

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

B. Alex Hyman, Circuit Court Judge

Lower Court Case No. 2020-CP-26-00808

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Jul 11 2025

SC Court of Appeals

A. Tebele & Sons, a South Carolina General Partnership, Appellant-Respondent,

v.

Certain Underwriters at Lloyd's, HDI Global Specialty SE, General Security Indemnity
Company of Arizona, and Crescent Coast Insurance, LLC, Respondents,

Of which Crescent Coast Insurance, LLC is the Respondent-Appellant.

Appellate Case No. 2024-000705

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2600808

A Tebele & Sons
PLAINTIFF(S)

Certain Underwriters At Lloyds et al
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

On December 21, 2023, Plaintiff A. Tebele & Sons filed post-trial motions with respect to the defendant insurers in this case. On December 27, 2023, Plaintiff filed amended post-trial motions with respect to those defendants, incorporating by reference the exhibits included in the motions originally filed on December 21, 2023. Plaintiff moves for a new trial and judgment notwithstanding the verdict. After carefully considering the amended motion, the exhibits incorporated by reference, the supplemental memorandum filed January 10, 2024, the defendant insurers' memorandum in opposition filed January 10, 2024, as well as Plaintiff's reply brief thereto, and all relevant caselaw and statutes, the court respectfully denies Plaintiff's post-trial motions as to the defendant insurers in this case.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/08/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Horry Common Pleas

Case Caption: A Tebele & Sons VS Certain Underwriters At Lloyds , defendant, et al

Case Number: 2020CP2600808

Type: Order/Electronic Form 4

15th Circuit Resident Judge

s/ B. Alex Hyman

Electronically signed on 2024-04-08 16:19:16 page 3 of 3

ELECTRONICALLY FILED - 2024 Apr 08 4:44 PM - HORRY - COMMON PLEAS - CASE#2020CP2600808

0003

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2600808

A Tebele & Sons
PLAINTIFF(S)

Certain Underwriters At Lloyds et al
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

On December 21, 20223, Plaintiff A. Tebele & Sons filed post-trial motions with respect to Defendant Crescent Coast Insurance, LLC. Plaintiff filed a motion for a new trial absolute, and in the alternative, for a new trial additur. After carefully considering Plaintiff's motion and memorandum, the exhibits included therewith, as well as Defendant's memorandum in opposition, and all relevant caselaw, the court respectfully denies Plaintiff's motions.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/08/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Horry Common Pleas

Case Caption: A Tebele & Sons VS Certain Underwriters At Lloyds , defendant, et al

Case Number: 2020CP2600808

Type: Order/Electronic Form 4

15th Circuit Resident Judge

s/ B. Alex Hyman

Electronically signed on 2024-04-08 16:19:16 page 3 of 3

0006

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2020CP2600808

A Tebele & Sons		Certain Underwriters At Lloyds General Security Indemnity Company Of Arizona	Crescent Coast Insurance LLC HDI Global Specialty SE

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

We, the jury, unanimously find in favor of the Defendants, Certain Underwriters at Lloyd's, HDI Global Specialty SE and General Security Indemnity Company of Arizona on the first cause of action, Breach of an Insurance Contract and the second cause of action, Bad Faith.

We, the jury, unanimously find that the Defendant, Crescent Coast Insurance LLC, was negligent and that such negligence proximately caused the Plaintiff, A. Tebele & Sons' injuries at 40%.

We, the jury, unanimously find that the Plaintiff, A. Tebele & Sons, was negligent and that such negligence proximately caused the Plaintiff, A. Tebele & Sons' injuries at 60%.

We, the jury, unanimously find in favor of the Plaintiff, A. Tebele & Sons, and against the Defendant, Crescent Coast Insurance LLC, for Breach of Fiduciary Duty in the amount of \$15,000.00.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

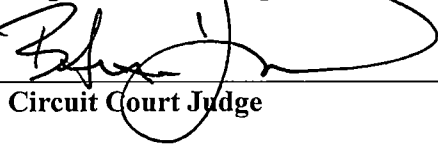
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
A. Tebele & Sons	Crescent Coast Insurance LLC	\$15,000.00

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 or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

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



Circuit Court Judge

2776

Judge Code

12/19/2023

Date

For Clerk of Court Office Use Only

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

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter - Julie Kevish

Renee N. Elvis - Clerk of Court

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

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

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

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina)
general partnership,)

Plaintiff,)

vs.)

CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.)

VERDICT FORM

SECTION I

1. On the **FIRST** cause of action, **BREACH OF AN INSURANCE CONTRACT**,

We, the jury, unanimously find:

_____ For the Plaintiff, **A. Tebele & Sons**, and against the Defendants, **Certain Underwriters At Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona**, actual damages in the amount of:

_____ (\$ _____ .) Dollars.

OR

☒ For the Defendants, **Certain Underwriters At Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona**.

[GO TO NEXT PAGE]

SECTION II

2. On the **SECOND** cause of action, **BAD FAITH**,

We, the jury, unanimously find:

_____ For the Plaintiff, **A. Tebele & Sons**, and against the Defendants, **Certain Underwriters At Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona**, actual damages in the amount of:

_____ (\$ _____) Dollars.

OR

✓ For the Defendants, **Certain Underwriters At Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona**.

Sandra LoBello
Foreperson

December 13, 2023
Conway, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina
general partnership,

Plaintiff,)

VS.

CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.)

VERDICT FORM 2

SECTION I

1. Do you, the Jury, unanimously find that the Defendant, **Crescent Coast Insurance, LLC**, was negligent and that such negligence proximately caused the Plaintiff, **A. Tebele & Sons'** injuries.

✓ YES: If you answer yes, **GO TO QUESTION 2**

_____ NO: If you answer no, **SKIP** and **GO TO SECTION II**

2. Do you, the Jury, unanimously find that the Plaintiff, **A. Tebele & Sons**, was negligent and that such negligence proximately caused Plaintiff's, **A. Tebele & Sons'** injuries?

 / YES: If you answer yes, **GO TO QUESTION 3**

NO: If you answer no, **GO TO QUESTION 4**

[GO TO NEXT PAGE]

3. If your Answers to **BOTH QUESTION 1** and **QUESTION 2** above are **YES**, then answer this question: Taking the combined negligence that proximately caused the plaintiff's injuries as one hundred percent (100%), what percentage of that negligence is attributable to the Plaintiff, **A. Tebele & Sons** and what percentage is attributable to the Defendant, **Crescent Coast Insurance, LLC**?

Plaintiff A. Tebele & Sons 60 %

Defendant Crescent Coast Insurance, LLC 40 %
100% (Total)

If the Plaintiff's, **A. Tebele & Sons**' percentage of the combined negligence is greater than 50%, **SKIP QUESTION 4** and go to **SECTION II** below.

If the Plaintiff's, **A. Tebele & Sons**' percentage of the combined negligence is 50% or less, **GO TO QUESTION 4**.

4. Please state the total amount of damages if any, sustained by the Plaintiff, **A. Tebele & Sons**.

\$ _____

NOTE: If your answer to question number 2 above was **YES**, do not **Reduce** the plaintiff's damages above by the percentage of Negligence attributed to him in question number 3 above.

[GO TO NEXT PAGE]

SECTION II

1. On the **FOURTH** cause of action, **BREACH OF FIDUCIARY DUTY**,

We, the jury, unanimously find:

✓ For the Plaintiff, **A. Tebele & Sons**, and against the Defendant, **Crescent Coast Insurance, LLC**, actual damages in the amount of:

Fifteen thousand (\$ ~~25,000~~ ^{15,000}) Dollars.

OR

_____ For the Defendant, **Crescent Coast Insurance, LLC**.

Sandra Robello
Foreperson

December 13, 2023
Conway, South Carolina

[illegible]

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-_____

A. TEBELE & SONS, a South Carolina)
general partnership,)

Plaintiff,

VS.

CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA; and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.

SUMMONS

(Jury Trial Demanded)

TO: THE DEFENDANTS ABOVE-NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office at 1357 21st Avenue North, Suite 102, Myrtle Beach, South Carolina, 29577, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

DESCHAMPS LAW FIRM

s/William W. DesChamps, III

William W. DesChamps, III, S.C. Bar No. 77150

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Attorney for Plaintiff

February 3, 2020

Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-

A. TEBELE & SONS, a South Carolina)
general partnership,)

Plaintiff,

VS.

CERTAIN UNDERWRITERS AT)
LLOYD’S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA; and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.

COMPLAINT

(Breach of Contract/Bad Faith/
Negligence/Breach of Fiduciary Duty)

(Jury Trial Demanded)

Plaintiff, A. Tebele & Sons (“Plaintiff” or “Tebele”), by and through its undersigned counsel, files this Complaint against Defendants, Certain Underwriters at Lloyd’s, HDI Global Specialty Se, General Security Indemnity Company of Arizona (collectively, “Insurers”), and Crescent Coast Insurance (“Insurance Agent” or “Crescent Coast”, together with Insurers, “Defendants”, and Tebele, along with Defendants, the “Parties”), and respectfully states and alleges as follows:

NATURE OF ACTION

1. Tebele brings this action against the Insurers for breach of contract and bad faith arising from Insurers' improper failure to provide coverage to Tebele under Policy Numbers AQS-190065, HAQRS-190065, TR00093911900065 (collectively, the "Policy"). Alternatively, Tebele sues Crescent Coast for negligence and breach of fiduciary duty.

2. Through this action, Tebele seeks monetary damages, punitive damages, and attorney's fees as a result of Defendants' conduct.

PARTIES

3. Tebele is a general partnership organized and existing under the laws of the State of South Carolina. Among other things, Tebele is a property management company conducting business in Horry County, South Carolina, and its business operations include ownership of commercial property located at 1901 North Kings Highway, Myrtle Beach, South Carolina 29577 (hereinafter “Insured Property”).

4. Insurers are, upon information and belief, corporate entities organized and existing pursuant to the laws of a state other than the State of South Carolina and syndicates of named and anonymous individual underwriters and London market insurance companies who have subscribed to one or more insurance policies sold to Tebele. At all times relevant hereto, Insurers transacted, and continue to transact, business in the State of South Carolina.

5. The Insurance Agent is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina that works with insureds and insurers to negotiate and procure third party insurance policies on behalf of insureds.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action and the Parties to this action, and Horry County, South Carolina is a proper venue for this case because the Insured Property is located in Horry County, South Carolina, Tebele and the Insurance Agent are organized in and conduct business in South Carolina, and Defendants, in general, conduct business in South Carolina.

7. Furthermore, pursuant to the Service of Suit Clause contained in the Policy, Insurers agree to submit to the jurisdiction of any court of competent jurisdiction within the United States, including South Carolina, and agree to comply with all requirements necessary to give such

court jurisdiction. The Policy's Service of Suit Clause authorizes and directs Mendes & Mount of New York, New York to accept service of process on Insurers' behalf.

FACTUAL BACKGROUND

Relevant Policy Language

8. The Policy provides property damage coverage for the Insured Property and promises to "pay for direct physical loss of or damage to [the Insured Property] caused by or resulting from any Covered Cause of Loss." See **Exhibit A**, Policy at p. 8, § A.

9. A Covered Cause of Loss is any "[r]isks of [d]irect [p]hysical [l]oss unless the loss is" either expressly excluded or limited. *Id.* at p22, § A.

10. Subject to certain conditions and exclusions, and in the event that the Insured Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, "extra expenses." *Id.* at p. 12, § 10; p. 13, § 11(a)(2)-(3), p. 15, § 12; p. 18, § A(1)-(2).

11. The limits of liability under the Policy are "\$22,155,400 per Occurrence[.]" *Id.* at p. 1; p. 4, § E.

The Insured Property and Its Fire Safety Inspection History

12. As part of its business operations, Tebele owned and rented the Insured Property to a tenant who operated a restaurant in it. The Insured Property's lease required the tenant to "maintain the premises in good and safe condition, including . . . electrical wiring, plumbing and heating installations and any other system or equipment upon the premises[.]" See **Exhibit B** at § 7.

13. During the lease term, Tebele did not have unfettered access to the Insured Property. To the contrary, the underlying lease only “permit[s Tebele] to enter upon the premises at reasonable times and upon reasonable notice” and only for the “purpose of inspecting” the Insured Property. *Id.* at § 8.

14. On or about June 2017, at the direction of the Fire Marshall for the City of Myrtle Beach, Tebele contracted Crawford Sprinkler Co. of SC, Inc. (“Crawford”), a specialist in sprinkler installation and repair, to “install [a] sprinkler system in [the] existing building.” See **Exhibit C**. Tebele paid Crawford to install the sprinkler system and continued to follow up with Crawford, reminding Crawford “that the [sprinkler] system had to be connected.” See **Exhibit D** at 38:17-21; 73:10-24.

15. In the summer of 2018, Tebele began shopping for alternative coverage for the Insured Property.

16. Seizing on an opportunity to procure coverage for Tebele through Insurers, on or about August 20, 2018, David Egan (“Egan”), Crescent Coast’s managing partner, contacted Whitney Gurtzweiler (“Gurtzweiler”), an employee of AmWINS Access Insurance Services, an underwriter for Insurers, with a “new submission” opportunity. See **Exhibit E**.

17. Two days later, Gurtzweiler sent an email to her colleague, informing him of a new submission by Egan. In that email, Gurtzweiler described Egan as “one of the agents I was telling you about that I just saw in Myrtle Beach.” See **Exhibit F**. Gurtzweiler further directed her colleague to work with Sandra Nenna (“Nenna”), Egan’s customer service representative and “a former [Insurer] employee [that] knows how it goes and will get you anything you need!” *Id.*

18. On or about October 3, 2018, at Insurers’ request, a third party inspector conducted an inspection of the Insured Property and produced an inspection report that Insurers reviewed on

November 25, 2018. See **Exhibit G**. This report indicated that the Insured Property had a “sprinkler system,” and, aside from recommending changes to fire extinguisher markings, contained no additional notes regarding fire protective safeguards. *Id.* at p. 3-5.

19. This report is consistent with a previous inspection conducted earlier in 2018, wherein another inspector noted that the Insured Property was “now adding a sprinkler system throughout the building in all spaces.” See **Exhibit H**.

20. After months of communications between the Insurance Agent and the Insurers, the Insurers received a Commercial Insurance Application from Tebele on January 11, 2019, which indicated that the Insured Property had a sprinkler system that was “100%”. See **Exhibit I**.

21. The same day, however, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system. See **Exhibit J** at p. 3-4. Specifically, Nenna explained that “[w]hen the app[lication] was submitted for the risk, it was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time.” *Id.* Nenna elaborated: “We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a ‘head’s up’ on this.” *Id.* Gurtzweiler replied: “Got it, I’ll note the file.” *Id.* Four days later, the Insurers bound coverage.

22. Furthermore, Insurers’ own risk assessment documents indicate that the information Nenna relayed to Insurers was absolutely accurate and that Insurers designated the Insured Property as “100% sprinklered.”

23. For instance, prior to binding coverage, Insurers prepared a “Schedule of Values”, a document Insurers used to evaluate the risk of insuring several properties owned by Tebele, including the Insured Property. See **Exhibit K**.

24. The Schedule of Values listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* For every building, the Schedule of Values listed important information such as the real property value of a given building, the building occupancy description, a building's overall square footage, and, critically, whether each building was "Sprinklered" – marked affirmatively by a "Y", or negatively by "N" – and the percentage of the building that was "Sprinklered," if applicable. *Id.* at Columns AD-AF. Of the twenty-three (23) properties accounted for, Insurers noted that only 24% of the 271,000 total square feet of commercial space in the area was "sprinklered." *Id.* at Row 8-9, Column AB-AD.

25. Indeed, the Schedule of Values only marked five (5) buildings as "Sprinklered" to "100%" capacity. *Id.* at Columns AD-AF. The Insured Property, labeled as "Building 10" in the Schedule of Values, was one of those five (5) "100% Sprinklered" buildings. *Id.* at Row 10, Columns AD-AF.

26. Thus, as indicated by the commercial insurance application, the communications between Defendants, and according to Insurer's own records and findings, the Insured Property was sprinklered to a 100% capacity.

27. These findings, coupled with Defendants' actual and constructive knowledge of previous inspections of the Insured Property, indicate that Defendants knew, or should have known, that the Insured Property's sprinkler was installed, but that the Insured Property's tenant did not activate the water feed.

The Fire Loss And Insurers' Improper Denial Of Coverage

28. The Insured Property was completely destroyed by fire on February 24, 2019.

29. After the loss, Insurers conducted an investigation, wherein an inspector found that the Insured Property was “in the process of installing a sprinkler system. It was almost complete but had not been connected to the water main.” See **Exhibit L**.

30. On March 19, 2019, Insurers informed Tebele that they were “continuing to investigate the cause of this loss . . . with a full reservation of rights under the policy.” See **Exhibit M**. Despite correspondence demanding that Insurers cover the loss, Insurers denied coverage on August 7, 2019. See **Exhibit N**.

FIRST CAUSE OF ACTION
(Breach of Contract Against Insurers)

31. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

32. Insurers, for valuable consideration paid and delivered by Tebele, issued the Policy insuring the Insured Property against “[r]isks of [d]irect [p]hysical [l]oss unless the loss is” either expressly excluded or limited. See **Ex. A** at p22, § A.

33. The Policy includes coverage for a fire damage, and fire damage is included in the Policy as a “Specified Cause of Loss.” *Id.* at p. 38.

34. Tebele has paid \$105,870.00 in premiums, including inspection fees. *Id.* at p. 2.

35. The Policy does not contain any fire-related limitations. *Id.* at p. 22, § C.

36. The Policy contains a Fire Endorsement wherein, “[a]s a condition of this insurance, [Tebele is] required to maintain” fire “protective devices,” including a “‘AS’ Automatic Sprinkler System.” *Id.* at SRU-024 (07-10).

37. The Fire Endorsement further provides that Insurers “will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any

protective safeguard listed [in the Policy] and over which [Tebele] had control, in complete working order.” *Id.*

38. Insurers chose not to define “maintain,” nor delineate Tebele’s duties and obligations, and their scope, under Tebele’s alleged duty to “maintain” the “protective devices.”

39. Similarly, Insurers chose not to define “control” and “complete working order.”

40. The Fire Endorsement requires the Automatic Sprinkler System protective safeguard to be maintained at the locations marked with the “AS” symbol on the Insurer’s Schedule of Values. The Insurer Property descriptions and notations set forth on the Insurer’s Schedule of Values, however, omits any notation, description, or reference of an “AS” symbol.

41. Nonetheless, Tebele, in compliance with the Fire Endorsement, undertook substantial action to install a building-wide sprinkler system. For instance, Tebele hired a third party specialist to install and test a building-wide sprinkler system for the Insured Property.

42. Tebele paid for the sprinkler system permit application and cleared the process through the City of Myrtle Beach.

43. Tebele initiated and maintained multiple communications with the third parties hired to install the building-wide sprinkler system to ensure that the Insured Property’s sprinklers were operational and connected to a water supply.

44. Insurers were in possession of multiple premises inspections of the Insured Property performed prior to the loss, and which revealed the state of the Insured Property’s sprinkler system.

45. Insurers, through information provided by Tebele, and according to Insurers’ own risk assessment documents, knew or should have known that the Insured Property’s sprinkler system, through no fault of Tebele, was installed but not connected to a water supply.

46. Notwithstanding its actual and constructive knowledge, Insurers bound coverage on January 15, 2019 and continued to accept and retain policy premiums for coverage that it ultimately denied.

47. Despite Insurers' actual and constructive knowledge of the Insured Property's sprinkler system, Insurers never informed Tebele of any alleged violations of the Policy's Fire Endorsement.

48. Through Insurers' actions and omissions, including its failure to address any alleged issues it knew or should have known existed with the Insured Property's sprinkler system, Insurers induced Tebele to believe that coverage existed and Tebele relied upon such beliefs to its detriment.

49. On or about February 24, 2019, a fire occurred in the Insured Property causing fire damage and decimating the Insured Property while the Policy was in full force and effect.

50. While the Policy was in full force and effect, Tebele suffered direct physical loss, loss of business income, and damage to the Insured Property as a result of the February 24, 2019 fire.

51. Tebele duly submitted a claim to Defendant for benefits due under the Policy resulting from this covered loss.

52. Tebele has duly performed all conditions precedent as required by the Policy, including cooperating with Insurers in its investigation of the claim.

53. Although requested to do so, Insurers have failed and refused to pay to the Tebele the sums due and owing under the Policy for damages caused to the Insured Property by the February 24, 2019 fire, which failure and refusal constitutes a breach of the Policy.

54. As a direct and proximate result of the breach of contract by Insurers, Tebele sustained damages in an amount to be determined by the trier of fact.

55. That the Insurers denied coverage in breach of the Policy and Tebele brings this cause of action for breach of contract for actual damages suffered by Plaintiff as a result of the February 24, 2019 fire.

SECOND CAUSE OF ACTION
(Bad Faith)

56. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

57. Insurers have breached their obligations to deal in good faith and fairly with Tebele, including mishandling the claims process and failing to pay benefits due under the Policy. Furthermore, without a reasonable basis or just cause, Insurers:

- a. Failed to pay Tebele for the loss and damage to the Insured Property;
- b. Failed to adopt and implement reasonable standards for the prompt investigation and settlement of the claims;
- c. Failed to attempt, in good faith, a prompt, fair, and equitable settlement of claims;
- d. Forced Tebele to retain legal counsel to investigate the loss, advise Tebele throughout the claims process, and prosecute this lawsuit to recover all of the benefits that should have been immediately paid under the Policy.

58. Insurers' bad faith also includes failure to pay a lawful and legal claim and failure to properly document why the claim would not be paid.

59. Insurers, through its agents and/or employees, have not provided a legitimate reason for denying the claim. Insurers' actions were willful, or in reckless disregard for Tebele's rights under the Policy.

60. As a direct and proximate result of Insurers' bad faith actions, Tebele has been damaged in an amount to be determined by the trier of fact.

61. Tebele brings this cause of action for bad faith wrongful refusal to pay an insurance claim and asks for actual damages, punitive damages, and all reasonable attorneys' fees for the prosecution of this action.

THIRD CAUSE OF ACTION
(Negligence Against Crescent Coast)

62. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

63. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

64. South Carolina law imposes upon Crescent Coast a duty to exercise good faith, reasonable skill, care, and diligence when placing insurance.

65. Crescent Coast breached its duties to Tebele through the following negligent and reckless acts and omissions:

- a. Crescent Coast was familiar with the Insured Property prior to the loss and knew, or should have known, about the Insured Property's fire safety safeguards;
- b. Crescent Coast received, processed, and delivered Tebele's commercial insurance application to Insurers;
- c. Crescent Coast knew, or should have known, that despite the commercial insurance application's notation that the Insured Property was "100% sprinklered," the Insured Property's sprinkler system was installed but not connected to a water supply source;

- d. Furthermore, Crescent Coast knew, or should have known, about the Insured Property's fire inspection and sprinkler system history through the various inspections of the Insured Property prior to binding coverage;
- e. Given Crescent Coast's actual and constructive knowledge of the Insured Property's sprinkler system, Crescent Coast had a duty to exercise good faith, reasonable skill, care, and diligence and affirmatively act to ensure that the Policy would cover risk of fire loss given all known and existing facts, and despite the Policy's Fire Endorsement;
- f. The Insurance Agent collected, and, upon information and belief, continues to collect fees and commissions incident to the Policy;

66. These actions were reckless and demonstrated a conscious disregard to exercise due care toward Tebele.

67. As a direct and proximate result of the Insurance Agent's negligent, reckless acts and omissions, Tebele brings this cause of action for actual damages to include the damages sustained from the fire damage to the Insured Property and for punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against Crescent Coast)

68. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

69. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

70. Crescent Coast has a specific duty under South Carolina law to exercise good faith, reasonable skill, care, and diligence when placing insurance.

71. South Carolina law holds the Insurance Agent liable if it procures coverage that is materially deficient or does not provide the coverage the Insurance Agent undertook to supply.

72. Furthermore, South Carolina law imposes an implied duty to exercise due care in giving coverage advice if an insurance agent undertakes to advise an insured or if there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relief on.

73. Crescent Coast breached its duties to Tebele under South Carolina law by failing to, among other things: 1) procure adequate coverage for the Insured Property; 2) communicate or advise Insurers of any of the Insured Property's alleged or perceived sprinkler issues; 3) remedy or act to correct the apparent coverage issues in light of the Policy's Fire Endorsement and the Insured Property's alleged sprinkler issues; and 4) continuing to collect fees and commissions off the sale of the Policy and leading Tebele to rightfully believe that, under the existing facts known to the Insurance Agent, the Insured Property was covered for fire losses.

74. The Insurance Agent's breach of its duties caused Tebele's harm and Tebele sustained damages in an amount to be established at trial, as a direct and proximate result of the Insurance Agent's breaches of the duties owed.

WHEREFORE, Tebele, having set forth its Complaint upon which relief can be granted, prays unto this Honorable Court as follows:

- a. On the First Cause of Action, judgment against Insurers for actual damages plus the attorney's fees costs of this action.
- b. On the Second Cause of Action, judgment against Insurers for actual damages, punitive damages, plus attorneys' fees and the costs of this action.

- c. On the Third Cause of Action, judgment against the Insurance Agent for actual damages and punitive damages.
- d. On the Fourth Cause of Action, judgment against the Insurance Agent for actual damages and punitive damages.
- e. For such other and further relief as this Court deems just and proper.

DESCHAMPS LAW FIRM

s/William W. DesChamps, III

William W. DesChamps, III, S.C. Bar No. 77150

William W. DesChamps, Jr., S.C. Bar No. 1658

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Attorneys for Plaintiff

February 3, 2020

Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2020-CP-26-0808

A. TEBELE & SONS, A South Carolina)
General Partnership,)
)
Plaintiff,)
v.)
)
CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA; and)
CRESCENT COAST INSURANCE, LLC,)
)
Defendants.)
_____)

**ANSWER AND AFFIRMATIVE
DEFENSES OF CERTAIN
UNDERWRITERS AT LLOYD'S,
LONDON SUBSCRIBING TO
POLICY NUMBER AQS-109965
TO PLAINTIFF'S COMPLAINT**

Defendants, the Certain Interested Underwriters at Lloyd's, London subscribing to Policy Number AQS-190065 ("the Underwriters") above-named, by and through the undersigned counsel, hereby answer and assert their affirmative defenses to the Complaint of the Plaintiff A. Tebele & Sons ("Tebele" or "Plaintiff"), as follows:

NATURE OF ACTION

1. Tebele brings this action against the Insurers for breach of contract and bad faith arising from Insurers' improper failure to provide coverage to Tebele under Policy Numbers AQS-190065, HAQRS-190065, TR00093911900065 (collectively, the "Policy"). Alternatively, Tebele sues Crescent Coast for negligence and breach of fiduciary duty.

ANSWER: The Underwriters admit that they entered into an insurance contract with Plaintiff numbered AQS-190065 ("Policy"), which was effective from

January 15, 2019 to January 15, 2020. The Underwriters deny all remaining allegations.

2. Through this action, Tebele seeks monetary damages, punitive damages, and attorney's fees as a result of Defendants' conduct.

ANSWER: Paragraph 2 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

PARTIES

3. Tebele is a general partnership organized and existing under the laws of the State of South Carolina. Among other things, Tebele is a property management company conducting business in Horry County, South Carolina, and its business operations include ownership of commercial property located at 1901 North Kings Highway, Myrtle Beach, South Carolina 29577 (hereinafter "Insured Property").

ANSWER: Upon information and belief, admitted.

4. Insurers are, upon information and belief, corporate entities organized and existing pursuant to the laws of a state other than the State of South Carolina and syndicates of named and anonymous individual underwriters and London market insurance companies who have subscribed to one or more insurance policies sold to Tebele. At all times relevant hereto, Insurers transacted, and continue to transact, business in the State of South Carolina.

ANSWER: The Underwriters admit that they are a series of individuals and companies organized into syndicates and/or managing general agents, acting severally, who underwrote the Policy issued to Plaintiff, in conjunction with the

other named insurance company Defendants. The Underwriters deny all remaining allegations.

5. The Insurance Agent is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina that works with insureds and insurers to negotiate and procure third party insurance policies on behalf of insureds.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 5, and therefore deny the same.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action and the Parties to this action, and Horry County, South Carolina is a proper venue for this case because the Insured Property is located in Horry County, South Carolina, Tebele and the Insurance Agent are organized in and conduct business in South Carolina, and Defendants, in general, conduct business in South Carolina.

ANSWER: Admitted as to venue and jurisdiction being proper in Horry County, South Carolina. Otherwise, denied.

7. Furthermore, pursuant to the Service of Suit Clause contained in the Policy, Insurers agree to submit to the jurisdiction of any court of competent jurisdiction within the United States, including South Carolina, and agree to comply with all requirements necessary to give such court jurisdiction. The Policy's Service of Suit Clause authorizes and directs Mendes & Mount of New York, New York to accept service of process on Insurers' behalf.

ANSWER: The Underwriters admit that this Honorable Court has jurisdiction over this action. Further, the Policy is a document which speaks for itself. The Underwriters deny all remaining allegations.

FACTUAL BACKGROUND
Relevant Policy Language

8. The Policy provides property damage coverage for the Insured Property and promises to "pay for direct physical loss of or damage to [the Insured Property] caused by or resulting from any Covered Cause of Loss." See **Exhibit A**, Policy at p. 8, § A.

ANSWER: The Policy is a document which speaks for itself. The Underwriters deny all remaining allegations.

9. A Covered Cause of Loss is any "[r]isks of [d]irect [p]hysical [l]oss unless the loss is" either expressly excluded or limited. *Id.* at p22, § A.

ANSWER: The Policy is a document which speaks for itself. The Underwriters deny all remaining allegations.

10. Subject to certain conditions and exclusions, and in the event that the Insured Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, "extra expenses." *Id.* at p. 12, § 10; p. 13, § 11(a)(2)-(3), p. 15, § 12; p. 18, § A(1)-(2).

ANSWER: The Policy is a document which speaks for itself. The Underwriters deny all remaining allegations.

11. The limits of liability under the Policy are "\$22,155,400 per Occurrence[.]" *Id.* At p. 1; p. 4, § E.

ANSWER: The Policy is a document which speaks for itself. The Underwriters deny all remaining allegations.

The Insured Property and Its Fire Safety Inspection History

12. As part of its business operations, Tebele owned and rented the Insured Property to a tenant who operated a restaurant in it. The Insured Property's lease required the tenant to "maintain the premises in good and safe condition, including . . . electrical wiring, plumbing and heating installations and any other system or equipment upon the premises[.]" See **Exhibit B** at § 7.

ANSWER: The lease is a document which speaks for itself. The Underwriters lack information sufficient to admit or deny the remaining allegations of Paragraph 12, and therefore deny the same.

13. During the lease term, Tebele did not have unfettered access to the Insured Property. To the contrary, the underlying lease only "permit[s Tebele] to enter upon the premises at reasonable times and upon reasonable notice" and only for the "purpose of inspecting" the Insured Property. *Id* at § 8.

ANSWER: The lease is a document which speaks for itself. The Underwriters deny all remaining allegations.

14. On or about June 2017, at the direction of the Fire Marshall for the City of Myrtle Beach, Tebele contracted Crawford Sprinkler Co. of SC, Inc. ("Crawford"), a specialist in sprinkler installation and repair, to "install [a] sprinkler system in [the] existing building." See **Exhibit C**. Tebele paid Crawford to install the sprinkler system and continued to follow up with Crawford, reminding Crawford "that the [sprinkler] system had to be connected." See **Exhibit D** at 38:17-21; 73:10-24.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 14, and therefore deny the same.

15. In the summer of 2018, Tebele began shopping for alternative coverage for the Insured Property.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 15, and therefore deny the same.

16. Seizing on an opportunity to procure coverage for Tebele through Insurers, on or about August 20, 2018, David Egan ("Egan"), Crescent Coast's managing partner, contacted Whitney Gurtzweiler ("Gurtzweiler"), an employee of AmWINS Access Insurance Services, an underwriter for Insurers, with a "new submission" opportunity. See **Exhibit E**.

ANSWER: Denied that Ms. Gurtzweiler or Amwins Access Insurance Services acted as "an underwriter for Insurers" as to the subject Policy. Otherwise, Underwriters are without knowledge sufficient to admit or deny the allegations in this paragraph, which are therefore denied.

17. Two days later, Gurtzweiler sent an email to her colleague, informing him of a new submission by Egan. In that email, Gurtzweiler described Egan as "one of the agents I was telling you about that I just saw in Myrtle Beach." See **Exhibit F**. Gurtzweiler further directed her colleague to work with Sandra Nenna ("Nenna"), Egan's customer service representative and "a former [Insurer] employee [that] knows how it goes and will get you anything you need!" *Id.*

ANSWER: Denied as to the reference to Ms. Nenna being a former "Insurer" employee if intended to reference the Insurers named as Defendants in this

action. Otherwise, the Underwriters lack information sufficient to admit or deny the allegations of Paragraph 17, and therefore deny the same.

18. On or about October 3, 2018, at Insurers' request, a third party inspector conducted an inspection of the Insured Property and produced an inspection report that Insurers reviewed on November 25, 2018. See **Exhibit G**. This report indicated that the Insured Property had a "sprinkler system," and, aside from recommending changes to fire extinguisher markings, contained no additional notes regarding fire protective safeguards. *Id.* at p. 3-5.

ANSWER: The report referenced in Paragraph 18 is a document which speaks for itself. The Underwriters deny all remaining allegations.

19. This report is consistent with a previous inspection conducted earlier in 2018, wherein another inspector noted that the Insured Property was "now adding a sprinkler system throughout the building in all spaces." See **Exhibit H**.

ANSWER: The report referenced in Paragraph 19 is a document which speaks for itself. The Underwriters deny all remaining allegations.

20. After months of communications between the Insurance Agent and the Insurers, the Insurers received a Commercial Insurance Application from Tebele on January 11, 2019, which indicated that the Insured Property had a sprinkler system that was "100%". See **Exhibit I**.

ANSWER: The Underwriters admit that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. The Underwriters deny all remaining allegations.

21. The same day, however, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system. See **Exhibit J** at p. 3-4. Specifically, Nenna explained that "[w]hen the app[lication] was submitted for the risk, it was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time." *Id.* Nenna elaborated: "We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a `head's up' on this." *Id.* Gurtzweiler replied: "Got it, I'll note the file." *Id.* Four days later, the Insurers bound coverage.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 21, and therefore deny the same.

22. Furthermore, Insurers' own risk assessment documents indicate that the information Nenna relayed to Insurers was absolutely accurate and that Insurers designated the Insured Property as "100% sprinklered."

ANSWER: The Underwriters admit that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. The Underwriters deny all remaining allegations.

23. For instance, prior to binding coverage, Insurers prepared a "Schedule of Values", a document Insurers used to evaluate the risk of insuring several properties owned by Tebele, including the Insured Property. See **Exhibit K**.

ANSWER: The Schedule of Values is a document which speaks for itself. The Underwriters deny all remaining allegations.

24. The Schedule of Values listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* For every building, the Schedule of Values listed important information such as the real property value of a given building, the building occupancy description, a building's overall square footage, and, critically, whether each building was "Sprinklered" — marked affirmatively by a "Y", or negatively by "N" — and the percentage of the building that was "Sprinklered," if applicable. *Id.* at Columns AD-AF. Of the twenty-three (23) properties accounted for, Insurers noted that only 24% of the 271,000 total square feet of commercial space in the area was "sprinklered." *Id.* at Row 8-9, Column AB-AD.

ANSWER: The Schedule of Values is a document which speaks for itself.

The Underwriters deny all remaining allegations.

25. Indeed, the Schedule of Values only marked five (5) buildings as "Sprinklered" to "100%" capacity. *Id.* at Columns AD-AF. The Insured Property, labeled as "Building 10" in the Schedule of Values, was one of those five (5) "100% Sprinklered" buildings. *Id.* at Row 10, Columns AD-AF.

ANSWER: The Schedule of Values is a document which speaks for itself.

The Underwriters deny all remaining allegations.

26. Thus, as indicated by the commercial insurance application, the communications between Defendants, and according to Insurer's own records and findings, the Insured Property was sprinklered to a 100% capacity.

ANSWER: The Underwriters admit that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle

Beach, South Carolina was 100% sprinklered. The Underwriters deny all remaining allegations.

27. These findings, coupled with Defendants' actual and constructive knowledge of previous inspections of the Insured Property, indicate that Defendants knew, or should have known, that the Insured Property's sprinkler was installed, but that the Insured Property's tenant did not activate the water feed.

ANSWER: Denied.

The Fire Loss And Insurers' Improper Denial Of Coverage

28. The Insured Property was completely destroyed by fire on February 24, 2019.

ANSWER: Admitted that a fire loss damaged the property on the date indicated. Otherwise, the Underwriters lack information sufficient to admit or deny the allegations of Paragraph 28, and therefore deny the same.

