████████████████████
11/10/2022	MHS	0.50			██████	██████	████████████████████

11/16/2022	MHS	0.20			██████	██████	██
11/21/2022	MHS	3.0			██████	████████	██ ██
11/23/2022	MHS	0.80			██████	██████	██ ██
11/29/2022	MHS	1.50			██████	██████	██ ██
11/30/2022	MHS	1.0			██████	██████	██
11/30/2022	MHS	1.20			██████	██████	██ ██
12/7/2022	MHS	1.0			██████	██████	██
1/5/2023	MHS	0.40			██████	██████	██ ██
1/10/2023	MHS	0.40			██████	██████	██
1/18/2023	MHS	0.50			██████	██████	██

2/15/2023	MHS	0.50					
2/15/2023	CRJ	0.30					
2/16/2023	MHS	7.00					
2/16/2023	CRJ	1.30					
2/16/2023			NMR	3.00			
2/17/2023	MHS	2.00					
2/17/2023	MHS	1.00					
2/17/2023	CRJ	2.60					
2/17/2023	CRJ	2.40					

2/17/2023			NMR	0.20			
2/17/2023			NMR	1.00			
2/23/2023	MHS	0.10					
2/23/2023	CRJ	0.20					
2/24/2023	MHS	0.50					
2/24/2023	CRJ	0.50					
2/24/2023			NMR	1.00			
3/10/2023			NMR	0.50			
3/17/2023	CRJ	0.20					
3/17/2023			NMR	0.50			
3/24/2023			NMR	1.00			

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4/25/2023	MHS	1.50					
4/25/2023	CRJ	0.20					
4/26/2023	MHS	0.50					
4/26/2023	CRJ	0.40					
4/26/2023			NMR	0.50			
5/3/2023	MHS	0.10					
5/4/2023	MHS	0.20					
5/5/2023	MHS	0.50					
5/5/2023	MHS	0.50					
5/5/2023	CRJ	0.80					
5/5/2023			NMR	0.50			
5/9/2023	CRJ	0.40					
5/15/2023	MHS	0.50					
5/17/2023	MHS	0.50					

5/23/2023	MHS	1.00					
5/23/2023	CRJ	0.70					
5/23/2023			NMR	0.50			
5/25/2023	MHS	0.20					
5/25/2023			NMR	0.10			
5/30/2023	MHS	0.50					
6/1/2023	MHS	0.50					
6/1/2023			NMR	0.40			
6/2/2023	MHS	1.40					
6/2/2023	CRJ	3.80					
6/2/2023	CRJ	0.60					
6/5/2023	MHS	0.50					
6/7/2023	MHS	0.10					
6/7/2023	CRJ	3.20					
6/8/2023	MHS	0.50					

6/13/2023	MHS	0.80					
6/19/2023	MHS	1.00					
6/19/2023	CRJ	0.60					
6/19/2023			NMR	0.25			
6/20/2023	MHS	0.50					
6/20/2023			NMR	2.50			
6/21/2023	MHS	0.50					
6/21/2023	CRJ	0.30					
6/21/2023			NMR	2.50			
6/22/2023	MHS	0.50					
6/22/2023	MHS	1.00					

6/22/2023	CRJ	5.00					
6/23/2023	MHS	1.00					
6/23/2023	CRJ	3.40					
6/23/2023	CRJ	0.90					
6/26/2023	MHS	1.00					
6/26/2023	CRJ	0.40					
6/26/2023	CRJ	0.90					
6/26/2023			NMR	0.25			
6/26/2023			NMR	1.50			
6/27/2023	MHS	0.50					
6/27/2023	CRJ	1.20					

							[REDACTED]
6/27/2023			NMR	2.00	[REDACTED]	[REDACTED]	[REDACTED]
6/27/2023			NMR	0.50	[REDACTED]	[REDACTED]	[REDACTED]
6/30/2023	MHS	1.00			[REDACTED]	[REDACTED]	[REDACTED]
6/30/2023	CRJ	0.40			[REDACTED]	[REDACTED]	[REDACTED]
6/30/2023			NMR	2.00	[REDACTED]	[REDACTED]	[REDACTED]
7/3/2023	CRJ	0.60			[REDACTED]	[REDACTED]	[REDACTED]
7/5/2023	MHS	0.20			[REDACTED]	[REDACTED]	[REDACTED]

7/5/2023	MHS	0.50					
7/5/2023			NMR	0.75			
7/6/2023	MHS	0.50					
7/10/2023	MHS	0.50					
7/11/2023	MHS	0.50					
7/11/2023			NMR	1.00			
7/12/2023	CRJ	0.30					
7/12/2023			NMR	0.50			
7/12/2023			NMR	2.00			

7/12/2023			NMR	1.00			
7/13/2023			NMR	2.00			
7/14/2023	CRJ	0.40					
7/14/2023	CRJ	1.40					
7/14/2023			NMR	1.00			
7/17/2023			NMR	1.00			
7/19/2023			NMR	0.25			
7/20/2023	MHS	0.20					

17

7/28/2023			NMR	0.50			
7/31/2023	CRJ	0.70					
7/31/2023	CRJ	0.80					
8/3/2023	MHS	1.50					
8/4/2023	CRJ	0.40					
8/10/2023	CRJ	1.30					
8/11/2023	CRJ	0.80					
8/11/2023			NMR	0.25			
8/14/2023	MHS	1.20					
8/14/2023	CRJ	0.40					
8/14/2023	CRJ	0.80					
8/14/2023			NMR	0.75			
8/14/2023			NMR	0.20			

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8/24/2023	MHS	0.10					
8/25/2023	MHS	1.00					
8/25/2023	CRJ	0.30					
8/29/2023	MHS	0.50					
8/29/2023			NMR	0.25			
9/11/2023	JBW	0.50					
9/11/2023	MHS	0.50					
9/11/2023	CRJ	0.20					
9/11/2023			NMR	0.25			
9/25/2023	MHS	0.20					
9/29/2023	MHS	0.50					
10/09/2023	MHS	0.20					
10/09/2023	CRJ	0.20					
10/10/2023			NMR	0.10			
10/24/2023	MHS	0.10					
10/26/2023			NMR	0.50			
11/03/2023	MHS	0.50					

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1/3/2024			NMR	0.75			
1/5/2024	MHS	1.00					
1/5/2024	CRJ	0.50					
1/8/2024	CRJ	1.50					
1/8/2024	MHS	1.00					
1/9/2024	CRJ	3.80					
1/11/2024			NMR	0.75			
1/12/2024			NMR	1.00			
1/16/2024	MHS	0.20					
1/24/2024	MHS	0.50					
1/24/2024	CRJ	0.40					
1/24/2024			NMR	0.50			
1/25/2024			NMR	1.00			

1/30/2024	MHS	2.00					
2/13/2024	MHS	0.20					
2/13/2024			NMR	0.20			
2/27/2024	MHS	0.20					
3/2/2024	MHS	2.50					
3/12/2024	MHS	0.50					

EXPENSES

DATE	Description	Total
7/27/2023		
7/27/2023		
3/29/2024		
TOTAL		\$ 178.08

EXHIBIT 4

Rikard & Protopapas, LLC
2110 N. Beltline Blvd
Columbia, SC 29204
(803) 978-6111

Covil Corp Receivership

Invoice

Invoice Number	277
Invoice Date	03/28/2024
Payment Due On	04/04/2024
Amount Due	\$49,467.50

Fees

Date	Description	Staff	Rate	Hours	Total
04/27/2020		LV		1.60	
04/28/2020		LV		0.80	
06/03/2020		LV		2.40	
06/05/2020		LV		1.40	
01/08/2021		LV		0.70	
04/29/2021		LV		2.10	
04/30/2021		LV		0.50	
05/18/2021		LV		1.50	
08/26/2021		LV		2.20	
11/19/2021		LV		0.70	
11/19/2021		LV		0.60	

12/29/2021		LV	0.60	
12/29/2021		LV	0.60	
03/08/2022		LV	0.20	
03/09/2022		LV	3.70	
03/17/2022		LV	0.60	
04/06/2022		LV	1.10	
05/13/2022		LV	0.80	
05/31/2022		LV	1.20	
09/06/2022		LV	3.10	
09/16/2022		LV	0.50	
10/06/2022		LV	1.10	
10/18/2022		LV	2.10	
11/01/2022		LV	6.20	
11/02/2022		LV	4.10	
11/07/2022		LV	4.10	
11/08/2022		LV	1.40	
11/08/2022		LV	1.20	
11/10/2022		LV	2.00	
11/14/2022		LV	1.60	
11/16/2022		LV	1.10	
11/17/2022		LV	8.20	
11/21/2022		LV	0.80	
11/22/2022		LV	2.70	
11/28/2022		LV	0.10	
11/28/2022		LV	0.80	
11/30/2022		LV	8.50	

11/30/2022		LV	1.50	
12/01/2022		LV	1.30	
12/01/2022		LV	3.10	
12/02/2022		LV	10.10	
12/03/2022		LV	8.10	
12/04/2022		LV	3.10	
12/04/2022		LV	6.10	
12/05/2022		LV	1.00	
12/05/2022		LV	8.10	
12/06/2022		LV	0.20	
05/05/2023		LV	0.70	
05/16/2023		LV	1.00	
06/06/2023		LV	4.10	
06/07/2023		LV	3.20	
06/09/2023		LV	0.40	
06/19/2023		LV	1.20	
08/17/2023		LV	1.10	
08/25/2023		LV	2.10	
09/11/2023		LV	0.40	
10/25/2023		LV	4.50	
10/31/2023		LV	1.90	
11/01/2023		LV	2.20	
11/01/2023		LV	2.20	
11/02/2023		LV	3.20	

11/02/2023		LV	0.80	
11/03/2023		LV	2.70	
11/03/2023		LV	1.40	
11/07/2023		LV	0.20	
11/17/2023		LV	0.10	
11/17/2023		LV	1.10	
11/17/2023		LV	4.20	
11/17/2023		LV	3.10	
11/20/2023		LV	0.20	
11/21/2023		LV	0.40	
11/21/2023		LV	0.20	
11/21/2023		LV	8.70	
11/22/2023		LV	2.60	
11/22/2023		LV	12.10	
11/22/2023		DN	7.00	
11/24/2023		LV	6.80	
11/24/2023		DN	6.00	
11/25/2023		LV	6.20	
11/25/2023		DN	5.00	
11/26/2023		LV	8.70	
11/26/2023		DN	6.50	
11/27/2023		LV	14.60	
11/27/2023		DN	9.00	
11/28/2023		LV	12.60	
11/28/2023		DN	11.10	

01/09/2024		JC		1.00	
01/16/2024		LV		0.30	
01/30/2024		LV		0.20	
02/27/2024		LV		0.20	
03/01/2024		LV		1.60	
03/08/2024		LV		0.30	
03/11/2024		LV		0.50	
03/12/2024		LV		0.20	
12/05/2024		LV		0.30	
12/14/2024		LV		1.20	
12/19/2024		LV		0.30	
				281.10	\$49,467.50

Subtotal	\$49,467.50
Total	\$49,467.50
Total Balance Due	\$49,467.50

Account Summary

Account Name	Balance
Operating Retainer	\$0.00

Rikard & Protopapas, LLC
2110 N. Beltline Blvd
Columbia, SC 29204
(803) 978-6111

Covil Corp Receivership

Invoice

Invoice Number	274
Invoice Date	03/25/2024
Payment Due On	04/01/2024
Amount Due	\$21,265.87

Expenses

Date	Description	Cost	Qty	Total
06/30/2023				
07/14/2023				
07/18/2023				
08/23/2023				
08/28/2023				
09/25/2023				
10/12/2023				
11/07/2023				
11/07/2023				
11/10/2023				
11/13/2023				
11/13/2023				
11/21/2023				
11/27/2023				
11/27/2023				
11/27/2023				

11/27/2023				
11/27/2023				
11/30/2023				
11/30/2023				
11/30/2023				
11/30/2023				
11/30/2023				
12/12/2023				
12/15/2023				
01/08/2024				
02/02/2024				
				\$21,265.87

Subtotal	\$21,265.87
Total	\$21,265.87
Total Balance Due	\$21,265.87

Payment Summary

Date	Note	Paid By	Source	Amount
07/14/2023				

Account Summary

Account Name	Balance
Operating Retainer	\$0.00

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

RECEIVED

APR 23 2024

SC Court of Appeals

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

Pennsylvania National Mutual
Casualty Insurance Company, Appellant.

NOTICE OF APPEAL

Pennsylvania National Mutual Casualty Insurance Co. appeals the following orders of the Honorable Jean H. Toal: (1) Order Approving Covil Corporation's Report on Attorney's Fees and Costs, dated April 5, 2024, and received by Appellant on April 5, 2024; (2) Order Denying Pennsylvania National Mutual Casualty Insurance Company's Post-Trial Motions, dated April 5, 2024, and received by Appellant on April 5, 2024; (3) Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation Against Pennsylvania National Mutual Casualty Insurance Company, dated March 1, 2024, and received by Appellant on March 1, 2024; (4) Order, dated September 6, 2023, filed September 7, 2023, and received by Appellant on September 7, 2023; (5) Scheduling Order, dated June 16, 2023, and received by Appellant on June 16, 2023; (6) Form 4 Judgment by the Court, dated June 8, 2023, and received by Appellant on June 8, 2023; (7) Order Granting Covil's Motion for Attorneys' Fees and Costs, dated May 11, 2023, filed May 12, 2023, and received by Appellant on May 12, 2023; (8) Order, dated December 6, 2022, filed December 7, 2022, and received by Appellant December 7, 2022; (9) Order, dated May 26, 2022, and received by Appellant May 26, 2022; and (10) Order on Discovery Motions, dated May 5, 2022, and received by Appellant May 5, 2022.

April 23, 2024

s/ Kirby D. Shealy III
Kirby D. Shealy III (S.C. Bar No. 11556)
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P: 803-254-4190
kirby.shealy@arlaw.com

David Grant Harris, II (S.C. Bar No. 101951)
Alexander Erwin Davis (S.C. Bar No. 100061)
Brady A. Yntema, *admitted pro hac vice*
(N.C. Bar No. 25771)
David L. Brown, *admitted pro hac vice* (N.C. Bar
No. 18942)
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dbrown@goldbergsegalla.com

*Attorneys for Appellant Pennsylvania National
Mutual Casualty Insurance Co.*

Other Counsel of Record:

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Shanon N. Peake
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MORGAN, LLC
2530 Devine Street, 3rd Floor
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

RECEIVED

APR 23 2024

SC Court of Appeals

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

Pennsylvania National Mutual
Casualty Insurance Co., Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas, by depositing a copy of it in the United States Mail, postage prepaid, on April 23, 2024, addressed to the attorneys of record:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(1) Order Approving Covil Corporation's Report on Attorney's Fees and Costs, dated April 5, 2024, and received by Appellant on April 5, 2024

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.

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

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

Defendants.

RECEIVED

APR 23 2024

SC Court of Appeals

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(2) Order Denying Pennsylvania National Mutual Casualty Insurance Company's Post-Trial
Motions, dated April 5, 2024, and received by Appellant on April 5, 2024

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**

RECEIVED

APR 23 2024

SC Court of Appeals

Before the Court is Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), Post-Trial Motions, pursuant to Rule 52(b) SCRCP 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) SCRCP ("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 Reifsnyder'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), SCRCP. 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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(3) Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation Against
Pennsylvania National Mutual Casualty Insurance Company, dated March 1, 2024, and received
by Appellant on March 1, 2024

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

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

RECEIVED

APR 23 2024

SC Court of Appeals

Defendants.

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); Bkrcty. Ct. Op. 134(a); *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrcty. 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 Cmty. 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. Reifsnnyder'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. Reifsnnyder'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. Reifsnnyder 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. Reifsnnyder 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. Reifsnnyder 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 Reifsnnyder, 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), SCRCP; *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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(4) Order, dated September 6, 2023, filed September 7, 2023, and received by Appellant on
September 7, 2023

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 Company, *et. al*,

Defendants.

ORDER
RECEIVED
APR 23 2024
SC Court of Appeals

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(5) Scheduling Order, dated June 16, 2023, and received by Appellant on June 16, 2023

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,

SCHEDULING ORDER

v.

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

Defendants.

RECEIVED

APR 23 2024

SC Court of Appeals

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(6) Form 4 Judgment by the Court, dated June 8, 2023, and received by Appellant on June 8,
2023

FORM 4

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ 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 :

RECEIVED

APR 23 2024

SC Court of Appeals

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Date _____

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(7) Order Granting Covil's Motion for Attorneys' Fees and Costs, dated May 11, 2023, filed
May 12, 2023, and received by Appellant on May 12, 2023

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.	)	

RECEIVED

APR 23 2024

SC Court of Appeals

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(8) Order, dated December 6, 2022, filed December 7, 2022, and received by Appellant
December 7, 2022

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.	)	

RECEIVED
APR 23 2024
SC Court of Appeals

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(9) Order, dated May 26, 2022, and received by Appellant May 26, 2022

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.

RECEIVED
APR 23 2024
SC Court of Appeals

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

ELECTRONICALLY FILED - 2024 Apr 25 11:48 AM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098
ELECTRONICALLY FILED - 2022 May 26 3:57 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4002098

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(10) Order on Discovery Motions, dated May 5, 2022, and received by Appellant May 5, 2022

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

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APR 23 2024

SC Court of Appeals

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-Receiver's 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

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) requests that the Supreme Court of South Carolina accept for review an order entered by the circuit court on May 5, 2022 and an order denying Penn National’s motion for reconsideration entered on May 26, 2022. In these orders, the circuit court took the unprecedented step of commanding Penn National to image and digitize its entire repository of historic commercial lines insurance policy related documents stored on microfiche and to allow opposing counsel to have unrestricted and unfettered access to the same. Penn National’s microfiche records include more than 200,000 historic policies, with the commercial line policies alone being stored on approximately 300,000 microfiche cards, each of which is comprised of up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche. These documents including private information for thousands of individuals and entities that have no relationship whatsoever to this litigation.

This matter presents exceptional circumstances, specifically (1) it involves a novel issue of law in the context of asbestos coverage litigation; and (2) if not immediately reviewed by this Court, the rights of Penn National and the numerous insureds to whom it issued historic policies of insurance will forever be lost. Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review the orders issued in this case. Penn National has also filed a Notice of Appeal of the orders; however, this matter has not been reviewed by the Court of Appeals. Penn National has also contemporaneously filed a Petition for Writ of Supersedeas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the circuit court appropriately ordered Penn National to image and digitize its microfiche repository of historic commercial lines policies.
2. Whether the circuit court appropriately ordered that opposing counsel have

unrestricted and unfettered access to Penn National's microfiche repository of historic commercial lines policies after the same is imaged and digitized at Penn National's expense.

STATEMENT OF THE CASE

Covil Corporation ("Covil"), a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. (Appx., pp. 25-26, ¶ 7) In 1991, Covil effectively ceased operations and its charter was thereafter administratively revoked. (*Id.*) Covil has been sued in numerous lawsuits brought by individuals allegedly injured through their exposure to asbestos, or their estates, claiming that such injuries were caused by Covil's alleged distribution and/or installation of asbestos-containing products. (*Id.*) See, e.g., *Covil Corp. v. Zurich Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 33140, *4-5 (D.S.C. 2020); *Zurich Am. Ins. Co. v. Covil Corp.*, 2020 U.S. Dist. LEXIS 138062, *15 (M.D.N.C. 2020).

In 2017, this Court appointed Retired Justice Jean Hoefer Toal to serve as Chief Judge for Administrative Purposes over all asbestos litigation filed in the South Carolina state court system. In this role, Ret. Justice Toal has exercised jurisdiction over both liability lawsuits as well as related insurance coverage litigation. On her own motion, on November 2, 2018, Ret. Justice Toal appointed Peter D. Protopappas to serve as a Receiver for Covil to manage its affairs under South Carolina law.¹ (Appx., pp. 37-39)

On or about April 27, 2020, Covil, by and through its Receiver, filed the present action against Penn National and others. In the Complaint, Covil acknowledged that Penn National

¹ Ret. Justice Toal found that certain of Covil's primary insurers, specifically United States Fidelity and Guaranty Company, Zurich American Insurance Company, and Sentry Insurance, were inappropriately responding to civil litigation filed against Covil without any involvement from Covil, which was, at that time, no longer in existence. Therefore, Ret. Justice Toal held that these three carriers were "alter egos" of Covil. Penn National was not one of these carriers.

issued two policies of general liability insurance to Covil: (1) Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 to March 31, 1987 (“1986-87 Policy”); and (2) Policy No. 515 50 28 53-8, for the next policy period of March 31, 1987 to March 31, 1988 (“1987-88 Policy”) (collectively, the “Policies”). The Complaint also noted that the liability limits contained in both Policies are \$1 million per occurrence and in the aggregate. (Appx. p. 26, ¶ 8) The Complaint seeks a declaration regarding the interpretation of the Policies. (Appx. pp. 28-31, ¶¶ 14-26)

1. *The Extensive Investigation of Penn National’s Insurance Repository.*

Penn National is a regional insurance company that has been in existence since 1919. It issues policies of insurance to both individuals and companies in eleven states. The policies of insurance that Penn National issues to businesses include workers compensation, inland marine, property, commercial general liability, automobile liability, and excess policies. (Appx., pp. 264-65, ¶ 18)

When it began to store its historic policies of insurance, decades before it was involved in any asbestos coverage litigation, Penn National stored its policies by policy number. (Appx. p. 420) Penn National has a Document Retention Policy. Under this Policy, all non-workers compensation policy documents must be retained for twenty-five (25) years from cancellation or non-renewal date. (Appx., p. 265, ¶ 19)

Initially, Penn National stored its historic insurance policies on microfiche cards. In 1992, Penn National implemented an electronic storage system, ImageRight, but Penn National stopped using this version of the electronic storage system in 1995. Between 1995 and 2003, Penn National stored paper copies of its insurance policies. These documents are contained in 5,800 boxes located in an Iron Mountain facility in Pennsylvania. Between 2003 and 2005, Penn National

stored its insurance policies in a hybrid of electronic and paper copies. After 2005, all policies of insurance issued by Penn National have been stored electronically. (Appx., pp. 264-65, ¶¶ 17-19)