29. After the loss, Insurers conducted an investigation, wherein an inspector found that the Insured Property was "in the process of installing a sprinkler system. It was almost complete but had not been connected to the water main." See **Exhibit L**.

ANSWER: Admitted that the Insurers investigated the fire loss when submitted as a claim. The report identified in Paragraph 29 is a document which speaks for itself. Admitted that after the loss the Insurers discovered that Plaintiff had not connected the sprinkler system to the water main prior to the fire. The Underwriters deny all remaining allegations.

30. On March 19, 2019, Insurers informed Tebele that they were "continuing to investigate the cause of this loss . . . with a full reservation of rights under the policy."

See **Exhibit M**. Despite correspondence demanding that Insurers cover the loss, Insurers denied coverage on August 7, 2019. See **Exhibit N**.

ANSWER: The Underwriters admit that the Insurers sent correspondence informing Plaintiff of the Insurers' reservation of rights on March 19, 2019 and additional correspondence declining coverage for the Plaintiff's insurance claim on August 6, 2019. The Underwriters deny all remaining allegations.

FIRST CAUSE OF ACTION
(Breach of Contract Against Insurers)

31. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: The Underwriters incorporate their prior answers to Paragraphs 1 through 30 above as if fully stated herein.

32. Insurers, for valuable consideration paid and delivered by Tebele, issued the Policy insuring the Insured Property against "[r]isks of [d]irect [p]hysical [1]oss unless the loss is" either expressly excluded or limited. See Ex. A at p22, § A.

ANSWER: The Underwriters admit that they entered into the Policy with Plaintiff and consideration was paid. The Policy is a written document which speaks for itself. The Underwriters deny all remaining allegations.

33. The Policy includes coverage for a fire damage, and fire damage is included in the Policy as a "Specified Cause of Loss." *Id.* at p. 38.

ANSWER: The Policy is a written document which speaks for itself. The Underwriters deny all remaining allegations.

34. Tebele has paid \$105,870.00 in premiums, including inspection fees. *Id.* at p. 2.

ANSWER: The Underwriters admit that Plaintiff paid certain premiums and inspections pursuant to the coverages afforded by the Policy for numerous properties. Non-payment of premium is not raised as a defense to coverage. The Underwriters deny all remaining allegations.

35. The Policy does not contain any fire-related limitations. *Id* at p. 22, § C.

ANSWER: The Policy is a written document which speaks for itself. The Underwriters deny all remaining allegations.

36. The Policy contains a Fire Endorsement wherein, "[a]s a condition of this insurance, [Tebele is] required to maintain" fire "protective devices," including a 'AS' Automatic Sprinkler System." *Id.* at SRU-024 (07-10).

ANSWER: The Policy is a written document which speaks for itself. The Underwriters admit that the Policy required Plaintiff to maintain fire protective devices, including a working sprinkler system. The Underwriters deny all remaining allegations.

37. The Fire Endorsement further provides that Insurers "will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed [in the Policy] and over which [Tebele] had control, in complete working order." *Id.*

ANSWER: The Policy is a written document which speaks for itself. The Underwriters admit that the Policy precludes coverage for loss or damage caused by fire to the extent the Plaintiff fails to maintain an applicable protective safeguard. The Underwriters deny all remaining allegations.

38. Insurers chose not to define "maintain," nor delineate Tebele's duties and obligations, and their scope, under Tebele's alleged duty to "maintain" the "protective devices."

ANSWER: Paragraph 38 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

39. Similarly, Insurers chose not to define "control" and "complete working order."

ANSWER: Paragraph 39 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

40. The Fire Endorsement requires the Automatic Sprinkler System protective safeguard to be maintained at the locations marked with the "AS" symbol on the Insurer's Schedule of Values. The Insurer Property descriptions and notations set forth on the Insurer's Schedule of Values, however, omits any notation, description, or reference of an "AS" symbol.

ANSWER: Paragraph 40 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

41. Nonetheless, Tebele, in compliance with the Fire Endorsement, undertook substantial action to install a building-wide sprinkler system. For instance, Tebele hired a third party specialist to install and test a building-wide sprinkler system for the Insured Property.

ANSWER: The Underwriters deny that Plaintiff complied with the Policy's protective safeguards requirements. The Underwriters lack information sufficient to admit or deny the remaining allegations of Paragraph 41, and therefore deny the same.

42. Tebele paid for the sprinkler system permit application and cleared the process through the City of Myrtle Beach.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 42, and therefore deny the same.

43. Tebele initiated and maintained multiple communications with the third parties hired to install the building-wide sprinkler system to ensure that the Insured Property's sprinklers were operational and connected to a water supply.

ANSWER: The Underwriters lack information sufficient to admit or deny the allegations of Paragraph 43, and therefore deny the same.

44. Insurers were in possession of multiple premises inspections of the Insured Property performed prior to the loss, and which revealed the state of the Insured Property's sprinkler system.

ANSWER: Denied.

45. Insurers, through information provided by Tebele, and according to Insurers' own risk assessment documents, knew or should have known that the Insured Property's sprinkler system, through no fault of Tebele, was installed but not connected to a water supply.

ANSWER: Denied.

46. Notwithstanding its actual and constructive knowledge, Insurers bound coverage on January 15, 2019 and continued to accept and retain policy premiums for coverage that it ultimately denied.

ANSWER: The Underwriters admit that they entered into the Policy with Plaintiff, accepted premiums, and following an investigation, denied the claim. The Underwriters deny all remaining allegations.

47. Despite Insurers' actual and constructive knowledge of the Insured Property's sprinkler system, Insurers never informed Tebele of any alleged violations of the Policy's Fire Endorsement.

ANSWER: Denied.

48. Through Insurers' actions and omissions, including its failure to address any alleged issues it knew or should have known existed with the Insured Property's sprinkler system, Insurers induced Tebele to believe that coverage existed and Tebele relied upon such beliefs to its detriment.

ANSWER: Denied.

49. On or about February 24, 2019, a fire occurred in the Insured Property causing fire damage and decimating the Insured Property while the Policy was in full force and effect.

ANSWER: The Underwriters admit that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. The Underwriters lack information sufficient to admit or deny the remaining allegations of Paragraph 49, and therefore deny the same.

50. While the Policy was in full force and effect, Tebele suffered direct physical loss, loss of business income, and damage to the Insured Property as a result of the February 24, 2019 fire.

ANSWER: The Underwriters admit that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. The Underwriters lack information sufficient to admit or deny the remaining allegations of Paragraph 50, and therefore deny the same.

51. Tebele duly submitted a claim to Defendant for benefits due under the Policy resulting from this covered loss.

ANSWER: The Underwriters admit that Plaintiff presented an insurance claim after a fire at the Property. The Underwriters deny all remaining allegations.

52. Tebele has duly performed all conditions precedent as required by the Policy, including cooperating with Insurers in its investigation of the claim.

ANSWER: Denied.

53. Although requested to do so, Insurers have failed and refused to pay to the Tebele the sums due and owing under the Policy for damages caused to the Insured Property by the February 24, 2019 fire, which failure and refusal constitutes a breach of the Policy.

ANSWER: Denied.

54. As a direct and proximate result of the breach of contract by Insurers, Tebele sustained damages in an amount to be determined by the trier of fact.

ANSWER: Denied.

55. That the Insurers denied coverage in breach of the Policy and Tebele brings this cause of action for breach of contract for actual damages suffered by Plaintiff as a result of the February 24, 2019 fire.

ANSWER: Denied.

SECOND CAUSE OF ACTION
(Bad Faith)

56. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: The Underwriters incorporate their prior answers to Paragraphs 1 through 55 above as if fully stated herein.

57. Insurers have breached their obligations to deal in good faith and fairly with Tebele, including mishandling the claims process and failing to pay benefits due under the Policy. Furthermore, without a reasonable basis or just cause, Insurers:

- a. Failed to pay Tebele for the loss and damage to the Insured Property;
- b. Failed to adopt and implement reasonable standards for the prompt investigation and settlement of the claims;
- c. Failed to attempt, in good faith, a prompt, fair, and equitable settlement of claims;
- d. Forced Tebele to retain legal counsel to investigate the loss, advise Tebele throughout the claims process, and prosecute this lawsuit to recover all of the benefits that should have been immediately paid under the Policy.

ANSWER: Denied.

58. Insurers' bad faith also includes failure to pay a lawful and legal claim and failure to properly document why the claim would not be paid.

ANSWER: Denied.

59. Insurers, through its agents and/or employees, have not provided a legitimate reason for denying the claim. Insurers' actions were willful, or in reckless disregard for Tebele's rights under the Policy.

ANSWER: Denied.

60. As a direct and proximate result of Insurers' bad faith actions, Tebele has been damaged in an amount to be determined by the trier of fact.

ANSWER: Denied.

61. Tebele brings this cause of action for bad faith wrongful refusal to pay an insurance claim and asks for actual damages, punitive damages, and all reasonable attorneys' fees for the prosecution of this action.

ANSWER: Paragraph 61 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

THIRD CAUSE OF ACTION
(Negligence Against Crescent Coast)

62. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: The Underwriters incorporate their prior answers to Paragraphs 1 through 61 above as if fully stated herein.

63. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 63 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

64. South Carolina law imposes upon Crescent Coast a duty to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 64 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

65. Crescent Coast breached its duties to Tebele through the following negligent and reckless acts and omissions:

- a. Crescent Coast was familiar with the Insured Property prior to the loss and knew, or should have known, about the Insured Property's fire safety safeguards;
- b. Crescent Coast received, processed, and delivered Tebele's commercial insurance application to Insurers;
- c. Crescent Coast knew, or should have known, that despite the commercial insurance application's notation that the Insured Property was "100% sprinklered," the Insured Property's sprinkler system was installed but not connected to a water supply source;
- d. Furthermore, Crescent Coast knew, or should have known, about the Insured Property's fire inspection and sprinkler system history through the various inspections of the Insured Property prior to binding coverage;

- e. Given Crescent Coast's actual and constructive knowledge of the Insured Property's sprinkler system, Crescent Coast had a duty to exercise good faith, reasonable skill, care, and diligence and affirmatively act to ensure that the Policy would cover risk of fire loss given all known and existing facts, and despite the Policy's Fire Endorsement;
- f. The Insurance Agent collected, and, upon information and belief, continues to collect fees and commissions incident to the Policy;

ANSWER: Paragraph 65 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

66. These actions were reckless and demonstrated a conscious disregard to exercise due care toward Tebele.

ANSWER: Paragraph 66 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

67. As a direct and proximate result of the Insurance Agent's negligent, reckless acts and omissions, Tebele brings this cause of action for actual damages to include the damages sustained from the fire damage to the Insured Property and for punitive damages.

ANSWER: Paragraph 67 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against Crescent Coast)

68. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: The Underwriters incorporate their prior answers to Paragraphs 1 through 67 above as if fully stated herein.

69. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 69 contains allegations that call for a legal conclusion and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

70. Crescent Coast has a specific duty under South Carolina law to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 70 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

71. South Carolina law holds the Insurance Agent liable if it procures coverage that is materially deficient or does not provide the coverage the Insurance Agent undertook to supply.

ANSWER: Paragraph 71 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

72. Furthermore, South Carolina law imposes an implied duty to exercise due care in giving coverage advice if an insurance agent undertakes to advise an insured or

if there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relief on.

ANSWER: Paragraph 72 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

73. Crescent Coast breached its duties to Tebele under South Carolina law by failing to, among other things: 1) procure adequate coverage for the Insured Property; 2) communicate or advise Insurers of any of the Insured Property's alleged or perceived sprinkler issues; 3) remedy or act to correct the apparent coverage issues in light of the Policy's Fire Endorsement and the Insured Property's alleged sprinkler issues; and 4) continuing to collect fees and commissions off the sale of the Policy and leading Tebele to rightfully believe that, under the existing facts known to the Insurance Agent, the Insured Property was covered for fire losses.

ANSWER: Paragraph 73 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

74. The Insurance Agent's breach of its duties caused Tebele's harm and Tebele sustained damages in an amount to be established at trial, as a direct and proximate result of the Insurance Agent's breaches of the duties owed.

ANSWER: Paragraph 74 contains allegations against a party other than the Underwriters and does not require a response from the Underwriters. To the extent a response is required, the Underwriters deny the same.

FURTHER ANSWERING THE COMPLAINT: All previous allegations not heretofore admitted are expressly denied, including Plaintiff's prayer for relief.

AFFIRMATIVE DEFENSES

The Underwriters assert the following affirmative defenses to Plaintiff's Complaint and hereby reserve the right to amend or supplement these defenses as information becomes available and known:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are not covered due to certain terms, conditions, exclusions, limitations, and endorsements of the Policy as expressed in communications between the Underwriters and Plaintiff regarding the claim. This includes, but is not limited to, the coverage position letter issued on August 6, 2019 to the Plaintiff by the Defendant Insurers, as attached as Exhibit "A".

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to the application of the Policy's provisions excluding coverage for failure to maintain a protective safeguard, as shown by the following Policy provisions and as explained in the Defendant Insurers' August 6, 2019 correspondence to Plaintiff, attached as Exhibit "A":

* * *

Protective Safeguards – Fire Endorsement

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any "OTHER":	(a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required

- (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times
- (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.

Protective Safeguards

- A.** As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.

The protective safeguard(s) to which this endorsement applies are identified by the following symbols:

1. "AS" Automatic Sprinkler System , including related supervisory services.

Automatic Sprinkler System means:

- a.** Any automatic fire protective or extinguishing system, including connected:
 - (1) Sprinklers and discharge nozzles;
 - (2) Ducts, pipes, valves and fittings;
 - (3) Tanks, their component parts and supports; and
 - (4) Pumps and private fire protection mains.
- b.** When supplied from an automatic fire protective system:
 - (1) Non-automatic fire protective systems; and
 - (2) Hydrants, standpipes and outlets.

2. "AA" Automatic Fire Alarm

Means an automatic fire alarm protecting the entire building that is:

- a.** Connected to a central station; or
- b.** Reporting to a public or private fire alarm station.

3. "SS" Security Service,

Means a security service with a recording system or watch clock, making hourly rounds covering the entire building, when the premises are not in actual operation.

4. "SC" Service Contract

Means a written contract with a privately owned fire department providing fire protection service to the described premises.

5. "OTHER"

Means the protective system described in the Schedule.

- B.** The following is added to the **EXCLUSIONS** section of the policy referenced above:

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

* * *

FOURTH AFFIRMATIVE DEFENSE

To the extent the claim is deemed covered, which the Insurers deny entirely, all of the provisions of the Policy governing calculation of insurance proceeds owed under all coverages claimed must be applied in order to determine the proper valuation of the damages owed (.e.g. Building, Business Personal Property, Loss of Use, Ordinance or Law).

FIFTH AFFIRMATIVE DEFENSE

The Insurers' coverage decision in this action was rendered based on their objectively reasonable belief and basis for determining that coverage was not owed as expressed in their August 6, 2019 correspondence. As such, no bad faith action can be supported based on their coverage decision, even if the decision is ultimately deemed to be incorrect by this Court.

SIXTH AFFIRMATIVE DEFENSE

The Underwriters reserve the right to allege any additional affirmative defenses, as the facts become known.

WHEREFORE, the Underwriters, having fully answered the Complaint of Plaintiff and asserted their Affirmative Defenses, respectfully pray the Court as follows:

1. That Plaintiff shall have and recover nothing from the Defendant Underwriters and that Plaintiff's Complaint be dismissed with prejudice;
2. That the Underwriters' Affirmative Defenses be sustained;

3. That the costs and reasonable attorneys' fees the Underwriters incur defending this Action be taxed to the Plaintiff; and

4. For such other and further relief as the Court deems just and proper.

BUTLER WEIHMULLER KATZ CRAIG LLP

/s/ L. Andrew Watson

L. Andrew Watson

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*Attorneys for Defendants Certain Underwriters at
Lloyd's, London Subscribing to Policy Number AQS-
190065*

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2020-CP-26-0808

A. TEBELE & SONS, A South Carolina)
General Partnership,)
)
Plaintiff,)
v.)
)
CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA; and)
CRESCENT COAST INSURANCE, LLC,))
)
Defendants.)
_____)

**ANSWER AND AFFIRMATIVE DEFENSES
OF HDI GLOBAL SPECIALTY
SE TO PLAINTIFF'S COMPLAINT**

Defendant, HDI Global Specialty SE ("HDI") above-named, by and through the undersigned counsel, hereby answers and asserts its affirmative defenses to the Complaint of the Plaintiff A. Tebele & Sons ("Tebele" or "Plaintiff"), as follows:

NATURE OF ACTION

1. Tebele brings this action against the Insurers for breach of contract and bad faith arising from Insurers' improper failure to provide coverage to Tebele under Policy Numbers AQS-190065, HAQRS-190065, TR00093911900065 (collectively, the "Policy"). Alternatively, Tebele sues Crescent Coast for negligence and breach of fiduciary duty.

ANSWER: HDI admits that it entered into an insurance contract with Plaintiff numbered HAQS-190065 ("Policy"), which was effective from January 15, 2019 to January 15, 2020. HDI denies all remaining allegations.

2. Through this action, Tebele seeks monetary damages, punitive damages, and attorney's fees as a result of Defendants' conduct.

ANSWER: Paragraph 2 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

PARTIES

3. Tebele is a general partnership organized and existing under the laws of the State of South Carolina. Among other things, Tebele is a property management company conducting business in Horry County, South Carolina, and its business operations include ownership of commercial property located at 1901 North Kings Highway, Myrtle Beach, South Carolina 29577 (hereinafter "Insured Property").

ANSWER: Upon information and belief, admitted.

4. Insurers are, upon information and belief, corporate entities organized and existing pursuant to the laws of a state other than the State of South Carolina and syndicates of named and anonymous individual underwriters and London market insurance companies who have subscribed to one or more insurance policies sold to Tebele. At all times relevant hereto, Insurers transacted, and continue to transact, business in the State of South Carolina.

ANSWER: HDI admits that it is an entity organized and existing pursuant to the laws of a jurisdiction other than the State of South Carolina, who underwrote the Policy issued to Plaintiff, in conjunction with the other named insurance company Defendants. HDI denies all remaining allegations.

5. The Insurance Agent is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina that works with insureds and insurers to negotiate and procure third party insurance policies on behalf of insureds.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 5, and therefore denies the same.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action and the Parties to this action, and Horry County, South Carolina is a proper venue for this case because the Insured Property is located in Horry County, South Carolina, Tebele and the Insurance Agent are organized in and conduct business in South Carolina, and Defendants, in general, conduct business in South Carolina.

ANSWER: Admitted as to venue and jurisdiction being proper in Horry County, South Carolina. Otherwise, denied.

7. Furthermore, pursuant to the Service of Suit Clause contained in the Policy, Insurers agree to submit to the jurisdiction of any court of competent jurisdiction within the United States, including South Carolina, and agree to comply with all requirements necessary to give such court jurisdiction. The Policy's Service of Suit Clause authorizes and directs Mendes & Mount of New York, New York to accept service of process on Insurers' behalf.

ANSWER: HDI admits that this Honorable Court has jurisdiction over this action. Further, the Policy is a document which speaks for itself. HDI denies all remaining allegations.

FACTUAL BACKGROUND
Relevant Policy Language

8. The Policy provides property damage coverage for the Insured Property and promises to "pay for direct physical loss of or damage to [the Insured Property] caused by or resulting from any Covered Cause of Loss." See **Exhibit A**, Policy at p. 8, § A.

ANSWER: The Policy is a document which speaks for itself. HDI denies all remaining allegations.

9. A Covered Cause of Loss is any "[r]isks of [d]irect [p]hysical [l]oss unless the loss is" either expressly excluded or limited. *Id.* at p22, § A.

ANSWER: The Policy is a document which speaks for itself. HDI denies all remaining allegations.

10. Subject to certain conditions and exclusions, and in the event that the Insured Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, "extra expenses." *Id.* at p. 12, § 10; p. 13, § 11(a)(2)-(3), p. 15, § 12; p. 18, § A(1)-(2).

ANSWER: The Policy is a document which speaks for itself. HDI denies all remaining allegations.

11. The limits of liability under the Policy are "\$22,155,400 per Occurrence[.]" *Id.* At p. 1; p. 4, § E.

ANSWER: The Policy is a document which speaks for itself. HDI denies all remaining allegations.

The Insured Property and Its Fire Safety Inspection History

12. As part of its business operations, Tebele owned and rented the Insured Property to a tenant who operated a restaurant in it. The Insured Property's lease required the tenant to "maintain the premises in good and safe condition, including . . . electrical wiring, plumbing and heating installations and any other system or equipment upon the premises[.]" See **Exhibit B** at § 7.

ANSWER: The lease is a document which speaks for itself. HDI lacks information sufficient to admit or deny the remaining allegations of Paragraph 12, and therefore denies the same.

13. During the lease term, Tebele did not have unfettered access to the Insured Property. To the contrary, the underlying lease only "permit[s Tebele] to enter upon the premises at reasonable times and upon reasonable notice" and only for the "purpose of inspecting" the Insured Property. *Id* at § 8.

ANSWER: The lease is a document which speaks for itself. HDI denies all remaining allegations.

14. On or about June 2017, at the direction of the Fire Marshall for the City of Myrtle Beach, Tebele contracted Crawford Sprinkler Co. of SC, Inc. ("Crawford"), a specialist in sprinkler installation and repair, to "install [a] sprinkler system in [the] existing building." See **Exhibit C**. Tebele paid Crawford to install the sprinkler system and continued to follow up with Crawford, reminding Crawford "that the [sprinkler] system had to be connected." See **Exhibit D** at 38:17-21; 73:10-24.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 14, and therefore denies the same.

15. In the summer of 2018, Tebele began shopping for alternative coverage for the Insured Property.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 15, and therefore denies the same.

16. Seizing on an opportunity to procure coverage for Tebele through Insurers, on or about August 20, 2018, David Egan ("Egan"), Crescent Coast's managing partner, contacted Whitney Gurtzweiler ("Gurtzweiler"), an employee of AmWINS Access Insurance Services, an underwriter for Insurers, with a "new submission" opportunity. See **Exhibit E**.

ANSWER: Denied that Ms. Gurtzweiler or AmWINS Access Insurance Services acted as "an underwriter for Insurers" as to the subject Policy. Otherwise, HDI is without knowledge sufficient to admit or deny the allegations in this paragraph, which are therefore denied.

17. Two days later, Gurtzweiler sent an email to her colleague, informing him of a new submission by Egan. In that email, Gurtzweiler described Egan as "one of the agents I was telling you about that I just saw in Myrtle Beach." See **Exhibit F**. Gurtzweiler further directed her colleague to work with Sandra Nenna ("Nenna"), Egan's customer service representative and "a former [Insurer] employee [that] knows how it goes and will get you anything you need!" *Id.*

ANSWER: Denied as to the reference to Ms. Nenna being a former "Insurer" employee if intended to reference the Insurers named as Defendants in this action. Otherwise, HDI lacks information sufficient to admit or deny the allegations of Paragraph 17, and therefore denies the same.

18. On or about October 3, 2018, at Insurers' request, a third party inspector conducted an inspection of the Insured Property and produced an inspection report that Insurers reviewed on November 25, 2018. See **Exhibit G**. This report indicated that the Insured Property had a "sprinkler system," and, aside from recommending changes to fire extinguisher markings, contained no additional notes regarding fire protective safeguards. *Id.* at p. 3-5.

ANSWER: The report referenced in Paragraph 18 is a document which speaks for itself. HDI denies all remaining allegations.

19. This report is consistent with a previous inspection conducted earlier in 2018, wherein another inspector noted that the Insured Property was "now adding a sprinkler system throughout the building in all spaces." See **Exhibit H**.

ANSWER: The report referenced in Paragraph 19 is a document which speaks for itself. HDI denies all remaining allegations.

20. After months of communications between the Insurance Agent and the Insurers, the Insurers received a Commercial Insurance Application from Tebele on January 11, 2019, which indicated that the Insured Property had a sprinkler system that was "100%". See **Exhibit I**.

ANSWER: HDI admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. HDI denies all remaining allegations.

21. The same day, however, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system. See **Exhibit J** at p. 3-4. Specifically, Nenna explained that "[w]hen the app[lication] was submitted for the risk, it

was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time." *Id.* Nenna elaborated: "We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a `head's up' on this." *Id.* Gurtzweiler replied: "Got it, I'll note the file." *Id.* Four days later, the Insurers bound coverage.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 21, and therefore denies the same.

22. Furthermore, Insurers' own risk assessment documents indicate that the information Nenna relayed to Insurers was absolutely accurate and that Insurers designated the Insured Property as "100% sprinklered."

ANSWER: HDI admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. HDI denies all remaining allegations.

23. For instance, prior to binding coverage, Insurers prepared a "Schedule of Values", a document Insurers used to evaluate the risk of insuring several properties owned by Tebele, including the Insured Property. See **Exhibit K**.

ANSWER: The Schedule of Values is a document which speaks for itself. HDI denies all remaining allegations.

24. The Schedule of Values listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* For every building, the Schedule of Values listed important information such as the real property value of a given building, the building occupancy description, a building's overall square footage, and, critically, whether each building was "Sprinklered" —

marked affirmatively by a "Y", or negatively by "N" — and the percentage of the building that was "Sprinklered," if applicable. *Id.* at Columns AD-AF. Of the twenty-three (23) properties accounted for, Insurers noted that only 24% of the 271,000 total square feet of commercial space in the area was "sprinklered." *Id.* at Row 8-9, Column AB-AD.

ANSWER: The Schedule of Values is a document which speaks for itself. HDI denies all remaining allegations.

25. Indeed, the Schedule of Values only marked five (5) buildings as "Sprinklered" to "100%" capacity. *Id.* at Columns AD-AF. The Insured Property, labeled as "Building 10" in the Schedule of Values, was one of those five (5) "100% Sprinklered" buildings. *Id.* at Row 10, Columns AD-AF.

ANSWER: The Schedule of Values is a document which speaks for itself. HDI denies all remaining allegations.

26. Thus, as indicated by the commercial insurance application, the communications between Defendants, and according to Insurer's own records and findings, the Insured Property was sprinklered to a 100% capacity.

ANSWER: HDI admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. HDI denies all remaining allegations.

27. These findings, coupled with Defendants' actual and constructive knowledge of previous inspections of the Insured Property, indicate that Defendants knew, or should have known, that the Insured Property's sprinkler was installed, but that the Insured Property's tenant did not activate the water feed.

ANSWER: Denied.

The Fire Loss And Insurers' Improper Denial Of Coverage

28. The Insured Property was completely destroyed by fire on February 24, 2019.

ANSWER: Admitted that a fire loss damaged the property on the date indicated. Otherwise, HDI lacks information sufficient to admit or deny the allegations of Paragraph 28, and therefore denies the same.

29. After the loss, Insurers conducted an investigation, wherein an inspector found that the Insured Property was "in the process of installing a sprinkler system. It was almost complete but had not been connected to the water main." See **Exhibit L**.

ANSWER: Admitted that the Insurers investigated the fire loss when submitted as a claim. The report identified in Paragraph 29 is a document which speaks for itself. Admitted that after the loss the Insurers discovered that Plaintiff had not connected the sprinkler system to the water main prior to the fire. HDI denies all remaining allegations.

30. On March 19, 2019, Insurers informed Tebele that they were "continuing to investigate the cause of this loss . . . with a full reservation of rights under the policy." See **Exhibit M**. Despite correspondence demanding that Insurers cover the loss, Insurers denied coverage on August 7, 2019. See **Exhibit N**.

ANSWER: HDI admits that the Insurers sent correspondence informing Plaintiff of the Insurers' reservation of rights on March 19, 2019 and additional correspondence declining coverage for the Plaintiff's insurance claim on August 6, 2019. HDI denies all remaining allegations.

FIRST CAUSE OF ACTION
(Breach of Contract Against Insurers)

31. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: HDI incorporate its prior answers to Paragraphs 1 through 30 above as if fully stated herein.

32. Insurers, for valuable consideration paid and delivered by Tebele, issued the Policy insuring the Insured Property against "[r]isks of [d]irect [p]hysical [1]oss unless the loss is" either expressly excluded or limited. See Ex. A at p22, § A.

ANSWER: HDI admits that it entered into the Policy with Plaintiff and consideration was paid. The Policy is a written document which speaks for itself. HDI denies all remaining allegations.

33. The Policy includes coverage for a fire damage, and fire damage is included in the Policy as a "Specified Cause of Loss." *Id.* at p. 38.

ANSWER: The Policy is a written document which speaks for itself. HDI denies all remaining allegations.

34. Tebele has paid \$105,870.00 in premiums, including inspection fees. *Id.* at p. 2.

ANSWER: HDI admits that Plaintiff paid certain premiums and inspections pursuant to the coverages afforded by the Policy for numerous properties. Non-payment of premium is not raised as a defense to coverage. HDI denies all remaining allegations.

35. The Policy does not contain any fire-related limitations. *Id.* at p. 22, § C.

ANSWER: The Policy is a written document which speaks for itself. HDI denies all remaining allegations.

36. The Policy contains a Fire Endorsement wherein, "[a]s a condition of this insurance, [Tebele is] required to maintain" fire "protective devices," including a 'AS' Automatic Sprinkler System." *Id.* at SRU-024 (07-10).

ANSWER: The Policy is a written document which speaks for itself. HDI admits that the Policy required Plaintiff to maintain fire protective devices, including a working sprinkler system. HDI denies all remaining allegations.

37. The Fire Endorsement further provides that Insurers "will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed [in the Policy] and over which [Tebele] had control, in complete working order." *Id.*

ANSWER: The Policy is a written document which speaks for itself. HDI admits that the Policy precludes coverage for loss or damage caused by fire to the extent the Plaintiff fails to maintain an applicable protective safeguard. HDI denies all remaining allegations.

38. Insurers chose not to define "maintain," nor delineate Tebele's duties and obligations, and their scope, under Tebele's alleged duty to "maintain" the "protective devices."

ANSWER: Paragraph 38 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

39. Similarly, Insurers chose not to define "control" and "complete working order."

ANSWER: Paragraph 39 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

40. The Fire Endorsement requires the Automatic Sprinkler System protective safeguard to be maintained at the locations marked with the "AS" symbol on the Insurer's Schedule of Values. The Insurer Property descriptions and notations set forth on the Insurer's Schedule of Values, however, omits any notation, description, or reference of an "AS" symbol.

ANSWER: Paragraph 40 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

41. Nonetheless, Tebele, in compliance with the Fire Endorsement, undertook substantial action to install a building-wide sprinkler system. For instance, Tebele hired a third party specialist to install and test a building-wide sprinkler system for the Insured Property.

ANSWER: HDI denies that Plaintiff complied with the Policy's protective safeguards requirements. HDI lacks information sufficient to admit or deny the remaining allegations of Paragraph 41, and therefore denies the same.

42. Tebele paid for the sprinkler system permit application and cleared the process through the City of Myrtle Beach.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 42, and therefore denies the same.

43. Tebele initiated and maintained multiple communications with the third parties hired to install the building-wide sprinkler system to ensure that the Insured Property's sprinklers were operational and connected to a water supply.

ANSWER: HDI lacks information sufficient to admit or deny the allegations of Paragraph 43, and therefore denies the same.

44. Insurers were in possession of multiple premises inspections of the Insured Property performed prior to the loss, and which revealed the state of the Insured Property's sprinkler system.

ANSWER: Denied.

45. Insurers, through information provided by Tebele, and according to Insurers' own risk assessment documents, knew or should have known that the Insured Property's sprinkler system, through no fault of Tebele, was installed but not connected to a water supply.

ANSWER: Denied.

46. Notwithstanding its actual and constructive knowledge, Insurers bound coverage on January 15, 2019 and continued to accept and retain policy premiums for coverage that it ultimately denied.

ANSWER: HDI admits that it entered into the Policy with Plaintiff, accepted premiums, and following an investigation, denied the claim. HDI denies all remaining allegations.

47. Despite Insurers' actual and constructive knowledge of the Insured Property's sprinkler system, Insurers never informed Tebele of any alleged violations of the Policy's Fire Endorsement.

ANSWER: Denied.

48. Through Insurers' actions and omissions, including its failure to address any alleged issues it knew or should have known existed with the Insured Property's sprinkler system, Insurers induced Tebele to believe that coverage existed and Tebele relied upon such beliefs to its detriment.

ANSWER: Denied.

49. On or about February 24, 2019, a fire occurred in the Insured Property causing fire damage and decimating the Insured Property while the Policy was in full force and effect.

ANSWER: HDI admits that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. HDI lacks information sufficient to admit or deny the remaining allegations of Paragraph 49, and therefore denies the same.

50. While the Policy was in full force and effect, Tebele suffered direct physical loss, loss of business income, and damage to the Insured Property as a result of the February 24, 2019 fire.

ANSWER: HDI admits that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. HDI lacks information sufficient to admit or deny the remaining allegations of Paragraph 50, and therefore denies the same.

51. Tebele duly submitted a claim to Defendant for benefits due under the Policy resulting from this covered loss.

ANSWER: HDI admits that Plaintiff presented an insurance claim after a fire at the Property. HDI denies all remaining allegations.

52. Tebele has duly performed all conditions precedent as required by the Policy, including cooperating with Insurers in its investigation of the claim.

ANSWER: Denied.

53. Although requested to do so, Insurers have failed and refused to pay to the Tebele the sums due and owing under the Policy for damages caused to the Insured Property by the February 24, 2019 fire, which failure and refusal constitutes a breach of the Policy.

ANSWER: Denied.

54. As a direct and proximate result of the breach of contract by Insurers, Tebele sustained damages in an amount to be determined by the trier of fact.

ANSWER: Denied.

55. That the Insurers denied coverage in breach of the Policy and Tebele brings this cause of action for breach of contract for actual damages suffered by Plaintiff as a result of the February 24, 2019 fire.

ANSWER: Denied.

SECOND CAUSE OF ACTION
(Bad Faith)

56. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: HDI incorporates its prior answers to Paragraphs 1 through 55 above as if fully stated herein.

57. Insurers have breached their obligations to deal in good faith and fairly with Tebele, including mishandling the claims process and failing to pay benefits due under the Policy. Furthermore, without a reasonable basis or just cause, Insurers:

- a. Failed to pay Tebele for the loss and damage to the Insured Property;
- b. Failed to adopt and implement reasonable standards for the prompt investigation and settlement of the claims;
- c. Failed to attempt, in good faith, a prompt, fair, and equitable settlement of claims;
- d. Forced Tebele to retain legal counsel to investigate the loss, advise Tebele throughout the claims process, and prosecute this lawsuit to recover all of the benefits that should have been immediately paid under the Policy.

ANSWER: Denied.

58. Insurers' bad faith also includes failure to pay a lawful and legal claim and failure to properly document why the claim would not be paid.

ANSWER: Denied.

59. Insurers, through its agents and/or employees, have not provided a legitimate reason for denying the claim. Insurers' actions were willful, or in reckless disregard for Tebele's rights under the Policy.

ANSWER: Denied.

60. As a direct and proximate result of Insurers' bad faith actions, Tebele has been damaged in an amount to be determined by the trier of fact.

ANSWER: Denied.

61. Tebele brings this cause of action for bad faith wrongful refusal to pay an insurance claim and asks for actual damages, punitive damages, and all reasonable attorneys' fees for the prosecution of this action.

ANSWER: Paragraph 61 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

THIRD CAUSE OF ACTION
(Negligence Against Crescent Coast)

62. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: HDI incorporates its prior answers to Paragraphs 1 through 61 above as if fully stated herein.

63. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 63 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

64. South Carolina law imposes upon Crescent Coast a duty to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 64 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

65. Crescent Coast breached its duties to Tebele through the following negligent and reckless acts and omissions:

- a. Crescent Coast was familiar with the Insured Property prior to the loss and knew, or should have known, about the Insured Property's fire safety safeguards;
- b. Crescent Coast received, processed, and delivered Tebele's commercial insurance application to Insurers;
- c. Crescent Coast knew, or should have known, that despite the commercial insurance application's notation that the Insured Property was "100% sprinklered," the Insured Property's sprinkler system was installed but not connected to a water supply source;
- d. Furthermore, Crescent Coast knew, or should have known, about the Insured Property's fire inspection and sprinkler system history through the various inspections of the Insured Property prior to binding coverage;
- e. Given Crescent Coast's actual and constructive knowledge of the Insured Property's sprinkler system, Crescent Coast had a duty to exercise good faith, reasonable skill, care, and diligence and affirmatively act to ensure that the Policy would cover risk of fire loss given all known and existing facts, and despite the Policy's Fire Endorsement;

- f. The Insurance Agent collected, and, upon information and belief, continues to collect fees and commissions incident to the Policy;

ANSWER: Paragraph 65 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

66. These actions were reckless and demonstrated a conscious disregard to exercise due care toward Tebele.

ANSWER: Paragraph 66 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

67. As a direct and proximate result of the Insurance Agent's negligent, reckless acts and omissions, Tebele brings this cause of action for actual damages to include the damages sustained from the fire damage to the Insured Property and for punitive damages.

ANSWER: Paragraph 67 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against Crescent Coast)

68. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: HDI incorporates its prior answers to Paragraphs 1 through 67 above as if fully stated herein.

69. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 69 contains allegations that call for a legal conclusion and does not require a response from HDI. To the extent a response is required, HDI denies the same.

70. Crescent Coast has a specific duty under South Carolina law to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 70 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

71. South Carolina law holds the Insurance Agent liable if it procures coverage that is materially deficient or does not provide the coverage the Insurance Agent undertook to supply.

ANSWER: Paragraph 71 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

72. Furthermore, South Carolina law imposes an implied duty to exercise due care in giving coverage advice if an insurance agent undertakes to advise an insured or if there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relief on.

ANSWER: Paragraph 72 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

73. Crescent Coast breached its duties to Tebele under South Carolina law by failing to, among other things: 1) procure adequate coverage for the Insured Property; 2) communicate or advise Insurers of any of the Insured Property's alleged or perceived sprinkler issues; 3) remedy or act to correct the apparent coverage issues in light of the Policy's Fire Endorsement and the Insured Property's alleged sprinkler issues; and 4) continuing to collect fees and commissions off the sale of the Policy and leading Tebele to rightfully believe that, under the existing facts known to the Insurance Agent, the Insured Property was covered for fire losses.

ANSWER: Paragraph 73 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

74. The Insurance Agent's breach of its duties caused Tebele's harm and Tebele sustained damages in an amount to be established at trial, as a direct and proximate result of the Insurance Agent's breaches of the duties owed.

ANSWER: Paragraph 74 contains allegations against a party other than HDI and does not require a response from HDI. To the extent a response is required, HDI denies the same.

FURTHER ANSWERING THE COMPLAINT: All previous allegations not heretofore admitted are expressly denied, including Plaintiff's prayer for relief.

AFFIRMATIVE DEFENSES

HDI asserts the following affirmative defenses to Plaintiff's Complaint and hereby reserves the right to amend or supplement these defenses as information becomes available and known:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are not covered due to certain terms, conditions, exclusions, limitations, and endorsements of the Policy as expressed in communications between HDI and Plaintiff regarding the claim. This includes, but is not limited to, the coverage position letter issued on August 6, 2019 to the Plaintiff by the Defendant Insurers, as attached as Exhibit "A".

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to the application of the Policy's provisions excluding coverage for failure to maintain a protective safeguard, as shown by the following Policy provisions and as explained in the Defendant Insurers' August 6, 2019 correspondence to Plaintiff, attached as Exhibit "A":

* * *

Protective Safeguards – Fire Endorsement

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any "OTHER":	(a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.

Protective Safeguards

- A.** As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.

The protective safeguard(s) to which this endorsement applies are identified by the following symbols:

1. "AS" Automatic Sprinkler System , including related supervisory services.

Automatic Sprinkler System means:

- a.** Any automatic fire protective or extinguishing system, including connected:
 - (1) Sprinklers and discharge nozzles;
 - (2) Ducts, pipes, valves and fittings;
 - (3) Tanks, their component parts and supports; and
 - (4) Pumps and private fire protection mains.
- b.** When supplied from an automatic fire protective system:
 - (1) Non-automatic fire protective systems; and
 - (2) Hydrants, standpipes and outlets.

2. "AA" Automatic Fire Alarm

Means an automatic fire alarm protecting the entire building that is:

- a.** Connected to a central station; or
- b.** Reporting to a public or private fire alarm station.

3. "SS" Security Service,

Means a security service with a recording system or watch clock, making hourly rounds covering the entire building, when the premises are not in actual operation.

4. "SC" Service Contract

Means a written contract with a privately owned fire department providing fire protection service to the described premises.

5. "OTHER"

Means the protective system described in the Schedule.

- B.** The following is added to the **EXCLUSIONS** section of the policy referenced above:

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

* * *

FOURTH AFFIRMATIVE DEFENSE

To the extent the claim is deemed covered, which the Insurers deny entirely, all of the provisions of the Policy governing calculation of insurance proceeds owed under all coverages claimed must be applied in order to determine the proper valuation of the damages owed (e.g. Building, Business Personal Property, Loss of Use, Ordinance or Law).

FIFTH AFFIRMATIVE DEFENSE

The Insurers' coverage decision in this action was rendered based on their objectively reasonable belief and basis for determining that coverage was not owed as expressed in their August 6, 2019 correspondence. As such, no bad faith action can be supported based on their coverage decision, even if the decision is ultimately deemed to be incorrect by this Court.

SIXTH AFFIRMATIVE DEFENSE

HDI reserves the right to allege any additional affirmative defenses, as the facts become known.

WHEREFORE, HDI, having fully answered the Complaint of Plaintiff and asserted its Affirmative Defenses, respectfully prays the Court as follows:

1. That Plaintiff shall have and recover nothing from the Defendant HDI and that Plaintiff's Complaint be dismissed with prejudice;
2. That HDI's Affirmative Defenses be sustained;
3. That the costs and reasonable attorneys' fees HDI incurs defending this Action be taxed to the Plaintiff; and

4. For such other and further relief as the Court deems just and proper.

BUTLER WEIHMULLER KATZ CRAIG LLP

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2020-CP-26-0808

A. TEBELE & SONS, A South Carolina)
General Partnership,)
)
Plaintiff,)
v.)
)
CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA; and)
CRESCENT COAST INSURANCE, LLC,))
)
Defendants.)
_____)

**ANSWER AND AFFIRMATIVE
DEFENSES OF GENERAL SECURITY
INDEMNITY COMPANY OF ARIZONA
TO PLAINTIFF' COMPLAINT**

Defendant, General Security Indemnity Company of Arizona ("General Security Indemnity") above-named, by and through the undersigned counsel, hereby answers and asserts its affirmative defenses to the Complaint of the Plaintiff A. Tebele & Sons ("Tebele" or "Plaintiff"), as follows:

NATURE OF ACTION

1. Tebele brings this action against the Insurers for breach of contract and bad faith arising from Insurers' improper failure to provide coverage to Tebele under Policy Numbers AQS-190065, HAQRS-190065, TR00093911900065 (collectively, the "Policy"). Alternatively, Tebele sues Crescent Coast for negligence and breach of fiduciary duty.

ANSWER: General Security Indemnity admits that it entered into an insurance contract with Plaintiff numbered TR00093911900065 ("Policy"), which was effective from January 15, 2019 to January 15, 2020. General Security Indemnity denies all remaining allegations.

2. Through this action, Tebele seeks monetary damages, punitive damages, and attorney's fees as a result of Defendants' conduct.

ANSWER: Paragraph 2 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

PARTIES

3. Tebele is a general partnership organized and existing under the laws of the State of South Carolina. Among other things, Tebele is a property management company conducting business in Horry County, South Carolina, and its business operations include ownership of commercial property located at 1901 North Kings Highway, Myrtle Beach, South Carolina 29577 (hereinafter "Insured Property").

ANSWER: Upon information and belief, admitted.

4. Insurers are, upon information and belief, corporate entities organized and existing pursuant to the laws of a state other than the State of South Carolina and syndicates of named and anonymous individual underwriters and London market insurance companies who have subscribed to one or more insurance policies sold to Tebele. At all times relevant hereto, Insurers transacted, and continue to transact, business in the State of South Carolina.

ANSWER: General Security Indemnity admits that it is an entity organized and existing pursuant to the laws of a state other than the State of South Carolina, who underwrote the Policy issued to Plaintiff, in conjunction with the other named insurance company Defendants. General Security Indemnity denies all remaining allegations.

5. The Insurance Agent is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina that works with insureds and insurers to negotiate and procure third party insurance policies on behalf of insureds.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 5, and therefore denies the same.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action and the Parties to this action, and Horry County, South Carolina is a proper venue for this case because the Insured Property is located in Horry County, South Carolina, Tebele and the Insurance Agent are organized in and conduct business in South Carolina, and Defendants, in general, conduct business in South Carolina.

ANSWER: Admitted as to venue and jurisdiction being proper in Horry County, South Carolina. Otherwise, denied.

7. Furthermore, pursuant to the Service of Suit Clause contained in the Policy, Insurers agree to submit to the jurisdiction of any court of competent jurisdiction within the United States, including South Carolina, and agree to comply with all requirements necessary to give such court jurisdiction. The Policy's Service of Suit Clause authorizes and directs Mendes & Mount of New York, New York to accept service of process on Insurers' behalf.

ANSWER: General Security Indemnity admits that this Honorable Court has jurisdiction over this action. Further, the Policy is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

FACTUAL BACKGROUND
Relevant Policy Language

8. The Policy provides property damage coverage for the Insured Property and promises to "pay for direct physical loss of or damage to [the Insured Property] caused by or resulting from any Covered Cause of Loss." See **Exhibit A**, Policy at p. 8, § A.

ANSWER: The Policy is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

9. A Covered Cause of Loss is any "[r]isks of [d]irect [p]hysical [l]oss unless the loss is" either expressly excluded or limited. *Id.* at p22, § A.

ANSWER: The Policy is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

10. Subject to certain conditions and exclusions, and in the event that the Insured Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, "extra expenses." *Id.* at p. 12, § 10; p. 13, § 11(a)(2)-(3), p. 15, § 12; p. 18, § A(1)-(2).

ANSWER: The Policy is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

11. The limits of liability under the Policy are "\$22,155,400 per Occurrence[.]" *Id.* At p. 1; p. 4, § E.

ANSWER: The Policy is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

The Insured Property and Its Fire Safety Inspection History

12. As part of its business operations, Tebele owned and rented the Insured Property to a tenant who operated a restaurant in it. The Insured Property's lease required the tenant to "maintain the premises in good and safe condition, including . . . electrical wiring, plumbing and heating installations and any other system or equipment upon the premises[.]" See **Exhibit B** at § 7.

ANSWER: The lease is a document which speaks for itself. General Security Indemnity lacks information sufficient to admit or deny the remaining allegations of Paragraph 12, and therefore denies the same.

13. During the lease term, Tebele did not have unfettered access to the Insured Property. To the contrary, the underlying lease only "permit[s Tebele] to enter upon the premises at reasonable times and upon reasonable notice" and only for the "purpose of inspecting" the Insured Property. *Id* at § 8.

ANSWER: The lease is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

14. On or about June 2017, at the direction of the Fire Marshall for the City of Myrtle Beach, Tebele contracted Crawford Sprinkler Co. of SC, Inc. ("Crawford"), a specialist in sprinkler installation and repair, to "install [a] sprinkler system in [the] existing building." See **Exhibit C**. Tebele paid Crawford to install the sprinkler system and continued to follow up with Crawford, reminding Crawford "that the [sprinkler] system had to be connected." See **Exhibit D** at 38:17-21; 73:10-24.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 14, and therefore denies the same.

15. In the summer of 2018, Tebele began shopping for alternative coverage for the Insured Property.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 15, and therefore denies the same.

16. Seizing on an opportunity to procure coverage for Tebele through Insurers, on or about August 20, 2018, David Egan ("Egan"), Crescent Coast's managing partner, contacted Whitney Gurtzweiler ("Gurtzweiler"), an employee of AmWINS Access Insurance Services, an underwriter for Insurers, with a "new submission" opportunity. See **Exhibit E**.

ANSWER: Denied that Ms. Gurtzweiler or AmWINS Access Insurance Services acted as "an underwriter for Insurers" as to the subject Policy. Otherwise, General Security Indemnity is without knowledge sufficient to admit or deny the allegations in this paragraph, which are therefore denied.

17. Two days later, Gurtzweiler sent an email to her colleague, informing him of a new submission by Egan. In that email, Gurtzweiler described Egan as "one of the agents I was telling you about that I just saw in Myrtle Beach." See **Exhibit F**. Gurtzweiler further directed her colleague to work with Sandra Nenna ("Nenna"), Egan's customer service representative and "a former [Insurer] employee [that] knows how it goes and will get you anything you need!" *Id.*

ANSWER: Denied as to the reference to Ms. Nenna being a former "Insurer" employee if intended to reference the Insurers named as Defendants in this action. Otherwise, General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 17, and therefore denies the same.

18. On or about October 3, 2018, at Insurers' request, a third party inspector conducted an inspection of the Insured Property and produced an inspection report that Insurers reviewed on November 25, 2018. See **Exhibit G**. This report indicated that the Insured Property had a "sprinkler system," and, aside from recommending changes to fire extinguisher markings, contained no additional notes regarding fire protective safeguards. *Id.* at p. 3-5.

ANSWER: The report referenced in Paragraph 18 is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

19. This report is consistent with a previous inspection conducted earlier in 2018, wherein another inspector noted that the Insured Property was "now adding a sprinkler system throughout the building in all spaces." See **Exhibit H**.

ANSWER: The report referenced in Paragraph 19 is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

20. After months of communications between the Insurance Agent and the Insurers, the Insurers received a Commercial Insurance Application from Tebele on January 11, 2019, which indicated that the Insured Property had a sprinkler system that was "100%". See **Exhibit I**.

ANSWER: General Security Indemnity admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. General Security Indemnity denies all remaining allegations.

21. The same day, however, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system. See **Exhibit J** at p. 3-4.

Specifically, Nenna explained that "[w]hen the app[lication] was submitted for the risk, it was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time." *Id.* Nenna elaborated: "We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a 'head's up' on this." *Id.* Gurtzweiler replied: "Got it, I'll note the file." *Id.* Four days later, the Insurers bound coverage.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 21, and therefore denies the same.

22. Furthermore, Insurers' own risk assessment documents indicate that the information Nenna relayed to Insurers was absolutely accurate and that Insurers designated the Insured Property as "100% sprinklered."

ANSWER: General Security Indemnity admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. General Security Indemnity denies all remaining allegations.

23. For instance, prior to binding coverage, Insurers prepared a "Schedule of Values", a document Insurers used to evaluate the risk of insuring several properties owned by Tebele, including the Insured Property. See **Exhibit K**.

ANSWER: The Schedule of Values is a document which speaks for itself. General Security Indemnity denies all remaining allegations.

24. The Schedule of Values listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* For every building, the Schedule of Values listed important information such as the real

property value of a given building, the building occupancy description, a building's overall square footage, and, critically, whether each building was "Sprinklered" — marked affirmatively by a "Y", or negatively by "N" — and the percentage of the building that was "Sprinklered," if applicable. *Id.* at Columns AD-AF. Of the twenty-three (23) properties accounted for, Insurers noted that only 24% of the 271,000 total square feet of commercial space in the area was "sprinklered." *Id.* at Row 8-9, Column AB-AD.

ANSWER: The Schedule of Values is a document which speaks for itself.

General Security Indemnity denies all remaining allegations.

25. Indeed, the Schedule of Values only marked five (5) buildings as "Sprinklered" to "100%" capacity. *Id.* at Columns AD-AF. The Insured Property, labeled as "Building 10" in the Schedule of Values, was one of those five (5) "100% Sprinklered" buildings. *Id.* at Row 10, Columns AD-AF.

ANSWER: The Schedule of Values is a document which speaks for itself.

General Security Indemnity denies all remaining allegations.

26. Thus, as indicated by the commercial insurance application, the communications between Defendants, and according to Insurer's own records and findings, the Insured Property was sprinklered to a 100% capacity.

ANSWER: General Security Indemnity admits that Plaintiff's signed Commercial Insurance Application stated that the property at 1901 North Kings Highway, Myrtle Beach, South Carolina was 100% sprinklered. General Security Indemnity denies all remaining allegations.

27. These findings, coupled with Defendants' actual and constructive knowledge of previous inspections of the Insured Property, indicate that Defendants

knew, or should have known, that the Insured Property's sprinkler was installed, but that the Insured Property's tenant did not activate the water feed.

ANSWER: Denied.

The Fire Loss And Insurers' Improper Denial Of Coverage

28. The Insured Property was completely destroyed by fire on February 24, 2019.

ANSWER: Admitted that a fire loss damaged the property on the date indicated. Otherwise, General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 28, and therefore denies the same.

29. After the loss, Insurers conducted an investigation, wherein an inspector found that the Insured Property was "in the process of installing a sprinkler system. It was almost complete but had not been connected to the water main." See **Exhibit L**.

ANSWER: Admitted that the Insurers investigated the fire loss when submitted as a claim. The report identified in Paragraph 29 is a document which speaks for itself. Admitted that after the loss the Insurers discovered that Plaintiff had not connected the sprinkler system to the water main prior to the fire. General Security Indemnity denies all remaining allegations.

30. On March 19, 2019, Insurers informed Tebele that they were "continuing to investigate the cause of this loss . . . with a full reservation of rights under the policy." See **Exhibit M**. Despite correspondence demanding that Insurers cover the loss, Insurers denied coverage on August 7, 2019. See **Exhibit N**.

ANSWER: General Security Indemnity admits that the Insurers sent correspondence informing Plaintiff of the Insurers' reservation of rights on March

19, 2019 and additional correspondence declining coverage for the Plaintiff's insurance claim on August 6, 2019. General Security Indemnity denies all remaining allegations.

FIRST CAUSE OF ACTION
(Breach of Contract Against Insurers)

31. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: General Security Indemnity incorporate its prior answers to Paragraphs 1 through 30 above as if fully stated herein.

32. Insurers, for valuable consideration paid and delivered by Tebele, issued the Policy insuring the Insured Property against "[r]isks of [d]irect [p]hysical [1]oss unless the loss is" either expressly excluded or limited. See Ex. A at p22, § A.

ANSWER: General Security Indemnity admits that it entered into the Policy with Plaintiff and consideration was paid. The Policy is a written document which speaks for itself. General Security Indemnity denies all remaining allegations.

33. The Policy includes coverage for a fire damage, and fire damage is included in the Policy as a "Specified Cause of Loss." *Id.* at p. 38.

ANSWER: The Policy is a written document which speaks for itself. General Security Indemnity denies all remaining allegations.

34. Tebele has paid \$105,870.00 in premiums, including inspection fees. *Id.* at p. 2.

ANSWER: General Security Indemnity admits that Plaintiff paid certain premiums and inspections pursuant to the coverages afforded by the Policy for

numerous properties. Non-payment of premium is not raised as a defense to coverage. General Security Indemnity denies all remaining allegations.

35. The Policy does not contain any fire-related limitations. *Id* at p. 22, § C.

ANSWER: The Policy is a written document which speaks for itself. General Security Indemnity denies all remaining allegations.

36. The Policy contains a Fire Endorsement wherein, "[a]s a condition of this insurance, [Tebele is] required to maintain" fire "protective devices," including a 'AS' Automatic Sprinkler System." *Id.* at SRU-024 (07-10).

ANSWER: The Policy is a written document which speaks for itself. General Security Indemnity admits that the Policy required Plaintiff to maintain fire protective devices, including a working sprinkler system. General Security Indemnity denies all remaining allegations.

37. The Fire Endorsement further provides that Insurers "will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed [in the Policy] and over which [Tebele] had control, in complete working order." *Id.*

ANSWER: The Policy is a written document which speaks for itself. General Security Indemnity admits that the Policy precludes coverage for loss or damage caused by fire to the extent the Plaintiff fails to maintain an applicable protective safeguard. General Security Indemnity denies all remaining allegations.

38. Insurers chose not to define "maintain," nor delineate Tebele's duties and obligations, and their scope, under Tebele's alleged duty to "maintain" the "protective devices."

ANSWER: Paragraph 38 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

39. Similarly, Insurers chose not to define "control" and "complete working order."

ANSWER: Paragraph 39 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

40. The Fire Endorsement requires the Automatic Sprinkler System protective safeguard to be maintained at the locations marked with the "AS" symbol on the Insurer's Schedule of Values. The Insurer Property descriptions and notations set forth on the Insurer's Schedule of Values, however, omits any notation, description, or reference of an "AS" symbol.

ANSWER: Paragraph 40 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

41. Nonetheless, Tebele, in compliance with the Fire Endorsement, undertook substantial action to install a building-wide sprinkler system. For instance, Tebele hired a third party specialist to install and test a building-wide sprinkler system for the Insured Property.

ANSWER: General Security Indemnity denies that Plaintiff complied with the Policy's protective safeguards requirements. General Security Indemnity

lacks information sufficient to admit or deny the remaining allegations of Paragraph 41, and therefore denies the same.

42. Tebele paid for the sprinkler system permit application and cleared the process through the City of Myrtle Beach.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 42, and therefore denies the same.

43. Tebele initiated and maintained multiple communications with the third parties hired to install the building-wide sprinkler system to ensure that the Insured Property's sprinklers were operational and connected to a water supply.

ANSWER: General Security Indemnity lacks information sufficient to admit or deny the allegations of Paragraph 43, and therefore denies the same.

44. Insurers were in possession of multiple premises inspections of the Insured Property performed prior to the loss, and which revealed the state of the Insured Property's sprinkler system.

ANSWER: Denied.

45. Insurers, through information provided by Tebele, and according to Insurers' own risk assessment documents, knew or should have known that the Insured Property's sprinkler system, through no fault of Tebele, was installed but not connected to a water supply.

ANSWER: Denied.

46. Notwithstanding its actual and constructive knowledge, Insurers bound coverage on January 15, 2019 and continued to accept and retain policy premiums for coverage that it ultimately denied.

ANSWER: General Security Indemnity admits that it entered into the Policy with Plaintiff, accepted premiums, and following an investigation, denied the claim. General Security Indemnity denies all remaining allegations.

47. Despite Insurers' actual and constructive knowledge of the Insured Property's sprinkler system, Insurers never informed Tebele of any alleged violations of the Policy's Fire Endorsement.

ANSWER: Denied.

48. Through Insurers' actions and omissions, including its failure to address any alleged issues it knew or should have known existed with the Insured Property's sprinkler system, Insurers induced Tebele to believe that coverage existed and Tebele relied upon such beliefs to its detriment.

ANSWER: Denied.

49. On or about February 24, 2019, a fire occurred in the Insured Property causing fire damage and decimating the Insured Property while the Policy was in full force and effect.

ANSWER: General Security Indemnity admits that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. General Security Indemnity lacks information sufficient to admit or deny the remaining allegations of Paragraph 49, and therefore denies the same.

50. While the Policy was in full force and effect, Tebele suffered direct physical loss, loss of business income, and damage to the Insured Property as a result of the February 24, 2019 fire.

ANSWER: General Security Indemnity admits that the Policy had an effective period of January 15, 2019 to January 15, 2020, and that the fire occurred during that period and damaged the property. General Security Indemnity lacks information sufficient to admit or deny the remaining allegations of Paragraph 50, and therefore denies the same.

51. Tebele duly submitted a claim to Defendant for benefits due under the Policy resulting from this covered loss.

ANSWER: General Security Indemnity admits that Plaintiff presented an insurance claim after a fire at the Property. General Security Indemnity denies all remaining allegations.

52. Tebele has duly performed all conditions precedent as required by the Policy, including cooperating with Insurers in its investigation of the claim.

ANSWER: Denied.

53. Although requested to do so, Insurers have failed and refused to pay to the Tebele the sums due and owing under the Policy for damages caused to the Insured Property by the February 24, 2019 fire, which failure and refusal constitutes a breach of the Policy.

ANSWER: Denied.

54. As a direct and proximate result of the breach of contract by Insurers, Tebele sustained damages in an amount to be determined by the trier of fact.

ANSWER: Denied.

5. That the Insurers denied coverage in breach of the Policy and Tebele brings this cause of action for breach of contract for actual damages suffered by Plaintiff as a result of the February 24, 2019 fire.

ANSWER: Denied.

SECOND CAUSE OF ACTION
(Bad Faith)

56. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: General Security Indemnity incorporates its prior answers to Paragraphs 1 through 55 above as if fully stated herein.

57. Insurers have breached their obligations to deal in good faith and fairly with Tebele, including mishandling the claims process and failing to pay benefits due under the Policy. Furthermore, without a reasonable basis or just cause, Insurers:

- a. Failed to pay Tebele for the loss and damage to the Insured Property;
- b. Failed to adopt and implement reasonable standards for the prompt investigation and settlement of the claims;
- c. Failed to attempt, in good faith, a prompt, fair, and equitable settlement of claims;
- d. Forced Tebele to retain legal counsel to investigate the loss, advise Tebele throughout the claims process, and prosecute this lawsuit to recover all of the benefits that should have been immediately paid under the Policy.

ANSWER: Denied.

58. Insurers' bad faith also includes failure to pay a lawful and legal claim and failure to properly document why the claim would not be paid.

ANSWER: Denied.

59. Insurers, through its agents and/or employees, have not provided a legitimate reason for denying the claim. Insurers' actions were willful, or in reckless disregard for Tebele's rights under the Policy.

ANSWER: Denied.

60. As a direct and proximate result of Insurers' bad faith actions, Tebele has been damaged in an amount to be determined by the trier of fact.

ANSWER: Denied.

61. Tebele brings this cause of action for bad faith wrongful refusal to pay an insurance claim and asks for actual damages, punitive damages, and all reasonable attorneys' fees for the prosecution of this action.

ANSWER: Paragraph 61 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

THIRD CAUSE OF ACTION
(Negligence Against Crescent Coast)

62. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: General Security Indemnity incorporates its prior answers to Paragraphs 1 through 61 above as if fully stated herein.

63. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 63 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

64. South Carolina law imposes upon Crescent Coast a duty to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 64 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

65. Crescent Coast breached its duties to Tebele through the following negligent and reckless acts and omissions:

- a. Crescent Coast was familiar with the Insured Property prior to the loss and knew, or should have known, about the Insured Property's fire safety safeguards;
- b. Crescent Coast received, processed, and delivered Tebele's commercial insurance application to Insurers;
- c. Crescent Coast knew, or should have known, that despite the commercial insurance application's notation that the Insured Property was "100% sprinklered," the Insured Property's sprinkler system was installed but not connected to a water supply source;
- d. Furthermore, Crescent Coast knew, or should have known, about the Insured Property's fire inspection and sprinkler system history through the various inspections of the Insured Property prior to binding coverage;

- e. Given Crescent Coast's actual and constructive knowledge of the Insured Property's sprinkler system, Crescent Coast had a duty to exercise good faith, reasonable skill, care, and diligence and affirmatively act to ensure that the Policy would cover risk of fire loss given all known and existing facts, and despite the Policy's Fire Endorsement;
- f. The Insurance Agent collected, and, upon information and belief, continues to collect fees and commissions incident to the Policy;

ANSWER: Paragraph 65 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

66. These actions were reckless and demonstrated a conscious disregard to exercise due care toward Tebele.

ANSWER: Paragraph 66 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

67. As a direct and proximate result of the Insurance Agent's negligent, reckless acts and omissions, Tebele brings this cause of action for actual damages to include the damages sustained from the fire damage to the Insured Property and for punitive damages.

ANSWER: Paragraph 67 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against Crescent Coast)

68. Tebele reiterates and re-alleges, as if fully set forth herein, the allegations above as if fully repeated herein verbatim.

ANSWER: General Security Indemnity incorporates its prior answers to Paragraphs 1 through 67 above as if fully stated herein.

69. This cause of action is pled in the alternative to the causes of action brought against the Insurers.

ANSWER: Paragraph 69 contains allegations that call for a legal conclusion and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

70. Crescent Coast has a specific duty under South Carolina law to exercise good faith, reasonable skill, care, and diligence when placing insurance.

ANSWER: Paragraph 70 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

71. South Carolina law holds the Insurance Agent liable if it procures coverage that is materially deficient or does not provide the coverage the Insurance Agent undertook to supply.

ANSWER: Paragraph 71 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

72. Furthermore, South Carolina law imposes an implied duty to exercise due care in giving coverage advice if an insurance agent undertakes to advise an insured or if there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relief on.

ANSWER: Paragraph 72 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

73. Crescent Coast breached its duties to Tebele under South Carolina law by failing to, among other things: 1) procure adequate coverage for the Insured Property; 2) communicate or advise Insurers of any of the Insured Property's alleged or perceived sprinkler issues; 3) remedy or act to correct the apparent coverage issues in light of the Policy's Fire Endorsement and the Insured Property's alleged sprinkler issues; and 4) continuing to collect fees and commissions off the sale of the Policy and leading Tebele to rightfully believe that, under the existing facts known to the Insurance Agent, the Insured Property was covered for fire losses.

ANSWER: Paragraph 73 contains allegations against a party other than General Security Indemnity and does not require a response from General

Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

74. The Insurance Agent's breach of its duties caused Tebele's harm and Tebele sustained damages in an amount to be established at trial, as a direct and proximate result of the Insurance Agent's breaches of the duties owed.

ANSWER: Paragraph 74 contains allegations against a party other than General Security Indemnity and does not require a response from General Security Indemnity. To the extent a response is required, General Security Indemnity denies the same.

FURTHER ANSWERING THE COMPLAINT: All previous allegations not heretofore admitted are expressly denied, including Plaintiff's prayer for relief.

AFFIRMATIVE DEFENSES

General Security Indemnity asserts the following affirmative defenses to Plaintiff's Complaint and hereby reserves the right to amend or supplement these defenses as information becomes available and known:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are not covered due to certain terms, conditions, exclusions, limitations, and endorsements of the Policy as expressed in communications between HDI and Plaintiff regarding the claim. This includes, but is not limited to, the coverage position letter issued on August 6, 2019 to the Plaintiff by the Defendant Insurers, as attached as Exhibit "A".

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to the application of the Policy's provisions excluding coverage for failure to maintain a protective safeguard, as shown by the following Policy provisions and as explained in the Defendant Insurers' August 6, 2019 correspondence to Plaintiff, attached as Exhibit "A":

* * *

Protective Safeguards – Fire Endorsement

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any "OTHER":	(a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.

Protective Safeguards

- A.** As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.

The protective safeguard(s) to which this endorsement applies are identified by the following symbols:

1. "AS" Automatic Sprinkler System , including related supervisory services.

Automatic Sprinkler System means:

- a.** Any automatic fire protective or extinguishing system, including connected:
 - (1) Sprinklers and discharge nozzles;
 - (2) Ducts, pipes, valves and fittings;
 - (3) Tanks, their component parts and supports; and
 - (4) Pumps and private fire protection mains.
- b.** When supplied from an automatic fire protective system:
 - (1) Non-automatic fire protective systems; and
 - (2) Hydrants, standpipes and outlets.

2. "AA" Automatic Fire Alarm

Means an automatic fire alarm protecting the entire building that is:

- a. Connected to a central station; or
- b. Reporting to a public or private fire alarm station.

3. "SS" Security Service,

Means a security service with a recording system or watch clock, making hourly rounds covering the entire building, when the premises are not in actual operation.

4. "SC" Service Contract

Means a written contract with a privately owned fire department providing fire protection service to the described premises.

5. "OTHER"

Means the protective system described in the Schedule.

- B.** The following is added to the **EXCLUSIONS** section of the policy referenced above:

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

* * *

FOURTH AFFIRMATIVE DEFENSE

To the extent the claim is deemed covered, which the Insurers deny entirely, all of the provisions of the Policy governing calculation of insurance proceeds owed under all coverages claimed must be applied in order to determine the proper valuation of the damages owed (.e.g. Building, Business Personal Property, Loss of Use, Ordinance or Law).

FIFTH AFFIRMATIVE DEFENSE

The Insurers' coverage decision in this action was rendered based on their objectively reasonable belief and basis for determining that coverage was not owed as expressed in their August 6, 2019 correspondence. As such, no bad faith action can be supported based on their coverage decision, even if the decision is ultimately deemed to be incorrect by this Court.

SIXTH AFFIRMATIVE DEFENSE

General Security Indemnity reserves the right to allege any additional affirmative defenses, as the facts become known.

WHEREFORE, General Security Indemnity, having fully answered the Complaint of Plaintiff and asserted its Affirmative Defenses, respectfully prays the Court as follows:

1. That Plaintiff shall have and recover nothing from the Defendant General Security Indemnity and that Plaintiff's Complaint be dismissed with prejudice;
2. That General Security Indemnity's Affirmative Defenses be sustained;
3. That the costs and reasonable attorneys' fees General Security Indemnity incurs defending this Action be taxed to the Plaintiff; and
4. For such other and further relief as the Court deems just and proper.

BUTLER WEIHMULLER KATZ CRAIG LLP

/s/ L. Andrew Watson

L. Andrew Watson

SC Bar No.: 100322

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*Attorneys for Defendant General Security Indemnity
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CIVIL CASE NO. 2020-CP-26-0808
	)	
A. Tebele & Sons, a South Carolina	)	
General Partnership,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ANSWER OF
	)	CRESCENT COAST INSURANCE, LLC
Certain Underwriters at Lloyd's,	)	
HDI Global Specialty SE,	)	
General Security Indemnity Company of	)	
Arizona, and	)	(Jury Trial Demanded)
Crescent Coast Insurance, LLC,	)	
	)	
Defendants.	)	

Defendant, Crescent Coast Insurance, LLC, herein responds to the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not hereinafter specifically admitted is denied.
2. This Defendant would show that the allegations contained in Paragraphs 1 and 2 of the Complaint do not require a response; however, it is specifically denies that it was negligent or breached a fiduciary duty or that it owes the Plaintiff damages.
3. This Defendant, upon information and belief, admits the allegations as contained in Paragraph 3 of the Complaint.
4. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraph 4 of the Complaint.
5. This Defendant, upon information and belief, admits the allegations as contained in Paragraphs 5 and 6 of the Complaint.

6. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraph 7 of the Complaint.
7. With regard to Paragraphs 8, 9, 10 and 11 of the Complaint, this Defendant admits the existence of the “policy” and would show that the document speaks for itself.
8. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraphs 12, 13, 14 and 15 of the Complaint, and, therefore, demands strict proof thereof.
9. With regard to Paragraphs 16 and 17 of the Complaint, this Defendant admits that there were communications with the Plaintiff concerning obtaining coverage and that there were email communications including Exhibits E and F to the Complaint.
10. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraphs 18 and 19 of the Complaint, and, therefore, demands strict proof thereof.
11. With regard to Paragraph 20 of the Complaint, this Defendant admits the existence of the commercial insurance application and would show that the document speaks for itself.
12. With regard to Paragraph 21 of the Complaint, this Defendant would show that there were communications concerning the sprinkler system and would show that the documents speak for themselves.
13. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraphs 22 of the Complaint, and, therefore, demands strict proof thereof.
14. With regard to Paragraphs 23, 24, 25 and 26 of the Complaint, this Defendant would show that the document speaks for itself, and this Defendant has insufficient information in which to admit or deny the remaining allegations, and, therefore demands strict proof thereof.

15. With regard to Paragraph 27, this Defendant admits that it was aware that the sprinkler system was installed; however, it has insufficient information in which to admit or deny the remaining allegations, and, therefore, demands strict proof thereof.
16. With regard to Paragraph 28 of the Complaint, this Defendant, upon information and belief, admits that a fire occurred at the insured's property on or about February 24, 2019 which caused substantial damages.
17. This Defendant has insufficient information in which to admit or deny the allegations as contained in Paragraphs 29 and 30 of the Complaint.

FOR A FIRST DEFENSE AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract Against Insurers)

18. This Defendant would show that the allegations contained in Paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 55 of the Complaint do not pertain to this Defendant, and, therefore, do not require a response; however, to the extent these paragraphs contain any allegations of wrongdoing on the part of this Defendant, then same is denied.

FOR A FIRST DEFENSE AS TO THE SECOND CAUSE OF ACTION
(Bad Faith)

19. This Defendant would show that the allegations contained in Paragraphs 57, 58, 59, 60 and 61 of the Complaint do not pertain to this Defendant, and, therefore, do not require a response; however, to the extent these paragraphs contain any allegations of wrongdoing on the part of this Defendant, then same is denied.

FOR A FIRST DEFENSE AS TO THE THIRD CAUSE OF ACTION
(Negligence Against Crescent Coast)

20. This Defendant would show that Paragraph 63 of the Complaint does not require a response.

21. With regard to Paragraph 64 of the Complaint, this Defendant denies that it breached any duty of care.

22. This Defendant denies the allegations as contained in Paragraphs 65, 66 and 67 of the Complaint.

FOR A FIRST DEFENSE AS TO THE FOURTH CAUSE OF ACTION
Breach of Fiduciary Duty Against Crescent Coast

23. This Defendant would show that Paragraph 69 of the Complaint does not require a response.

24. With regard to Paragraph 70 of the Complaint, this Defendant specifically denies that it breached any duty of care.

25. This Defendant would show that the allegations as contained in Paragraphs 71 and 72 of the Complaint call for legal conclusions and do not require a response; however, it specially denies that it violated any South Carolina law.

26. This Defendant denies the allegations as contained in Paragraph 73 and 74 of the Complaint.

FOR A SECOND DEFENSE

27. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.

28. The complaint fails to set out sufficient allegations to constitute a cause of action as against this Defendant.

FOR A THIRD DEFENSE

29. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.

30. This Defendant asserts equitable estoppel as an affirmative defense.

FOR A FOURTH DEFENSE

31. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.
32. This Defendant would show that the Plaintiff's alleged damages were due to and caused by its own acts or omissions.