Given that its repository of non-electronic historic insurance policies are stored by policy number, Penn National can readily search for and obtain a copy of a policy of insurance once it is provided with a policy number. If no policy number is provided, Penn National can conduct a search of its electronic underwriting records (for the time periods from 1992 to 1995 and 2003 to present) by entering an entity's name to determine if Penn National has any electronic record of an insurance policy that was issued to that entity. (Appx. p. 256, ¶ 8) Electronically stored policy information is retained in the system by the first, or primary, named insured shown on declarations pages of insurance policies. (*Id.*) Therefore, Penn National can utilize this database to search for names of entities. The electronic search will produce matches to the name searched, along with the insured's city and state, policy number, and type of coverage issued. Once the policy number is obtained through the search, Penn National can search its repository of historic insurance policy documents and obtain a copy of the policy. (Appx., pp. 256-57, ¶¶ 8-10)

The Policies at issue in this case were initially located by Penn National approximately four years ago in response to a subpoena issued to Penn National in May 2018 by counsel for plaintiffs in an underlying asbestos case in which Covil was a defendant.² (Appx. p. 255, ¶ 4) The subpoena requested copies of insurance policies issued to Covil, and it attached a list of all the policies of insurance with policy numbers issued to Covil from March 31, 1969 through March 31, 1992 by various insurers, including the Policies issued by Penn National which are at issue in this case. (Appx. pp. 363-67) Pursuant to that subpoena, Penn National located and produced copies

² The subpoena was issued in the following underlying asbestos case: *Finch v. BASF Catalysts, LLC, et al.*, Civil Action No. 1:16-cv-1077, United States District Court for the Middle District of North Carolina.

of its Policies for Covil using the policy numbers provided. Penn National also conducted an electronic search to see if there were any commercial general liability policies that were issued either before its 1986-87 Policy or after its 1987-88 Policy, there were none. (Appx. p. 290) Covil has had complete copies of these two policies since 2018.

The Receiver for Covil began tendering Covil related asbestos cases to Penn National in February 2020. Penn National has since contributed to the defense of all asbestos lawsuits filed against Covil that have been tendered to Penn National. Penn National has further attended the mediations conducted in these lawsuits, and it has also participated and collaborated in countless pre-mediation and pre-trial conferences with Covil's Receiver, Covil's asbestos defense counsel, and other participating insurers with respect to strategy, valuation, and contribution to settlements based upon the applicable insurance coverage and the known evidence in each underlying Covil asbestos case.

After the Complaint in this action was filed in April 2020, Penn National has been engaged in extensive discovery concerning its insurance repository and searches for Covil related policy documents. Specifically, Covil has served the following written discovery on Penn National:

- Covil Corporation's First Interrogatories and First Requests for Production to Defendant Penn National (served on April 9, 2021): The twenty-six (26) interrogatories and thirty-three (33) requests for production of documents sought information regarding all insurance policies issued to Covil or on which Covil was insured, all underwriting files, total amounts of premium paid by Covil, all claims submitted by Covil for insurance coverage under any insurance policy, all reserves on any such claims, loss runs on each policy of insurance, detailed description of what Penn National did to search for policies issued to Covil, all locations where such searches were conducted, all steps taken by Penn National to

determine the terms and conditions of any policies issued to Covil, communications with reinsurers, reinsurance documents, retention policies, storage policies, all electronic systems used by Penn National to store its policies, process is how policy numbers are assigned, how liability payments are saved and stored, any documents in which the word, “Covil,” is used, communications with defense counsel for Covil, membership in Insurance Services Office, participation in an April 1977 meeting held by the American Insurance Association, claims handling policies, all policies of insurance issued to 240 listed contractors, and certificates of insurance or other coverage issued to 650 listed facilities. (Appx. pp. 51-91)

- o Penn National served its responses to Covil’s first set of discovery requests on May 10, 2021 (Appx. pp. 92-137), and supplement responses on June 11, 2021 (Appx. 138-77). In conjunction with its responses, Penn National produced a voluminous set of Covil related policy documents, and offered to produce additional documents upon agreement on a Confidentiality Agreement and Protective Order.
- Covil’s Second Set of Requests for Production of Documents (served on November 19, 2021): Covil sought documents regarding litigation holds placed by Penn National. (Appx. 178-82)
 - o Penn National served its responses to Covil’s second requests for documents on December 20, 2021. (Appx. pp. 183-89)
- Covil’s Second Set of Interrogatories, Third Requests for Production of Documents, and First Requests for Admissions (served on January 18, 2022): The twenty-two (22) additional interrogatories, twenty-four (24) additional requests for production of

documents, and twenty-six (26) requests for admission requested information regarding why certain historic insurance policies were not destroyed pursuant to Penn National's retention policy, additional information regarding Penn National's retention policy, information regarding all historic insurance policies that were destroyed pursuant to Penn National's retention policies after June 2018, including identification of named insureds and additional insureds on those policies, notices provided to insureds regarding the destruction of historic insurance policies, all historic insurance policies that were not destroyed pursuant to Penn National's retention policy, Penn National's destruction/purge practices, how historic insurance policies are identified to be destroyed, all communications between Penn National and any other insurer for Covil, all communications with Iron Mountain, all training relating to Penn National's retention policy, Penn National's litigation hold policy, all litigation holds placed after June 2018, all sanctions issued to Penn National and its counsel, all spoliation orders received by Penn National policyholders, policies written to Louisiana and Wisconsin insureds prior to 1990, and all litigation where Penn National was sued in a direct action in Louisiana and Wisconsin. (Appx. pp. 190-210)

- o Penn National responded to Covil's second set of interrogatories, third requests for production of documents and requests for admission on February 17, 2022. (Appx. pp. 211-246) On March 9, 2022, Penn National served its supplemental response to Covil's third set of requests for production of documents, and upon execution of a Confidentiality Agreement and Protective Order, Penn National also produced over 2,500 pages of additional documents.
- Covil's Fourth Set of Requests for Production of Documents (served on May 13, 2022):

Covil served nineteen (19) addition requests for production of documents, including requesting documents regarding reviews by Penn National of documents it destroyed after 2010 pursuant to its retention policy, all self-audits generated in connection with Penn National's record retention policy, additional documents regarding Penn National's litigation hold regarding Covil cases, copies of Penn National's Standards of Conduct policy, copies of Penn National's legal review guidelines, a spreadsheet of all historic insurance policies stored at Iron Mountain, all documents contained in the boxes from Iron Mountain reviewed by Ellis & Winters, Penn National's organization of historic insurance policies contained on microfiche, inventory data sheets for historic insurance policies stored by Penn National, all communications regarding orders entered by Ret. Justice Toal, and all communications with Covil's asbestos defense attorneys. (Appx. pp. 247-53)

In addition to the forty-eight (48) interrogatories, seventy-eight (78) requests for production of documents, and twenty-six (26) requests for admission, Covil has taken the deposition of Brent Reifsnyder, Penn National Director of Administrative Services, (Appx. pp. 408-507) and has also conducted two separate Rule 30(b)(6) depositions of Penn National, for which Boyd Wright, Penn National's Senior Home Office Claims Examiner, served as Penn National's corporate designee. (Appx. pp. 273-407, 508-606) Covil is also currently seeking a third Rule 30(b)(6) deposition of Penn National. (Appx. pp. 16-17)

While Covil has never produced a policy number or even any secondary evidence of any additional commercial general liability policies issued by Penn National to Covil other than the 1986-87 Policy and the 1987-88 Policy, both of which were produced to Covil, Covil demanded that Penn National manually search its entire repository of historic policies to determine

if any additional policies of insurance issued to Covil exist and if there are any policies of insurance on which Covil is covered as an additional insured. (Appx. pp. 607-10) Penn National objected to performing a manual search on the grounds that it would be unduly burdensome without being provided with a policy number to perform the search. (Appx. pp. 611-24) Specifically, Penn National stores its historic policies on microfiche contained in 148 boxes—which include approximately 300,000 microfiche cards containing commercial lines policies, each of which is comprised of up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche—and in paper documents contained in 5,800 boxes stored at an Iron Mountain facility. (Appx. p. 268, ¶¶ 8-9; 653) A manual search of these millions of documents is not reasonable and would be all-consuming and take an inordinate amount of time.

Covil further demanded that Penn National search its millions of policy related documents to find any policies that Penn National may or may not have issued for 240 different “contractors” and 650 separate “facilities” on which Covil is not a named insured, but rather may theoretically qualify as additional insured. (Appx pp. 65-71) This request was made by Covil without any evidence indicating that Penn National issued policies to any of these 240 “contractors” or 650 “facilities” or that Covil indeed had any substantive relationship with any of the “contractors” or “facilities”.

Even without any evidence indicating that Penn National may have issued a policy for any of the 890 entities listed by Covil, or that Covil had any relationship with any of the entities, Penn National searched its electronic system for any information regarding the entities. After dedicating many hours to this project, Penn National’s search generated a result of four policies: an inland marine policy which did not provide general liability insurance coverage, a policy issued to an entity after Covil was no longer in existence and that had been purged pursuant to

Penn National's Document Retention Policy, and two additional general liability policies issued to other entities which did not provide coverage to Covil as an insured or additional insured. (Appx. pp. 255-59, ¶¶ 7-20) Internal Penn National communications concerning these policy related documents were produced with Penn National's responses to Covil's discovery request, and Penn National confirmed that it would produce the policy documents subject to a protective order as such documents were confidential in that they related to non-Covil entities. (Appx. p. 172)

Still not satisfied with the results of Penn National's search for policies, Covil moved to compel Penn National to perform a manual search of its historic files. After a hearing on such motion, the circuit court directed Covil's asbestos defense counsel, Ellis & Winters, LLP ("Ellis & Winters") to conduct a review of Penn National's repository of historic policy related documents to confirm whether there is a way to search Penn National's archived records for policy documents for a specific insured without a policy number. (Appx. p. 652) Three Ellis & Winters employees spent two days and 32 hours sampling approximately 100 boxes of paper documents. (Appx. pp. 690-706) Subsequently, two Ellis & Winters employees spent another two days and 21.7 hours reviewing microfiche cards. (*Id.*) After its search, Ellis & Winters submitted a report to the circuit court, which confirmed that Penn National actually stored its historic policy documents by policy numbers; as Penn National had repeatedly represented in this litigation. (Appx. pp. 652-56) Having access to Penn National's historic policy documents, Ellis & Winters was unable to find any additional commercial general liability policies that were issued to Covil or under which Covil was an additional insured.³ (*Id.*)

³ The Ellis & Winters employees, using a list of policy numbers apparently provided by Covil to them (but not to Penn National), were able to locate three additional policies of insurance. However, these policies were only located by Ellis & Winters because it had access to policy numbers for the policies. (Appx. p. 654) Furthermore, it is undisputed by the parties that these policies of insurance are not applicable to respond to Covil's asbestos liability because the policies

2. *The Orders at Issue.*

A hearing was conducted on April 11, 2022, addressing Ellis & Winters' report and other pending motions. (Appx. pp. 657-75) As a result of the hearing, the circuit court entered an Order on May 5, 2022⁴, which ordered that Penn National: (1) must now image and digitize its microfiche repository of historic commercial lines insurance policies, and (2) allow Covil and its attorneys to have unfettered access to this repository:

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. ...