FOR A FIFTH DEFENSE

33. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.
34. This Defendant asserts comparative negligence as an affirmative defense.

FOR A SIXTH DEFENSE

35. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.
36. This Defendant relied upon information provided by the Plaintiff in conjunction with the application for insurance.

FOR A SEVENTH DEFENSE

37. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.
38. That any claim for punitive or exemplary damages as set forth in the Complaint against this Defendant would violate this Defendant's constitutional rights under the Due Process Clause in the Fifth and Fourteenth Amendments to the Constitution of the United States of America, Excessive Fines Clause in the Eighth Amendment to the Constitution of the United States of

America, the Double Jeopardy Clause in the Fifth Amendment to the Constitution of the United States of America, and similar provisions in the Constitution of the State of South Carolina and/or the common law and public policies of the State of South Carolina, and/or applicable statutes and court rules, and this Defendant raises these defenses as a complete bar to the imposition of punitive or exemplary damage against them.

FOR AN EIGHTH DEFENSE

39. This Defendant reiterates the allegations as contained in the previous defenses as if repeated verbatim within this defense.
40. This Defendant would show that any award of punitive damage is subject to the provisions and limitations as contained in §15-32-520 and §15-32-530 of The Code of Laws of South Carolina, as amended.

Wherefore, having fully responded to the Complaint of the Plaintiff, Defendant, Crescent Coast Insurance, LLC, requests that same be dismissed with prejudice, together with the costs and disbursements in the defense of this matter, and for such other and further relief as this Court deems just and proper.

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Respectfully submitted,

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Douglas C. Baxter

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Attorneys for Crescent Coast Insurance, LLC

May 8, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina)
general partnership,)

Plaintiff,)

vs.)

CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.)

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
PARTIAL SUMMARY
JUDGMENT AS TO THE
AMBIGUITY AND NON-
APPLICATION OF THE
PROTECTIVE SAFEGUARD
ENDORSEMENT**

**TO: THE DEFENDANTS ABOVE-NAMED BY AND THROUGH THEIR
ATTORNEYS OF RECORD:**

YOU WILL PLEASE TAKE NOTICE that, within ten days after service hereof, or as soon as this matter can be heard, the Plaintiff, A. Tebele & Sons, by and through its undersigned counsel, will move before this Honorable Court pursuant to Rule 56, SCRCP, for an order granting Plaintiff's Motion for Partial Summary Judgment against the Defendants, Certain Underwriters at Lloyd's ("Lloyd's"), HDI Global Specialty SE ("HDI"), General Security Indemnity Company of Arizona ("General Security" and together "Insurers") with respect to the ambiguity and non-application of the Protective Safeguard Fire Endorsement (the "Endorsement"), and as to Plaintiff's entitlement to coverage under the subject insurance policy for the damages sustained by the insured property as a result of the February 24, 2019 fire loss. Specifically, the ambiguous exclusionary clauses in the Endorsement that the Insurers relied upon to deny coverage must be construed by the Court in favor of coverage. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994); *B.L.G. Enter. v. First Financial Ins. Co.*, 328

S.C. 374, 491 S.E.2d 695 (Ct. App. 1997); *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420 (1969). This Motion is made pursuant to Rule 56, *South Carolina Rules of Civil Procedure*, and is based on the grounds that there is no genuine issue of material fact, and that, as a matter of law, the Plaintiff is entitled to coverage under the subject insurance policy for the damages sustained by the insured property as a result of the February 24, 2019 fire loss.

The within Motion is supported by the pleadings, written discovery, the record of this action, the supporting Memorandum of Law and supporting Exhibits attached thereto filed simultaneously herewith, the Affidavit of Abraham Tebele filed simultaneously herewith and attached hereto and incorporated herein by reference as Exhibit “A,” and such other and further evidence as may be presented to the Court prior to or at the time of the hearing.

For Rule 11 purposes, the undersigned counsel submits that consultation with opposing counsel is not required as the within Motion for Partial Summary Judgment is a dispositive motion.

DESCHAMPS LAW FIRM

s/William W. DesChamps, III

William W. DesChamps, III, S.C. Bar No. 77150

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Attorney for Plaintiff

May 10, 2022

Myrtle Beach, South Carolina

[illegible]

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina)
general partnership,)

Plaintiff,

VS.

CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)

Defendants.

**PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL
SUMMARY JUDGMENT
CONCERNING THE AMBIGUITY
AND NON-APPLICATION OF
THE PROTECTIVE SAFEGUARD
ENDORSEMENT AND
INSURERS' ESTOPPEL AND
WAIVER THEREOF**

Plaintiff, A. Tebele & Sons (“Tebele” or “Plaintiff”), submits this memorandum of law in support of its motion for partial summary judgment against Defendants, Certain Underwriters at Lloyd’s (“Lloyd’s”), HDI Global Specialty SE (“HDI”), General Security Indemnity Company of Arizona (“General Security” and together “Insurers”), and Crescent Coast Insurance, LLC (“Crescent Coast” and, collectively with “Insurers” the “Defendants”), with respect to the non-application of the Protective Safeguard Fire Endorsement (the “Endorsement”) and how Insurers are estopped from invoking, and have waived their rights under, the Endorsement.

INTRODUCTION

Tebele owns and leases a variety of commercial properties throughout Horry County, South Carolina. One such property is located at 1901 N. Kings Highway, Myrtle Beach, SC 29577 (the “Property”). As of early 2019, Tebele was leasing the Property to a tenant, who was operating it as La Casona Mexican Restaurant.

On February 24, 2019, a fire completely destroyed the Property, including all fixtures and business personal property on site. Tebele immediately notified the Insurers, who sold Tebele an all-risk property policy a few months before the fire for the price of \$105,870. In exchange, the Insurers promised to “pay for direct physical loss of or damage to the [Property] caused by or resulting from any Covered Cause of Loss,” specifically contemplating coverage for loss caused by fire.

The Insurers nevertheless denied coverage because the policy contained a “Protective Safeguard Fire Endorsement.” This endorsement, which the Insurers separately issued after they bound coverage, required Tebele “to maintain” fire “protective devices,” including an “AS’ Automatic Sprinkler System.” Otherwise, the Insurers threatened not to “pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed [in the Policy] and over which [Tebele] had control, in complete working order.”

Leading up to the fire, Tebele spent thousands of dollars hiring specialists and contractors to design, install, and connect sprinkler systems throughout the Property. This maintenance obligation belonged to the tenant, as set forth in the Property’s lease, but Tebele expended substantial resources to accelerate and facilitate the process. The contractors completed the installation of the sprinkler system infrastructure, but never connected it to local water lines.

The Insurers knew this. Multiple property inspections revealed that the sprinkler system was installed, but not connected to water. Tebele also informed his broker, Crescent Coast, that the installed sprinkler system lacked waterline connections. In turn, Crescent Coast expressly told the Insurers’ underwriter that the “100% sprinklered” Property lacked waterline connections.

Rather than do anything about this information during underwriting or inform Tebele of any purported sprinkler requirement, the Insurers stayed silent, bound coverage, and subsequently

issued the Endorsement after the fire. Tebele never saw the Endorsement prior to the fire, and never agreed to its use in the Policy.

The Insurers' coverage position is wrong, and Tebele is entitled to partial summary judgment on three grounds.

First, as a matter of law, the exclusionary language in the Endorsement is ambiguous, and this Court must interpret this ambiguity in Tebele's favor. It is undisputed that Tebele "maintained" the sprinkler system prior to the fire, and the Insurers cannot therefore meet their burden to apply the exclusionary language in the Endorsement as a matter of law.

Second, the Endorsement has no legal effect because the undisputed facts demonstrate that the Insurers never provided Tebele with a copy of the Endorsement (or notice of its purported inclusion in the Policy) prior to policy issuance.

Finally, the Insurers are estopped from denying coverage under the Endorsement because they knew, or at very least should have known, that the Property's installed sprinkler system was not connected to water prior to the fire. As courts across the country have held in nearly identical circumstances, insurance companies cannot learn information impacting their risk during underwriting, bind coverage in reliance upon it, and subsequently collect premiums and issue tailored exclusionary endorsements to bar coverage for the heightened risk they know exists.

STATEMENT OF UNDISPUTED FACTS

A. Even Though the Property's Lease Imposed All Maintenance Obligations on the Tenant, Tebele Contracted and Paid for the Complete Installation of the Property's Sprinkler Infrastructure.

As part of Tebele's commercial real estate business, Tebele rents the Property to third-party tenants. **Ex. A, Plaintiff's 30(b)(6) Deposition** at 14:11-14. Since approximately 1995, Tebele rented the Property to third-party tenants, which, in turn, used it to operate restaurant and

night club businesses. *Id.* at 13:19-24. In 2016, Tebele formally leased part of the Property to Melissa Garcia (“Garcia”), who used a portion of the Property for dining and entertainment purposes.

The Property’s lease required Garcia, not Tebele, to “maintain the premises in good and safe condition, including . . . electrical wiring, plumbing and heating installations and any other system or equipment upon the premises[.]” *See Ex. B, Amend. To Comm. Lease* at § 7. Indeed, under the Property’s lease, Tebele never had unregulated, daily access to the Property. To the contrary, the Property’s lease “permit[s] [Tebele] to enter upon the premises at reasonable times and upon reasonable notice” and only for the “purpose of inspecting” the Property. *Id.* at § 8. Garcia planned to expand her occupancy to the remaining unoccupied portion of the Property, but no sprinkler system hardware was installed. *See Ex. C, Tebele’s Examination Under Oath Deposition* at 28:13-25; 29:1-5. In accordance with the terms of the lease, Garcia was responsible for installing a sprinkler system, and local authorities “wouldn’t issue a business license to her unless she installed [it].” *See Ex. A* at 16:1-3.

In June 2017, at the direction of the fire marshal for the City of Myrtle Beach, Tebele assisted Garcia with contracting Crawford Sprinkler Co. of SC, Inc. (“Crawford”), a specialist in sprinkler installation and repair, to install a sprinkler system for the Property. *See Ex. D, Crawford Email Correspondence.* Tebele paid Crawford for the work and for the permit application. *See Ex. E, Sprinkler Permit Inquiry & Payment Information.* To confirm the sprinkler system was properly installed, Tebele repeatedly contacted Crawford and their subcontractors in August of 2018, telling them “that the [sprinkler] system had to be connected.” *See Ex. C* at 38:17-21; 73:10-24. Ultimately, Tebele paid thousands of dollars to Crawford for

the complete installation of the sprinkler system, but neither Crawford nor Garcia endeavored to connect the sprinkler infrastructure to water pipelines.

B. Insurers Knew That the Property's Sprinkler Infrastructure Was Unconnected to Water Lines When They Bound Coverage.

Tebele began shopping for insurance coverage for the Property in the summer of 2018. On August 20, 2018, David Egan ("Egan"), the Managing Partner of Crescent Coast Insurance, an insurance broker working to help Tebele procure coverage, contacted Whitney Gurtzweiler ("Gurtzweiler"), an underwriter and Vice President at AmWINS Access Insurance Services ("AmWINS"), with a "new submission" for coverage. *See Ex. F, Egan 8/20/18 Email.*

Specifically, Egan asked Gurtzweiler to review a "new submission" attached to an email and informed her that Tebele was "looking to switch [carriers] mid-term." *Id.* Two days later, Gurtzweiler sent an email to her colleague, Barrett Sellars ("Sellars"), informing him of a new submission through Egan, "one of the agents I was telling you about that I just saw in Myrtle Beach." *See Ex. G, Gurtzweiler 8/22/18 Email.* Gurtzweiler further informed her colleague to work with Sandra Nenna ("Nenna"), Egan's customer service representative and "a former AmWINS employee [that] knows how it goes and will get you anything you need!" *Id.* Gurtzweiler also asked Sellars for his discretion because Tebele did not "want to put [its former carrier] on alert that they are moving the business" to AmWINS. *Id.* Gurtzweiler concluded communications with Sellars, informing him that she "will work on the [general liability and excess general liability]" for Tebele's account. *Id.*

The dynamics of underwriting the Tebele Policy are clear: Tebele's broker worked through Gurtzweiler – an AmWINS underwriter and agent of the Insurers – to procure coverage for the Policy. Indeed, during his deposition, Tony Hayter ("Hayter"), the corporate representative for the Insurers, admitted that he worked closely with AmWINS in preparation for his deposition and

that AmWINS was the “managing general agency for . . . the [Tebele Policy].” *See* **Ex. H, Lloyd’s of London 30(b)(6) Deposition** at 6: 20-25 (explaining that Hayter participated in conference calls with AmWINS prior to his deposition); *Id.* at 13:1-14 (explaining that AmWINS is the managing general agent that underwrote the risk for the Insurers on the Policy); *Id.* at 14:3-4 (explaining that “[a] binding authority would be in place between [the Insurers] and AmWINS.”).

On October 3, 2018, at the Insurers’ request, a third-party inspector conducted an inspection of the Property and produced an inspection report, which the Insurers reviewed on November 26, 2018. *See* **Ex. A** at 65:14-17; **Ex. I, Insurers’ 10/3/18 Inspection Report**. This report indicated that the Property had a “sprinkler system,” and, aside from recommending changes to fire extinguisher markings, contained no additional notes regarding fire protective safeguards. *Id.* at pp. 3-5. An additional inspection and report conducted on February 14, 2018 concluded, among other things, that the Property was “now adding a sprinkler system throughout the building in all spaces.” *See* **Ex. J, 2/14/18 Broker Report**. The Insurers conducted an additional inspection of the Property’s premises on January 10, 2019, wherein they had ample opportunity to assess the entire, fully installed sprinkler system. *See* **Ex. A** at 44:18-25; 45:1-2; 47:2-7; **Ex. K, ISO 1/10/19 Survey**.

On January 14, 2019, the Insurers received a Commercial Insurance Application, which indicated that the Property was “100% Sprinklered”. *See* **Ex. L, Tebele Insurance Application at pp. 4, 21**. Furthermore, before the Insurers bound coverage for the Property, Tebele crystalized a crucial point to Crescent Coast: the Property’s sprinkler system was completely installed but unconnected to water supply lines. *See* **Ex. A** at 31:9-14. Specifically, Tebele informed Crescent Coast that “there’s a sprinkler system, but it’s not connected to the water. And then [Crescent Coast] asked me, does it go through the whole building? And I said, yeah, it goes through 100

percent of the building.” *Id.* As Tebele explained, the application’s reference to the Property’s “100%” sprinkler system was correct because “the designation of the 100 percent literally means that there is a sprinkler system in the building . . . there’s no reference or mention of being connected in that designation.” *See id.* at 100:17-21.

This information found its way to AMWINS. Indeed, before Tebele submitted the application for insurance on the Property, Nenna contacted Gurtzweiler on January 11, 2019 to clarify that the insurance application incorrectly rated the sprinkler system. *See Ex. M*, Gurtzweiler 1/11/19 Email Correspondence at p. 1. Specifically, Nenna explained that “[w]hen the app[lication] was submitted for the risk, it was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time.” *Id.* Nenna elaborated: “We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a ‘head’s up’ on this.” *Id.* Gurtzweiler replied: “Got it, I’ll note the file.” *Id.* at p. 2. Four days later, the Insurers bound coverage, with knowledge of this information.

Additional underwriting materials unequivocally show that the Insurers knew the risk they were accepting premiums to insure. For instance, prior to binding coverage, the Insurers prepared a “Schedule of Values,” a document used to evaluate the risk of insuring several properties owned by Tebele, including the Property. *See Ex. N, Insurers’ Schedule of Values.* The Schedule of Values listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* at p. 1. For every building, the Schedule of Values listed important information such as the real property value of a given building, the building occupancy description, a building’s overall square footage, and, critically, whether each building was “Sprinklered” – marked affirmatively by a “Y”, or negatively by an “N” – and the percentage

of the building that was “Sprinklered,” if applicable. *Id.* at p. 2 (as highlighted in red in the graph below).

AmRisc Application / Schedule of Values

Any person who knowingly and with intent to defraud any insurance company files an application for insurance or statement of claim containing any materially false or misleading information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and subjects the person to criminal and (NY; substantial) civil penalties. In some states insurance benefits may also be denied. **By submission of this application the insured and the agent represent that all information is true and correct to the best of their knowledge and that they have not deleted or altered the questions herein.**

Yellow = Required

Orange = Required for ACIC

Blue = Required if habitational

Green = Required for General Liability

Gray = Required for High Hazard Quake

Properties. (Warranted)

Total # Units	Total Sq. Ft.	Avg % Occup	Avg % Sprinklered
0	271,000		24%
BVRents per Unit per Month			
Sq. Ft. per Unit			

* Bldg. No.	*Property Ty	Location Name	AddressNo	*Street Address	*City	*State Co	Is Prop Mgd or Ownr	Date Added to Sched	*# of Units	*Square Footage	% Occupied	Percent Sprinklered	Sprinklered (Y/N)	ISO Prot. Cla	Flood Zone
1	Building		2909	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
2	Building		2911	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
3	Building		502	30th Ave S	Myrtle Beach	SC				900				1	
4	Building		3001	N Kings Hwy	Myrtle Beach	SC				17,000				1	
5	Building		3205	N Kings Hwy	Myrtle Beach	SC				8,400		0%	n	2	
6	Building		1600	EIS N Kings Hwy	Myrtle Beach	SC				10,000		0%	n	1	
7	Building	310-312	310	9th Ave N	Myrtle Beach	SC				1,000		0%	n	1	
8	Building	316-320	316	9th Ave N	Myrtle Beach	SC				3,800		0%	n	1	
9	Building	609-611	609	S Kings Hwy	Myrtle Beach	SC				3,500		0%	n	1	
10	Building		1901	N Kings Hwy	Myrtle Beach	SC				36,000		100%	y	1	
11	Building		610	WFS S Kings Hwy	Myrtle Beach	SC				25,000		100%	y	1	
12	Building		1012	S Kings Hwy	Myrtle Beach	SC				20,000		0%	n	1	
13	Building		900	Chester St	Myrtle Beach	SC				3,000		0%	n	1	
14	Building		201	Main St	North Myrtle Beach	SC				5,000		0%	n	2	
15	Building	94-96	94	S Kings Hwy	North Myrtle Beach	SC				10,000		0%	n	2	

Of the twenty-three (23) properties listed, the Insurers noted that only 23% of the 271,000 total square feet of commercial space in the area was “sprinklered.” *Id.* at p. 2 “Avg % Sprinklered”. Indeed, the Schedule of Values only marked five (5) buildings as “Sprinklered” to “100%” capacity. *Id.* at p. 2 “Percent Sprinklered”. The Property, labeled as “Building 10” in the Schedule of Values, was one of them. *Id.* at p. 2.

C. The Policy Language and the Protective Safeguard Endorsement.

The Insurers sold Tebele an all-risk property insurance policy that promises to “pay for direct physical loss of or damage to the [Property] caused by or resulting from any Covered Cause of Loss.” See **Ex. O** at p. 18, Tebele Insurance Policy at p. 8 § A (the “Policy”). In turn, a Covered

Cause of Loss is any “[r]isks of [d]irect [p]hysical [l]oss unless the loss is” either expressly excluded or limited. *Id.* at p. 32, Policy at p. 22, § A. Subject to certain conditions and exclusions, and in the event that the Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, “extra expenses.” *Id.* at p. 22, Policy at p. 12, § 10; p. 23, Policy at 13, § 11(a)(2)-(3); p. 25, Policy at p. 15, § 12; p. 28, Policy at p. 18, § A(1)-(2).

As an all-risk property coverage policy, fire-related losses constitute a “Specified Cause of Loss.” *Id.* at p. 48, Policy at p. 38. In total, the limits of liability under the Policy are “\$22,155,400 per Occurrence” and Tebele paid \$105,870.00” in premiums for the Policy, including inspection fees. *Id.* at p. 14, Policy at p. 4, § E.

The Protective Safeguard Endorsement provides that “[a]s a condition of this insurance, [Tebele] required to maintain” fire “protective devices,” including a “‘AS’ Automatic Sprinkler System.” *See id.* at p. 80, SRU-024 (07-10). The Endorsement contains an exclusion:

B. The following is added to the **EXCLUSIONS** section of the policy referenced above:

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

SRU-024 (07-10)
Page 1 of 1

Id. Critically, the Insurers chose not to define “maintain,” nor did they specify what Tebele was required to do in order to “maintain” the “protective devices.” Nor did the Insurers chose to define “control” or the phrase “complete working order.”

Tebele never received the Endorsement until *after* the fire, nor did he consent to its inclusion in the Policy. Specifically, during his deposition, Tebele was asked, “[d]o you recall when you received [the Endorsement]?” *See Ex. A* at 140:4-6. He replied: “After the fire . . . The

fire was February 24 of '19 . . . I think I received a copy of the [P]olicy after the fire, and the specific [E]ndorsement, probably in March.” *Id.* at 140:11-14. Tebele never discussed the Endorsement with its broker, Crescent Coast, nor the Insurers. When asked if “Crescent Coast ever discuss[ed] the Endorsement . . . before coverage was bound,” Tebele simply responded, “[n]o.” *Id.* at 140:19-22; *see also* **Ex. C** at 83:9-17; 113:9-14.

ARGUMENT AND MEMORANDUM OF LAW¹

Tebele moves for partial summary judgment on three specific issues.

First, as a matter of law, the Endorsement is ambiguous. The Endorsement requires Tebele to “maintain” the sprinkler system “over which [Tebele] ha[s] control.” Neither the Endorsement nor the Policy define these terms. Yet, similar to other courts that have interpreted endorsements and facts almost identical to these, Tebele’s complete installation of the Property’s sprinkler system is legally sufficient to satisfy the Endorsement’s condition that Tebele “maintain” the sprinkler system. Moreover, it is an undisputed fact that the Property’s tenant, not Tebele, had control over the maintenance of the Property’s sprinkler system.

Second, as a matter of law, the Endorsement cannot bar coverage for the fire because Tebele never received the Endorsement when the Insurers bound coverage, nor was he made aware of the Endorsement’s existence until after the fire. The Endorsement, which fundamentally

¹ This Court should enter summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), *South Carolina Rules of Civil Procedure*. All reasonable inferences therefrom, in the light most favorable to the non-moving party. *Simmons v. Toumey Regional Medical Center*, 533 S.E.2d 312 (2000) (citing *Manning v. Quinn*, 365 S.E.2d 24 (1988)).” But non-moving parties opposing summary judgment “must come forward with specific facts showing that there is a genuine issue for trial” or affirmatively demonstrate the presence of genuine issues of fact. *See Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 608 (2013) (quoting *Russell v. Wachovia Bank, N.A.*, 578 S.E.2d 329, 335 (2003)); *Nelson v. Piggly Wiggly Cent., Inc.*, 701 S.E.2d 776, 779 (Ct. App. 2010). Once the moving party meets its initial burden of showing a lack of genuine issue of material fact, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Bravis v. Dunbar*, 449 S.E.2d 495, 496 (1994).

affected coverage for losses under the Policy, has no legal effect under South Carolina law if the insured did not receive it prior to binding.

Finally, Insurers are estopped from invoking, and have waived rights under, the Endorsement. Insurers knew the Property's sprinkler system was unconnected to water lines and bound coverage anyway, knowing they could continue to collect premiums and simply lean on the Endorsement to bar coverage for any fire losses.

A. As a Matter of Law, the Endorsement Is Ambiguous and This Court Must Interpret It in Tebele's Favor.

"Maintain" and "over which you have control" have more than one reasonable meaning in light of the policy language, rendering the exclusionary language in the Endorsement ambiguous. Construed in Tebele's favor, the undisputed facts show that Tebele "maintained" the Property's sprinkler system prior to the fire. The Insurers are therefore unable to meet their burden to apply the exclusion in the Endorsement as a matter of law, entitling Tebele to partial summary judgment.

Under South Carolina law, "[i]nsurance policies are subject to the general rules of contract construction," whereby courts endeavor to "ascertain and give legal effect to the parties' intentions as determined by the contract language." *Beaufort County Sch. Dist. v. United Nat'l Ins. Co.*, 709 S.E.2d 85, 90 (S.C. 2011). If, however, an "insurance contract is . . . in any respect ambiguous or capable of two meanings," then such terms "must be construed in favor of the insured." *Id.* As such, South Carolina courts follow the "universal rule that an insurance policy must be construed most strongly against the insurer, resolving any ambiguity in favor of the insured[.]" *Harleysville Mut. Casualty Co. v. Nationwide Mut. Ins. Co.*, 150 S.E.2d 233, 234 (S.C. 1966).

This rule applies with special force to exclusionary policy language, which is "construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Auto-Owners Ins. Co. v. Benjamin*, 781 S.E.2d 137, 141 (S.C. 2015).

Within this analytical framework, South Carolina courts must scrutinize the meaning of every word in an insurance policy – especially where an insurer relies on undefined terms to bar coverage through an exclusion. *See Beaufort County*, 709 S.E.2d at 91 (extensively interpreting the terms “series” and “related” in an exclusion and holding in the insured’s favor at summary judgment because both terms were “not defined in the endorsements, so [they] must be defined according to the usual understanding of the ordinary person.”).

In the context of interpreting fire protective safeguard endorsements, courts across the country have found that the terms “maintain” and “over which you had control” are ambiguous and, as such, must be interpreted in the insured’s favor.

In *Breton, LLC v. Graphic Arts Mut. Ins. Co.*, the Fourth Circuit Court of Appeals partially affirmed the trial court’s entry of summary judgment in the insured’s favor when the carrier denied coverage for a fire loss based on a protective safeguard endorsement. 446 Fed. Appx. 598, 600 (4th Cir. 2011). The insured in *Breton* completely installed an automatic sprinkler system, but the “valve controlling the water to the sprinkler heads was in the closed position, rendering the . . . sprinkler system inoperable.” *Id.* at 601. The carrier denied coverage for a fire loss based on an endorsement that required the insured to “maintain the protective devices or services listed in the [s]chedule . . . as a condition of this insurance,” including “an automatic sprinkler system[.]” *Id.* at 600. The Fourth Circuit sided with the insured and the trial court, explaining that “the word ‘maintain’ may be understood in more than one way, which supports a finding of ambiguity.” *Id.* at 603 (internal quotations omitted).

While the carrier in *Breton* argued that the word “maintain” was not open to interpretation nor ambiguous because it has a “plain meaning,” the Fourth Circuit disagreed. Specifically, “[a]s used in the insurance contract, ‘maintain’ could be reasonably interpreted . . . to refer to an

obligation to continue to have an Automatic Sprinkler System,” instead of the insurer’s interpretation, which implied “regular repair obligations with respect to the Automatic Sprinkler System.” *Id.* Indeed, the exclusionary language in the *Breton* policy did not define “maintain,” but qualified it with contiguous language, “in complete working order.” *Id.* Thus, “interpreting ‘maintain’ to require ensuing operability would render the ‘in complete working order’ language in the exclusion superfluous.” *Id.* Ultimately, the Fourth Circuit held that the insured “satisfied the condition placed on coverage” because it simply “kept an Automatic Sprinkler System in place at all relevant times[.]” *Id.* at 604.

Likewise, in *Five Star Hotels, LLC v. Ins. Co. of Greater N.Y.*, the insured purchased a property policy that, similar to *Breton*, required it to “maintain the protective devices or services listed in [a schedule].” 2011 U.S. Dist. LEXIS 31313, *7 (S.D.N.Y. Mar. 24, 2011). When water damage stemming from leaking sprinkler pipes and water lines destroyed the insured’s premises, the carrier denied coverage under the protective safeguards endorsement, arguing that the insured failed to “maintain” the sprinkler system. *Id.* *16. The Southern District of New York, drawing from the trial court’s opinion in *Breton*, disagreed, holding that “the term ‘maintain’ is hopelessly ambiguous here.” *Id.* at *23-24. Indeed, the court held that “‘maintain’ could mean that [the insured] was obligated to keep the switches and valves in the open position,” or it “could mean that [the insured] was obligated to ensure that all piping and standpipes were properly functioning.” *Id.* at *24. “Maintain” could also mean that the insured “was obligated to keep the system in place and not to dismantle it.” *Id.* Ultimately, “[a]ny of these meanings would be a reasonable application of the word ‘maintain’ as used in the policy.” *Id.* Thus, the court held that the insured’s “coverage claim is not barred by any breach of the Protective Safeguards Endorsement.” *Id.*

Here, the Endorsement is nearly identical to those interpreted and held as ambiguous by the courts in *Breton* and *Five Star Hotels*. The Endorsement provides that “[a]s a condition of this insurance, [Tebele is] required to maintain” fire “protective devices,” including a “‘AS’ Automatic Sprinkler System.” See **Ex. O** at p. 80, SRU-024 (07-10). The Endorsement further provides that the Insurers “will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed [in the Policy] *and* over which [Tebele] had control, in complete working order.” *Id.* (emphasis added). The Insurers chose not to define “maintain,” or to specify what Tebele was required to do in order to “maintain” the “protective devices.” Nor did the Insurers choose to define “control” or the phrase “complete working order.”

Reasonably interpreted, Tebele complied with its obligations under the Endorsement because it “kept the sprinkler system in place,” and “did not dismantle it.” See *Five Star Hotels*, 2011 U.S. Dist. LEXIS 31313 at *24. Much like the insured in *Breton*, Tebele took great steps to assist Garcia, the tenant, with the installation of a complete sprinkler system in the building. See **Ex. D**. Tebele paid a contractor, Crawford, to obtain the pertinent permit application and install the sprinkler system. See **Ex. E**. To confirm the sprinkler system was properly installed, Tebele repeatedly contacted Crawford and their subcontractors in August of 2018, telling them “that the [sprinkler] system had to be connected.” See **Ex. C** at 38:17-21; 73:10-24. Ultimately, Tebele paid thousands of dollars to Crawford for the complete installation of the sprinkler system, but neither Crawford nor Garcia endeavored to connect the sprinkler infrastructure to water pipelines. Tebele undertook these actions even though he was not in control of the Property, but merely owned it. See *Byerly v. Connor*, 307 S.C. 441, 443 (S.C. 1992) (finding that a lessor was not responsible for hazardous conditions on the land created by the lessee as: “[i]n the absence of an agreement to the contrary, the lessor surrenders possession and control of the land to the lessee.”);

see also *Monari v. Surfside Boat Club, Inc.*, 469 F.2d 9, 11 (2d Cir. 1972) (defining control as “sufficient possessory dominion over the property.”); *Hanson v. General Acc. Fire Life*, 450 So. 2d 1260, 1262 n.2 (Fla. Dist. Ct. App. 1984) (“In general, the courts have held that an insured with only limited access to property does not control the property”); *Washington Hsg. Auth. v. N.C. Hsg. Auth.*, 130 N.C. App. 279, 284 (N.C. Ct. App. 1998) (declining to apply a custody, care or control exclusion where “the property was not in plaintiff’s exclusive custody or control and others, such as tenants, were in possessory control of portions of the premises.”).

Thus, as used in the Policy, and under jurisprudence interpreting cases nearly identical to this one, the Endorsement is ambiguous and must be interpreted in Tebele’s favor, meaning that the Insurers cannot deny coverage for the fire. Tebele was not in control of the Property’s sprinkler system at the time of the fire and sufficiently “maintained” the sprinkler system upon which coverage is supposedly conditioned.

B. As a Matter of Law, the Endorsement Does not Apply to Bar Tebele’s Coverage Claims Because Insurers First Served the Endorsement to Tebele after the Fire.

Endorsements to insurance policies are designed to enlarge, restrict, particularize or otherwise modify some provision of the policy. *Charles v. Canal Ins. Co.*, 121 S.E.2d 200, 210 (S.C. 1961). Under South Carolina law, an endorsement or rider to a policy definitively becomes effective to bind the insured when it is “physically attached to a policy of insurance contemporaneous with execution, and delivered to the insured as attached, and sufficient reference is made in either the policy or the attached matter to identify the papers as related...” *Id.* at 204 (citing *Brown v. State Farm Mut. Ins. Co.*, 233 S.C. 376, 388 (S.C. 1958)). Because endorsements modify the terms of insurance contracts, “to be considered a part” of a policy in question an endorsement “must be so clearly imported into it as to leave no doubt of the intention of the parties” to rely on its terms and inclusion. *Id.* Restrictions or limitations on coverage of

which an insured has no notice are not binding on the insured. *Rickborn v. Liberty Life Ins. Co.*, 468 S.E.2d 292, 297 (S.C. 1996); *See also Poston v. National Fidelity Life Ins. Co.*, 399 S.E.2d 770 (S.C. 1990) (“Applicant must have notice of limitations to be bound.”).

If, upon examination of the record, it is unclear whether “the intention of the parties [was] to treat the [endorsement] as part of the policy, [South Carolina] courts give the benefit of the doubt to the insured, and construe the policy in his favor. . .” *Id*; *see also Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 803 S.E.2d 288, 302 (S.C. 2017); *Quinn v. State Farm Mut. Auto. Ins. Co.*, 120 S.E.2d 15, 17, (S.C. 1961) (“If the language of the policy is uncertain or ambiguous, and is susceptible to more than one construction, the court will adopt and apply that construction which is most favorable to the insured.”). If, however, an endorsement is neither attached nor referenced in the policy, it will not form a part of it. *Shaw v. Hartford Acci. & Indem. Co.*, 178 F. Supp. 571, 576 (W.D. Mo. 1959).²

Here, the Insurers’ failure to provide Tebele with a copy of the Endorsement at binding, or to otherwise inform Tebele of its existence at the moment of binding, is an undisputed, material fact sufficient to destroy the Insurers’ attempt to apply the Endorsement as a bar to coverage. Tebele testified multiple times at his deposition that he never received the Endorsement until *after* the fire, nor did he consent to its inclusion in the Policy. When asked about when he first received a copy of the Endorsement, Tebele testified: “After the fire . . . The fire was February 24 of ’19 . . . I think I received a copy of the [P]olicy after the fire, and the specific [E]ndorsement, probably in March.” *See Ex. A* at 140:11-14. Tebele never discussed the Endorsement with its broker,

² South Carolina courts turn to precedent elsewhere as persuasive authority in the absence of intra-jurisdictional authority. *Golini v. Bolton*, 326 S.C. 333, 343 (S.C. Ct. App. 1997) (holding that a probate court’s citation to and adoption of other jurisdiction’s law was not error).

Crescent Coast, nor the Insurers. When asked if “Crescent Coast ever discuss[ed] the Endorsement . . . before coverage was bound,” he simply responded, “[n]o.” *Id.* at 140:19-22.

During his Examination Under Oath, Insurers’ counsel asked Tebele “[i]s the [Endorsement] something you learned about, after the fire?” *See Ex. C* at 83:15-16. Tebele simply responded, “Yes.” *Id.* at 83:17. Tebele further specified: “I had never actually seen the [E]ndorsement or the [Endorsement] section, until after the last. You know, the [P]olicy is recently binding, and then the fire occurred . . . shortly after, and we didn’t actually receive the [P]olicy, by that time.” *Id.* at 113:9-14.

Under South Carolina law, the Endorsement cannot apply to bar coverage because it was not “physically attached to a policy of insurance contemporaneous with execution, and delivered to the insured as attached, and sufficient reference is made in either the policy or the attached matter to identify the papers as related...” *Canal Ins. Co.*, 121 S.E. at 204 (citing *Brown*, 233 S.C. at 388). Tebele’s expectations in paying substantial premiums in exchange for coverage under the Policy were clear: if there was a fire, Tebele expected the all-risk Policy to cover it as a covered cause of loss. *See Ex. A* at 105:14-18 (“[W]e were purchasing a policy to cover our property, and the presumption on our part was that we were covered.”); *see also id.* at 106:14-18 (“[M]y understanding was in purchasing the [P]olicy that [the Property] would be protected against fire. And if there were any instance where I would have thought otherwise, I probably would not have purchased the [P]olicy.”).

Had Tebele known about the Endorsement, and given that all parties knew of the sprinkler situation at the Property, Tebele would not have accepted the Endorsement’s inclusion in the Policy. *See Abraham Tebele Affidavit, PLF Mot. for Sum. J., at Ex. A*, p. 3. Under South Carolina law, the Endorsement cannot be considered a part of the Policy if its inclusion brings the

contractual intent of the parties into conflict or otherwise fails to reflect the true intent of the parties in contracting for the Policy. *Canal Ins. Co.*, 121 S.E. at 204 (“[T]o be considered a part” of a policy in question an endorsement “must be so clearly imported into it as to leave no doubt of the intention of the parties” to rely on it terms and inclusion). The Endorsement’s inclusion, made without Tebele’s knowledge or consent, effectively renders coverage illusory in a situation where the Insurers knew, or should have known, that the tenant was not diligent about its maintenance obligations regarding the sprinklers.

Tebele never received the Endorsement when the Insurers bound coverage, nor was he made aware of the Endorsement’s existence until after the fire. Therefore, the Endorsement does not apply to bar coverage for Tebele’s coverage claims. Because the Insurers *exclusively* relied on the Endorsement’s application as the basis for denying coverage, coverage exists for the fire as a matter of law.

C. The Insurers Are Estopped from Invoking, and Have Waived Their Rights under, the Endorsement.

Courts across the country have assessed coverage denials implicating facts and protective safeguard endorsements akin to those at issue in this case, and have consistently held that insurers are estopped from invoking, and have waived rights under, the Endorsement.

Under South Carolina law, waiver and estoppel are related equitable remedies that prevent a party from asserting rights that have been waived through that party’s own inequitable conduct. *See Pitts v. New York Life Ins. Co.*, 148 S.E.2d 369, 371 (S.C. 1966) (noting that the two “related” doctrines “result[] from conduct of the party against whom it is invoked which has rendered it inequitable that he assert a right to which, in the absence of such conduct, he would be entitled.”). In the insurance coverage context, waiver and estoppel prevent insurers from barring coverage for losses triggered by facts known to the insurer when it bound coverage, and which the insured

reasonably understood would be covered. *See e.g Fender v. N.Y. Life Ins. Co.*, 158 S.C. 331, 339 (1930) (insurer could not rely on forfeiture clause requiring that the insured not receive any new medical diagnoses prior to policy issuance where the insurer knew that the insured breached the condition yet nevertheless issued the policy); *Hightower v. New York Fire Ins. Co.*, 112 F. Supp. 10, 11 (E.D.S.C. 1953) (insurer could not bar coverage based on the condition that the property remain unoccupied where the insurer was aware that the insured was living on the insured property); *Preferred Risk Mut. Ins. Co. v. Thomas*, 372 F.2d 227, 230-31 (4th Cir. 1967) (holding that an insurer was estopped from relying on an exclusion for vehicles used as public conveyance where the insurer knew that the vehicle would be used as such prior to issuing the policy and nevertheless bound coverage and accepted premiums); *Auto Owners Ins. Co. v. Pittman*, No. 2007-UP-341, 2007 WL 8327923, at *3 (S.C. Ct. App. June 29, 2007) (estopping insurer from denying coverage “where the insured misrepresented his health history,” but “there was evidence the insurer’s agent had been informed of the insured’s medical history,” thereby binding the insurer through agency principles). While these doctrines do not generally extend the scope of coverage afforded, they operate to waive conditions or exclusions to what is otherwise a covered cause of loss. *See Peters v. Great American Ins. Co.*, 177 F.2d 773, 778 (4th Cir. 1949) (noting that waiver may not alter the “scope of a policy” but may waive conditions of coverage); *see also Cent. Mut. Ins. Co. v. Ycaw5, LLC*, Nos. 09CVH-07-10013, 09CVA-11-17138, 2011 Ohio Misc. LEXIS 12499, at *16 (Ct. Com. Pl. Jan. 4, 2011) (denying insurer’s argument that preventing the application of a protective safeguards endorsement altered the scope of coverage where fire was a covered cause of loss under the policy).

Not only have South Carolina courts frequently applied estoppel and waiver to prevent insurers from relying on certain exclusionary clauses, but courts across the country have also

consistently estopped insurers from applying protective safeguard endorsements to bar coverage in situations akin to those at play here – where insurers bound coverage despite knowledge of dispositive, undisputed facts that could otherwise jeopardize coverage under the endorsement itself.

For instance, in *Kinsale Insurance Co. v. JDBC Holdings, Inc., et al.*, the court granted a policyholder’s motion for summary judgment in a fire loss case where the policyholder was in the process of installing a sprinkler system and the insurer bound coverage knowing it. Case No. 3:20-CV-8, 2021 WL 2773002 (N.D. W.Va. Mar. 31, 2021). The protective safeguard endorsement in *Kinsale* was almost identical to the one at play here. Specifically, the *Kinsale* policy required the policyholder, “[a]s a condition of this insurance . . . to maintain the protective devises or services listed in [the policy’s] schedule,” including a “Automatic Sprinkler System” and “related supervisory services.” *Id.* at * 4. An “Automatic Sprinkler System” meant “[a]ny automatic fire protective or extinguishing system, including connected . . . sprinklers and discharge nozzles.” *Id.*

The endorsement issued to the insured in *Kinsale* mirrors the one purportedly issued to Tebele: “We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you . . . [f]ailed to maintain any protective safeguard listed in the [s]chedule above, and over which you had control, in complete working order.” *Id.*

Much like what Tebele did before the Fire, the *Kinsale* policyholder and landowner paid a third-party contractor \$89,700 to “design, furnish, and install a fire protection system for the [policyholder’s] factory.” *Kinsale*, 2021 WL 2773002 at *1. Preparations for connectivity to city lines were underway, but incomplete. *Id.* Shortly thereafter, the policyholder began shopping for property coverage and effectively applied for insurance through a broker. *Id.* In the application process, the policyholder stated that “its sprinkler system [was] being installed” and was not yet

complete. *Id.* at *2 (internal quotations omitted). The insurer, knowing this, bound coverage and, naturally, before the policyholder could conclude all fire protective work, an accident sparked a fire that burned the factory to the ground. *Id.*

The court held that the insurer was estopped from invoking, and waived all rights under, the protective safeguard endorsement. Specifically, the court held that the insurer “knew at the time of the insurance application that [the policyholder] did not have said fire protection safeguards installed at the subject facility.” *Id.* at *6. The court noted that “[a]n insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed.” *Id.* at *7. Indeed, “[i]t is patently unfair for a claimant to obtain a policy, pay his premiums and operate under the assumption that he is insured against a specified risk, only to learn after he submits a claim that he is not insured[.]” *Id.*

Although the insurer argued against estoppel because “it believed the sprinkler system was either ‘fully installed or would be very soon,’” the court rejected that position. *Id.* In doing so, the court explained that the “undisputed portion of the record herein clearly demonstrates that [the policyholder] disclosed that the fire prevention systems at issue were not installed, but were instead ‘being installed[.]’” *Id.* Despite knowing this, the insurer “approved [the policyholder’s] application, bound and issued the subject policy, and accepted [the policyholder’s] \$80,000 premiums in exchange for coverage.” *Id.* Ultimately, the court estopped the insurer from applying the safeguard endorsement to bar coverage because it “issued the subject policy with knowledge of facts that would void the policy under the fire safeguards endorsement and because [the policyholder] relied on that decision by not obtaining coverage elsewhere[.]” *Id.*

Similarly, courts in *Colony Insurance Co. v. Peterson* and *Centennial Mutual Insurance Co. v. YCAW5, LLC* assessed facts nearly identical to those here at play and held that the insurers

waived, and were estopped from invoking, protective safeguard endorsements. 582 F. App'x 156 (4th Cir. 2014); 2011 Ohio Misc. LEXIS 12499, at *2. In *Colony*, the insurer inspected the premises the same day it issued the policy and discovered that all utilities, including water and heat, were disconnected. 582 F. App'x . at 158. A few weeks after the inspection, a fire destroyed the property and a corresponding report revealed that the sprinkler system was inactive. *Id.* at 159. Critically, in discovery, an employee of the insurer testified that she received the inspection report indicating that water and utilities were disconnected to the property, but she “just did not get to the inspection by the time the loss occurred.” *Id.* at 159. The insured also identified discrepancies “between some of the representations made on insurance applications and the conditions revealed by [insurer’s] inspections.” *Id.* Ultimately, the court held that insurer “waived its right to rescind the policy and was estopped from denying coverage” for the loss. *Id.*

Likewise, in *Centennial*, the insured owned a large warehouse and “inadvertently” turned off the sprinkler system in half the building. 2011 Ohio Misc. LEXIS 12499, at *2. A group of insurers wrote coverage for the premises and included a protective safeguards endorsement that “condition[ed]” coverage on the insured “maintain[ing] the protective devices or services,” including an “Automatic Sprinkler System.” *Id.* at *5. The policy also contained an exclusion that barred coverage if insured “[k]new of any suspension or impairment in any protective safeguard” or “[f]ailed to maintain any protective safeguard . . . in working order.” *Id.* The insurers conducted a “loss control survey” of the premises that identified operational deficiencies in the building’s sprinkler system. *Id.* at *4. The insurer received this report and discussed its findings at length with the insurer’s general agent. *Id.* at *13-14. In fact, the agent wrote two letters to the insured “urg[ing] prompt compliance” and asking the insured to “let us know within 30 days what action will be taken” by the insured to remedy the situation. *Id.* at *15.

Critically, as the court explained, “[t]here was no suggestion that coverage would not remain in force while investigation and corrective actions were pursued[.]” *Id.* at *15-16. Indeed, “more importantly[,], there is no suggestion in the record that [the insurer] did not have knowledge as good as its insured” regarding the disabled sprinklers. *Id.* at *16. After a fire decimated the premises, and after the insurer denied coverage, the court denied insurer’s summary judgment motion, finding that “the voluminous factual record appears to show that [insurer’s] underwriter knew of some significant difficulties with [insured’s] sprinkler system.” *Id.* Yet, despite that knowledge, the insurer “never suspended fire insurance . . . and took a rather benign view of the urgency of attending to this issue.” *Id.* Accordingly, the court denied the insurer’s summary judgment motion because it waived its right to assert the endorsement and exclusions at play.

Here, it is undisputed that the Insurers knew the sprinkler system was not connected to water prior to issuing the policy. Prior to binding coverage, the Insurers conducted *multiple* on-site inspections that revealed a completed sprinkler system that was unconnected to water lines. *See Ex. A* at 65:14-17; 45:1-2; 47:2-7; *Ex. I* at pp. 2-5; *Ex. J*. Although Insurers received a Commercial Insurance Application that indicated that the Property had a sprinkler system that was “100%”, multiple sources informed Insurers that the sprinkler system was unconnected to a water supply. *See Ex. L*; *See Ex. A* 31:9-14; 100:17-21. In fact, just days prior to Tebele submitting the application for insurance on the Property, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system. *See Ex. M* at pp. 1-2. Specifically, Nenna explained that “[w]hen the app[lication] was submitted for the risk, it was represented that the building was 100% sprinklered as the sprinkler system was being installed at that time.” *Id.* Nenna elaborated: “We have learned as of yesterday, that the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a

‘head’s up’ on this.” *Id.* Gurtzweiler replied: “Got it, I’ll note the file.” *Id.* Four days later, the Insurers bound coverage.

Thus, the Insurers were perfectly aware that the Property’s sprinkler system was completely installed but unconnected to the water supply. Much like the insurers in *Kinsale*, Insurers had an “obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed.” *Kinsale*. 2021 WL 2773002 at *7. Much like *Kinsale*, here the “undisputed portion of the record herein clearly demonstrates that [Plaintiff] disclosed that the fire prevention systems at issue were not installed, but were instead ‘being installed[.]’” *Id.* Yet, Insurers “approved [Plaintiff’s] application, bound and issued the subject policy, and accepted [Plaintiff’s] premiums in exchange for coverage.” *Id.* Ultimately, the court estopped the insurer from applying the safeguard endorsement to bar coverage because it “issued the subject policy with knowledge of facts that would void the policy under the fire safeguards endorsement and because [the policyholder] relied on that decision by not obtaining coverage elsewhere[.]” *Id.*

The risk at issue in the instant action – i.e., that fire may destroy the Property, was factored into the original underwriting of the Policy, and the premium paid by Tebele was in exchange for coverage against the same risk. Binding coverage with this knowledge, collecting more than \$105,000 in premiums, and subsequently seeking to evade coverage obligations through the Endorsement, estops Insurers from using the Endorsement as a basis to deny coverage.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff’s Motion for Summary Judgment Concerning the Ambiguity and Non-Application of the Protective Safeguard Endorsement and Insurers’ Estoppel and Waiver Thereof. There being no genuine issue of material fact, summary judgment in favor of Plaintiff is just and proper.

Respectfully submitted,

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May 10, 2022

Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2020-CP-26-0808

A. TEBELE & SONS, a South Carolina
general partnership,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT
LLOYD'S; HDI GLOBAL SPECIALTY SE;
GENERAL SECURITY INDEMNITY
COMPANY OF ARIZONA; and
CRESCENT COAST INSURANCE, LLC,

Defendants.

**MOTION FOR SUMMARY JUDGMENT
OF CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON; HDI GLOBAL
SPECIALTY SE, AND GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA**

Defendants, the Certain Interested Underwriters at Lloyd's, London subscribing to Policy Number AQS-190065 ("the Underwriters"), HDI Global Specialty SE ("HDI"), and General Security Indemnity Company of Arizona ("General Security Indemnity") (collectively the "Insurers") hereby move this Honorable Court for summary judgment in the above-captioned matter pursuant to South Carolina Rule of Civil Procedure 56, the Local Rules of this Court, and applicable law. In support of this Motion for Summary Judgment, the Insurers state as follows:

1. This lawsuit arises from a property insurance claim submitted by Plaintiff A. Tebele & Sons, a South Carolina general partnership ("Plaintiff"), to the Insurers seeking indemnification for building and contents damages, and loss of income, following a fire ("Loss Event") at real property located at 1901 N. Kings Hwy, Myrtle Beach, South Carolina ("Loss Location") owned by Kings Realty Management, LLC ("Kings Realty").

2. Plaintiff is not a member of Kings Realty, nor is Kings Realty a partner of Plaintiff.

3. The Insurers investigated the Loss Event. However, at the time of the Loss Event, neither Plaintiff nor Kings Realty had connected the Loss Location's fire prevention sprinkler system to a water supply. As such, at the time of the Loss Event, the sprinkler system was unconnected to a water supply and incapable of operating to extinguish a fire.

4. The insurance policy ("Policy") issued by the Insurers contains a Protective Safeguards Endorsement that expressly requires Plaintiff to maintain a working automatic sprinkler system at the Loss Location, as a condition of coverage for any loss by fire.

5. Unfortunately, the fire that occurred at the Property during the Policy period was not extinguished or limited in any way by the unconnected sprinkler system.

6. Thus, the Policy does not afford coverage for the Loss Event.

7. The Insurers declined coverage for Plaintiff's fire insurance claim, and explained the decision in writing.

8. Plaintiff sued the Insurers alleging Breach of Contract and common law Bad Faith because the Insurers declined coverage for Plaintiff's claim, despite the undisputed fact that Plaintiff's required sprinkler system was not connected to water at the time of the fire.

9. The pleadings, discovery, and other documents of record show that there is no genuine issue of material fact as to whether the Insurers breached the Policy or

acted in bad faith. They did not. The Insurers are entitled to judgment as a matter of law with regard to both counts alleged by Plaintiff.

10. In support of this motion, the Insurers rely upon the following:
 - a. Examination Under Oath of Plaintiff's corporate designee, Mr. Abraham Tebele;
 - b. Deposition of Mr. Tebele;
 - c. Deposition of the Underwriters' official designee, Mr. Tony Hayter;
 - d. Plaintiff's Answers to Interrogatories;
 - e. Plaintiff's Responses to Requests for Production;
 - f. Plaintiff's Responses to Requests for Admissions; and
 - g. All pleadings of record in this action, including the brief in support of this Motion, to be filed with this Court within the time prescribed for filing prior to a hearing upon this Motion.

Plaintiff cannot establish all elements of its causes of action against the Insurers. Therefore, there is no genuine issue of material fact, and the Insurers are entitled to summary judgment as a matter of law, as to all counts pled against them.

WHEREFORE, the Certain Interested Underwriters at Lloyd's, London subscribing to Policy Number AQS-190065, HDI Global Specialty SE, and General Security Indemnity Company of Arizona respectfully request that this Honorable Court enter an order granting the Insurers' motion for summary judgment and entering judgment in the Insurers' favor as a matter of law. The Insurers also request that the Court grant such other and further relief as may be just and proper.

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Security Indemnity Company of Arizona*

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina)
general partnership,)
Plaintiff,)
vs.)
CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)
Defendants.)

**PLAINTIFF'S RESPONSE TO
DEFENDANT INSURERS' MOTION
FOR SUMMARY JUDGMENT AND
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Plaintiff A. Tebele & Sons ("Tebele") respectfully submits this memorandum in response to the Motion for Summary Judgment filed by Defendants Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Co. of Arizona on June 2, 2022 (collectively, the "Insurers"), and in further support of Tebele's Motion for Partial Summary Judgment filed on May 10, 2022. Tebele also provides notice of filing additional evidence in support of its motion and in opposition to the Insurers' motion. For the reasons set forth below, the Court should deny the Insurers' motion and grant partial summary judgment in favor of Tebele.

INTRODUCTION

The Insurers seek summary judgment based on a policy exclusion set forth in a "Protective Safeguard" endorsement (the "Endorsement") that was not delivered or communicated to Tebele until after the February 24, 2019 fire that completely destroyed Tebele's commercial property. The Insurers' motion should be denied for several independent reasons.

First, the motion is entirely boilerplate and unsupported, and while the Insurers say that they intend to file a “brief in support of [their] Motion . . . within the time prescribed for filing prior to a hearing upon [the] Motion,” *see* Insurers’ Mot. 3, as of this response, the Insurers have not done so. This alone warrants denying the Insurers’ motion, particularly because the Insurers (the moving party) bear the burden of proof on the issue raised in their motion and therefore must affirmatively and clearly demonstrate that they are entitled to judgment as a matter of law. At minimum, Tebele must be given an opportunity to respond to any additional brief the Insurers seek to file prior to a hearing on the parties’ summary judgment motions.

Second, under South Carolina law, the Endorsement is not binding on Tebele, who had no notice of the Endorsement before the fire occurred. The Endorsement cannot bar coverage for the fire because Tebele never received the Endorsement when the Insurers bound coverage, nor was Tebele made aware of its existence (or requirements) until after the fire. An endorsement has no legal effect under South Carolina law if the insured did not receive it prior to binding.

Third, as numerous courts across the country have recognized, the exclusionary language in the Protective Safeguards Endorsement is ambiguous and must be construed in Tebele’s favor. Reasonably interpreted, Tebele had no obligation to ensure that the sprinkler system was connected prior to the fire because only the tenant, not Tebele, had access and “control” over the Property’s sprinkler system. Even if Tebele did have “control” within the meaning of the Policy, Tebele’s installation of the system and instructions to the tenant and contractor to connect the system to the water supply lines satisfies any obligation to “maintain” such a system.

Fourth, the Insurers are estopped from invoking (and have waived the right to invoke) the exclusion in the Endorsement. The factual record reflects that the Insurers (and their agents) knew that the Property’s sprinkler system was unconnected to water lines and bound coverage anyway,

knowing they could collect premiums and simply lean on the Endorsement to bar coverage for any fire losses. Which is precisely what they did here.

Fifth, to the extent the Insurers claim that Tebele lacks a sufficient interest in the Property (which is not clear from their barebones motion), the Insurers are wrong legally and factually.

Finally, the Insurers are not entitled to summary judgment on Tebele's bad faith claim (a) absent a judgment in their favor finding that the Endorsement does indeed bar coverage and (b) given the fact-intensive nature of issues surrounding an insurer's bad faith, and the legal and factual record showing that the Insurers in this case had no reasonable basis to deny coverage based on a condition that they knew existed before issuing the Policy and collecting premiums from Tebele.

STATEMENT OF FACTS¹

A. The Property and Tebele's Interest and Rights Related to the Property.

Tebele owns and leases a variety of commercial properties throughout Horry County, South Carolina. Tebele purchased the Insured Property in 1990 with fee title being in the names of its individual partners, David Tebele and Edward Tebele. (Ex. 1, Abraham Tebele Affidavit at ¶ 8; *Id.* at Ex. A, Tebele 1990 Deed). At that time, all of Tebele's partnership real estate properties were titled in the names of the individual partners, David Tebele and Edward Tebele. (Ex. 1 at ¶ 5). As new types of entity forms evolved which provided benefits unavailable to general partnership entities, Tebele's partners decided to form Kings Realty, LP ("KRLP"), and deeded the Insured Property to KRLP on December 28, 1993, so KRLP would be the named fee title holder of record. (Ex. 2, Dep. Tr. PL 30(b)(6) designee at 11:6-16, 12:11-20; Ex. 1 at ¶¶ 5, 9; *Id.* at Ex. B, Tebele 1993 Deed). Tebele is the general partnership and management company utilized by

¹ Tebele will not recite the entire factual record already set forth in its Motion for Partial Summary Judgment and supporting memorandum filed on May 10, 2022, but incorporates those facts here by reference and sets forth additional facts and evidence revealed after the filing of the pending motions, and facts relevant to the Insurers' Motion.

KRLP and the other Tebele family-owned entities to perform managerial services, maintain Tebele's commercial real properties, and conduct the family business, which includes procuring insurance coverage for the Tebele family-owned entities. (Ex. 1 at ¶¶ 7, 10). Thus, Tebele is the entity charged with the obligation of procuring insurance coverage for the Tebele real properties, including the Insured Property.

Tebele paid a total premium in the sum of \$170,997.08 to procure coverage for twenty-three of Tebele's real properties, including the Insured Property. (Ex. 3, Dep. Tr. Crescent Coast 30(b)(6) designee at 73:4-14, 76:24-78:10).² The Policy as well as a general liability policy and excess liability policy were issued in exchange for Tebele's payment of the \$170,997.08 total premium, providing coverage to Tebele, as the first named-insured, and insuring various risks pertaining to the Insured Property along with twenty-two of Tebele's other real properties. (Ex. 3 at 78:1-10; Ex. 4, Premium Down Payment and Finance Agreement).

Of the \$170,997.08 premium charged by the Insurers, \$105,870.00 was for the Policy at issue in this action.³ KRLP along with the other entities that were part of Tebele's management company and family-owned entities were additional named insureds under each of the insurance policies issued. (Ex. 3 at 47:1-17; Ex. 5, Tebele General Liability Application at pp. 2, 7-9). The Policy issued by the Insurers at issue in this action is a Valued Policy that provides fire insurance coverage to Tebele, as the first-named insured, for the full value of the insured properties fixed by the Insurers at the time of issuance.⁴ With regard to the Insured Property, the Stated or Schedule Total Insurable Value ("TIV") fixed by the Insurers at issuance was \$2,850,000.00 and is set forth on the SOV.⁵ The Policy provides coverage and payment "for direct physical loss of or damage to

² See also Tebele Ins. Application, PL's Memo. in Supp. of Mot. for Summ. J. ("PL's MSJ"), at Ex. L, pp. 2, 7-9.

³ See Ex. 4 at p. 2; Tebele Ins. Policy, PL's MSJ at Ex. O, p. 2.

⁴ See Tebele Ins. Policy, PL's MSJ at Ex. O, p. 14; *Id.* at p. 62, SRU-016 (07-10).

⁵ See Insurers' Schedule of Values, PL's MSJ at Ex. N, p. 2.

Covered Property at an ‘insured location’ caused by or resulting from any Covered Cause of Loss.”⁶ Covered Property includes “[a]dditions under construction, alterations and repairs to the building or structure.”⁷

As part of Tebele’s commercial real estate business, Tebele rents the Property to third-party tenants, which, in turn, use it to operate restaurant and night club businesses.⁸ In 2016, Tebele formally leased part of the Property to Melissa Garcia, who used a portion of the Property for dining and entertainment business purposes and who was obligated to “maintain the premises in good and safe condition, including . . . electrical, plumbing and heating installations and any other system or equipment upon the premises”⁹ As detailed in Tebele’s motion for summary judgment, the lease did not provide Tebele with a general or daily right of access to the Property, but only “at reasonable times and upon reasonable notice” to Garcia, and only for the “purpose of inspecting” the Property.¹⁰ Garcia planned to expand her occupancy to the remaining, unoccupied portion of the Property, but no sprinkler system hardware was installed on that portion.¹¹ In accordance with the terms of the lease, Garcia was responsible for installing and maintaining a sprinkler system, and local authorities “wouldn’t issue a business license to her unless she installed [it].”¹²

From the time Tebele purchased the Insured Property up through the loss, Tebele managed the Insured Property, leased the building improvements to tenants, and expended monies to make building improvements and procure insurance providing property and liability coverage. In June 2017, at the direction of the fire marshal for the City of Myrtle Beach, Tebele assisted Garcia with

⁶ See PL’s MSJ at Ex. O, p. 18, Policy at p. 8, § A.

⁷ *Id.*, Policy at p. 8, § A(1)(a)(5)(b).

⁸ See Plaintiff’s 30(b)(6) Deposition at 14:11-14, 13:19-24, PL’s MSJ at Ex. A.

⁹ See Amend. To Comm. Lease at § 7, PL’s MSJ at Ex. B.

¹⁰ See *id.* at § 8.

¹¹ See Tebele’s EUO Dep. at 28:13-25, 29:1-5, PL’s MSJ at Ex. C.

¹² See Plaintiff’s 30(b)(6) Deposition at 16:1-3, PL’s MSJ at Ex. A.

contracting Crawford Sprinkler Co. of SC, Inc. (“Crawford”), a specialist in sprinkler installation and repair, to install a sprinkler system for the Property.¹³ Tebele paid Crawford \$236,516 for the design and installation of the building sprinkler system at the Insured Property, and for the permit application. (Ex. 1 at ¶ 10). And Tebele took steps to confirm that the system was properly installed, repeatedly contacting Crawford and their subcontractors in August 2018 and telling them that the system had to be connected.¹⁴ Although Tebele paid thousands of dollars for the complete installation of the sprinkler system, neither Crawford nor Garcia endeavored to connect the sprinkler infrastructure to water pipelines before the fire occurred.¹⁵

Tebele also paid a premium down payment in the amount of \$34,199.42 for coverage under the Policy, and executed a Premium Finance Agreement obligating Tebele for payment of the remaining \$136,797.66 policy premium balance. (Ex. 1 at ¶ 10; Ex. 4).

B. The Insurers Underwrote and Bound Coverage and Collected Premiums Knowing that the Sprinkler System Was Not Fully Connected.

Tebele first retained Defendant Crescent Coast Insurance, LLC (“Crescent Coast”), to obtain coverage quotes for Tebele’s commercial properties in the summer of 2018. (Ex. 3 at 24:2-25). David Egan (“Egan”), an insurance broker and producer and the managing partner of Crescent Coast, met with Tebele in early August of 2018 to gather information to quote coverages for Tebele’s commercial properties, including the Insured Property. *Id.* at 24:4-25. After meeting with Tebele, Egan entered information onto a standard pre-printed form known as an Accord Form 140 (the “Accord”), which Crescent Coast uses in the ordinary course of business to send to an underwriter to provide insurance quotes. (Ex. 3 at 27:20-28:14; *Id.* at 32:2-19). The Accord listed each of Tebele’s twenty-three commercial properties. (Ex. 3 at 26:18-27:3; *Id.* at 27:7-11; Ex. 6,

¹³ See PL’s MSJ at 4, Ex. D.

¹⁴ See PL’s MSJ at 4, Ex. C at 38:17-21, 73:10-24.

¹⁵ See PL’s MSJ at 4-5.

Accord Form 140). The Accord listed information pertaining to each of Tebele's properties such as the building's construction type, the building's square footage, and the percentage of the building that was sprinklered, or more specifically, the area of a particular building with a building sprinkler system. (Ex. 6 at p. 1; Ex. 3 at 31:9-32:1).

On August 20, 2018, Egan sent an email attaching the Accord to Whitney Gurtzweiler ("Gurtzweiler"), an employee of the Insurers' AmWINS underwriter, to obtain coverage quotes from the Insurers. (Ex. 3 at 34:20-35:19; *Id.* at 58:16-25; Ex. 7, Crescent Coast's Answers to PL's First Set of Interrogatories at pp. 1-3). Egan asked Gurtzweiler to review a "new submission" and informed her that Tebele was "looking to switch [carriers] mid-term." *Id.* Two days later, Gurtzweiler sent an email to her colleague, Barrett Sellars, informing him of a new submission from Egan and asking Sellars for his discretion because Tebele did not "want to put [its former carrier] on alert that they are moving the business" to AmWINS.¹⁶ Gurtzweiler also stated that she "will work on the [general liability and excess general liability]" for Tebele's account. *Id.*

As outlined in Tebele's motion for summary judgment, the dynamics surrounding the underwriting of the Policy are clear: Tebele's broker (Crescent Coast) worked through Gurtzweiler (an AmWINS underwriter and agent of the Insurers) to procure coverage for the Property. Indeed, during his deposition, Tony Hayter, the corporate representative for the Insurers, admitted that he worked closely with AmWINS in preparation for his deposition and that AmWINS was the "managing general agency for . . . the [Tebele Policy]."¹⁷

The Accord attached to Egan's August 20 email to AmWINS indicated that the Insured Property was 100% sprinklered because the new building sprinkler system had been installed throughout the entire building with only the tap installation remaining for the completion of

¹⁶ See PL's MSJ at 5, Ex. G, Gurtzweiler 8/22/19 Email.

¹⁷ See PL's MSJ at 6, Ex. H, Lloyd's 30(b)(6) Dep. at 6:20-25, 13:1-14, 14:3-4.

construction and the sprinkler system to become operational. (Ex. 2 at 31:2-14; *Id.* at 33:22-34:3; Ex. 6 at p. 12). In addition to Gurtzweiler, Barrett Sellars and Hollan Delany were also employees of the Insurers' AmWINS underwriter who brokered coverage for Tebele. (Ex. 7 at pp. 1-3). Gurtzweiler continued to request information from Egan on behalf of the Insurers after Egan initially emailed Gurtzweiler on August 20, 2018 to obtain coverage quotes. (Ex. 8, Dep. Tr. Whitney Gurtzweiler n/k/a Whitney Northcutt at 43:2-19; Ex. 9, Gurtzweiler 1/3/19 Email Corresp. at p. 1; Ex. 3 at 64:16-66:17).

On October 3, 2018, at the Insurers' request, a third-party inspector conducted an inspection of the Property and produced an inspection report, which the Insurers reviewed on November 26, 2018, noting that the Property had a sprinkler system.¹⁸ An additional inspection report dated February 14, 2018, observed that the Property was "now adding a sprinkler system throughout the building in all spaces."¹⁹ Finally, the Insurers conducted an additional inspection on January 10, 2019, where they had ample opportunity to assess the entire sprinkler system.²⁰ As of January 10, 2019, Crescent Coast was aware that the building sprinkler system was not operational.²¹ On January 11, 2019, Crescent Coast notified Gurtzweiler that the building sprinkler system at the Insured Property was not connected to the city water supply.²²

In the interim, on December 26, 2018, Gurtzweiler requested Tebele to provide a tenant list, and Tebele submitted a tenant list in response to Gurtzweiler's request on that same date. (Ex. 3 at 61:16-63:4; *Id.* at 63:12-16; Ex. 10, Gurtzweiler 12/26/18 Email Corresp. at p. 1; Ex. 11, Joey

¹⁸ See PL's MSJ at 6, Ex. A at 65:14-17 and Ex. I, Insurers' 10/3/18 Inspection Report.

¹⁹ See PL's MSJ at 6, Ex. J, 2/14/18 Broker Report.

²⁰ See PL's MSJ at 6, Ex. A at 44:18-25; 45:1-2; 47:2-7; Ex. K, ISO 1/10/19 Survey.

²¹ See Ex. 3 at 98:9-99:20; Gurtzweiler 1/11/19 Email Corresp., PL's MSJ, at Ex. M.

²² See PL's MSJ, at Ex. M; Ex. 8 at 48:4-50:4.

Sutherland 1/3/19 Email Chain at pp. 2, 4-6). The tenant list provided by Tebele listed the Insured Property under the name of KRLP. (Ex. 11 at p. 5).

At the time of the loss, the construction of the building sprinkler system addition at the Insured Property was nearly complete but was not finished because the connection of the building sprinkler system to the city water supply had not been completed. (Insurers' Fire Report, Compl. at Ex. L, p. 3; Ex. 12, Lauraleigh Weaver 2/28/19 Email Corresp). Carolina Tap & Bore, Inc. ("Carolina Tap"), was the subcontractor hired by Crawford to prepare the underground main and construct the tap to connect the city water supply to the building sprinkler system previously installed by Crawford. (Ex. 13, Carolina Tap Proposal). Carolina Tap made the tap on the city water line on January 31, 2019, but did not complete the connection to the building sprinkler system before the February 24, 2019 fire. (Ex. 14, Richard Young 3/13/19 Email Corresp. and Time Sheets).

On January 14, 2019, Tebele received a property insurance application from Egan and digitally signed it. (Ex 3 at 41:7-18; *Id.* at 67:19-68:2). Egan signed the application as "producer" and submitted it for coverage on January 14, 2019. (Ex. 3 at 40:18-41:21; *Id.* at 53:3-6). Before the Insurers bound coverage for the Property, Tebele crystalized a crucial point to Crescent Coast: The sprinkler system was completely installed, but it was still unconnected to the water supply lines.²³ And that information was communicated to the Insurers' agent, AmWINS. Indeed, before Egan submitted the application, Crescent's customer service representative (and former AmWINS employee) Sandra Nenna emailed Gurtzweiler to clarify that "the sprinklers have been installed, but the landlord has not turned the water on to have them operational. We just wanted to give you a 'head's up' on this."²⁴

²³ See PL's MSJ at 6, Ex. A at 31:9-14.

²⁴ See PL's MSJ at 7, Ex. M, Gurtzweiler 1/11/19 Email Correspondence.

Gurtzweiler simply replied: “Got it, I’ll note the file.” *Id.* at p. 2.

Four days later, the Insurers bound coverage knowing the sprinkler system was unconnected to the water supply line.

Indeed, underwriting materials clearly show that the Insurers knew the risk they were accepting premiums to insure. For instance, prior to binding coverage, the Insurers prepared a “Schedule of Values” (“SOV”), a document used to evaluate the risk of insuring several properties owned by Tebele, including the Property.²⁵ The SOV listed twenty-three (23) properties belonging to Tebele that collectively comprise a larger commercial building and shopping district. *Id.* at p. 1. For each building, the SOV listed important information, including whether the building was “Sprinklered” – marked affirmatively by a “Y”, or negatively by an “N” – and the percentage of the building that was “Sprinklered,” if applicable. *Id.* at p. 2 (as highlighted in red in the graph below).

AmRisk Application / Schedule of Values															
Any person who knowingly and with intent to defraud any insurance company files an application for insurance or statement of claim containing any materially false or misleading information, or conceals for the purpose of misleading information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and subjects the person to criminal and (NY) substantial civil penalties. In some states insurance benefits may also be denied. By submission of this application the insured and the agent represent that all information is true and correct to the best of their knowledge and that they have not deleted or altered the questions herein.															
s (EIFS) (ted)															
Properties. (Warranted)															
Yellow = Required Orange = Required for ACIC Blue = Required if habitational Green = Required for General Liability Gray = Required for High Hazard Quake															
Total # Units Total Sq. Ft. Avg % Occup Avg % Sprinklered 0 271,000 24% B/Rents per Unit per Month Sq. Ft. per Unit															
* Bldg. No.	*Property Ty	Location Name	Address#	*Street Address	*City	*State	Is Prop Mgd or Ownr	Date Added to Sched	*# of Unit	*Square Footage	% Occupied	Percent Sprinklered	Sprinklered (Y/N)	ISO Prot. Class	Flood Zone
1	Building		2909	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
2	Building		2311	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
3	Building		502	30th Ave S	Myrtle Beach	SC				900				1	
4	Building		3001	N Kings Hwy	Myrtle Beach	SC				17,000				1	
5	Building		3205	N Kings Hwy	Myrtle Beach	SC				6,400		0%	n	2	
6	Building		1600	E/S N Kings Hwy	Myrtle Beach	SC				10,000		0%	n	1	
7	Building	310-312	310	9th Ave N	Myrtle Beach	SC				1,000		0%	n	1	
8	Building	316-320	316	9th Ave N	Myrtle Beach	SC				3,800		0%	n	1	
9	Building	609-611	609	S Kings Hwy	Myrtle Beach	SC				3,500		0%	n	1	
10	Building		1901	N Kings Hwy	Myrtle Beach	SC				36,000		100%	y	1	
11	Building		610	W/S S Kings Hwy	Myrtle Beach	SC				25,000		100%	y	1	
12	Building		1012	S Kings Hwy	Myrtle Beach	SC				20,000		0%	n	1	
13	Building		900	Chester St	Myrtle Beach	SC				3,000		0%	n	1	
14	Building		201	Main St	North Myrtle Beach	SC				5,000		0%	n	2	
15	Building	84-96	94	S Kings Hwy	North Myrtle Beach	SC				10,000		0%	n	2	

²⁵ See PL’s MSJ at 7, Ex. N, Insurers’ Schedule of Values.