... The Receiver and his outside counsel 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. ...

(Appx. pp. 12-13) (emphasis added)

The "intransigence" referred to in the above quote is Penn National's decision, made decades before its involvement in any asbestos coverage litigation, to store its historic insurance

were an inland marine policy, a boiler machine policy, and a commercial automobile policy, and therefore, provided no general liability coverage to Covil. (*Id.*)

⁴ The circuit court's order indicates that it applies in this case as well as any other matters in which Peter Protopapas is appointed the Receiver, and specifically identifies Case Numbers 2020-CP-40-04475, 2021-CP-40-03484, 2021-CP-40-01821, 2020-CP-40-05526, 2020-CP-40-01364, and 2020-CP-40-01952.

policies by policy number, Penn National's refusal to comply with Covil's unreasonable demand that Penn National manually search its historic insurance policies for any policies issued to Covil, and Penn National's failure to voluntarily incur the enormous expense to image and digitize its historic repository of insurance policy documents:

... This Court fully expects that an insurance company served with discovery requests from a receiver in this state, seeking the 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.

* * *

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. ...

* * *

... 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 with a policy number. ...

(Appx. pp. 7-8, 9, 11)

As Ellis & Winters found during its investigation, Penn National's archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies

alone (with each card containing up to 60 images), meaning that there are roughly 18 million pages of commercial line policy related documents stored on Penn National's microfiche cards. (Appx. pp. 653, 656) Ellis & Winters found that it could take up to 45 minutes to print the images on a single microfiche card, meaning that it could take roughly 5,625 workweeks to just print the images stored on microfiche for commercial line policies. (*Id.*) Furthermore, Ellis & Winters found that the cost to image and digitize Penn National's microfiche repository of commercial lines policies would be between \$240,000 to \$960,000. (Appx. p. 656)

As such, the circuit court held that Penn National was "intransigent" and ordered Penn National to image and digitize its repository of history commercial lines policies and to provide the counsel for the Receiver unfettered access to the database created. The circuit court attempted to justify its order and characterization of Penn National as "intransigent" because Penn National did not voluntarily agree to either spend an unreasonable amount of time and resources manually searching its repository of historic policies or incur hundreds of thousands of dollars to image and digitize its repository in response to the Receiver's requests (which came without any policy numbers or other secondary evidence to suggest that Penn National had issued any policies responsive to the Receiver's requests that had not already been produced).⁵

On May 26, 2022, the circuit court denied Penn National's Motion for Reconsideration of

⁵ The circuit court's order also directs Penn National to produce yet further documents, including internal "policy prefix code keys", information provided by Penn National to Ellis & Winters during its review of Penn National's microfiche, and all underwriting documents for all Receivership entities. The order further mandates that Penn National must undergo a third Rule 30(b)(6) deposition on topics that certainly could have been addressed during the previous Rule 30(b)(6) depositions that Penn National has had to undergo. Finally, the order further penalizes Penn National by unnecessarily requiring that a copy of the order be sent to the South Carolina Department of Insurance. (Appx. pp. 13-14, 16-18) All of these orders were objected to and addressed by Penn National in its Motion for Reconsideration, and they are likewise included as issues that should be subject to review by this Court.

its May 5, 2022 Order. (Appx. pp. 20-23)

ARGUMENT IN SUPPORT OF PETITION

1. Whether A Circuit Court May Order An Insurance Company To Image And Digitize Its Entire Repository Of Historic Insurance Policies And Allow The Opposing Party To Have Unfettered Access To These Documents In This And Other Cases Is A Novel Question Of Law That Needs To Be Addressed By This Court.

In this case, the circuit court has taken the unprecedented step of mandating that Penn National image and digitize its entire historic microfiche repository of commercial lines insurance policies and that Penn National allow full and unrestricted access to this created database to opposing counsel. There is simply no justification for such an onerous, burdensome, and expensive fishing expedition – one that will violate the rights and privacy of thousands of insureds to whom Penn National issued insurance policies and who are not involved in the present litigation. Furthermore, the Receiver has issued similar requests for documents to many other insureds in relation to asbestos litigation, and is using the orders at issue in this case as authority to impose similarly onerous, burdensome, and expensive fishing expeditions on other insurers.⁶

The circuit court attempted to justify its extraordinary actions in this case by characterizing Penn National as “intransigen[t].” However, Penn National’s “intransigence” in this case consisted of: (1) the fact that it has always stored its historic insurance policies by policy number; (2) it did not manually search its millions of pages of documents or microfiche films for general liability coverage that may have been issued to Covil; and (3) it previously did not voluntarily

⁶ For example, in *Childers v. Davis Mechanical et al.*, Case No. 2021-CP-40-03484 (Richland County, SC), the Receiver has filed similar Motions to Compel seeking to require insurers to perform unreasonable searches of their historical policy documents. on May 16, 2022, the Receiver filed a Notice of Filing in the *Childers* action, placing the circuit court’s May 5, 2022 Order in the file and claiming that “this Order contains helpful guidance regarding this Court’s expectations regarding the administration of receiverships.” In that one case alone, the Receiver on behalf of various entities has filed seven (7) motions to compel since late 2021 to present, seeking to impose unreasonable obligations on various insurers to search for policy documents.

image and digitize its repository of historic policies. Ultimately, the circuit court is punishing Penn National for making a decision to store its policies of insurance by policy number.⁷ It should not be allowed to do so.

A. *There Is No Legal Requirement That Penn National Store Its Insurance Policies In A Certain Way.*

At its core, the circuit court in the orders at issue is punishing Penn National for the method by which it chose to store its historic insurance policies. However, there has never been any law or regulation promulgated by any federal or state agency that mandates how an insurance company should file and store its policies of insurance. In South Carolina, the legislature has enacted The Insurance Law, S.C. Code Ann. §38-1-10, *et seq.* which governs many aspects of the insurance industry. For example, this law addresses the capital and surplus required of insurance companies (S.C. Code Ann. §§38-9-10, *et seq.*), the investment and investment practices of property and casualty companies (S.C. Code Ann. §§38-12-410, *et seq.*), the length of time – five years – that losses and claims are to be kept by insurers (S.C. Code Ann. §38-13-130), and what constitutes improper claims practices (S.C. Code Ann. §38-59-20). However, The Insurance Law does not mandate, or even address, a method by which insurance companies are to store their historic insurance policies.

Penn National chose to store its historic insurance policies by policy number. As explained by the Penn National employees, policy numbers are important to an insurance company because

⁷ Ret. Justice Toal erroneously speculated (without any evidence) during the hearing out of which the May 5, 2022 Order was issued that Penn National’s intent in storing policy documents by policy number was to make it difficult to find policies. (Appx. p. 666) However, the employee with Ellis & Winters charged with reviewing Penn National’s archived policy documents stated that he could not speak to Penn National’s intent, but that the terminal digit system used by Penn National to store its policies is commonly used by businesses to store or inventory its historical documents. (*Id.*)

they are a distinct identifier that is specifically associated with a particular insured. Insurance companies do not duplicate their policy numbers. An insured's name, address, or location may be similar to or identical to another insured's name, address, or location. However, the policy number assigned to a certain policy issued to a certain insured is unique. Because policy numbers are distinctive, they provide certainty regarding the issuance of insurance coverage. Mr. Wright testified in his deposition:

Insurance companies, and Penn National is no exception, issue policy numbers for a very specific reason. Name similarity, locations, and other things vary. Policy number is like a Social Security number. It's the identifier for that particular insured.

(Appx. p. 297) Because Penn National stores its historic policies by policy number, Penn National can only reasonably search its microfiche or paper documents by policy number.

It is clear that the circuit court disagrees with how Penn National stores its historic insurance policies. In its order, the circuit court stated: "For 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."

(Appx. p. 8) Regardless of whether Penn National's decision to store its historic insurance policies by policy number is seen as inappropriate, unwieldy, or even ridiculous; absent a statute, rule or regulation requiring otherwise, a court cannot substitute its judgment on how such insurance policies should be stored and should not be allowed to punish an insurance company for failing to store its historic policies in a certain way. But, that is exactly what the circuit court has done in this case. See, *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 362-63 (1978) ("Finally, the suggestion that petitioners should have used 'different systems' to keep their records borders on the frivolous ... we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs

could not have been anticipated.”).

B. *There Is No Evidence That Penn National Issued Any Additional Policies Of Insurance That Provided Coverage To Covil As An Insured Or Additional Insured.*

It is significant to note that there is no evidence that Penn National issued any general liability policy to Covil other than the 1986-87 Policy and the 1987-88 Policy. This is not a lost policy case. In fact, the undisputed information possessed by all parties to this case is that Covil was completely insured from March 31, 1969 through March 31, 1992, with consecutively issued policies of general liability insurance issued by insurance companies. There are no gaps in coverage. There are no periods where Covil was not insured or even self-insured. Coverage for each policy period was provided by a certain insurance carrier and the policy numbers for each such period are known and identified. (Appx. pp. 602-06)

Additionally, Covil has produced no information or secondary evidence that there may be other general liability insurance policies (not listed on the chart of insurance policy information attached to the subpoena) that may have been issued to it. See, Gamble v. Travelers Ins. Co., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (burden of proof on person seeking insurance benefits to prove coverage). For example, Covil has not produced any business records, statements for premiums, cashed checks showing payment of premiums, records from agents showing the issuance of policies, or testimony regarding the existence of policies. In fact, Covil has presented no evidence at all that Penn National may have issued other general liability policies to Covil at any time other than the 1986-87 Policy and the 1987-88 Policy. Further, there is no evidence that Covil used any reasonable means to search for any such secondary evidence. Indeed, the order does not reference any such evidence.

The orders at issue reference whether Covil was insured as an “additional insured” on

policies of insurance issued by Penn National. This is a red herring. Generally, a business can be insured on a policy of insurance issued to another entity if the policy contains an endorsement that broadens the definition of “Who Is An Insured” under that policy to include other businesses when that business has a contractual relationship with the named insured which requires such additional insurance and the liability arises out of the named insured’s work. For example, a typical additional insured endorsement states:

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom [the named insured] is performing operations when [the named insured] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [the named insured’s] policy. Such person or organization is an additional insured only with respect to liability for “bodily injury”, “property damage”, or “personal and advertising injury” caused, in whole or in part, by:

1. [The named insured’s] acts or omissions; or
2. The acts or omissions of those acting on [the named insured’s] behalf;

in performance of [the named insured’s] ongoing operations for the additional insured.

Dan Ryan Builders W.Va., LLC v. Main St. Am. Assur. Co., 452 F.Supp.3d 327, 332-33 (D.S.C. 2020).

It is extremely improbable that a manual search of historic insurance policies will produce policies under which Covil was insured as an additional insured. First, most additional insured coverage does not actually identify the entity who may qualify for coverage as an additional insured. As demonstrated by the language in the additional insured endorsement quoted above, such coverage is determined first by whether a contract or written agreement exists between the named insured and Covil. Covil has not produced any such contracts in the present case.

Furthermore, as demonstrated by the language above, additional insured coverage is

usually provided to companies for whom the named insured is performing or has performed operations. A common example is in the construction industry. Routinely, general contractors qualify for additional insured coverage under policies issued to a subcontractor. *See, e.g., Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, 788 F.3d 375, 377-78 (4th Cir. 2015); *Lendlease (US) Constr. Inc. v. National Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 180377 (D.S.C. 2021). Here, it is undisputed that the asbestos liability asserted against Covil is the result of work or products that Covil brought to facilities in which it performed operations. *See, e.g., Finch v. Covil Corp.*, 388 F.Supp.3d 593, 600-01 (M.D.N.C. 2019). Because Covil was the vendor or subcontractor (and not the general contractor or facility owner), it is highly unlikely that Covil would be entitled to additional insured coverage under policies issued to the businesses where Covil brought its products or performed its operations. Indeed, Covil has never provided any evidence that would support any relationship between Covil and any of the hundreds of “contractors” or “facilities” for which it demands Penn National to search for coverage.

The simple truth is that it is highly unlikely and improbable that a manual search of Penn National’s repository of historic insurance policies would result in the discovery of any general liability policies that provided coverage to Covil as a named insured or as an additional insured. The facts in this case plainly do not justify the extraordinary remedy of requiring Penn National to image and digitalize its microfiche repository of commercial lines insurance policies at a cost of hundreds of thousands of dollars in order to allow the Receiver to engage in a fishing expedition for policies that it has no good faith basis to believe exist, and to then provide unrestricted access to such database to Covil, its Receiver, and their counsel.

C. *The Order Entered By The Circuit Court Is An Impermissible Fishing Expedition And Should Not Be Allowed To Stand.*

Generally, parties are allowed wide latitude in pursuing discovery in civil cases. However,

this Court has previously limited discovery that has been found to be abusive and impose an undue burden by expense. *Oncology & Heatology Assocs. of S.C., LLC v. South Carolina Dep't of Health & Env'tl. Control*, 387 S.C. 380, 388-89, 692 S.E.2d 920, 924-25 (2010). The order of which Penn National seeks review is oppressive and beyond the pale. By its order, the circuit court is imposing a sanction on Penn National by requiring it to image and digitize its microfiche repository of historic commercial lines insurance policies at great expense and to allow Covil and its attorneys' unrestricted access to the created database. This sanction is based on nothing more than Covil's unfounded and wholly unsupported "hope" that Penn National may have issued more policies under which Covil may be insured for general liability purposes, and the circuit court's readily influenced irritation that Penn National used a storage method with which she disagreed. The circuit court's order in this case is a clear abuse of discretion.

In *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), this Court established the framework by which a court should review discovery requests for abusiveness and undue burden by expense. Specifically, this Court held that if the party from whom discovery is being sought shows a particularized harm which will be caused by allowing the discovery, the person seeking the discovery has the burden of proving that the discovery sought is both relevant and necessary. *Id.* at 578, 683 S.E.2d at 498. In this case, Penn National has clearly shown that requiring it to perform a manual review of its historic policies of insurance would cause an undue burden by expense. (Appx. pp. 268-69, ¶¶11-12; 468-70) Ellis & Winters advised that Penn National's archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies, with each card containing up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche cards. (Appx. pp. 653, 656) Ellis & Winters further found that it could take up to 45 minutes to print the images on a

single microfiche card, meaning that it could take roughly 5,625 workweeks to just print the images stored on microfiche for commercial line policies if a manual review of the archived policy documents were to be undertaken. (*Id.*)

The cost to image and digitize Penn National's microfiche repository fares no better. Ellis & Winters has estimated that the cost to image and digitize Penn National's microfiche repository of historic commercial lines policies would be between \$240,000 to \$960,000; a cost ordered by the circuit court to be paid solely by Penn National.⁸ (Appx. pp. 15, 656)

Covil, however, has not shown that requiring the imaging and digitizing of these historic policies is both relevant and necessary to the present case. As indicated more fully above, Covil has not demonstrated by the production of policy numbers or by other secondary evidence that Penn National actually issued policies of general liability insurance to Covil other than the previously produced 1986-87 Policy and the 1987-88 Policy. There is no evidence that Covil even conducted a reasonable search to locate any such secondary evidence. Furthermore, Covil has not shown that there is any chance that a manual search of Penn National's historic insurance policies would actually uncover additional policies of insurance under which Covil would be an insured or additional insured. The circuit court failed to hold Covil to its burden of showing that a manual search of Penn National's historic microfiche repository is relevant and necessary. Instead, the circuit court has imposed on Penn National the extreme expense of digitizing its microfiche

⁸ The circuit court went so far as to prohibit Penn National from even participating in the choice of vendor to image and digitize Penn National's microfiche repository. Therefore, Penn National has no control over the vendor selected, the cost incurred to image and digitize its repository (a cost which the circuit court has imposed on Penn National), the electronic system used, or whether such system is compatible with and can be supported by Penn National's existing computer system. (Appx. p. 15: "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.")

records and then ordered that Covil, the Receiver, and the Receiver's counsel be provided unfettered access to the entire database, including private information for Penn National's insureds with no connection to Covil whatsoever. Therefore, the circuit court abused its discretion when it ordered the imaging and digitizing of Penn National's historic repository, and providing unfettered access to such database to Covil, the Receiver, and the Receiver's counsel.

This Court's decision in *Hollman v. Woolfson* is instructive. In *Hollman*, this Court accepted a petition for writ of certiorari to review a discovery order that allowed one party to contact and interview the patients of the opposing party. In issuing the writ, this Court found that "allowing the interviews will moot any claim petitioners could raise on appeal that the discovery was erroneously allowed." *Id.* at 577, 683 S.E.2d at 498. Although this Court found that the interviews of non-party patients may be relevant to the claim of violation of the Unfair Trade Practices Act, this Court held that the plaintiff failed to show that such interviews were necessary. The burden of showing that the requested discovery is necessary is on the party propounding the discovery request:

In determining whether information is necessary, the party seeking information must 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 a real, rather than a merely possible, threat. The trial court must determine whether there are reasonable alternatives available to discover the information.

Id. at 580, 683 S.E.2d at 500 (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 476, 674 S.E.2d 154, 163 (2009)). By failing to make specific findings as to how the lack of information would impair the plaintiff's case, this Court held that the circuit court abused its discretion in ordering the discovery:

The circuit court committed an abuse of discretion in determining the interviews with the nonparty patients were necessary. Petitioners' treatment of other patients is not necessary to establish any element of

respondents' causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached the standard of care when treating respondents or committed fraud on respondents. As to the UTPA cause of action, the circuit court did not make a specific finding as to exactly how the lack of information obtained from the interviews would impair respondents' presentation of the merits of that cause of action or that there were no reasonable alternatives available to discover the information.

Id. at 581, 683 S.E.2d at 500.

Similarly, in the present case, Covil failed to meet its burden of showing that a manual search of Penn National's historic insurance policies is relevant and necessary to prosecute its declaratory judgment claims in this case. In its order, the circuit court did not make specific findings as to how the failure to perform a manual search would impair Covil's case. In truth, Covil does not have and cannot show that Penn National issued any policies of insurance under which Covil was insured as a named insured or additional insured other than the two policies previously produced, the 1986-87 Policy and the 1987-88 Policy. Because the circuit court did not appropriately support its order, the circuit court abused its discretion in ordering the imaging and digitizing of Penn National's microfiche repository of historic commercial lines insurance policies.

The circuit court further abused its discretion in directing that Covil's Receiver and his attorneys be allowed unrestricted access to the created database of Penn National's repository of historic commercial lines policies. In so ordering, the circuit court never considered more limited alternatives. Instead, the circuit court is allowing the Receiver to access, review, and search Penn National's repository not only for insurance policies under which Covil may be insured but also for every other individual or entity to whom Penn National issued insurance policies. (Appx. pp. 12-13: "The Receiver and his outside counsel 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 or other insured's policies.”)

The order in this case is nothing more than a court-sanctioned fishing expedition. Such fishing expeditions have long been disapproved by this Court. This Court's holding in *Boykin v. Hermitage Cotton Mills*, 180 S.C. 364, 185 S.E. 863 (1936), where the circuit court ordered discovery of eleven years of corporate minutes, applies equally to the present case:

If discovery were allowed to this extent, the petitioner would obtain a great mass of confidential matter, wholly irrelevant to his cause of action. Private records of the Hermitage Cotton Mills, unrelated to the warehouse company, would be opened before him, with resultant damage to the appellant, and with no advantage to the petitioner in the preparation of his pleadings. We can see no reasonable justification for adopting a course which would inevitably result in a fishing expedition.

Id. at 379-80, 185 S.E. at 869.

This Court's decision in *Royster v. Unity Life Insurance Company*, 193 S.C. 468, 8 S.E.2d 875 (1940) is controlling. In *Royster*, the plaintiffs sought discovery of the insurance company's books and records, which the circuit court ordered. This Court noted initially that the discovery order “has all the earmarks of a fishing expedition, an enterprise which this Court has time and again stated it does not favor.” *Id.* at 472, 8 S.E.2d at 877. This Court then vacated the discovery order, holding:

The order appealed from requires the insurance company to produce before the Clerk of Court of Williamsburg County its books and records; - there to be examined and inspected by these five plaintiffs.

This Court is of the opinion that the order should be vacated. To subject the insurance company to such a far-reaching order on the record therein would be vexatious in the extreme. Matters of a confidential and private nature would almost certainly be disclosed to plaintiffs.

Id. at 473, 8 S.E.2d at 877.

The circuit court in the present case has ordered substantially the same relief as was ordered

in *Royster*, that Penn National be required to image and digitize its historic policies and allow Covil and its attorneys to have unrestricted access to these records. Like in *Royster*, matters of a private and confidential nature, specifically policy and policy-related documents issued to individuals, companies, or organizations who are not in any way involved in this case, would then be disclosed without any consent or knowledge by these policyholders. The order in this case, like the order in *Royster*, is “vexatious in the extreme.” Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review and vacate the circuit court’s order mandating that Penn National image and digitize its microfiche repository of historic commercial lines insurance policies and that Covil, its Receiver and their attorneys have full and unfettered access to the same.

CONCLUSION

Penn National requests this Court to issue a writ of certiorari to review the circuit court’s unprecedented order mandating that Penn National image and digitize its entire microfiche repository of historic commercial lines insurance policies and, further, allowing the opposing party, Covil, its Receiver, and their attorneys unrestricted access to this database in this and many other current and future cases. The circuit court took this extraordinary action simply because it disagreed with the method by which Penn National stored its historic insurance policies, i.e. by policy number. The facts show that there is no other basis for this action – there is no evidence that Penn National actually issued any additional commercial general liability insurance policies (other than the two policies previously produced) under which Covil would be insured. The truth is that there is no reasonable justification for ordering such a remedy that will inevitably result in a fishing expedition. Penn National requests that this Court protect it from this abusive and unduly burdensome order and accept its Petition for Writ of Certiorari to review and vacate the same.

/s/ David G. Harris II

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*Attorneys for Petitioner Pennsylvania National
Mutual Casual Insurance Company*

Date: June 6, 2022

The South Carolina Court of Appeals

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

v.