Of the 23 properties listed, only 24% of the 271,000 total square feet of commercial space in the area was “sprinklered.” *Id.* at p. 2, “Avg % Sprinklered”. Indeed, the SOV only marked five buildings as “Sprinklered” to “100%” capacity. *Id.* The Property, labeled as “Building 10” in the SOV, was one of them. *Id.*

C. The Policy and Protective Safeguards Endorsement.

The Insurers ultimately issued an all-risk property insurance policy that promises to “pay for direct physical loss of or damage to the [Property] caused by or resulting from any Covered Cause of Loss.”²⁶ In turn, a Covered Cause of Loss is any “[r]isks of [d]irect [p]hysical [l]oss unless the loss is” either expressly excluded or limited.²⁷ Subject to certain conditions and exclusions, and in the event that the Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property; demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, “extra expenses.”²⁸ As an all-risk property coverage policy, fire-related losses constitute a “Specified Cause of Loss.”²⁹ The limits of liability under the Policy are “\$22,155,400 per Occurrence,” and Tebele paid \$105,870.00 in premiums for the Policy, including inspection fees.³⁰

The Protective Safeguard Endorsement provides that “[a]s a condition of this insurance, [Tebele is] required to maintain” fire “protective devices,” including a “‘AS’ Automatic Sprinkler System.”³¹ The Endorsement contains an exclusion, which states: “We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working

²⁶ See PL’s MSJ, Ex. O at p. 18, Tebele Insurance Policy at p. 8 § A (the “Policy”).

²⁷ *Id.* at p. 32, Policy at p. 22, § A.

²⁸ *Id.* at p. 22, Policy at p. 12, § 10; p. 23, Policy at 13, § 11(a)(2)-(3); p. 25, Policy at p. 15, § 12; p. 28, Policy at p. 18, § A(1)-(2).

²⁹ *Id.* at p. 48, Policy at p. 38.

³⁰ *Id.* at p. 14, Policy at p. 4, § E.

³¹ See *id.* at p. 80, SRU-024 (07-10).

order.” *Id.* The Insurers chose not to define “maintain,” nor did they specify what Tebele was required to do in order to “maintain” the “protective devices.” Nor did the Insurers choose to define “control” or the phrase “complete working order.”

Tebele did not receive the Policy until Egan hand-delivered a copy after the loss during a site inspection of the Insured Property with the Insurers’ field adjuster. (Ex. 3 at 95:17-96:17). Tebele neither saw nor received the Endorsement until after the loss.³² No person associated with Crescent Coast, the Insurers, or the Insurers’ AmWINS underwriter ever advised Tebele that an operational sprinkler system would be required for coverage, nor was the Endorsement ever mentioned to or discussed with Tebele prior to the loss. (Ex. 2 at 106:9-25; *Id.* at 140:19-141:1). After the loss, Crescent Coast advised Tebele that the loss should be covered under the Policy. (Ex. 15, Tebele EUO Dep. Tr. at 115:10-13).

D. The Insurers Deny Coverage Based on their Underwriter’s Self-Serving, Post-Claim Interpretation of the Endorsement.

The SOV relied upon by the Insurers to deny coverage is an AmRisc template that was prepared by the Insurers’ AmWINS underwriter for modeling purposes long before Tebele received or signed the Application. (Ex. 16, Dep. Tr. Lloyd’s of London 30(b)(6) designee at 61:17-62:7; *Id.* at 117:22-118:2; Ex. 17, Delany 12/17/18 Email Chain). On November 27, 2018, Delany emailed the SOV to Mark Melvin, an employee of the Insurers’ AmWINS underwriter principally responsible for underwriting the Policy.³³ On December 14, 2018, Delany emailed the SOV to Egan to update for modeling purposes. (Ex. 17 at pp. 3-4; Ex. 3 at 86:1-87:17; *Id.* at 90:3-91:1). Neither the Insurers nor the Insurers’ AmWINS underwriter ever advised or informed Egan as to whether any information depicted in the SOV would contain or otherwise affect any policy

³² See Ex. 3 at 95:17-96:17; Tebele EUO Dep. Tr., PL’s MSJ, Ex. C at 113:9-14.

³³ See Ex. 16 at 46:23-47:1; Hollan Delany 11/27/18 Email Corresp. designated “Confidential” and Bates Stamp Sequence A. Tebele UW-000109.

term or provision pertaining to coverage under the Policy. (Ex. 3 at 101:8-17). In addition, Crescent Coast's National Producer Agreement with the Insurers' AmWINS underwriter prohibits Crescent Coast and Egan from altering, varying, changing, or adding any terms of coverage under an insurance policy. (Ex. 7 at pp. 5-6; Ex. 3 at 15:24-21:21; *Id.* at 101:19-102:10).

In any event, Egan never delivered the SOV to Tebele. (Ex. 3 at 91:12-15). In fact, the SOV was never mentioned, discussed, referenced, nor presented to Tebele until March 19, 2019 by way of a letter prepared by the Insurers' claims adjuster. (Ex. 18, PIB March 2019 Corresp. & Proof of Loss at pp. 1-3). The letter included excerpts from the Endorsement and referenced the form code (SRU-024-07-10), but omitted critical terms and language of the Endorsement:

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any "OTHER":	
(a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required	
(b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times	
(c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.	

The above language providing that an "AS" would apply to locations "as indicated on the Schedule of Values on file with the Company" was omitted from the Insurers' letter, which claimed that "the building does not have an Automatic Sprinkler System as claimed on the Schedule of Values on file with AmWINS Special Risk Underwriters." (Ex. 18 at p. 1). Tebele notified the Insurers of this error, that the Endorsement's symbols did not appear on the SOV, that Tebele did not receive a discounted premium for having a building sprinkler system, and that Tebele did not receive a copy of the Policy or the SOV until after the loss. *Id.* at pp. 5, 10-11. In addition, Tebele

also provided the Insurers with an inspection report following the October 3, 2018 inspection of the Insured Property that was prepared for the Insurers' AmWINS underwriter.³⁴

The Insurers' adjuster then contacted Mark Melvin to inquire as to the Endorsement's symbols not appearing on the SOV.³⁵ The interpretation provided by Mark Melvin on March 28, 2019, was that the 'AS' symbol on the Endorsement "refers to the body of the Endorsement and not the SOV, [and] AmWINS does not put AS symbols on the SOV." (Ex. 16 at 92:12-93:7). The Insurers understood that Tebele's claim was a total loss and, therefore, a policy limits claim. (Ex. 16 at 94:14-15; *Id.* at 95:1-13).

The Insurers also maintain that the claims and underwriting functions should be separate because they have two different functions, but ultimately decided to deny Tebele's claim based solely on Melvin's interpretation. (Ex. 16 at 89:13-90:5; *Id.* at 101:25-102:11).

The Insurers elected not to rescind the Policy due to an adverse verdict in a recent litigation proceeding.³⁶ (Ex. 16 at 106:11-107:2; *Id.* at 108:2-24). Instead, they merely adopted Melvin's interpretation provided on March 28, 2019 and waited until August 6, 2019 to deny Tebele's claim based on the SOV's "100% Sprink" notation.³⁷ According to the Insurers' August 6, 2019 denial letter, the Insurers denied coverage under their SOV notation because the building sprinkler system was still under construction and not operational at the time of the loss, and due to their claimed ignorance as to the sprinkler system's status, which the letter represented was due to the Insurers' false statement as to Gurtzweiler being merely a broker for the tenant.³⁸

³⁴ See Ex. 18 at p. 10; Twenty First Services, LLC Comm. Package, Compl. at Ex. G, pp. 1.-6.

³⁵ See Ex. 16 at 74:8-13, 75:10-78:23, 91:14-25.

³⁶ See *Zydeco's II, L.L.C. v. Certain Underwriters at Lloyd's*, No. 19-CA-562, 2021 WL 2178482 (La. Ct. App. May 28, 2021) (La. App. 5 Cir. Feb. 25, 2019).

³⁷ See Ex. 16 at 99:5-10; *Id.* at 101:25-102:11; Insurer 8/6/19 Denial Letter, Compl. at Ex. N.

³⁸ Compl. at Ex. N.

Remarkably, Mark Melvin prepared a modified version of the Endorsement (the “Modified Endorsement”), indicating that the actual Endorsement sold to Tebele does not clearly support the Insurers’ coverage position. (Ex. 16 at 67:10-69:7, Ex. 19, Melvin Affidavit at p. 5). The modified version differs from the Endorsement in that the schedule template at the top was amended to state: “Symbols: ‘AS’; Locations Applicable: *all Covered Locations reported as sprinklered in the Schedule of Values on file with the Company.*” (Ex. 19 at p. 4) (emphasis added).

The Modified Endorsement is a template utilized by the Insurers’ AmWINS underwriter and not part of the Tebele Policy. (Ex. 16 at 70:5-10). Thus, the clearer language in the Modified Endorsement was available to the Insurers and their underwriters to use if they had chosen to include it in the Policy or the Endorsement. *Id.* at 72:19-73:1.

ARGUMENT AND MEMORANDUM OF LAW³⁹

A. The Insurers’ Motion Is Boilerplate, Conclusory, And Completely Unsupported.

As a threshold matter, the Insurers’ motion should be denied because it lacks any legal or factual support whatsoever. Under Rule 56(c), SCRCp, the party seeking summary judgment “has the burden of clearly establishing the absence of a genuine issue of material fact.” *Froneberger v. Smith*, 406 S.C. 37, 45, 748 S.E.2d 625, 629 (Ct. App. 2012). Moreover, “[w]here, as here, the movant seeks summary judgment on an affirmative defense, it must conclusively establish all essential elements of that defense.” *Ray Comms., Inc. v. Clear Channel Comms., Inc.*, 673 F.3d 294, 299-300 (4th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (defendant

³⁹ “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). “To determine whether any triable issues of fact exist, the . . . court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party.” *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005).

may prevail on a motion for summary judgment on an affirmative defense when it has produced credible evidence that would entitle it to a directed verdict if not controverted at trial)).

“‘[W]here the movant fails to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing.’” *Id.* (quoting *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2d Cir. 2003)) (internal citation and quotation marks omitted).

The Insurers seek summary judgment based solely on their affirmative defense claiming that coverage is barred “due to the application of the Policy’s provisions excluding coverage for failure to maintain a protective safeguard, as shown by the [] Policy provisions” in the Protective Safeguards Endorsement. *See* Lloyd’s Ans. & Affirmative Defenses at 23-24, Third Affirmative Defense, filed Mar. 30, 2020.⁴⁰ Thus, they must conclusively establish all the essential elements of that defense, and provide admissible evidence of the material facts that would entitle them to summary judgment. *See Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) (recognizing that policy exclusions are “construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability”).

The Insurers’ motion falls far short of these basic requirements. They cite no case law or legal authority whatsoever in their motion, including, for example, any case law interpreting or applying the policy language in the exclusion that they rely on. Indeed, the motion does not even quote the relevant policy language, much less provide any analysis as to how the pertinent policy language should be interpreted under South Carolina law.

⁴⁰ The Insurers all filed materially identical answers and affirmative defenses on March 30, 2020, raising the exclusionary provisions in the Protective Safeguards Endorsement as an affirmative defense to coverage.

Nor have the Insurers provided the Court with any specific evidence (much less admissible evidence) that would entitle them to judgment as a matter of law based on the protective safeguards exclusion. Instead, the Insurers argue in completely conclusory fashion that the sprinkler system was unconnected at the time of the fire and *ipso facto* “the Policy does not afford coverage for the loss.” *See* Insurers’ Mot. 2. Under any applicable standard, that is clearly not enough.

Indeed, the Insurers sole factual argument is that “[t]he pleadings, discovery, and other documents of record show that there is no genuine issue of material fact as to whether the Insurers breached the Policy or acted in bad faith.” *Id.* at 2-3. Other than the boilerplate list of depositions taken in the case, as well as unspecified “Answers to Interrogatories” and “Responses to Requests for Production” and “Requests for Admission,” however, the Insurers fail to cite any summary judgment evidence that supports their arguments.

These basic procedural and evidentiary defects alone preclude summary judgment in the Insurers’ favor.

B. The Protective Safeguards Endorsement Is Not Binding On Tebele Who Had No Notice Of The Endorsement Before The Fire Occurred.

The Insurers’ motion also fails on the merits. “An insurance policy is a contract between the insured and the insurance company, and the policy’s terms are to be construed according to the law of contracts.” *Canal Ins. Co. v. Nat’l House Movers, LLC*, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015). The cardinal rule of contract interpretation is to “ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language in the contract.” *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016). Consistent with that cardinal rule, courts recognize that “[r]estrictions or limitations of which an insured has no notice are not binding.” *Poston v. Nat’l Fid. Life Ins. Co.*, 303 S.C. 182, 186, 399 S.E.2d 770, 772 (1990).

An endorsement (including the Protective Safeguards Endorsement) is designed to enlarge, restrict, particularize, or otherwise modify some provision of an insurance policy. Under South Carolina law, an endorsement becomes effective to bind the insured when it is “physically attached to a policy of insurance contemporaneous with execution, and delivered to the insured as attached, and sufficient evidence is made in either the policy or the attached matter to identify the papers as related” *Charles v. Canal Ins. Co.*, 238 S.C. 600, 607, 121 S.E.2d 200, 204 (1961) (citing *Brown v. State Farm Mut. Ins. Co.*, 233 S.C. 376, 388, 104 S.E.2d 673, 679 (1958)). In other words, “to be considered a part” of the policy, an endorsement “must be so clearly imported into it as to leave no doubt as to the intention of the parties.” *Id.*

Moreover, “when there is doubt as to the intention of the parties to treat the [endorsement] [or] paper as part of the policy, the courts give the benefit of the doubt to the insured, and construe the policy in his favor.” *Id.* at 608, 121 S.E.2d at 204; *see also Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 344, 803 S.E.2d 288, 302 (2017); *Quinn v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 301, 305, 120 S.E.2d 15, 17, (1961) (“If the language of the policy is uncertain or ambiguous, and is susceptible to more than one construction, the court will adopt and apply that construction which is most favorable to the insured.”).⁴¹

As detailed in Tebele’s motion for summary judgment, the Insurers’ failure to provide Tebele with a copy of the Endorsement at binding or otherwise inform Tebele of its existence at the moment of binding is an undisputed, material fact sufficient to destroy the Insurers’ attempt to apply the Endorsement as a bar to coverage. Those facts are certainly sufficient to deny the Insurers’ motion for summary judgment. *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625,

⁴¹ South Carolina courts look to precedent elsewhere as persuasive authority absent controlling authority under South Carolina law. *See Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) (holding that a probate court’s citation to and adoption of other jurisdiction’s law was not error); *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019).

629 (Ct. App. 2013) (“To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.”).

Tebele testified multiple times at his deposition that he never received the Endorsement until *after* the fire, nor did he consent to its inclusion in the Policy. When asked about when he first received a copy of the Endorsement, Tebele testified: “After the fire . . . The fire was February 24 of ’19 . . . I think I received a copy of the [P]olicy after the fire, and the specific [E]ndorsement, probably in March.”⁴² Tebele never discussed the Endorsement with its broker, Crescent Coast, nor the Insurers. When asked if “Crescent Coast ever discuss[ed] the Endorsement . . . before coverage was bound,” he simply responded, “[n]o.”⁴³ During his Examination Under Oath, Insurers’ counsel asked Tebele “[i]s the [Endorsement] something you learned about, after the fire?”⁴⁴ Tebele simply responded, “Yes.”⁴⁵ Tebele further specified that he did not even receive the Policy until after the fire: “I had never actually seen the [E]ndorsement or the [Endorsement] section, until after the last. You know, the [P]olicy is recently binding, and then the fire occurred . . . shortly after, and we didn’t actually receive the [P]olicy, by that time.”⁴⁶

Under South Carolina law, the Endorsement cannot apply to bar coverage because it was not “physically attached to a policy of insurance contemporaneous with execution, and delivered to the insured as attached, and sufficient reference [] made in either the policy or the attached matter to identify the papers as related” *Canal Ins. Co.*, 121 S.E. at 204 (citing *Brown*, 233 S.C. at 388). Tebele’s expectations in paying substantial premiums in exchange for coverage under

⁴² See PL’s MSJ, Ex. A at 140:11-14.

⁴³ *Id.* at 140:19-22.

⁴⁴ See PL’s MSJ, Ex. C at 83:15-16.

⁴⁵ *Id.* at 83:17.

⁴⁶ *Id.* at 113:9-14.

the Policy were clear: if there was a fire, Tebele expected the all-risk Policy to cover it as a covered cause of loss.⁴⁷

Had Tebele known about the Endorsement, and given that all parties knew of the sprinkler situation at the Property, Tebele clearly would not have accepted the Endorsement's inclusion in the Policy.⁴⁸ Under South Carolina law, the Endorsement cannot be considered a part of the Policy if its inclusion brings the contractual intent of the parties into doubt or otherwise fails to reflect the true intent of the parties. *Canal Ins. Co.*, 121 S.E. at 204 (explaining that “to be considered a part” of a policy, an endorsement “must be so clearly imported into it as to leave no doubt of the intention of the parties” to rely on its terms and inclusion). The Endorsement's inclusion here, made without Tebele's knowledge or consent, effectively renders coverage illusory in a situation where the Insurers knew, or should have known, that the tenant was not diligent about its maintenance obligations regarding the sprinklers.

In short, Tebele never received the Endorsement when the Insurers bound coverage, nor was he made aware of the Endorsement's existence until after the fire. Thus, the Endorsement does not apply to bar coverage for the loss, and because the Insurers *exclusively* rely on the Endorsement as the basis for denying coverage, coverage exists for the fire as a matter of law and the Insurers' motion for summary judgment must be denied.

C. The Endorsement Is Ambiguous And Must Be Construed in Tebele's Favor.

The Insurers' motion also fails because the Protective Safeguards endorsement is ambiguous and must be construed in favor of Tebele as a matter of law. The endorsement requires

⁴⁷ See PL's MSJ, Ex. A at 105:14-18 (“[W]e were purchasing a policy to cover our property, and the presumption on our part was that we were covered.”); see also *id.* at 106:14-18 (“[M]y understanding was in purchasing the [P]olicy that [the Property] would be protected against fire. And if there were any instance where I would have thought otherwise, I probably would not have purchased the [P]olicy.”).

⁴⁸ See PL's Mot. for Summ. J., Ex. A at ¶ 10.

Tebele to “maintain” the sprinkler system “over which [Tebele] ha[s] control.” Neither the endorsement nor the Policy define these terms, and both terms — “[m]aintain” and “over which you have control”—have more than one reasonable meaning, rendering the exclusionary language ambiguous. Construed in Tebele’s favor, the undisputed facts show that Tebele “maintained” the Property’s sprinkler system prior to the fire. Moreover, it is an undisputed fact that the Property’s tenant, not Tebele, had control over the maintenance of the Property’s sprinkler system. Thus, the Insurers are unable to meet their burden to apply the exclusion as a matter of law, precluding summary judgment in their favor.

Under South Carolina law, “[i]nsurance policies are subject to the general rules of contract construction,” whereby courts endeavor to “ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Beaufort County Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). If, however, an “insurance contract is . . . in any respect ambiguous or capable of two meanings,” then such terms “must be construed in favor of the insured.” *Id.* As such, South Carolina courts follow the “universal rule that an insurance policy must be construed most strongly against the insurer, resolving any ambiguity in favor of the insured” *Harleysville Mut. Casualty Co. v. Nationwide Mut. Ins. Co.*, 248 S.C. 398, 400, 150 S.E.2d 233, 234 (1966).

This rule applies with special force to exclusionary policy language, which is “construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Benjamin*, 781 S.E.2d at 141. Within this analytical framework, South Carolina courts must scrutinize the meaning of every word in an insurance policy—especially where an insurer relies on undefined terms to bar coverage through an exclusion. *See Beaufort County*, 709 S.E.2d at 91 (extensively interpreting the terms “series” and “related” in an exclusion

and holding in the insured's favor at summary judgment because both terms were "not defined in the endorsements, so [they] must be defined according to the usual understanding of the ordinary person").

In the context of interpreting fire protective safeguard endorsements, courts across the country have found that the terms "maintain" and "over which you had control" are ambiguous and, as such, must be interpreted in the insured's favor. For example, in *Breton, LLC v. Graphic Arts Mut. Ins. Co.*, the Fourth Circuit Court of Appeals partially affirmed the trial court's entry of summary judgment in the insured's favor when the carrier denied coverage for a fire loss based on a protective safeguard endorsement. 446 Fed. App'x 598, 600 (4th Cir. 2011). The insured in *Breton* completely installed an automatic sprinkler system, but the "valve controlling the water to the sprinkler heads was in the closed position, rendering the . . . sprinkler system inoperable." *Id.* at 601. The carrier denied coverage for a fire loss based on an endorsement that required the insured to "maintain the protective devices or services listed in the [s]chedule . . . as a condition of this insurance," including "an automatic sprinkler system[.]" *Id.* at 600. The Fourth Circuit sided with the insured and the trial court, explaining that "the word 'maintain' may be understood in more than one way, which supports a finding of ambiguity." *Id.* at 603 (internal quotations omitted).

While the carrier in *Breton* argued that the word "maintain" was not open to interpretation nor ambiguous because it has a "plain meaning," the Fourth Circuit disagreed. The court observed that, "[a]s used in the insurance contract, 'maintain' could be reasonably interpreted . . . to refer to an obligation to continue to have an Automatic Sprinkler System," instead of the insurer's interpretation, which implied "regular repair obligations with respect to the Automatic Sprinkler System." *Id.* Indeed, the exclusionary language in the *Breton* policy did not define "maintain," but qualified it with the language, "in complete working order." *Id.* Thus, "interpreting 'maintain' to

require ensuing operability would render the ‘in complete working order’ language in the exclusion superfluous.” *Id.* Ultimately, the Fourth Circuit held that the insured “satisfied the condition placed on coverage” because it simply “kept an Automatic Sprinkler System in place at all relevant times[.]” *Id.* at 604.

Likewise, in *Five Star Hotels, LLC v. Ins. Co. of Greater N.Y.*, the insured purchased a property policy that, similar to *Breton*, required it to “maintain the protective devices or services listed in [a schedule].” 2011 U.S. Dist. LEXIS 31313, *7 (S.D.N.Y. Mar. 24, 2011). When water damage stemming from leaking sprinkler pipes and water lines destroyed the insured’s premises, the carrier denied coverage under the protective safeguards endorsement, arguing that the insured failed to “maintain” the sprinkler system. *Id.* at *16. The Southern District of New York, drawing from the trial court’s opinion in *Breton*, disagreed, holding that “the term ‘maintain’ is hopelessly ambiguous here.” *Id.* at *23-24. The court explained that “‘maintain’ could mean that [the insured] was obligated to keep the switches and valves in the open position,” or it “could mean that [the insured] was obligated to ensure that all piping and standpipes were properly functioning.” *Id.* at *24. “Maintain” could also mean that the insured “was obligated to keep the system in place and not to dismantle it.” *Id.* Ultimately, “[a]ny of these meanings would be a reasonable application of the word ‘maintain’ as used in the policy.” *Id.* Thus, the court held that the insured’s claim was not barred by any breach of the Protective Safeguards Endorsement. *Id.*

Here, the Endorsement is nearly identical to those found to be ambiguous in *Breton* and *Five Star Hotels*. The Endorsement provides that “[a]s a condition of this insurance, [Tebele is] required to maintain” fire “protective devices,” including a “‘AS’ Automatic Sprinkler System.” The Endorsement further provides that the Insurers “will not pay for loss or damage caused by or resulting from fire if, prior to the fire, [Tebele] failed to maintain any protective safeguard listed

[in the Policy] *and* over which [Tebele] had control, in complete working order.” The Insurers chose not to define “maintain,” or to specify what Tebele was required to do in order to “maintain” the “protective devices.” Nor did the Insurers choose to define “control” or the phrase “complete working order.”

Reasonably interpreted, Tebele sufficiently complied with any obligations it had under the Endorsement because it “kept the sprinkler system in place,” and “did not dismantle it.” *See Five Star Hotels*, 2011 U.S. Dist. LEXIS 31313 at *24. Much like the insured in *Breton*, moreover, Tebele took great steps to assist Garcia, the tenant, with the installation of a complete sprinkler system in the building. As detailed above, Tebele paid Crawford to obtain the pertinent permit application and install the sprinkler system. To confirm the sprinkler system was properly installed, Tebele repeatedly contacted Crawford and their subcontractors in August of 2018, telling them “that the [sprinkler] system had to be connected.” Ultimately, Tebele paid thousands of dollars to Crawford for the complete installation of the sprinkler system, but neither Crawford nor Garcia endeavored to connect the sprinkler infrastructure to water pipelines before the fire occurred.

Moreover, Tebele was not in control of the Property, but merely owned it. *See Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992)(finding that a lessor was not responsible for hazardous conditions on the land created by the lessee because, “[i]n the absence of an agreement to the contrary, the lessor surrenders possession and control of the land to the lessee”); *see also Monari v. Surfside Boat Club, Inc.*, 469 F.2d 9, 11 (2d Cir. 1972) (defining control as “sufficient possessory dominion over the property”); *Hanson v. General Acc. Fire Life*, 450 So. 2d 1260, 1262 n.2 (Fla. Dist. Ct. App. 1984) (“In general, the courts have held that an insured with only limited access to property does not control the property.”); *Washington Housing Auth. v. N.C. Housing Auth.*, 130 N.C. App. 279, 284 (N.C. Ct. App. 1998) (declining to apply a custody, care

or control exclusion where “the property was not in plaintiff’s exclusive custody or control and others, such as tenants, were in possessory control of portions of the premises”). The Endorsement is inapplicable for that reason too.

Westfield Insurance Co. v. Enterprise 522, LLC is also instructive. There, the endorsement provided that, “as a condition of insurance . . . [the] [insured] is required to maintain the protective devices or services listed in the schedule above.” 34 F. Supp. 3d 737, 742 (E.D. Mich. 2014). The exclusionary provision requiring an automatic building sprinkler system was defined by the endorsement’s reference to a ‘P-1’ code or symbol and the endorsement’s corresponding sprinkler safeguard description. *Id.* at 742, 744. But the code was not listed in the schedule referenced in endorsement, and the declarations page only listed the code “under the Optional Coverages subheading, and [it was] not even defined on the declarations page, nor [was] there text directing [the insured] to the page which defines the symbol.” *Id.* at 744.

The court held that the “applicability of the exclusion [was] patently ambiguous on its face; even a reading of the policy, i.e., endorsement and its declarations fails to adequately show that the exclusion is a condition of fire coverage.” *Id.*

As in *Westfield*, the Endorsement’s exclusionary provision requiring an automatic building sprinkler system is defined by reference to an ‘AS’ code or symbol and the corresponding sprinkler safeguard description. But the Policy’s declarations neither define the ‘AS’ symbol nor direct the insured to a policy provision that defines the ‘AS’ symbol, and the second page of the declarations merely lists the form code or encrypted series of codes listed on the endorsement under ‘Forms Applicable To Common Forms.’ More importantly, the ‘AS’ symbol, which would make the Endorsement’s exclusion applicable to a particular property, is not even listed or mentioned in the

SOV. Thus, the applicability of the Endorsement is ambiguous, and that doubt must be resolved in favor of Tebele.

Finally, the Policy the Insurers sold to Tebele promises to “pay for direct physical loss of or damage to ‘Covered Property’ at [the Insured Property] caused by or resulting from [fire].”⁴⁹ Pursuant to the Policy, “Covered Property” includes not only the building situated on the Insured Property, but also “additions under construction, alternations and repairs to the building or structure.”⁵⁰ The Endorsement directly conflicts with these coverage provisions, which specifically insure additions and alterations, such as the building sprinkler system installed by Crawford but still under construction at the time of the fire. A building sprinkler system that is under construction at the time of a fire loss cannot be operational at that time, and would undoubtedly be covered under the Policy regardless of its operational status. To give effect to the exclusion by barring coverage because the property remained under construction at the time of the fire would render the “Covered Property” provisions meaningless.

Thus, the internal inconsistency created by the Endorsement’s exclusion also renders the Policy ambiguous, and that ambiguity must be resolved in favor of coverage. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (“The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous, and we must resolve that ambiguity in favor of coverage.”).

In short, as used in the Policy, and under jurisprudence interpreting policy language nearly identical to this one, the Endorsement is ambiguous and must be interpreted in Tebele’s favor. And because the undisputed facts show that Tebele was not in control of the Property’s sprinkler system

⁴⁹ See PL’s MSJ, at Ex. O, p. 18, Policy at p. 8, § A; *Id.* at p. 48, Policy at p. 38.

⁵⁰ *Id.* at p. 18, Policy at p. 8, § A(1)(a)(5)(b).

at the time of the fire, and sufficiently “maintained” the sprinkler system upon which coverage is supposedly conditioned, the Insurers cannot deny coverage for the fire. At minimum, they are not entitled to summary judgment based on the Endorsement.

D. The Insurers’ Are Estopped From Invoking (And Waived The Right To Invoke) The Protective Safeguards Endorsement.

Courts across the country have assessed facts and protective safeguard endorsements akin to those at issue in this case, and have consistently held that insurers are estopped from invoking, and have waived rights under, the Endorsement. At minimum, courts recognize that facts tending to support the application of waiver or estoppel preclude summary judgment in favor of the insurer. *See, e.g., Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421 (1989) (issues of fact concerning equitable estoppel in the context of an insurer’s reliance on exclusions precluded summary judgment in the insurer’s favor given its knowledge of the nature and scope of the insured’s operation, which led the insured to believe that he was fully covered for the loss); *see also Crescent Co. of Spartanburg, Inc. v. Insurance Co. of N. Am.*, 266 S.C. 598, 602 (1976) (issues of fact as to whether the insurer should be estopped from denying coverage or waived the right to raise exclusions for damage to vacant buildings precluded summary judgment, as the facts showed that the insurer had knowledge that the houses had been unoccupied for years).

Under South Carolina law, waiver and estoppel are related equitable remedies that prevent a party from asserting rights that have been waived through that party’s own inequitable conduct. *See Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 552, 148 S.E.2d 369, 371 (1966) (noting that the two “related” doctrines “result[] from conduct of the party against whom it is invoked which has rendered it inequitable that he assert a right to which, in the absence of such conduct, he would be entitled.”). In the insurance coverage context, waiver and estoppel prevent insurers from barring coverage for losses triggered by facts known to the insurer when it bound coverage, and which the

insured reasonably understood would be covered. *See e.g Fender v. N.Y. Life Ins. Co.*, 158 S.C. 331, 339 (1930) (insurer could not rely on forfeiture clause requiring that the insured not receive any new medical diagnoses prior to policy issuance where the insurer knew that the insured breached the condition yet nevertheless issued the policy); *Hightower v. New York Fire Ins. Co.*, 112 F. Supp. 10, 11 (E.D.S.C. 1953) (insurer could not bar coverage based on the condition that the property remain unoccupied where the insurer was aware that the insured was living on the insured property); *Preferred Risk Mut. Ins. Co. v. Thomas*, 372 F.2d 227, 230-31 (4th Cir. 1967) (holding that an insurer was estopped from relying on an exclusion for vehicles used as public conveyance where the insurer knew that the vehicle would be used as such prior to issuing the policy and nevertheless bound coverage and accepted premiums); *Auto Owners Ins. Co. v. Pittman*, No. 2007-UP-341, 2007 WL 8327923, at *3 (S.C. Ct. App. June 29, 2007) (estopping insurer from denying coverage “where the insured misrepresented his health history,” but “there was evidence the insurer’s agent had been informed of the insured’s medical history,” thereby binding the insurer through agency principles).

While these doctrines do not generally extend the scope of coverage afforded, they operate to waive conditions or exclusions to what is otherwise a covered cause of loss. *See Peters v. Great American Ins. Co.*, 177 F.2d 773, 778 (4th Cir. 1949) (noting that waiver may not alter the “scope of a policy” but may waive conditions of coverage); *see also Cent. Mut. Ins. Co. v. Ycaw5, LLC*, Nos. 09CVH-07-10013, 09CVA-11-17138, 2011 Ohio Misc. LEXIS 12499, at *16 (Ct. Com. Pl. Jan. 4, 2011) (denying insurer’s argument that preventing the application of a protective safeguards endorsement altered the scope of coverage where fire was a covered cause of loss under the policy).

Not only have South Carolina courts frequently applied estoppel and waiver to prevent insurers from relying on exclusionary clauses, but courts across the country have also consistently

estopped insurers from applying protective safeguard endorsements to bar coverage in situations akin to those at play here—where the Insurers bound coverage despite knowledge of dispositive, undisputed facts that could otherwise jeopardize coverage under the endorsement itself.

For instance, in *Kinsale Insurance Co. v. JDBC Holdings, Inc., et al.*, the court granted a policyholder’s motion for summary judgment in a fire loss case where the policyholder was in the process of installing a sprinkler system and the insurer bound coverage knowing it. Case No. 3:20-CV-8, 2021 WL 2773002 (N.D. W.Va. Mar. 31, 2021). The protective safeguard endorsement in *Kinsale* was almost identical to the one at play here. Specifically, the *Kinsale* policy required the policyholder, “[a]s a condition of this insurance . . . to maintain the protective devises or services listed in [the policy’s] schedule,” including a “Automatic Sprinkler System” and “related supervisory services.” *Id.* at * 4. An “Automatic Sprinkler System” meant “[a]ny automatic fire protective or extinguishing system, including connected . . . sprinklers and discharge nozzles.” *Id.*

The endorsement issued to the insured in *Kinsale* mirrors the one purportedly issued to Tebele: “We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you . . . [f]ailed to maintain any protective safeguard listed in the [s]chedule above, and over which you had control, in complete working order.” *Id.* Much like what Tebele did before the fire, the *Kinsale* policyholder and landowner paid a third-party contractor \$89,700 to “design, furnish, and install a fire protection system for the [policyholder’s] factory.” *Kinsale*, 2021 WL 2773002 at *1. Preparations for connectivity to city lines were underway, but incomplete. *Id.* Shortly thereafter, the policyholder began shopping for property coverage and applied for insurance through a broker. *Id.* In the application process, the policyholder said “its sprinkler system [was] being installed” and was not yet complete. *Id.* at *2 (internal quotations omitted). The insurer, knowing this, bound

coverage and, naturally, before the policyholder could complete all of the fire protective work, an accident sparked a fire that burned the factory to the ground. *Id.*

The court held that the insurer was estopped from invoking, and waived all rights under, the protective safeguard endorsement. Specifically, the court held that the insurer “knew at the time of the insurance application that [the policyholder] did not have said fire protection safeguards installed at the subject facility.” *Id.* at *6. The court noted that “[a]n insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed.” *Id.* at *7. Indeed, “[i]t is patently unfair for a claimant to obtain a policy, pay his premiums and operate under the assumption that he is insured against a specified risk, only to learn after he submits a claim that he is not insured[.]” *Id.*

Although the insurer argued against estoppel because “it believed the sprinkler system was either ‘fully installed or would be very soon,’” the court rejected that position. *Id.* In doing so, the court explained that the “undisputed portion of the record herein clearly demonstrates that [the policyholder] disclosed that the fire prevention systems at issue were not installed, but were instead ‘being installed[.]’” *Id.* Despite knowing this, the insurer “approved [the] application, bound and issued the subject policy, and accepted [the policyholder’s] \$80,000 premiums in exchange for coverage.” *Id.* Ultimately, the court estopped the insurer from applying the safeguard endorsement to bar coverage because it “issued the subject policy with knowledge of facts that would void the policy under the fire safeguards endorsement and because [the policyholder] relied on that decision by not obtaining coverage elsewhere[.]” *Id.*

Similarly, courts in *Colony Insurance Co. v. Peterson* and *Centennial Mutual Insurance Co. v. YCAW5, LLC* considered facts nearly identical to those here at play and held that the insurers waived, and were estopped from invoking, protective safeguard endorsements. 582 F. App’x 156

(4th Cir. 2014); 2011 Ohio Misc. LEXIS 12499, at *2. In *Colony*, the insurer inspected the premises the same day it issued the policy and discovered that all utilities, including water and heat, were disconnected. 582 F. App'x at 158. A few weeks after the inspection, a fire destroyed the property and a corresponding report revealed that the sprinkler system was inactive. *Id.* at 159. Critically, in discovery, an employee of the insurer testified that she received the inspection report indicating that water and utilities were disconnected to the property, but she “just did not get to the inspection by the time the loss occurred.” *Id.* at 159. The insured also identified discrepancies “between some of the representations made on insurance applications and the conditions revealed by [insurer’s] inspections.” *Id.* Ultimately, the court held that insurer “waived its right to rescind the policy and was estopped from denying coverage” for the loss. *Id.*

Likewise, in *Centennial*, the insured owned a large warehouse and “inadvertently” turned off the sprinkler system in half the building. 2011 Ohio Misc. LEXIS 12499, at *2. A group of insurers wrote coverage for the premises and included a protective safeguards endorsement that “condition[ed]” coverage on the insured “maintain[ing] the protective devices or services,” including an “Automatic Sprinkler System.” *Id.* at *5. The policy also contained an exclusion that barred coverage if insured “[k]new of any suspension or impairment in any protective safeguard” or “[f]ailed to maintain any protective safeguard . . . in working order.” *Id.* The insurers conducted a “loss control survey” of the premises that identified operational deficiencies in the building’s sprinkler system. *Id.* at *4. The insurer received this report and discussed its findings at length with the insurer’s general agent. *Id.* at *13-14. In fact, the agent wrote two letters to the insured “urg[ing] prompt compliance” and asking the insured to “let us know within 30 days what action will be taken” by the insured to remedy the situation. *Id.* at *15.