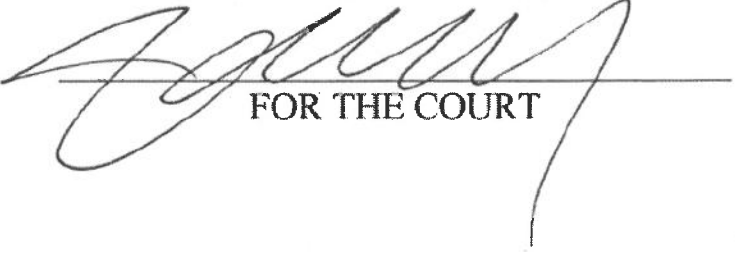
Pennsylvania National Mutual Casualty Insurance, Co.;
Sam J. Crain & Co., Inc.; and South Carolina Property
and Casualty Insurance Guaranty Association,
Defendants,

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

Appellate Case No. 2022-000761

ORDER

After careful consideration, Respondent's motion to dismiss is granted. The orders on appeal are not immediately appealable. *See See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right."); *Waddell v. Kahdy*, 309 S.C. 1, 419 S.E.2d 783 (1992) (an order compelling a party to submit to discovery is interlocutory and not directly appealable). The remittitur will be sent as required by Rule 221(b), SCACR.



FOR THE COURT

Columbia, South Carolina

cc:

FILED
Aug 09 2022

David Grant Harris, II, Esquire
Brady Allen Yntema, Esq, Esquire
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Jescelyn Tillman Spitz, Esquire
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Jonathan M. Robinson, Esquire
William Bradley Nes, Esquire
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The Supreme Court of South Carolina

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

v.

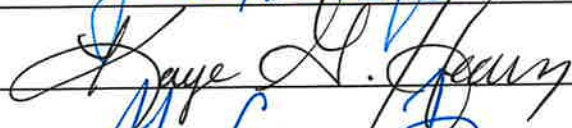
Pennsylvania National Mutual Casualty Insurance, Co.;
Sam J. Crain & Co., Inc.; and South Carolina Property
and Casualty Insurance Guaranty Association,
Defendants,

Of whom Pennsylvania National Mutual Casualty
Insurance Company is the Petitioner.

Appellate Case No. 2022-000785

ORDER

Pennsylvania National Mutual Casualty Insurance Company has filed a petition for a writ of certiorari in the Court's original jurisdiction and a motion to file a portion of the appendix to the petition under seal. The motion to file under seal is granted. The petition for a writ of certiorari is denied.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	J.

Columbia, South Carolina
August 23, 2022

cc:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

Appellate Case No. 2022-000761

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

Respondent,

v.

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

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

**APPELLANT’S PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING *EN BANC***

Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), by and through counsel, and pursuant to the South Carolina Appellate Court Rules, Rules 221(a) and Rule 240, hereby respectfully moves and petitions the Court for a rehearing of the Court’s Order issued August 9, 2022, (“August 9 Order”), granting the motion to dismiss filed by Respondent Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas

RECEIVED
Aug 24 2022
SC Court of Appeals

(“Covil Corporation”). Penn National further suggests rehearing *en banc*, pursuant to Rule 219(b) of the South Carolina Appellate Court Rules. Consideration by the full court is necessary to maintain uniformity of decisions and resolve questions of exceptional importance, including but not limited to questions relating to the appealability of the imposition of severe sanctions in the guise of a discovery order for petitioner’s business decision to maintain its records in a manner amenable to the conduct of its business as an insurer.

The Court of Appeals’ August 9 Order as it currently stands allows the dismissal of Penn National’s appeal on the grounds that it is an interlocutory appeal of discovery orders of the circuit court. However, while titled discovery orders, the circuit court orders appealed by Penn National are in fact contempt or sanction orders in that they punish Penn National for its alleged “intransigence” by imposing burdensome sanctions and monetary penalties for its decision to store its historical policies by policy number. Such orders, in contrast to ordinary discovery orders, are immediately appealable.

The Court should grant Penn National’s Petition for Rehearing of Covil Corporations’ motion to dismiss Penn National’s appeal based on the arguments herein, as well as all arguments previously raised by Penn National in its prior submissions, which Penn National incorporates herein by reference.

INTRODUCTION

Penn National has appealed two orders of the circuit court, dated May 5, 2022¹ and May 26, 2022² (hereinafter collectively “the Orders”), that go well beyond an order that simply resolves a discovery dispute between Penn National and the Receiver. The Orders adopted by the circuit court found that Penn National “refused” to properly review its insurance repository for Covil related policy documents, and that Penn National has been “intransigent” in its search for such documents. The trial court asserts that “[d]espite prior orders” of the circuit court, Penn National has taken a “defiant stance” in failing to appropriately maintain and search its insurance repository of historical policy related documents.

Penn National’s historical policy related documents (pre-1992) are stored on microfiche by policy number, and include more than 200,000 historic policies, with the commercial line policies alone being stored on approximately 300,000 microfiche cards, each of which is comprised of up to 60 images, meaning that there are roughly 18 million pages of commercial lines policies stored on microfiche. It is evident that the circuit court takes issue with Penn National’s document storage practices, believing that Penn National should have altered its document retention and storage policies at some point and processed the microfiche so that the cards could be searched electronically. The circuit courts’ belief that Penn National’s continued failure to take this step, “despite the [circuit court’s] prior orders,” constitutes a “defiant stance” and “intransigence” by Penn National. Therefore, the circuit court took the unprecedented step of

¹ A copy of this order, hereinafter referred to as “the May 5 Order” and previously attached to Penn National’s Notice of Appeal, is attached hereto as **Exhibit 1**, for ease of reference.

² A copy of this order denying Penn National’s Motion to Reconsider the May 5 Order, hereinafter referred to as “the May 26 Order” and previously attached to Penn National’s Notice of Appeal, is attached hereto as **Exhibit 2**, for ease of reference.

directing Penn National to allow other parties to re-image and digitize its entire repository of historic commercial lines insurance policy related documents stored on microfiche, contrary to its long-standing document retention policies, and to allow opposing counsel to have unrestricted and unfettered access to the database that would be created by such process, at an exorbitant expense to be solely incurred by Penn National. Further, the Orders expressly refuse Penn National any say in the method or manner in which the process is to take place, selection of any vendors for the required digitization, or any ability to contest or restrict production of the digitized documents, and require that the Orders be sent to the Office of Consumer Services for the South Carolina Department of Insurance. May 5 Order, p. 15. The Orders adopted by the circuit court fundamentally imposed a sanction or penalty on Penn National, including a punitive monetary component. In granting Covil Corporation's motion to dismiss Penn National's appeal, there was an oversight of the significant penalties imposed on Penn National by the Orders and, as such, a misapprehension of case precedent that otherwise establish the right to an immediate appeal of the Orders in this case.

ARGUMENT

Rule 221(a) of the South Carolina Appellate Court Rules permits a party to petition for rehearing where it supposes the court to have "overlooked or misapprehended" issues on appeal. *See also Ex parte Dunovant*, 16 S.C. 299, 301 (1881) ("[E]very party considering himself aggrieved by what he regards an erroneous decision of this court may apply for a rehearing upon certain well-established grounds."). The Court has failed to consider Penn National's argument that the Orders, in imposing monetary and other penalties on Penn National, operate as contempt orders, and thus, are immediately appealable. In general, "[s]tatutes and rules of court should be construed liberally in favor of the right of appeal." *Wieters v. Bon-Secours St. Francis Xavier*

Hosp., Inc., 378 S.C. 160, 167, 662 S.E.2d 430, 434 (2008) (citations omitted). This Court should grant a petition for rehearing to allow Penn National to exercise its right of appeal and have this appeal heard on the merits.

Despite styling the Orders as “discovery orders,” the circuit court imposed a number of sanctions on the basis of Penn National’s alleged “defiant stance” and “intransigence,” including punitive orders that force Penn National to (1) finance the actions of third-parties in digitizing its confidential records, (2) provide unfettered access of third-parties to Penn National’s *entire* library of microfiche records containing policy related underwriting files without evidence that any such files that have not already been disclosed may be relevant to the litigation in question, and (3) prevent Penn National from exercising any oversight or taking any steps whatsoever to protect confidential information unrelated to this litigation. May 5 Order, p. 8. The circuit court further ordered that the Receiver provide a copy of the May 5 Order to the Office of Consumer Services for the South Carolina Department of Insurance. May 5 Order, p. 15. The dismissal of Penn National’s appeal on the basis of the Orders’ characterization as discovery orders overlooks the nature of the circuit court’s Orders, which actually impose sanctions on Penn National in the nature of a contempt order.

The substance of orders is subject to review regardless of the order’s title or styling. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (“Our review of trial court orders is not constrained by how the order is styled”). While the Orders appealed are styled as discovery orders, they are in the nature of contempt orders or sanctions in their substance, and should be immediately appealable. The effect of an order, not its styling, determines whether it is immediately appealable. *Id.* at 539 (“An appellate court should look to the effect of an . . . order to determine its appealability”) (quoting *Thornton v. S.C.*

Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). See e.g. *Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 554, 684 S.E.2d 779, 781 (Ct. App. 2009) (an order granting a motion to dismiss would be considered one granting summary judgment because the trial court considered matters outside the pleadings); *Patterson v. Witter*, 425 S.C. 213, 225-26, 821 S.E.2d 677, 684 (2018) (same); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592-93, 615 S.E.2d 437, 438-39 (2005) (treating motion to quash affidavit of default as equivalent of granting a motion to dismiss, making it immediately appealable). The Order's styling as discovery orders is irrelevant in this case. Its substance as a contempt order imposing penalties on Penn National is the essential consideration that was overlooked in the August 9 Order to dismiss Penn National's appeal. Ordinary discovery orders are indeed "interlocutory and not immediately appealable." *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 335, 852 S.E.2d 744, 747 (2020). Contempt orders, in contrast, are immediately appealable. See *Tucker v. Honda of S.C. Mfg.*, 354 S.C. 574, 577, 582 S.E.2d 405, 407 (2003), *Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999) ("[A] contempt order also is a final order that is immediately appealable."). Whether or not the Orders are substantively ordinary discovery orders or contempt orders is essential to determining their appealability.

Contempt orders have previously been styled as discovery orders and subsequently reviewed by the South Carolina Supreme Court. *Grosshuesch v. Cramer*, 377 S.C. 12, 18, 659 S.E.2d 112, 115 (2008) (referring to various orders appealed, including contempt orders, as "several discovery orders"). Thus, the manner in which an order is titled does not in and of itself control a determination of whether it is immediately appealable. Rather, it is the substance of the order that should control.

For example, the South Carolina Supreme Court in *Grosshuesch* heard consolidated appeals related to several orders characterized by the court as “discovery orders,” which included orders granting sanctions for contempt against a defendant and her attorneys and a protective order issued by the trial court. 377 S.C. at 18. The Supreme Court, holding that the orders concerning contempt and sanctions were immediately appealable, vacated the contempt order and sanctions against the defendant and reversed the contempt order and sanctions as to her counsel. 377 S.C. at 31. However, the Supreme Court held that the questions on appeal relating to the protective order were not immediately appealable. Each of the questions on appeal was characterized by the Supreme Court as “relate[d] to several discovery orders.” 377 S.C. at 18. However, questions concerning discovery orders that dealt with contempt and sanctions, which are immediately appealable, were distinguished from discovery orders that dealt with protective orders, which are not immediately appealable. 377 S.C. at 30. As such, *Grosshuesch* stands for three essential propositions: (1) some orders characterized as “discovery orders” are appealable; (2) the substance of a “discovery order,” and not its characterization as a “discovery order,” determines whether or not the order is appealable; and (3) “discovery orders” that in substance concern contempt or sanctions are immediately appealable, regardless of their characterization.

The Supreme Court of South Carolina has specifically held that the refusal of a party to comply with an order to participate in discovery, resulting in contempt, is immediately appealable. *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986); *See E.g. Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999) (“a contempt order is also a final order that is immediately appealable”); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 42 (Ct. App. 2005) (“[a]n order finding a party in contempt is immediately appealable”) (citing *Hooper*, 334 S.C. at 291, 513 S.E.2d at 364), *aff’d as modified* 371 S.C. 10, 636 S.E.2d 864 (2006); *Grosshuesch v. Cramer*,

377 S.C. 12, 659 S.E.2d 112 (2008) (referring to various orders appealed, including contempt orders, as “several discovery orders”, but addressing and reversing the immediately appealable contempt orders). It is well-settled law that “[a] contempt order is a final order that is immediately appealable.” *McCain v. Brightharp*, 399 S.C. 240, 251, 730 S.E.2d 916, 922 (2012).

South Carolina’s appellate courts have held that contempt orders, because of their nature, are final and immediately appealable. As set forth above, regardless of the title of the Orders in question, they are final and award relief identical to what could be awarded by a contempt order. The Orders do not compel any additional acts on the part of Penn National; they expressly take away any involvement of Penn National in the method or manner in which the documents are digitized. The Orders also impose in essence a fine in the amount of the cost to get the documents digitized on Penn National, as Penn National is ordered to pay the costs with no involvement in the selection of a vendor or any other aspect of the digitization, and has no recourse or ability to attempt to control costs. Finally, the Orders direct additional punishment in the transmission of the May 5 Order to the Department of Insurance. An immediate appeal of these contempt-type sanctions against Penn National, which were expressly imposed in response to Penn National’s alleged “intransigence” and “defiant stance” with respect to prior discovery orders of the circuit court, should be allowed to proceed. Penn National’s appeal should not be dismissed on the grounds that the circuit court’s Orders were simply styled as discovery orders. Respectfully, such a dismissal was a result of an oversight of the substance of the Orders that were styled as “discovery” orders when they were indeed contempt orders that sanctioned Penn National, which are immediately appealable pursuant to appellate court precedent. As such,

a petition for rehearing is appropriate here and should be granted to allow Penn National's appeal to be heard on the merits.

CONCLUSION

Penn National respectfully requests that the Court grant Penn National's Petition for Rehearing and Suggestion for Rehearing *En Banc*, and to hear Penn National's appeal on the merits.

This the 24th day of August, 2022.

/s/ David G. Harris II

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EXHIBIT 1

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

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.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

Appellate Case No. 2022-000761

RECEIVED
Aug 24 2022
SC Court of Appeals

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

Respondent,

v.

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

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

PROOF OF SERVICE

I hereby certify that on August 24, 2022, I have served all counsel in this action with a copy of Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules.

Counsel Served:

Jescelyn Tillman Spitz - jspitz@rplegalgroup.com.
G. Murrell Smith, Jr. - murrell@smithrobinsonlaw.com
Jonathan M. Robinson - jon@smithrobinsonlaw.com
Shanon Peake - shanonp@smithrobinsonlaw.com
W. Brad Nes - brad.nes@morganlewis.com

This the 24th day of August, 2022.

/s/ David G. Harris II

David G. Harris, II (S.C. State Bar No: 101951)

Brady A. Yntema (*Admitted Pro Hac Vice*)

N.C. State Bar No: 25771

David L. Brown

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*Attorneys for Appellant Pennsylvania National
Mutual Casual Insurance Company*



August 24, 2022

Via Email and First Class Mail

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED
Aug 24 2022
SC Court of Appeals

RE: Covil Corporation v. Pennsylvania National Mutual Casualty Ins. Co.
Appellate Case No. 2022-000761

Dear Ms. Kitchings:

I am enclosing Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc in the above case. I am also enclosing our firm check in the amount of \$50.00 for the filing fee.

Thank you for your help.

Sincerely yours,

Jane Carter

Jane Carter, NCCP
Paralegal to David G. Harris II

Enclosures

c: Jescelyn Tillman Spitz (with enclosures via Email)
G. Murrell Smith, Jr. (with enclosures via Email)
Jonathan M. Robinson (with enclosures via Email)
Shanon Peake (with enclosures via Email)
Brad Nes (with enclosures via Email and First Class Mail)

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

The South Carolina Court of Appeals

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

v.

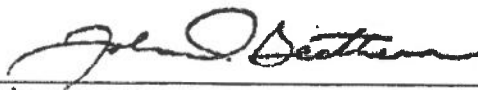
Pennsylvania National Mutual Casualty Insurance, Co.;
Sam J. Crain & Co., Inc.; and South Carolina Property
and Casualty Insurance Guaranty Association,
Defendants,

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

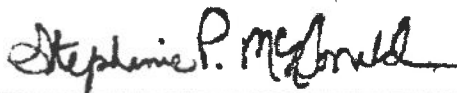
Appellate Case No. 2022-000761

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED
Nov 15 2022

cc:

David Grant Harris, II, Esquire
Brady Allen Yntema, Esq, Esquire
David L. Brown, Esquire
Jescelyn Tillman Spitz, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
William Bradley Nes, Esquire
Shanon N. Peake, Esquire

RECEIVED
Dec 14 2022
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, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

MOTION TO DISMISS AND EXPEDITE

This is the *third* frivolous appeal filed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) in this case in less than six months.¹ The Supreme Court of South Carolina has warned Covil’s insurers that filing frivolous appeals to delay trial proceedings would

¹ On August 23, 2022, the Supreme Court of South Carolina denied Penn National’s petition for a writ of certiorari regarding a non-appealable discovery order (Appellate Case Number 2022-000785). On August 9, 2022, the Court of Appeals dismissed Penn National’s separate, parallel appeal on the same non-appealable discovery order (Appellate Case Number 2022-000761). Then, on November 15, 2022, the Court of Appeals denied Penn National’s motion for reconsideration (Appellate Case Number 2022-000761).

not be tolerated.² Penn National is aware of this admonishment from the Supreme Court against filing appeals in an attempt to delay the adjudication of cases involving Covil.³

Nonetheless, Penn National filed its latest, last minute frivolous Notice of Appeal to delay the commencement of a December 12, 2022 trial on narrow issues of insurance coverage law that are not triable to a jury. The three Causes of Action pleaded by the Receiver for Covil Corporation (“the Receiver”) against Penn National are all actions for Declaratory Judgment. The circuit court’s order confirming a non-jury trial on these declaratory judgment causes of action noted that it was not an appealable order. Accordingly, it is time for this Court to end what the circuit court described as Penn National’s “foot dragging operation.” (App. 73).

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Peter D. Protopapas, in his capacity as the Receiver, by and through the undersigned counsel, respectfully requests this Court dismiss the frivolous Notice of Appeal filed by Penn National on December 7, 2022.

² Unfortunately, this is not the first time Covil’s insurers have attempted to abuse our appellate courts to subvert justice and delay scheduled trials. For example, on December 21, 2020, other insurers of Covil, in a separate case, filed a Notice of Appeal from an unappealable bifurcation order setting a bench trial on certain non-jury matters on January 11, 2021. *See* Appellate Case No. 2020-001663. Two days after filing the Notice of Appeal, the insurer filed an emergency Petition for a Writ of Prohibition with the South Carolina Supreme Court requesting the Supreme Court review the same bifurcation order and prevent the bench trial from proceeding. *See* Appellate Case No. 2020-001670. The insurer later withdrew its Petition on January 4, 2021. *Id.* This Court dismissed the appeal on January 6, 2021, as not immediately appealable. The Supreme Court declined to review this dismissal. *See* Appellate Case No. 2021-000462. On March 9, 2021, the Supreme Court issued an order noting its expectation that “the parties and their attorneys in this and any other case . . . fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner” and cautioning that “[a]ny action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions.” *See* Appellate Case No. 2020-001670.

³ *See* Appellate Case No. 2022-000785, Return to Petition for Writ of Certiorari at 9 n.7.

Summary dismissal is appropriate where, as here, no substantial question has been presented on appeal. South Carolina law is clear that a cause of action for declaratory judgment seeking the interpretation of an unambiguous insurance policy is not an issue that is triable to a jury. However, in contradiction to decades worth of case law governing appealability and the non-jury nature of a declaratory judgment action seeking the interpretation of an insurance policy, Penn National nonetheless appealed the December 7, 2022 Order of the Honorable Jean Hoefer Toal confirming that this declaratory judgment action would proceed as a non-jury trial beginning at 9:30 a.m. on December 12, 2022. The Receiver echoes Chief Justice Toal's "firm[] belie[f] that this Order is not appealable." (App. 191). This appeal is simply another attempt in a long line of recent attempts by Penn National to abuse our rules of procedure to subvert justice and delay circuit court rulings on important matters of South Carolina insurance law.

Given Penn National's predilection to use our appellate courts to delay the adjudication of this matter, the Receiver respectfully requests the Court expedite briefing on this Motion.

PROCEDURAL BACKGROUND

By way of background, the Receiver filed this action against Penn National on April 27, 2020, seeking declarations as to the interpretation and meaning of insurance policies Penn National issued to Covil.⁴ (App. 8–19). Penn National admits it issued these insurance policies. (App. 24).

⁴ The Receiver also named insurance broker Sam J. Crain & Co., Inc. ("Crain") and the South Carolina Property & Casualty Insurance Guaranty Association ("the Guarantee Association") as defendants. The Receiver brought causes of action for failure to procure insurance and breach of contract against Crain and a declaratory judgment action against the Guarantee Association. (App. 70–71). However, neither of these defendants appeared in this action. The Receiver dismissed the Guaranty Association on September 8, 2021, and dismissed Crain on December 6, 2022. (App. 33–34). Thus, Penn National remains the only defendant in this action, and the only remaining causes of action are for a declaratory judgment related to the insurance policies.

In the wherefore clause contained in its Answer, Penn National prayed for “a trial by jury on all issues so triable.”⁵ (App. 30).

On September 6, 2022, the Receiver requested the circuit court schedule a non-jury trial on Covil’s declaratory judgment issues against Penn National to take place in December 2022. (App. 35–39). Penn National did not file any written response or objection to the Receiver’s request for a non-jury trial on his claims for declaratory relief. The circuit court held a status conference on September 8, 2022. (App. 62). At the status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (App. 65, 71–72). The circuit court set the non-jury trial on December 12 or 14, 2022. (App. 74). Penn National did not object to a non-jury trial at the status conference. (App. 74). Its only request was for the Court to incorporate a mediation deadline in the forthcoming scheduling order. (App. 77). The circuit court agreed to do so and then asked the parties if there were any further matters to raise for the court’s consideration. (App. 77–78). Penn National was silent. (App. 78).