Critically, as the court explained, “[t]here was no suggestion that coverage would not remain in force while investigation and corrective actions were pursued[.]” *Id.* at *15-16. Indeed, “more importantly[,] there is no suggestion in the record that [the insurer] did not have knowledge as good as its insured” regarding the disabled sprinklers. *Id.* at *16. After a fire decimated the premises and the insurer denied coverage, the court denied insurer’s summary judgment motion, finding that “the voluminous factual record appears to show that [insurer’s] underwriter knew of some significant difficulties with [insured’s] sprinkler system.” *Id.* Despite that knowledge, the insurer “never suspended fire insurance . . . and took a rather benign view of the urgency of attending to this issue.” *Id.* Accordingly, the court denied the insurer’s summary judgment motion because it waived its right to assert the endorsement and exclusions at play.

Here, it is undisputed that the Insurers knew the sprinkler system was not connected to water prior to issuing the policy. Prior to binding coverage, the Insurers conducted *multiple* on-site inspections that revealed a completed sprinkler system that was unconnected to water lines. While the Insurers received Tebele’s application indicating that the Property had a sprinkler system that was “100%”, multiple sources informed Insurers that the sprinkler system was unconnected to a water supply. In fact, just days prior to Tebele submitting the application for insurance on the Property, Nenna contacted Gurtzweiler to clarify that the insurance application incorrectly rated the sprinkler system and gave the Insurers a “head’s up” that the system was not yet operational. Acting on behalf of the Insurers’ underwriting agent AmWINS, Gurtzweiler replied: “Got it, I’ll note the file,” and the Insurers proceeded to bind coverage four days later.

The Insurers were thus perfectly aware that the Property’s sprinkler system was completely installed but unconnected to the water supply. Much like the insurers in *Kinsale*, Insurers had an “obligation to its insureds to do its underwriting at the time a policy application is made, not after

a claim is filed.” *Kinsale*, 2021 WL 2773002 at *7. Much like *Kinsale*, here the “undisputed portion of the record herein clearly demonstrates that [Plaintiff] disclosed that the fire prevention systems at issue were not installed, but were instead ‘being installed[.]’” *Id.* Yet, the Insurers “approved [Plaintiff’s] application, bound and issued the subject policy, and accepted [Plaintiff’s] premiums in exchange for coverage.” *Id.* The court estopped the insurer from invoking the endorsement to bar coverage because it “issued the subject policy with knowledge of facts that would void the policy under the fire safeguards endorsement and because [the policyholder] relied on that decision by not obtaining coverage elsewhere[.]” *Id.*

The risk at issue in the instant action—i.e., that a fire may destroy Tebele’s property—was factored into the underwriting of the Policy, and the premium paid by Tebele was in exchange for coverage against the same risk. Binding coverage with this knowledge, and collecting more than \$105,000 in premiums, and then seeking to evade coverage obligations through the Endorsement, estops Insurers from using the Endorsement as a basis to deny coverage.

E. The Insurers’ Motion Also Lacks Merit To The Extent They Contend That Tebele Lacks An Insurable Interest In The Property.

The Insurers’ motion asserts that the property is owned by Kings Realty Management, LLC, and mentions in passing that “Plaintiff is not a member of Kings Realty, nor is Kings Realty a partner of Plaintiff.” *See* Mot. 1-2. Having failed to file any memorandum elaborating upon their positions, it is unclear whether this is meant to suggest that Tebele lacks a sufficient interest in the property to recover under the Policy. To the extent the Insurers are making that argument, they are incorrect. While Kings Realty is an additional insured under the Policy, it is not and has never been an owner or record fee title holder of the Insured Property. *See supra*.

Even if Tebele lacked full property ownership, South Carolina’s Valued Policy law would still entitle Tebele to recover the full amount of insurance. *See* S.C. Code Ann. § 38-75-20 (“[T]he

amount of insurance must be fixed by the insurer and insured at or before the time of issuing the policy. In [the] case of [a] total loss by fire the insured is entitled to recover the full amount of insurance.”). “Under settled principles, this statute forms a part of every fire insurance policy issued in this State and policy provisions in conflict with the statute are null and void.” *Tedder v. Hartford Fire Ins. Co.*, 246 S.C. 163, 166, 143 S.E.2d 122, 123 (1965). In the event of a total loss by fire, an insured, under the Valued Policy Statute, “may recover the full value insured even though he has a limited interest worth less than the amount of the insurance.” *Hunt v. Gen. Ins. Co.*, 227 S.C. 125, 132, 87 S.E.2d 34, 37 (1955).

In the partnership context, where an insurer insures real property and receives payment of the premium, “paid on the partnership’s account, it cannot [thereafter] . . . be heard to question the policy on the basis that it was issued in the name of the partners instead of the partnership itself.” *S.C. Ins. Co.*, 315 S.C. at 213, 432 S.E.2d at 509. All property “acquired by purchase or otherwise, on account of the partnership . . . , [and] property acquired with partnership funds is partnership property.” S.C. Code Ann. §§ 33-41-230(1), (2); *see also Stephens v. Stephens*, 213 S.C. 525, 50 S.E.2d 577 (1948) (Real estate purchased with partnership funds is partnership property even if legal title is in the name of individual partners.).

Indeed, “anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction.” *Powell v. Ins. Co. of N. Am.*, 285 S.C. 588, 330 S.E.2d 550 (Ct. App. 1985). “The contractual duty to procure insurance gives rise to an insurable interest, as the party bound to obtain insurance will suffer a pecuniary loss on destruction of the property in the absence of insurance.” *Jones v. Equicredit Corp.*, 347 S.C. 535, 542, 556 S.E.2d 713, 717 (Ct. App. 2001). “The lack of an ownership interest does not necessarily translate into lack of an insurable interest.” *Studio Frames, Ltd. v. Std. Fire Ins. Co.*, 483 F.3d 239, 245 (4th

Cir. 2007).⁵¹ Thus, a policyholder who expends his own money to make building improvements but does not have an ownership interest therein has an insurable interest in the property because the insured will “suffer a loss in if the building was damaged or destroyed.” *Studio Frames, Ltd.*, 483 F.3d at 245 (citing *State Farm Auto. Ins. Co. v. Raymer*, 977 P.2d 706, 811 (Alaska 1999)) (stating that “the measure of an insurable interest in property is the extent to which the insured might be indemnified by loss, injury or impairment”).

In *Studio Frames*, the insurer argued “that because [plaintiff] did not own the building, it ha[d] no insurable interest in it.” *Studio Frames, Ltd.*, 483 F.3d at 245. Applying South Carolina precedent, the United States Court of Appeals for the Fourth Circuit held that the plaintiff had an insurable interest since it expended money to make building improvements. *Id.*

In the instant action, Tebele paid the consideration to purchase and purchased the Insured Property. As more favorable entity types became available after Tebele purchased the Insured Property in 1990, Tebele’s partners formed KRLP and deeded the Insured Property to it so KRLP would be the named fee title holder of record. Thereafter, Tebele continued to manage, maintain, and improve the Insured Property. Tebele paid \$236,516 for the design and installation of the building sprinkler system at the Insured Property, procured and paid the premium for the Policy, and executed the Premium Finance Agreement obligating Tebele for repayment of the policy premium balance plus interest accrual. And Tebele’s source of repayment of the property and improvement expenditures vanished when the Property was destroyed by fire.

⁵¹ See also *Benton & Rhodes v. Boden*, 310 S.C. 400, 404, 426 S.E.2d 823, 826 (Ct. App. 1993) (“The term ‘interest,’ is not limited to property or ownership in the subject matter of the insurance; where the interest of insured in, or his relation to, the property is such that he will, or may, be benefited by its continued existence or suffer a direct pecuniary loss from its destruction or injury by fire, his contract of insurance will be upheld, although he has no title, either legal or equitable, no property right or interest, no estate, no lien, and no possession or right of possession.”). “An insurable interest in property does not necessarily imply a property interest in, or a lien upon, or possession of, the subject matter of insurance, and neither title nor a beneficial interest is requisite to the existence of such an interest, it is sufficient that the insured is so situated with reference to the property that he would be liable to loss should it be injured or destroyed by the peril against which it is insured.” *Id.*

In short, the Policy is a valued policy that provides coverage for both the building and the building sprinkler system addition under construction at the time of the fire. Therefore, Tebele, as the first-named insured under the Policy, is entitled to recover the full value insured or the full amount of insurance. For purposes of the Insurers' motion, it suffices that Tebele has an insurable interest and is entitled to coverage for the reasons discussed above, so the Insurers are not entitled to judgment as a matter of law.

F. Summary Judgment Is Inappropriate on the Issue of Bad Faith.

In the context of a claim for bad faith refusal to pay benefits due under an insurance policy, the question of whether the insurer's refusal to pay was reasonable is reserved for the jury. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 451-52, 450 S.E.2d 582, 585-86 (1994) (holding that trial judge did not err in submitting the question of whether the insurer's refusal to pay benefits was unreasonable to the jury). If more than one inference can be drawn from the evidence, summary judgment as to a claim for bad faith refusal to pay must be denied. *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 398, 562 S.E.2d 659, 661 (Ct. App. 2002).

"An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *Am. Fire & Cas. Co. v. Johnson*, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998). Bad faith can also be established by showing that the insurer engaged in misconduct in issuing the policy and in adjusting the claim. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994). An insurer's delay in paying first party benefits, for example, has been construed by the South Carolina Supreme Court as sufficient to satisfy the requisite elements of a bad faith claim. *Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996). "An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." *Mixson, Inc.*, 349 S.C. at 400, 562 S.E.2d at 662.

Here, to the extent the Court agrees that the Endorsement cannot be applied to bar coverage for the numerous reasons discussed above, the Court can also reasonably infer that the Insurers' denial of coverage based solely on that Endorsement lacked a reasonable basis and was made in bad faith. Moreover, the Insurers' corporate designee testified that the claims and underwriting departments are separate because they have two different functions. Yet, the Insurers blindly adopted Mark Melvin's erroneous interpretation of the Endorsement in Tebele's Policy in denying the claim. That suggests that the Insurers lacked any reasonable basis for their coverage decision.

The Insurers' corporate designee also testified that the SOV is based on the application. Yet, the SOV is a template that was prepared by the Insurers' AmWINS underwriter long before Tebele ever received the application. It is undisputed that the SOV was emailed by Delany to Mark Melvin on November 27, 2018, and that Delany emailed the SOV with the "100% Sprink" notation to Egan on December 14, 2018 for Egan to update for modeling purposes. It is also undisputed that Tebele neither received the Endorsement nor the SOV until after the fire, and that the Insurers withheld the SOV from Tebele until their March 19, 2019 letter.

The Insurers also waited nearly six months to deny coverage, and then misrepresented the facts in order to fit their narrative. For instance, the Insurers, in their August 6, 2019 denial letter, represented to Tebele that Gurtzweiler's knowledge of the building sprinkler system's operational status prior to binding was not relevant because Gurtzweiler was merely an insurance broker for the tenant. The record shows otherwise. Indeed, Gurtzweiler received and processed the Accord for coverage quotes in August of 2018, and requested information from Tebele on the Insurers' behalf up through January 3, 2019.

Ultimately, whether the Insurers acted in bad faith and lacked a reasonable, good faith basis for denying coverage by blindly adopting their underwriter's erroneous interpretation is a question

of fact for the jury to decide. *Howard*, 450 S.E.2d at 585-86. Thus, the Insurers are not entitled to summary judgment on Tebele's bad faith claim.

CONCLUSION

For the foregoing reasons, and those discussed in Tebele's Motion for Partial Summary Judgment, the Court should deny the Insurers' Motion for Summary Judgment and grant partial summary judgment in favor of Tebele finding that the Protective Safeguards Endorsement cannot be applied to bar coverage for the fire loss.

Respectfully submitted.

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November 29, 2022
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2020-CP-26-0808

A. TEBELE & SONS, a South Carolina
general partnership,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT
LLOYD'S; HDI GLOBAL SPECIALTY SE;
GENERAL SECURITY INDEMNITY
COMPANY OF ARIZONA; and
CRESCENT COAST INSURANCE, LLC,

Defendants.

**CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON; HDI GLOBAL
SPECIALTY SE, AND GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA'S CONSOLIDATED BRIEF IN
SUPPORT OF THE INSURERS' MOTION
FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Defendants, the Certain Interested Underwriters at Lloyd's, London subscribing to Policy Number AQS-190065 ("the Underwriters"), HDI Global Specialty SE ("HDI"), and General Security Indemnity Company of Arizona ("General Security Indemnity") (collectively the "Insurers") respectfully submit to this Honorable Court this Consolidated Brief in Support of the Insurers' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, pursuant to South Carolina Rule of Civil Procedure 56, the Local Rules of this Court, and applicable law.

I. SUMMARY OF ARGUMENT

Placing sprinkler heads on empty pipes does not create a "maintained" sprinkler system. Here, several insureds affirmatively represented that certain real property was 100% sprinklered. In reality, the property was 0% sprinklered, as it remained completely unprotected by an empty array of pipes and sprinkler heads incapable of deterring any fire. A fire consumed the property shortly after the insureds' incorrect characterization. That fire is not covered by the relevant insurance policy.

This matter involves a sophisticated group of commercial property management companies that applied for and obtained an insurance policy ("Policy") affording certain coverages for two dozen locations, subject to the Policy's terms and conditions. Prior to issuance of the Policy, one of the insured companies (collectively the "Insureds"), Kings Realty, LP ("Kings Realty"), began installing an automatic sprinkler system in its real property located at 1901 N. Kings Hwy in Myrtle Beach, South Carolina ("Property").¹ By all accounts, as of early 2019 Kings Realty had completed a significant portion of the sprinkler installation. Whether Kings Realty misunderstood communications with its sprinkler installation contractors (which it has argued) or was simply betting that the sprinkler would be up and running before any harm would befall the Property, two inescapable facts remain crystal clear.² First, on **January 14, 2019** Kings Realty and the Insureds represented in their insurance application to the Insurers that the Property was 100% sprinklered **at that time**. Second, the Insureds did **not** provide any notice to the Insurers between their January 14, 2019 insurance application and the February 24, 2019 fire ("Loss Event") that damaged the Loss Location that the Loss Location sprinkler was **never** completed **nor** operational.

The Policy entered into between Kings Realty and the Insurers contains a coverage condition requiring the Insureds to maintain an Automatic Sprinkler System. The Insureds merely had a collection of dry pipes and sprinkler heads at the Property,

¹ As discussed herein, the Plaintiff is not the owner of the Property and has no insurable interest therein. For ease, the collective term "Insureds" is used to the extent the facts or analysis require no distinction. Where a distinction is warranted, references are made to "Plaintiff" and "Kings Realty."

² The Insureds have testified under oath that they were told by their contractors that the sprinkler system "would be connected" by January 14, 2019. See *Ex. 1, Insureds' EUO Transcript*, at p. 74:8-15 [hereinafter "*Insureds' EUO*"]. However, the Insureds continued to communicate with their contractors regarding completion of the sprinkler system **after they submitted their insurance application**. See *Ex. 21, Jan. 31, 2019 Email from Bob Summers, Carolina Tap 000193 (relaying access provided by the Insureds to subcontractor assigned to install tap connection)*.

anticipating a sprinkler system that the Insureds never completed with a tap connection. In other words, the Insureds **failed** to comply with a required Policy condition. The Policy, as a matter of law, **unambiguously** precludes coverage for the Loss Event to any Insured, including both the owner Kings Realty and Plaintiff, who, in addition to having failed to comply with the Policy's terms, had no insurable interest in the Property.

The Insureds' reaction to the Loss Event was to blame anyone and everyone else, including the tenant renting a fraction of the Property, the Insureds' broker Crescent Coast ("Insureds' Broker"), who communicated to the Insurers that the Property was 100% Sprinklered, and the Insurers who accepted the Insureds' application representations. Indeed, Plaintiff incorrectly asserts that the Policy is ambiguous, that Plaintiff did not receive the Policy before the Loss Event, and that the Insurers somehow knew that the sprinkler was not operational when coverage was bound. Applicable law belies each of Plaintiff's unfounded arguments, which attempt to avoid any consequences for the Insureds' affirmative, but incorrect representation that the Property was 100% Sprinklered. As such, the Insurers are entitled to summary judgment as a matter of law and an order denying Plaintiff's motion for partial summary judgment.

II. **STATEMENT OF UNDISPUTED MATERIAL FACTS**

The following material facts are not subject to genuine dispute and demonstrate that summary judgment in favor of the Insurers is proper. This recitation of material facts identifies the specific evidence adduced in this matter, which, upon review, demonstrates that Plaintiff's purported recitation of facts is entwined with unreasonable inferences refuted by the record.

A. Kings Realty's Ownership and Occupancy of the Property

At all times relevant to the instant litigation, Kings Realty owned the Property. See **Ex. 2**, *Abraham Tebele Deposition Transcript*, at p. 11:6-9 [hereinafter "*Tebele Depo.*"]; **Ex. 1**, *Insureds' EUO*, at p. 20:4-7 ("[T]he property is owned by a partnership, which is Kings Realty, LP."); **Ex. 3**, *Amendment to Commercial Lease*, EUO-000156 (identifying Kings Realty as landlord/lessor of Property).³ The Property is an approximately 36,000 square-foot commercial space. **Ex. 2**, *Tebele Depo.*, at p. 86:15-24.

Beginning on or about April 1, 2016, Kings Realty began leasing a fraction of the Property, totaling approximately 9,300 square feet, less than 26% of the Property, to a restaurant/club d/b/a La Casona ("Rented Space"). See **Ex. 1**, *Insureds' EUO*, at p. 46:6-25 (admitting that La Casona occupied only 9,300 square feet and remaining area was vacant); **Ex. 4**, *Commercial Lease and Deposit Receipt*, EUO-000157-159 [hereinafter "*Lease*"]. Per the Lease between La Casona and Kings Realty, Kings Realty retained ultimate decision-making authority regarding any improvement or alteration to be installed within the Rented Space. See, **Ex. 4**, *Lease*, EUO-000157-159 ("No improvement or alteration of the premises shall be made without the prior written consent of the Lessor.").

During the course of La Casona's use of the Rented Space, Kings Realty decided to add an automatic sprinkler system to the entire Property, not just the approximately 26% occupied by La Casona. See, **Ex. 2**, *Tebele Depo.*, at pp. 74:25-

³ According to the Insureds, A. Tebele & Sons has no legal relationship to Kings Realty, LP. See **Ex. 1**, *Insureds' EUO*, at p. 20:13-19. The only connection between the two separate entities is an overlap of individuals involved with both. See *id.* Similarly, Mr. Tebele's property management company, Kings Realty of SC, had no involvement with the Property. See **Ex. 1**, *Insureds' EUO*, at p. 19:8-23.

75:17. Kings Realty acted upon this intent by paying its contractors to perform installation of sprinkler heads and piping throughout the **entire** Property. However, the Insureds never completed the sprinkler system or made it operational, as the Insureds **never completed an outstanding tap connection to the city water line outside of the Property**. See **Ex. 2**, Tebele Depo., at p. 103:14-104:6; see also **Ex. 1**, Insureds' EUO, at p. 38:3-6 ("[W]e also know, now, **the tap connection was not complete**."); see also **Ex. 2**, Tebele Depo. at p. 102:18-21 (agreeing the sprinkler system was not connected to water as of the Loss Event, and did not spray a single drop of water).

B. The Insureds' Procurement of Insurance Coverage, Including the Policy

The Insureds, a savvy group of property management companies, have experience procuring insurance policies, including insurance policies containing endorsements conditioning coverage on the presence of protective safeguards such as automatic sprinkler systems. For example, under a prior insurance policy issued by a different market of insurance carriers, a miscommunication between the Insureds and its prior carriers led to an incorrect identification of locations subject to a protective safeguards endorsement. The Insureds immediately contacted their prior carriers to correct the miscommunication regarding their prior policy the same day they received the pertinent documents. See **Ex. 5**, Apr. 2, 2018 Emails between Amanda Columbus of CRC Atlanta and Alice Sanders of BB&T Insurance Services, McGriffSUBP_000110-111. In addition to being vigilant regarding the insurance coverage they obtained directly, the Insureds also took steps to verify protections afforded through the insurance coverage obtained by their tenants at the Property, such as La Casona. See **Ex. 6**, Aug. 8, 2018 Text Messages between Mr. Tebele and Mr. David Egan of

Crescent Coast, Crescent Coast 02631-32 (verifying insurance coverage obtained by La Casona relative to the Rented Space).

When the Insureds procured the Policy, they similarly used their acumen to negotiate the premium charged relative to the Policy based on numerous characteristics of the various locations. For example, the Insureds identified five locations, including the Property, which the Insureds represented via their January 14, 2019 insurance application (“Application”) were 100% Sprinklered. See **Ex. 7**, *Application, Tebele 000192-228*; **Ex. 2**, *Tebele Depo.*, at pp. 90:3-91:22 (*conceding that four of the five locations had operational sprinkler systems*); see also *Plaintiff’s Memo. in Support of Partial Motion for Summary Judgment*, at p. 8 (*conceding that five buildings were represented as 100% Sprinklered*). The lack of any automatic sprinkler system at all remaining locations was also clear; the Insureds represented that each of the remaining locations was “0%” Sprinklered. See **Ex. 7**, *Application, Tebele 000192-228*.

Based upon the various characteristics of the locations as identified by the Insureds via the Application, the Parties negotiated the terms of and agreed to enter an insurance contract, *i.e.* the Policy. First, based upon their negotiations the Parties agreed to bind coverage effective January 15, 2019. That same day, AmWINS Special Risk Underwriters (“SRU”), the Insurers’ underwriter relative to the Policy, sent the binder agreement (“Binder”) reflecting the Parties’ negotiations to the Insureds’ Broker. See **Ex. 8**, *Jan. 15, 2019 Email from Hollan Delany, Crescent Coast 00551-53*; **Ex. 9**, *Binder, Crescent Coast 00715-20*; **Ex. 17**, *Crescent Coast Deposition Transcript*, at pp. 106:22-107:4; 108:7-12. In its January 15, 2019 email, SRU instructed Plaintiff to review

the Binder carefully and provide immediate notice of any perceived inaccuracy. See **Ex. 8**, Jan. 15, 2019 Email from Hollan Delany, Crescent Coast 00551-53.

The Binder specifically states that an Automatic Sprinkler System Protective Safeguard applies to the Policy and identifies “Form SRU-024 0710 Protective Safeguards - Fire” (“Safeguards Endorsement”) as the relevant form. See **Ex. 9**, Binder, at Crescent Coast 00716. Two days later, the Insureds’ Broker provided the Binder to the Insureds. See **Ex. 10**, Jan. 17, 2019 Email from David Egan, EUO-000425-426. While the Insureds did identify adjustments needed to the Policy, including desired modifications to the Schedule of Values, the Insureds did not raise any issue with the automatic sprinkler system purportedly in place at the Property or the corresponding Protective Safeguard Endorsement. See, e.g., **Ex. 11**, Crescent Coast Insurance, LLC’s Answers to HDI Global Specialty SE’s Second Requests for Admission, Response no. 11 (admitting change requests regarding addresses and additional mortgagees); **Ex. 12**, Jan. 31, 2019 Email from David Egan, Crescent Coast 00573-75 (identifying address revisions and an additional property to be insured); **Ex. 13**, Feb. 18, 2018 Email from Hollan Delany, Crescent Coast 00578 (providing endorsement showing inclusion of new property added to Policy by Insureds); see also **Ex. 14**, Certified Policy, AMWINS-000107 (endorsement adding additional property).

Then, on February 7, 2019, SRU sent a copy of the Policy, including the Safeguards Endorsement, to the Insureds’ Broker together with another request that the Insureds provide immediate notice of any perceived inaccuracy. See **Ex. 15**, Feb. 7, 2019 Email from Hollan Delany, Crescent Coast 00576-577; **Ex. 16**, Crescent Coast Deposition Exhibit 16; **Ex. 17**, Crescent Coast Depo., at pp. 72:2-73:3 (testifying relative

to deposition exhibit 16 that the “whole package was emailed,” including the Safeguards Endorsement). During the entirety of this time, the Insureds, via their Broker, also had access to the Schedule of Values. See **Ex. 17**, *Crescent Coast Depo.*, at pp. 108:13-109:1 (testifying that the Insureds had access to the schedule of values on January 15, 2019 when Policy was bound).

The Safeguards Endorsement establishes both (1) a condition precedent to coverage, and (2) an exclusion. See **Ex. 14**, *Policy*, AMWINS-000092. Relative to the condition precedent, the Insureds “are required to maintain the protective devices or services listed” on the Endorsement’s “Schedule.” See *id.* Given the differences in characteristics between the numerous locations on the Policy, the Endorsement “Schedule” incorporates “the Schedule of Values on file with the Company” to identify the locations subject to the “Automatic Sprinkler System” safeguard condition. See *id.* Regarding Sprinklered locations, the Schedule of Values matches the Application. It identifies as 100% Sprinklered the same five locations the Insureds represented to be 100% Sprinklered, including the Property, while the remaining locations also match the Application in that they are identified as 0% Sprinklered. See **Ex. 18**, *Schedule of Values*, *Crescent Coast 01350-1353*.

Turning to the exclusion, the Endorsement explicitly precludes coverage for “loss or damage caused by or resulting from fire if, prior to the fire, you [the Insureds] failed to maintain any protective safeguard listed in the [Endorsement] Schedule . . . , and over which you had control, in complete working order. See **Ex. 14**, *Policy*, AMWINS-000092.

Despite receiving the Policy on February 7, 2019 via Crescent Coast, the Insureds did nothing to correct their erroneous Application representation that the Property, among other characteristics, was 100% Sprinklered **as of January 14, 2019**. See **Ex. 19**, *Crescent Coast Insurance, LLC's Answers to HDI Global Specialty SE's Requests for Admission, Response no. 1* (admitting that "between January 14, 2019 and February 24, 2019 there were no communication [sic] with AmWINS Special Risk Underwriters pertaining to the sprinkler system being unconnected"). Nor did the Insureds raise any issue with the Safeguards Endorsement. But see **Ex. 5**, Apr. 2, 2018 *Emails, McGriffSUBP_000110-111* (demonstrating that the Insureds were aware of the need to properly identify properties subject to such endorsements).

C. The Loss Event and the Insureds' Efforts to Rewrite the Policy

As explained above, the Insureds did nothing to correct their representation that the Property was "100% Sprinklered" at any time between January 14, 2019 and February 24, 2019. On February 24, 2019, the Loss Event occurred, causing significant damage to the Property. Plaintiff agrees that the empty piping and sprinkler heads at the Property did not disburse a single drop of water because they had no connection to water. See **Ex. 2**, *Tebele Depo.*, at p. 102:18-22. In contrast, all four of the other insured locations identified as being 100% Sprinklered all had sprinkler systems that were installed **and** connected to water. See **Ex. 2**, *Tebele Depo.*, at pp. 90:3-91:22 (conceding that all 100% Sprinklered locations, except for the Property, had operational sprinkler systems).

After the Insureds provided notice of the fire loss as an insurance claim ("Claim"), the Insurers conducted their investigation. Said investigation revealed that not only was

the Property's sprinkler not operational at the time of the Loss Event, but indeed the sprinkler was **never** operational. At all times prior to the Loss Event, the Property was actually 0% Sprinklered, not 100% Sprinklered as represented by the Insureds on their Application. See **Ex. 1**, *Insureds' EUO*, at p. 38:3-6 ("*[W]e also know, now, the tap connection was not complete.*"). The Insureds had not complied with the condition precedent imposed by the Safeguards Endorsement as required to obtain coverage for the Claim.

Notwithstanding, since the Loss Event, the Insureds repeatedly have tried to rewrite the Policy by disregarding the unambiguous Safeguards Endorsement. For example, after the Loss Event the Insureds baselessly have argued that three inspection reports and an email from Crescent Coast to **La Casona's** underwriter (collectively the "Past Reports") somehow obviate their January 14, 2019 Application and the Safeguards Endorsement.⁴ See *Plaintiff's Memo. in Support of Partial Summary Judgment, Exhibits I-J, M*.

The following chart summarizes the pertinent information revealed via discovery conducted during the course of this litigation regarding the Past Reports, as compared to the Insureds' Application:

⁴ Prior to the Insureds' Application seeking the Policy, La Casona had employed Crescent Coast as La Casona's insurance broker and obtained insurance coverage via underwriter AmWINS **Access Insurance Services** ("AIS"). Although also an "AmWINS" entity, AIS does **not** have access to files from other AmWINS entities such as the Policy and the associated underwriting file and did not submit the Past Reports to SRU, a separate entity. See **Ex. 23**, *Whitney N. Northcutt Deposition Transcript*, at pp. 18:14-23; 48:4-51:21; 63:1-64:19.

Further, AIS did **not** underwrite the Policy at issue in this litigation. See **Ex. 23**, *Whitney N. Northcutt Deposition Transcript*, at p. 64:6-8.

<u>Document</u>	<u>Date</u>	<u>Policy no.</u>	<u>Contained in underwriting file?</u>	<u>Sprinkler information</u>
AmRisc Broker Report	2/14/2018	AMR-61964	No	"[N]ow adding a sprinkler system through the building <u>in all spaces.</u> "
Twenty First Services, LLC Commercial Package	10/3/2018	PAV0119063-NC127465 ⁵ [La Casona]	No	"Sprinkler system . . . Yes" "There is a sprinkler system, <u>riser is in unoccupied area of building and not under insured's [La Casona's] control.</u> "
Prometrix Loss Cost Quote	1/10/2019	None	No	"Sprinkler system installed: Yes"
Email from Sandra Nenna	1/11/2019	La Casona NC127465	No	"[T]he sprinklers have been installed, but the landlord has not turned the water on . . ."
Application	1/14/2019	AQS-190065 HAQRS-190065 TR00093911900065	Yes	"% SPRNK 100"

As reflected in the chart above, the Insureds' Application, not the Past Reports, provided the most recent evidence regarding the purported status of the Property's sprinkler system prior to the Loss Event. See **Ex. 7, Application, Tebele 000192-228**. Further, none of the Past Reports contains any indication that their contents were communicated **to the Insurers** at any time prior to the Loss Event. See *Plaintiff's Memo. in Support of Partial Summary Judgment, Exhibits I-J, M*. Additionally, the Insurers have testified that they did not have these documents, and none of the Past Reports are present in the Policy's underwriting file, which Plaintiff has reviewed via discovery in this Action. See **Ex. 20, Underwriters Deposition Transcript, at p. 40:1-41:9**;

⁵ Plaintiff redacted the policy number in its most recent submission of this document. However, Plaintiff did not redact the policy number when filing the document as Exhibit G to the initial Complaint.

126:4-11; 128:10-130:18 (testifying that the Insurers had conducted no inspection of the Property prior to the Loss Event and were unaware of Past Reports); **Ex. 24**, HDI's Responses to Plaintiff's Requests for Production, Response 14.

Given the Insureds' lack of compliance with the Safeguards Endorsement, the Insurers ultimately denied the Claim. Plaintiff then filed this Action alleging the Insurers' denial and reliance on the Safeguards Endorsement constituted a breach of contract and common law bad faith. Both of Plaintiff's causes of action fail as a matter of law.

III. LEGAL ANALYSIS⁶

The Insurers are entitled to summary judgment because (1) Plaintiff has no insurable interest in the Property, and (2) the Insureds failed to comply with the Policy's unambiguous Safeguards Endorsement by failing to "maintain" an Automatic Sprinkler System at the Property.

In contrast, all three arguments Plaintiff asserts in favor of its partial motion for summary judgment fail as a matter of law. As shown below, the Policy is not ambiguous, Plaintiff's assertion that one of its employees did not read the Policy prior to the Loss Event does not entitle Plaintiff to rewrite or avoid obligations within the Policy, and the Past Reports, superseded by the Insureds' Application, do not support waiver or estoppel.

⁶ The Court is to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Ambiguities, conclusions, and inferences arising in and from the evidence are construed in the light most favorable to the non-moving party. See *USAA Property and Casualty Insurance Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." See *id.*, 377 S.C. at 653-54, 661 S.E.2d at 796 (citation omitted); see also *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014).

Thus, as shown below, this Honorable Court should grant the Insurers' Motion for Summary Judgment and deny Plaintiff's motion for partial summary judgment.

A. Plaintiff Has No Insurable Interest in the Property and Regardless the Policy Does Not Afford Coverage for the Loss Event Because the Insureds Never Had an Automatic Sprinkler System in Place at the Property.

As a preliminary matter, the Plaintiff cannot recover in this matter because Plaintiff has no insurable interest relative to the Property. Courts applying South Carolina law require that an insured have a legal or equitable interest in property, such as ownership or tenancy, to pursue indemnification pursuant to an insurance contract. See *Belton v. Cincinnati Insurance Co.*, 360 S.C. 575, 579-80, 602 S.E.2d 389, 391-92 (2004); *South Carolina Insurance Co. v. White*, 301 S.C. 133, 138, 390 S.E.2d 471, 474-75 (Ct. App. 1990). Other connections to property, including mere possession, are insufficient as a matter of law to obtain any indemnification from an insurance policy. See *id.* The owner of the Property, Kings Realty, is not the Plaintiff in this matter, and the statute of limitations for Kings Realty to bring a breach of contract has expired.⁷ See *Lowcountry Block, LLC v. Cincinnati Insurance Companies*, 2017 WL 3278878, at *2 (applying a three-year statute of limitations to allegations of breach of contract). Plaintiff is a separate South Carolina general partnership, A. Tebele & Sons, and has no membership interest in Kings Realty. Nor did Plaintiff have any interest as an owner or tenant of the Property when the Policy inceptioned or at the time of the Loss Event. Thus, Plaintiff **lacks** the requisite legal or equitable interest in the Property to pursue indemnification for the Claim. This is particularly significant in this Civil Action as various

⁷ Although Plaintiff alleges that it is the Property's owner in its complaint, Plaintiff has refuted any ownership interest under oath as discussed in the material facts section. Compare *Complaint*, ¶ 3 (alleging Plaintiff's ownership), with *Ex. 2, Tebele Depo.*, at p. 11:6-9; *Ex. 1, Insureds' EUO*, at p. 20:4-7.

Insureds, including Plaintiff and Kings Realty, are currently embroiled in litigation regarding the entities' structure and assets.⁸

Even assuming Plaintiff is a proper party with an insurable interest, the Insureds admittedly never put an Automatic Sprinkler System in place at the Property, precluding coverage as a matter of law. In South Carolina, insurance policies are to be construed according to the law of contracts. See *Butler v. Travelers Home and Marine Insurance Co.*, 433 S.C. 360, 366, 858 S.E.2d 407, 410 (2021) (citations omitted). Contract interpretation requires a court “to ascertain and give legal effect to the parties’ intentions **as determined by the contract language**,” with such clear and unambiguous language “determin[ing] the contract’s force and effect.” See *id.*, 433 S.C. at 367, 858 S.E.2d at 410 (citations omitted). A court may **not** “torture the ordinary meaning of language to extend coverage expressly excluded by the terms of [a] policy.” See *McPherson v. Michigan Mutual Insurance Co.*, 306 S.C. 456, 463, 412 S.E.2d 445, 449 (Ct. App. 1991), *aff’d as modified*, 310 S.C. 316, 426 S.E.2d 770 (1993).

Applying similar rules of construction, numerous courts have found that protective safeguards endorsements must be enforced when policyholders incorrectly represent that property is protected by a sprinkler system or other safeguard. See *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 495-96 (4th Cir. 1998) (finding summary judgment against policyholder appropriate when protective safeguard was not in place at property); *Goldstein v. Fidelity and Guarantee Insurance Underwriters, Inc.*, 86 F.3d 749, 753 (7th Cir. 1996) (enforcing protective safeguard when sprinkler system was not in operation); *Chaucer Corporate Capital (No. 2) Ltd.*

⁸ See *Complaint, Alice J. Tebele, et al. v. Abraham A. Tebele, et al.*, Civil Action 2021-CP-26-07367, Horry County Court of Common Pleas.

American Way Cellular, Inc. v. Travelers Property Casualty Co. of America, 216 Cal. App. 4th 1040, 1055-56, 157 Cal. Rptr. 3d 385, 397-98 (2013) (finding insurer has no duty to investigate policyholder's insurance application responses and property's lack of operational automatic sprinklers violates enforceable policy condition); *Berenato v. Seneca Specialty Insurance Co.*, 240 F. Supp. 3d 351, 360 (E.D. Pa. 2017) ("[Insured] had no reasonable expectation of coverage with the [sprinkler] system shut off . . .").