The circuit court issued a scheduling order on September 16, 2022, setting the non-jury trial for December 12 or 14, 2022, and a pretrial hearing for November 18, 2022.⁶ (App. 1–3). The scheduling order also included deadlines for the parties to attend mediation and to file proposed findings of fact and conclusions of law, trial exhibits, witness lists, deposition

⁵ It appears that Penn National mistakenly believed the Receiver brought the breach of contract action against Penn National because Penn National captioned its responsive pleading as “**ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT.**” (App. 23). However, a simple reading of the Complaint in this case shows the only causes of action brought against Penn National are for a declaratory judgment. Further, the Receiver has made it clear to Penn National that it seeks only declaratory relief against Penn National. (App. 60).

⁶ This pre-trial hearing was subsequently moved to November 14, 2022.

designations, and motions in limine. (App. 1–3). Penn National did not raise any objections or file a motion seeking reconsideration of the scheduling order.

It was not until November 7, 2022, that Penn National first raised to the circuit court any concerns with the non-jury trial scheduled in December 2022. (App. 192).

The case came before the circuit court for a pre-trial hearing on November 14, 2022. (App. 80). At the hearing, the circuit court reiterated that it scheduled a non-jury hearing to begin the week of December 12, 2022. (App. 171). Penn National requested “a jury trial to the extent there are factual issues as to the spoliation component for this case.” (App. 183). The circuit court indicated it was unsure, based on the record before it, what factual issues Penn National believed entitled it to a jury trial and reiterated that the non-jury trial in the declaratory judgment action would start on December 12, 2022. (App. 185–86). The parties subsequently conducted a number of remaining depositions and filed and exchanged motions in limine, deposition designations, witness lists, and trial exhibits in accordance with the scheduling order.

On December 2, 2022, only ten days before the non-jury trial would begin, Penn National filed a Motion to Confirm Jury Trial Demand.⁷ (App. 44). Penn National asserted “the case must proceed on the jury trial roster at this time” and alleged its jury trial demand was proper given “the existence of factual questions in this case.”⁸ (App. 47). The Receiver filed a Notice on December 6, 2022, reconfirming that he only seeks declarations against Penn National related to the insurance policies. (App. 60). The circuit court issued an order on December 6, 2022, reiterating that the non-jury trial was previously scheduled to begin on December 12, 2022, and would proceed on

⁷ Although the Motion was drafted on November 28, 2022, Penn National waited until December 2, 2022 to file it. (App. 48).

⁸ Penn National again stated its mistaken belief that the “Complaint alleges claims for breach of contract and declaratory judgment against Penn National.” (App. 44). As discussed above, this case only involves declaratory judgment actions against Penn National.

that date. (App. 4). The circuit court noted “[n]one of the matters” pending against Penn National “are triable to a jury.” (App. 4).

As the trial date loomed, Penn National filed the instant appeal from the December 7, 2022 Order. Subsequently, the circuit court postponed the non-jury trial due to the appeal until such a time that this case is remitted. (App. 191). As noted above, this is the third improper appeal Penn National has filed in this case in the last six months in its apparent continuing strategy to delay the adjudication of this declaratory judgment matter at any cost.⁹

DISCUSSION

I. The Circuit Court’s Order Is Not Appealable.

First, this order is not appealable because Penn National is clearly not entitled to a jury trial in this declaratory judgment matter. *See C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (granting a motion to dismiss an appeal where the appellant did not have a right to a jury trial); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524–25, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing an appeal from an order transferring a case to a non-jury roster because there was no right to a jury trial).

⁹ On May 31, 2022, Penn National attempted to appeal two interlocutory discovery orders of Chief Justice Toal to this Court. *See* Appellate Case No. 2022-000761. Contrary to fundamental appellate practice and procedure, and without allowing this Court any chance to consider the May 31, 2022 appeal, Penn National filed a Petition for Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court eight days later, seeking contemporaneous appellate review of the interlocutory discovery orders. *See* Appellate Case No. 2022-000785. When the Receiver noted, in his Return to the Petition for Writ of Certiorari, the impropriety of Penn National’s attempt to forum shop in our appellate courts to receive its desired outcome, Penn National refused to withdraw the improper simultaneous appeal. This Court dismissed Penn National’s appeal on August 9, 2022, finding the orders on appeal were not immediately appealable, and subsequently denied Penn National’s petition for rehearing. The Supreme Court denied the Petition for Writ of Certiorari on August 23, 2022.

South Carolina courts recognize that a determination of coverage under an insurance policy is a question of law to be tried to a bench. “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). “The character of an action as legal or equitable depends on the relief sought.” *Bank of New York Mellon v. Lindsay*, No. 2015-UP-208, 2015 WL 1880195, at *1 (S.C. Ct. App. Apr. 22, 2015). “A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue.” *State Farm Fire & Cas. Co. v. Barrett*, 240 S.C. 1, 5, 530 S.E.2d 132, 134 (Ct. App. 2000) (quoting *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). “An action to determine coverage under an insurance policy is an action at law.” *Id.*; see also *Pennell v. Foster*, 338 S.C. 9, 14, 524 S.E.2d 630, 633 (Ct. App. 1999) (“A declaratory judgment action to determine the coverage under an insurance policy's omnibus clause is an action at law. An action to declare excess or secondary liability coverage is an action at law.”); see also *U.S. Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 462, 465 S.E.2d 759, 760–61 (Ct. App. 1995) (same); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 542, 677 S.E.2d 574, 578 (2009) (same). The interpretation of an unambiguous contract, including an insurance policy, is a question of law for the court to determine. See *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

In this case, the Receiver seeks a declaratory judgment against Penn National as to the interpretation of insurance policies that Penn National admits it issued.¹⁰ There are no ambiguities in the insurance policies, and Penn National has not attempted to point to any. Both the Receiver

¹⁰ At one point before the circuit court, Penn National attempted to argue an issue of fact existed as to the existence of the policies. (App. 41). However, this has never been a factual issue in this case as Penn National has at all times admitted that these policies exist. (App. 26).

and Penn National rely on the plain language of the policies in this case. Instead, the Receiver and Penn National disagree on the interpretation of the language, which necessitated the Receiver filing this declaratory judgment action in the first instance.

Penn National has failed to identify any specific factual issues in this declaratory judgment action that would give it a right to a jury trial. Penn National has continuously couched its request for a jury trial as a request for a jury trial “to the extent that there are factual issues” in the case without ever attempting to specify the factual issues it alleges exist. (App. 183). As noted by the circuit court, Penn National’s vague assertions that it wanted a jury trial on factual issues were not enough to inform the circuit court of why Penn National contended it was entitled to a jury trial. (App. 183–85). Even in its late-filed motion, Penn National did not identify any specific factual issues in this case as to the requested declaratory judgment. (App. 44–48). Because this case seeks only a declaration as to the meaning of unambiguous insurance policies, the circuit court properly found Penn National is not entitled to a jury trial.

II. The Circuit Court is Imbued with the Inherent Power To Consider Alleged Spoliation.

Second, any issues involving spoliation do not give Penn National a right to a jury trial.¹¹ South Carolina “does not recognize an independent tort for the negligent spoliation of evidence.” *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011). If the Supreme Court had wanted to provide litigants with a jury trial on issues of spoliation, it would have recognized a cause of action for spoliation. Instead, spoliation of evidence is recognized as a discovery

¹¹ Initially, the Receiver notes that the issues regarding spoliation were not yet before the circuit court. Although the Receiver noted its intent to seek a sanction for spoliation and requested that the court hold an evidentiary hearing during the non-jury trial, the Receiver has not yet moved for such. However, for the reasons contained herein, the Receiver requests the Court find that Penn National is not entitled to a jury trial on the evidentiary issue of spoliation arising during a non-jury trial.

violation potentially warranting sanctions, including the potential for an adverse inference, left to the discretion of the trial court. See *Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). As discussed by the Fourth Circuit, the decision of whether to impose a sanction for spoliation of evidence is “an inherent power of . . . courts” to facilitate the orderly administration of the judicial process and litigation. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004); see also *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

As with other evidentiary rulings the circuit court makes, it has the power to hold an evidentiary hearing to determine whether spoliation occurred and then it can decide an appropriate sanction for the spoliation. As the Supreme Court of Texas has aptly explained:

[S]poliation is an evidentiary concept, not a separate cause of action. It is well-established that evidentiary matters are resolved by the trial court. Further, spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the trial court. Finally, presenting spoliation issues to the jury for resolution magnifies the concern that the focus of the trial will shift from the merits to a party's spoliating conduct. For these reasons, we agree with Justice Baker that the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy. The trial court may hold an evidentiary hearing to assist the court in making spoliation findings, but not in the presence of the jury. Placing the responsibility on the trial court to make spoliation findings and to determine the proper remedy is a key mechanism in ensuring the jury's focus stays where it belongs—on the merits.

Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 19–20 (Tex. 2014) (internal citations omitted).

Allowing Penn National a jury trial on an evidentiary matter that is properly left to the discretion of the circuit court would effectively reverse Supreme Court precedent and create a new cause of action for spoliation in South Carolina.

III. Penn National Waived Any Argument That It Is Entitled To A Jury Trial On The Receiver's Declaratory Judgment Claims Or Alleged Spoliation.

Finally, notwithstanding the fact that Penn National is not entitled to a jury trial in this declaratory judgment action, this order is not appealable because these arguments were waived by Penn National. Penn National failed to timely raise these issues to the circuit court and failed to appeal the September rulings of the circuit court scheduling the non-jury trial. *See Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (finding a party waived any arguments that he was entitled to jury trial by failing to immediately appeal order referring the case to a master).

The Receiver requested a non-jury trial in its status report filed with the court on September 6, 2022. (App. 35). Penn National did not file any response to this status report or object to the Receiver's request for a non-jury trial. At the September status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (App. 65, 71–72). The circuit court set the trial and stated it “would be non-jury.” (App. 73). Penn National did not object to the non-jury trial at the status conference. (App. 73).

Penn National waited until ten days before the start of the non-jury trial—which had been already scheduled for three months—to move for clarification from the circuit court about the non-jury trial. However, even then, Penn National did not provide any specificity as to any existing factual issues it alleged entitled it to a non-jury trial. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (noting an issue is not preserved for appellate review unless it is “raised to the trial court with sufficient specificity” (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))). Instead, Penn National argued “there was nothing in the record” showing it was “not entitled to a jury trial.” (App. 46). As noted by the circuit court, Penn National has never sufficiently articulated its arguments as to why it is entitled to a jury trial in this declaratory judgment matter.

CONCLUSION

This declaratory judgment action was set for a non-jury trial on December 12, 2022, but has now been frivolously delayed by this improper appeal – Penn National’s third improper appeal in the past six months in this case. The Receiver maintains Penn National is not entitled to a jury trial in this matter and, therefore, the December 7, 2022 Order is not appealable and this appeal should be dismissed. Because time is of the essence, the Receiver respectfully requests this Court require an expedited response to this Motion to Dismiss.

Respectfully submitted,

s/Shanon N. Peake

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ATTORNEYS FOR RESPONDENT

December 14, 2022.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

**APPENDIX TO RESPONDENT'S
MOTION TO DISMISS AND EXPEDITE**

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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,

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	)	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
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

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803.978.6111

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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

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)

Rikard & Protopapas, LLC

1329 Blanding Street

Columbia, SC 29201

803.978.6111

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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