Similarly, here, this Honorable Court must enforce the Safeguards Endorsement. As discussed above, the Insureds' Application represents that the Property and four other locations were "100% Sprinklered," as of January 14, 2019, and the Parties' negotiations for insurance coverage were predicated upon that representation. Resultantly, both the initial Binder and the subsequent Policy included the Safeguards Endorsement and applied it to the Property. None of the Insureds complied with the Endorsement's unambiguous condition precedent. No one actually ever completed installation of an Automatic Sprinkler System, let alone "maintain[ed]" it at the Property. The mass of empty pipes and sprinkler heads were never connected to water. As a result, they could never have responded to a fire. As discovered after the Loss Event, contrary to the Insureds' Application representations, the Property never had an automatic fire protective or extinguishing system in place at the Property.⁹

Simply, empty piping and sprinkler heads that the Insureds never connected to any fire suppressant, water or otherwise, fails to comply with the Safeguards Endorsement's condition precedent. Thus, this Honorable Court should grant summary

⁹ The Insurers conducted significant investigation to confirm what, if any, coverage the Policy afforded relative to the Loss Event, including but not limited to conducting inspections of the Property and taking the Examination Under Oath of the Insureds as permitted by the Policy. The Insurers thorough investigation confirmed that the Policy does not afford coverage for the Loss Event, as explained herein.

judgment in the Insurers favor finding that they have not breached the Policy or acted in bad faith.

B. Plaintiff's Alternative Interpretations of the Word "Maintain" Do Not Alter the Outcome of This Action, and Plaintiff Fails to Show Ambiguity in the Policy.

In its own motion for partial summary judgment, Plaintiff nonetheless contends that this Honorable Court should find the Safeguards Endorsement, in particular its use of the word "maintain," is ambiguous and that the Insurers should be precluded from relying on the Safeguards Endorsement.¹⁰ Plaintiff's argument misses the mark because merely isolating one or two words in the Policy and contriving various definitions of those isolated words is insufficient to create "ambiguity." See, e.g., *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Quinn v. State Farm Mutual Automobile Insurance Co.*, 238 S.C. 301, 304, 120 S.E.2d 15, 16 (1961) (holding that when a court is faced with "two reasonable interpretations" it is merely allowed to adopt the interpretation most favorable to the insured).

Plaintiff incorrectly argues that two non-binding opinions, *Breton* and *Five Star Hotels*, support its position that the Policy's Safeguards Endorsement is ambiguous. Neither case identifies a "reasonable interpretation" that brings Plaintiff into compliance with the Policy. Relative to *Breton*, the parties argued regarding whether "maintain" in a safeguards endorsement superimposed "regular repair obligations

¹⁰ Plaintiff specifically directs its arguments to the word "maintain" as it appears in the Safeguards Endorsement's exclusion, but presumably would assert the word is also ambiguous as used in the condition precedent. Given the undisputed facts at issue, e.g. the failure to complete the tap connection, "maintain" is unambiguous in both instances.

with respect to the Automatic Sprinkler System” at issue or imposed “an obligation to continue to have an Automatic Sprinkler system.” See *Breton, LLC v. Graphic Arts Mutual Insurance Co.*, 446 Fed. Appx. 598, 603-04 (4th Cir. 2011). The parties did not dispute that the policyholder fully installed and “kept an Automatic Sprinkler System in place at all relevant times,” and therefore the *Breton* Court used that interpretation to find that the policyholder met the requisite condition precedent. See *id.*, 446 Fed. Appx. at 601, 604.

Five Star Hotels is likewise inapposite. There, the parties disputed whether the requirement to “maintain” an Automatic Sprinkler System required the policyholder to “keep switches and valves in the open position,” proactively test functionality and prevent service interruption, or simply keep the requisite system in place and abstain from dismantling it. See *Five Star Hotels, LLC v. Insurance Co. of Greater New York*, 2011 WL 1216022, at *6 (S.D.N.Y. Mar. 24, 2011). Similar to *Breton*, the *Five Stars Hotel* Court found that a policyholder satisfies its obligation to “maintain” an automatic sprinkler system by keeping the originally complete system in place without removing it. See *id.*, at *8-9.

In contrast, in the present matter, the Insureds never completed installation of an Automatic Sprinkler System at the Property. The Insureds installed sprinkler heads and piping, making it appear that a sprinkler system was in place, but never made the tap connection to water in order to complete the Automatic Sprinkler System. Here, it does not matter whether “maintain” means to “repair,” keep connected, prevent service interruption, or keep the complete Automatic Sprinkler System in place; the Insureds did none of these. The Insureds did not keep an

“Automatic Sprinkler System” or “automatic fire protective or extinguishing system” in place at the Property. That “the system was going to be completed shortly” is inapposite; the fact remains that “the tap connection was not complete.” See **Ex. 1**, *Insureds’ EUO*, at pp. 38:3-39:5; **Ex. 2**, *Tebele Depo.*, at p. 57:21 (“So my understanding, they never connected it.”). Thus, regardless of the interpretation of “maintain,” ultimately the conclusion remains that the Insureds failed to comply with the Safeguards Endorsement condition, and have failed to bring themselves within the Policy’s coverage terms.

Because the Insureds unambiguously failed to meet the Safeguards Endorsement’s condition precedent and bring themselves within the Policy’s coverage, this Court need not consider an additional argument that Plaintiff asserts regarding additional language in the Endorsement’s exclusion, namely that Plaintiff purportedly lacked control of the Property. Regardless, Plaintiff’s argument in that regard, that its Lease of the Rented Space affected its control of the Property, is fatally flawed.

First, Plaintiff inaccurately implies that the Lease pertained to the entire Property, when in reality it only allowed La Casona to use the Rented Space or less than 26% of the Property. See **Ex. 1**, *Insureds’ EUO*, at p. 46:6-25 (admitting that La Casona occupied only 9,300 square feet and the remaining area was vacant); **Ex. 4**, *Lease, EUO-000157-159*; see also *Plaintiff’s Exhibit I, Twenty First Services Report*, at A. *Tebele & Sons CF - 000191* (noting that the sprinkler system “riser is in unoccupied area of building and not under [La Casona’s] control”). Second, while the Lease includes a provision stating that La Casona was to “maintain” certain equipment within the Rented Space, the Lease makes clear that the Insureds, not La Casona, retained

authority to allow improvements and alterations such as installation of a sprinkler system. See, **Ex. 4**, Lease, EUO-000157-159 (“No improvement or alteration of the premises [Rented Space] shall be made without the prior written consent of the Lessor.”). Third and finally, the Insureds, not La Casona, installed piping and sprinkler heads throughout the entire Property, including the Rented Space and continued to provide the Insureds’ sprinkler contractors access to the Property after the Policy’s inception, presumably to complete the unfinished system. See **Ex. 21**, Jan. 31, 2019 Email from Bob Summers, Carolina Tap 000193 (relaying access provided by the Insureds to subcontractor assigned to install tap connection). Plaintiff’s disingenuous attempt to shield itself behind La Casona’s partial occupancy of the Rented Space must be disregarded as the Insureds clearly had control over the sprinkler system installation at the Property.

Thus, Plaintiff has failed to demonstrate an interpretation of the Safeguards Endorsement that would render it inapplicable as a matter of law, and Plaintiff’s request for summary judgment must be denied accordingly.

C. Intentional Blindness to the Policy’s Requirements Is Not a Basis to Retrospectively Rewrite the Parties’ Agreement.

Plaintiff incorrectly asserts that it is not beholden to the Safeguards Endorsement, asserting that the Binder did not identify the Endorsement and that Mr. Abraham Tebele, Plaintiff’s employee, did not access the Policy prior to the Loss Event. Mr. Tebele also self-servingly asserts that he likely would not have given “consent” to the Safeguards Endorsement had he been aware of it, arguing that this precludes inclusion of the Endorsement in the Policy. Each of Plaintiff’s arguments are clearly incorrect.

When an insured employs an insurance broker, the broker acts as the insured's agent and has authority to bind the insured with regards to insurance procurement and placement. See *Allstate Insurance Co. v. Smoak*, 256 S.C. 382, 392-93, 182 S.E.2d 749, 754 (1971). Further, "[i]t is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." See *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). Thus, communication of material facts from an insurer to a broker bind the policyholder as well. See *East Bridge Lofts Property Owners Association, Inc. v. Crum & Forster Specialty Insurance Co.*, 2015 WL 12831694, at *5 (D.S.C. Dec. 22, 2015) (finding knowledge of broker "imputed to the insureds" to the extent the agent learned material facts while acting within his authority); see also *Faulkner v. Millar*, 319 S.C. 216, 221, 460 S.E.2d 378, 381 ("Notice to agent is notice to principal.").

Here, Mr. David Egan of Crescent Coast acted as the Insureds' Broker at all times relevant to this action. See **Ex. 2**, *Tebele Depo.*, at p. 104:15-19 (testifying that Crescent Coast was agent of the Insureds); see also **Ex. 17**, *Crescent Coast Depo.*, at p. 103:6-16; **Ex. 22**, *National Producer Agreement*, Crescent Coast 02647-59 (acknowledging that Crescent Coast "is an agent for the insured and acts on behalf of the insured"). On January 15, 2019, the Insurers, via SRU, provided the Insureds' Broker with the Binder, which explicitly applies and identifies the Safeguards Endorsement. See **Ex. 8**, *Jan. 15, 2019 Email from Hollan Delany*, Crescent Coast 00551-53; **Ex. 9**, *Binder*, Crescent Coast 00715-20. On February 7, 2019, the Insurers also provided the Insureds' Broker with the Policy as initially issued, including the

Safeguards Endorsement as identified in the Binder. See **Ex. 15**, Feb. 7, 2019 Email from Hollan Delany, Crescent Coast 00576-577; **Ex. 16**, Crescent Coast Deposition Exhibit 16; **Ex. 17**, Crescent Coast Deposition Transcript, at pp. 72:2-73:3 (testifying relative to deposition exhibit 16 that the “whole package was emailed,” including the Safeguards Endorsement).

In other words, the Insureds’ Broker received both the Binder and the Policy, including the Safeguards Endorsement, weeks before the Loss Event. As a matter of law, the Insureds have the same knowledge as the Insureds’ Broker.¹¹ In other words, the Insureds had knowledge of the Safeguards Endorsement prior to the Loss Event, but admittedly failed to inform the Insurers that their Application on January 14, 2019 incorrectly represented that the Property was 100% Sprinklered.

The Insureds’ knowledge of the Policy and Safeguards Endorsement nullifies Plaintiff’s “what if” argument that it would not have entered the Policy had it received the Safeguards Endorsement. The Insureds received both the Binder and the Policy before the Loss Event and never raised any issue with the Safeguards Endorsement until after the Loss Event. Further, Plaintiff cannot rewrite the Policy unilaterally after the Loss Event by retroactively pronouncing its approval of terms affording coverage and its disapproval of provisions that would limit or preclude coverage. At best, accepting Plaintiff’s unsupported and self-serving arguments regarding “consent” would only serve

¹¹ Regardless of whether the Insureds actually availed themselves of the opportunity to access and read the Policy, as a matter of law they did in fact have an obligation to do so. See, e.g., *Walpole v. Great American Insurance Companies*, 914 F. Supp. 1283, 1291 (D.S.C. 1994) (“An insured has a duty to read the policy he purchases and to abide by its plain terms.”); *Doub v. Weathersby-Breeland Insurance Agency*, 286 S.C. 319, 326, 233 S.E.2d 111, 114 (1977) (“One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning.”). Furthermore, the Insureds had a legal obligation to abide by the Policy’s terms, including the Safeguards Endorsement. See *id.*

to demonstrate that the parties did not reach a meeting of the minds, as required to have an enforceable contract, as the Insurers' negotiated with the Insureds based upon the Application's representation that the Property was "100% Sprinklered."¹² Of course, absent a meeting of the minds there is no enforceable contract, and Plaintiff would remain unable to recover on its allegations of breach of contract and bad faith. As such, nothing regarding delivery of the Binder or the Policy raises any question of material fact in Plaintiff's favor, let alone grounds for summary judgment in Plaintiff's favor.

D. The Past Reports Do Not Support Waiver or Estoppel.

Plaintiff incorrectly asserts that the Past Reports give rise to waiver or estoppel as to the Safeguards Endorsement.¹³ As a preliminary matter, Plaintiff's reliance on the Past Reports is improper, as they are inadmissible hearsay. *See Hall v. Fedor*, 349 S.C. 169, 175-176, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding that "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence" and refusing to consider inadmissible hearsay evidence accordingly).

In any event, in South Carolina a party must establish six elements to prevail on an estoppel argument, the first three of which pertain to the party to be estopped and the last three of which pertain to the party seeking estoppel. *See Provident Life and*

¹² *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893-94 (1989) ("The 'meeting of the minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known."); *Myrick v. Prime Insurance Syndicate, Inc.*, 395 F.3d 485, 492 (4th Cir. 2005) ("Under South Carolina law, an erroneous description of property in an application for property insurance may avoid coverage when the erroneous description is material to the risk."), *citing Hinson v. Catawba Ins. Co.*, 224 S.C. 227, 78 S.E.2d 235, 236 (1953).

¹³ Plaintiff's invocation of estoppel and waiver in an attempt to obtain summary judgment violates South Carolina law in that "[e]stoppel and waiver are protective only, and are to be invoked as shield, and not as offensive weapons." *See Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339 345, 415 S.E.2d 384, 388 (1992).

Accident Insurance Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (1994). Specifically, the party to be estopped must (1) make a false representation or conceal material facts; (2) intend or expect the other party to act upon the representation or concealment; and (3) have actual or constructive knowledge of the real facts. See *id.* Further, the party claiming estoppel must (4) lack actual knowledge of and means to acquire knowledge of the true facts; (5) rely reasonably on the other party's conduct; and (6) make a prejudicial change in position. See *id.*

To obtain waiver, a party must establish “the voluntary and intentional relinquishment of a known right.” See *Provident Life and Accident Insurance Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (1994) (citation omitted). The “party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” See *Mac Papers, Inc. v. Genesis Press, Inc.*, 426 S.C. 393, 404, 826 S.E.2d 874, 880 (Ct. App. 2019).

However, an insurance carrier is entitled to request that a prospective policyholder submit an insurance application, and the carrier “has the right to know the whole truth.” See *Government Emp. Insurance Co. v. Chavis*, 254 S.C. 507, 513, 176 S.E.2d 131, 133 (1970). “A misstatement of material facts by the applicant takes away [the carrier’s] opportunity to estimate the risk under its contract.” See *id.* (citation omitted). Thus, a policyholder must make a “full disclosure,” including as to all “fact[s] . . . specifically inquired about,” “and the insurer has the **right** to rely upon the answer.” See *id.*, 254 S.C. at 513, 176 S.E.2d at 134 (emphasis added). “An applicant is required to make full answers without evasion, suppression, misrepresentation or concealment of

material facts,” and when stating “the circumstances which can affect the risk, [it] must do so fully and faithfully. See *id.* (citation omitted).

The Past Reports do not support Plaintiff’s improper attempt to use estoppel and waiver as offensive weapons. Relative to estoppel, Plaintiff has failed to identify any misrepresentation or concealment **by the Insurers**, let alone evidence of this element of estoppel for purposes of summary judgment. Relatedly, Plaintiff has not identified any evidence of intent or expectation of reliance by Plaintiff or knowledge **by the Insurers** of contrary “real facts.” In any event, the Insureds, as shown above, had access to the Property **and** the Policy, and Plaintiff has failed to provide any evidence that it lacked the means to acquire knowledge of any purportedly contrary true facts. Plaintiff has not identified any evidence of reasonable reliance on any purported misconduct it attributes **to the Insurers**, nor identified any evidence that it changed its position following such reliance.

Similarly, Plaintiff has failed to establish as a matter of law that the Insurers voluntarily and intentionally relinquished their right to abide by the terms of the Policy, including the Safeguards Endorsement. Nor has Plaintiff supported its invocation of waiver with any evidence that the Insurers had all material facts to make such a waiver knowingly.

While Plaintiff invokes the Past Reports relative to its estoppel and waiver arguments, Plaintiff fails to show how the Reports satisfy any of the aforementioned estoppel and waiver elements. Even assuming the Insurers had each of the Past Reports, which the Insurers dispute, the Insureds’ signed Application on January 14, 2019 superseded the Past Reports and any information therein regarding the Property’s

purported sprinkler system. Via the last of the Past Reports, Ms. Nenna's January 11, 2019 email, the Insureds represent that "the sprinklers **have been installed**, but the **landlord** [Kings Realty] has not turned the water on" See *Plaintiff's Exhibit M, Jan. 11, 2019 Email from Sandra Nenna*. The solution to this issue could have been as simple as opening a faucet, i.e. "**turn[ing] the water on.**" See *Ex. 23, Whitney N. Northcutt Deposition Transcript*, at p. 63:10-16. Then on January 14, 2019, three days **after** the email and last of the Past Reports, the Insureds submitted the Application representing the Property's then current sprinkler status as 100% Sprinklered. **The Insurers were entitled to rely on the Insureds' representation.** See *Government Emp. Insurance Co.*, 254 S.C. at 513, 176 S.E.2d at 134. In sum, Plaintiff cannot demonstrate waiver or estoppel as a matter of law and its motion for partial summary judgment should be denied accordingly.

IV. **CONCLUSION**

A series of pipes and sprinkler heads, unconnected to water, is not a "maintained" sprinkler system under any rational analysis. The Insurers agreed to insure the Property as "Sprinklered." It was not. Fire damage was not suppressed by the empty pipes and sprinkler heads. Plaintiff's hollow allegations of a breach of the Policy and common law bad faith by the Insurers, made while ignoring both its lack of an insurable interest and the clear applicability of the Safeguards Endorsement fails as a matter of law for the reasons set forth fully herein. Summary judgment in favor of the Insurers and against Plaintiff should be GRANTED. Further, Plaintiff's request for partial summary judgment should be DENIED.

BUTLER WEIHMULLER KATZ CRAIG LLP

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Lloyd's, London subscribing to Policy Number AQS-
190065, HDI Global Specialty SE, and General
Security Indemnity Company of Arizona*

1 A. I have -- I have a membership
2 interest in some of the companies, which actually
3 -- properties that are owned by the entities.

4 Q. Is it -- is it your practice that
5 if a new property is acquired that there is a new
6 organization formed for that property?

7 A. Yes.

8 Q. What about property management
9 companies? Do you have any ownership interest in
10 any property management companies?

11 A. So my company, which is
12 Kings Realty of SC, is an S Corporation, and it
13 is my company, and that's, basically, what -- you
14 know, what I do. In other words, manage the
15 properties for the -- by the company, rather.

16 Q. That is how you draw a salary or
17 you draw income, through that company?

18 A. Correct. Correct.

19 Q. Was that company involved in the
20 management or operation of
21 1901 North Kings Highway, which is the property
22 we are here about?

23 A. No.

24 Q. What other companies, such as
25 property management companies or other businesses

1 had any relationship with the premises at
2 1901 North Kings Highway, in Myrtle Beach,
3 besides A. Tebele and Sons?

4 A. Okay. So, the property is owned by
5 a partnership, which is Kings Realty, LP, and the
6 other company that is affiliated with it is,
7 Kings Realty Management, LLC.

8 Q. What does Kings Realty Management,
9 LLC, do?

10 A. The LLC is, basically, like a
11 general partner of the limited partnership. It,
12 like, holds that general partnership interest.

13 Q. Are either of these two
14 Kings Realty entities related to the
15 A. Tebele and Sons entity?

16 A. I would say, no, other than you
17 have similar -- you know, Edward is the general
18 partner of Tebele and Sons. He actually holds a
19 stake in that managing LLC.

20 Q. Kings Realty, limited partnership,
21 LP, that's your company?

22 A. No. Kings Realty, Limited
23 Partnership, is the entity that owns, 1901.

24 Q. Who are the partners of
25 Kings Realty, LP? We know that the general

1 **Q Okay. And who are the successors of Edward?**

2 A Namely his children and his spouse.

3 **Q And does the partnership have someone who is**
4 **generally the manager or in charge?**

5 A That would be me.

6 **Q Okay. Now, we're here about a piece of**
7 **property that's located at 1901 North Kings Highway in**
8 **Myrtle Beach. And who is the owner of that property?**

9 A Kings Realty, LP.

10 **Q What is Kings Realty, LP's relationship to A.**
11 **Tebele & Sons?**

12 A Technically, all these properties are kind of
13 managed, you know, out of the same office. They're
14 all family, you know, kind of held. I guess the
15 relationship would be family or some of the same
16 family members, you know, involved in both entities.

17 **Q And who are the limited partners -- or who**
18 **are the partners in Kings Realty?**

19 A So the partners in Kings Realty would be
20 Kings Realty Management, which is the general partner
21 of Kings Realty, LP, and then the children, so three
22 children of Edward and then, you know, I have two
23 siblings, myself and two siblings.

24 **Q Okay. So the Kings Realty, LP consists of**
25 **Kings Realty Management, yourself, and your two**

1 to amend or change at this time?

2 A No.

3 Q I want to go through some of the questions
4 you were asked by Mr. Baxter. This is what I believe
5 Mr. Baxter marked as Defendants' Exhibit 2, which was
6 this broker report on the AmRisc letterhead. Are you
7 able to see that?

8 A Yes.

9 Q We can agree that this document indicates it
10 was completed February 14, 2018, correct?

11 A Yes.

12 Q So that would be eleven months before you
13 purchased the coverage from the property insurers who
14 are the Defendants in this case, correct?

15 A Correct.

16 Q And the policy number indicated on this
17 property is not any of the policies you're suing my
18 client about?

19 A That's correct. That's correct.

20 Q So this document was generated relating to
21 the policy that preceded the one that you sued my
22 client about today, correct?

23 A If you want to summarize it that way then it
24 sounds somewhat accurate.

25 Q And at that time, February 14, 2018, the

1 notation was made on the document that the vacant
2 space was under construction, that meaning the portion
3 of your building that the Mexican restaurant owned by
4 Ms. Garcia did not occupy, right?

5 A So --

6 Q I can just ask it this way: The Mexican
7 restaurant Ms. Garcia was operating did not occupy the
8 full building, correct?

9 A That's correct.

10 Q And there was some portion of the property
11 that was vacant and not occupied when this fire
12 happened, right?

13 A We've already said that.

14 Q And back as early at February 14, 2018, there
15 was an intent on your part to add a sprinkler system
16 in the entire building, correct?

17 A That's correct.

18 (Defendants' Exhibit No. 63 marked.)

19 BY MR. WATSON:

20 Q Mr. Baxter asked you about the document I'm
21 showing you on the screen now. I believe he marked it
22 as Exhibit 7. The one I have on the screen has my
23 Exhibit No. 63, but I believe it's the same document
24 entitled, "Loss Cost Quote." Do you recall giving
25 that testimony earlier?

8. Admit that the Application contains a page, bates labeled Tebele 000212, which indicates that the Loss Location had a sprinkle system that was “100%”.

ANSWER: Admitted.

9. Admit that you submitted the Application to Barrett Sellars and Hollan Delany both of AmWINS Brokerage of the Carolinas, LLC on January 14, 2019. *See Crescent Coast 00544; Crescent Coast 00551 – Crescent Coast 00554.*

ANSWER: Admitted.

10. Admit that you did not submit the Application to Whitney Gurtzweiler of AmWINS Access Insurance Services, LLC. *See Crescent Coast 00544; Crescent Coast 00551 – Crescent Coast 00554.*

ANSWER: Admitted as qualified. This Defendant sent emails to Barrett Sellers and Hollan Delaney with the attached Application; however, it is not known whether Whitney Gurtzweiler had access to the Application once it was submitted.

11. Admit that you sent e-mails to Hollan Delany of AmWINS Brokerage of the Carolinas, LLC on January 25, 2019 and January 31, 2019 to provide updates regarding an additional mortgagee and address revisions for properties listed on the Policy. *See Crescent Coast 00567; Crescent Coast 00571.*

ANSWER: Admitted.

12. Admit that Virginia Mathis of AmWINS Brokerage of the Carolinas, LLC sent you an e-mail on February 7, 2019, more than two weeks prior to the Loss Event, with a copy of the Policy attached. *See Crescent Coast 00576.*

ANSWER: Admitted as qualified. This Defendant admits that on February 7, 2019 it received via email portions of the policies.

13. Admit that you submitted Plaintiff’s notice of loss seeking coverage under the Policy via e-mail to Barrett Sellars and Hollan Delany, both of AmWins Brokerage of the Carolinas, LLC, on February 25, 2019, and did not copy Whitney Gurtzweiler of AmWINS Access Insurance Services, LLC on the e-mail. *See Crescent Coast 00586.*

ANSWER: Admitted.

14. Admit that after the Loss Event you provided notice via e-mail to Barrett Sellars of AmWINS Brokerage of the Carolinas, LLC that two properties covered by the Policy

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) CIVIL CASE NO. 2020-CP-26-0808

A. Tebele & Sons, a South Carolina
General Partnership,

Plaintiff,

v.

Certain Underwriters at Lloyd's, HDI
Global Specialty SE, General Security
Indemnity Company of Arizona, and
Crescent Coast Insurance, LLC

Defendants.

**DEFENDANT CRESCENT COAST
INSURANCE, LLC'S MOTION FOR
SUMMARY JUDGMENT**

**TO: A. TEBELE & SONS, A SOUTH CAROLINA GENERAL PARTNERSHIP
AND ITS COUNSEL:**

Defendant Crescent Coast Insurance, LLC ("Crescent Coast"), by and through its undersigned counsel moves this Court within ten days of the date of this Motion for an order granting it summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This Motion is based on there being no genuine dispute as to any material fact and that under the facts, Crescent Coast is entitled to judgment as a matter of law.

This Motion is based upon the following:

Negligence Cause of Action

Defendant Crescent Coast Insurance, LLC is a retail insurance agency. Plaintiff has asserted causes of action against Crescent Coast for negligence and breach of fiduciary duty based principally on the allegations that: Crescent Coast knew, or should have known, that the Plaintiff had marked the insured premises as 100% sprinklered on the insurance application for the

premises, yet Crescent Coast allegedly also knew, or should have known, the insured premises was not sprinklered at the time the application was submitted and the policies were issued.

The following undisputed facts support this motion:

1. Plaintiff met with representatives from Crescent Coast multiple times, months ahead of the policy renewal, to gather information regarding all of Plaintiff's properties to be placed on the application for insurance.
2. Plaintiff told Crescent Coast the sprinkler system was being installed at the property that is subject of this lawsuit (1901 N. Kings Hwy) and that it covered 100% of the building.
3. Plaintiff believed at the time of these conversations that the sprinkler system would be completed within a matter of weeks.
4. The Plaintiff and Crescent Coast had no further discussions about the sprinkler system at issue until after the fire loss.
5. Plaintiff never asked any questions about policy information during the application process, including but not limited to coverages, endorsements or exclusions.
6. Plaintiff received and signed the application for insurance prior to its submittal from Crescent Coast to the broker for final review and binding of the policies.
7. Following the binder being issued, the Plaintiff received a copy of the binder from Crescent Coast.
8. Following the binder being issued, but prior to the fire loss, Plaintiff communicated with Crescent Coast about property information that needed to be corrected or added, through not fault of Crescent Coast, for coverage, but the status of the sprinkler system at 1901 N. Kings Hwy. was never updated by Plaintiff.

As a retail insurance agent in South Carolina, Crescent Coast, LLC owed no duty to Plaintiff under these facts. *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471-73, 377 S.E.2d 343, 347-49 (Ct. App. 1988)(“ Generally, an insurer and its agents owe no duty to advise an insure . . . If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice.”) (internal citations omitted).

There are no allegations, nor disputes of material fact, that Crescent Coast ever undertook any duties to advise the Plaintiff or otherwise act on the Plaintiff’s behalf beyond transmitting information supplied by Plaintiff in the insurance application. Crescent Coast’s sole role was to act as a conduit of information between Plaintiff the insurance applicant, and the broker who communicated with carriers regarding insurance coverage and rates. Because Crescent Coast owed no duty to advise the Plaintiff or perform any act beyond its role as an information conduit, as a matter of law, it cannot be negligent. As a result, Plaintiff’s cause of action for negligence should be dismissed as a matter of law.

Notwithstanding the fact that no duty existed, or was assumed, even assuming *arguendo* that a duty did exist, which is wholly denied, there is no dispute of material fact that Crescent Coast breached such a duty when it relayed information provided to it by the Plaintiff to the broker who communicated with insurers for insurance coverage.

Breach of Fiduciary Duties Cause of Action

Moreover, under South Carolina law, an insurance agent is not a fiduciary of a purported insured. *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002); *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 515, 839 S.E.2d 468, 475 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022). Accordingly, Crescent Coast

Insurance, LLC cannot be in breach of fiduciary duties that did not exist. Plaintiff's cause of action for breach of fiduciary duty should be dismissed as a matter of law.

Punitive Damages

The award of punitive damages in South Carolina requires a showing of "clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). "The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577–78, 106 S.E.2d 258, 263 (1958)). While the issue of whether punitive damages should be assessed is a question for the jury, where only one reasonable inference can be deduced from the evidence, however, the question becomes one of law for the court. *Wise v. Broadway*, 315 S.C. 273, 281, 433 S.E.2d 857, 861 (1993)

Plaintiff has shown no facts that reflect conduct that is reckless, willful, or wanton on behalf of Crescent Coast. Accordingly, Plaintiff is not entitled to punitive damages.

Conclusion

For the foregoing reasons, Defendant Crescent Coast Insurance, LLC respectfully requests this Court grant an Order Granting Summary Judgment. The Motion is made upon the pleadings, affidavits, discovery conducted to date, exhibits, and a memorandum of law which will be submitted prior to a hearing on the Motion.

Respectfully submitted November 22, 2023.

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Caleb M. Riser

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**ATTORNEYS FOR CRESCENT COAST
INSURANCE, LLC**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CIVIL CASE NO. 2020-CP-26-0808
	)	
A. Tebele & Sons, a South Carolina	)	
General Partnership,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT CRESCENT COAST
v.	)	INSURANCE, LLC'S MEMORANDUM IN
	)	SUPPORT OF MOTION FOR SUMMARY
	)	JUDGMENT
Certain Underwriters at Lloyd's, HDI	)	
Global Specialty SE, General Security	)	
Indemnity Company of Arizona, and	)	
Crescent Coast Insurance, LLC	)	
	)	
Defendants.	)	
	)	

Defendant Crescent Coast Insurance, LLC ("Crescent Coast"), by and through its undersigned counsel, respectfully submits this Memorandum in Support of its Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. For the reasons discussed below, this Court should grant Crescent Coast's Motion for Summary Judgment and dismiss all of the Plaintiff's claims with prejudice.

FACTUAL BACKGROUND¹

The following material facts are not subject to genuine dispute and demonstrate that summary judgment in favor of the Crescent Coast is proper.

The property at issue in this case is a nearly 36,000 square foot commercial space. Tebele Depo., pp. p. 11:6-9; 86:15-24, Ex. 2 to Insurance Carriers Memorandum of Law in Support of Summary Judgment. In April 2016, La Casona restaurant... began renting a portion of the

¹ For judicial economy Crescent Coast incorporates herein via reference the factual recitation and exhibits filed by the Insurance Carrier Defendants in their Memorandum of Law in Support of Summary Judgment ("Carriers Memo"), filed December 2, 2022.

property. During the course of that tenancy, Plaintiff was required to add an automatic sprinkler system to the property. *Id.*, at pp. 74:25- 75:17. However, the Plaintiff never completed the sprinkler system or made it operational, as the Plaintiff never completed an outstanding tap connection to the city water line outside of the Property. *Id.*, at p. 103:14-104:6; p. 102:18-21.

The timeline of actions in this matter is both undisputed, but particularly important to resolution of Plaintiff's claims. Plaintiff met with representatives from Crescent Coast multiple times, beginning in August 2018 ahead of the policy renewal, to gather information regarding all of Plaintiff's properties to be placed on the application for insurance. *Id.*, at p. 42 ll. 3 – p. 43 ll. 9. The bulk of the property information was transferred to Crescent Coast in August 2018 although Crescent Coast and Plaintiff met a few times to transfer data. *Id.* In those early meetings Plaintiff represented to Crescent Coast the sprinkler system was being installed at the property that is subject of this lawsuit (1901 N. Kings Hwy) and that it covered 100% of the building. *See* Dep. Trans. of Crescent Coast, 31:1-15, Ex. 17 to Carriers Memo. Furthermore, Plaintiff believed in August of 2018 that the water tap connection for the sprinkler system would be completed in a short time. Tebele Depo., pp. 38 ll. 3 - p. 39 ll. 5.

Plaintiff also received and signed the application for insurance prior to its submittal from Crescent Coast to the broker for final review and binding of the policies. Dep. Trans. of Crescent Coast, 31:1-15, Ex. 17 to Carriers Memo, 41:2-21 and 67:23-25, 68:1-6. The insurance carriers agreed to bind coverage effective January 15, 2019. That day, a representative of AmWINS Brokerage (“AmWins”), the broker for the property insurance policies, sent the binder agreement (“Binder”) to Crescent Coast. *Id.*, 68:11-23. Ex. 8 to Carriers Memo. That Binder stated specifically that an Automatic Sprinkler System Protective Safeguard applies to the Policy. *Id.*

Two days later, on January 17, 2019, Crescent Coast provided the Binder to Plaintiff. On or about that time, Plaintiff noted adjustments to the properties listed in the application for insurance. Ex. 10 to Carriers Memo. Some properties needed to be added to the policies, as well as some information regarding the listed properties needed to be corrected. However, and most importantly, when changes or were made after binding, Plaintiff raised no issue or question as to the applicable sprinkler endorsement nor did Plaintiff give any update to Crescent Coast as to the status of the sprinkler system installation at 1901 N. Kings Highway.

On February 24, 2019, a fire occurred, causing significant damage to the Property. Plaintiff agrees that the empty piping and sprinkler heads at the Property did not disburse a single drop of water because they had no connection to water. Tebele Depo., at pp. 90:3-91:22, Ex. 2 to Carriers Memo. Investigation revealed that not only was the Property's sprinkler not operational at the time of the Loss Event, but indeed the sprinkler was never operational.

Thereafter, based on lack of compliance with various endorsements, the Insurers denied Plaintiff's insurance claim. Plaintiff then commenced this action against Crescent Coast and the Insurers, arguing breach of contract, bad faith, and negligence. However, under these undisputed facts, Plaintiff's claims fail as a matter of law.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCp. "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and one which that

party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to material fact,’ since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

“Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008). Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005). Materials used to refute a motion for summary judgment must be those which would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

ARGUMENT

I. Plaintiff's negligence cause of action against Crescent Coast should fail where Crescent Coast owed no duty of care to Plaintiff beyond the transmittal of information.

“To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty.” *Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996). When—as has occurred here—a Plaintiff has failed to prove “any one of these elements, the action will fail.” *Vinson*, 324 S.C. at 400, 477 S.E.2d at 720.

At issue here is the nature of the duty owed by Crescent Coast to Plaintiff. This is a legal determination, to be made by the Court. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135–36, 638 S.E.2d 650, 656 (2006) (“*The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.*” (emphases added)).

As an initial matter Crescent Coast’s role in this case is undisputed. Crescent Coast is a retail insurance agent who merely transcribed the information provided by Plaintiff, sent it to a broker, who in turn sent it to the Insurers. And, as a retail insurance agent in South Carolina, Crescent Coast owed no duty to Plaintiff under these facts. Under South Carolina law: “Generally, an insurer and its agents owe no duty to advise an insure . . . If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice.” *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471-73, 377 S.E.2d 343, 347-49 (Ct. App. 1988) (internal citations omitted); *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 421, 171 S.E.2d 486, 491 (1969) (noting duties of insurance agent which do not include verifying information provided by potential customer).

While it is possible to undertake a duty under South Carolina law, there are no allegations, nor disputes of material fact, that Crescent Coast ever undertook any duties to advise the Plaintiff or otherwise act on the Plaintiff’s behalf beyond transmitting information supplied by Plaintiff in the insurance application. *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347 (“An insurer may assume a duty to advise an insured in one of two ways: (1) he may expressly undertake to advise the insured; or (2) he may impliedly undertake to advise the insured.”). However, facts do not exist to support an undertaking. To support such a determination, courts examine whether “(1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for

advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on.” *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005). There are no allegations, facts or evidence here that show Crescent Coast did not receive consideration beyond premium payment. Similarly, Plaintiff is a sophisticated party who seeks insurance on numerous properties. There was no desire for advice to be relied on, merely a seeking of the lowest possible premiums on properties.

Finally, there was simply no extended period of time. In fact, insurance agents in South Carolina do not even have a duty to get their customers the best price, let alone verify the factual assertions those customers make on their insurance applications. *See Houck*, 366 S.C. at 13, 620 S.E.2d at 330 (“[T]he duty of an insurance agent to procure the represented coverage does not create a duty to obtain coverage at any particular rate, absent an express promise to do so.” (citation omitted)).

Crescent Coast’s sole role was to act as a conduit of information between Plaintiff the insurance applicant, and the broker who communicated with carriers regarding insurance coverage and rates. This period lasted from approximately August 2018 when the Plaintiff first met with Crescent Coast to discuss his properties until approximately January 30, 2019 when Crescent Coast communicated to AmWins Brokerage the requested information and property additions received from Plaintiff. Because Crescent Coast owed no duty to advise the Plaintiff or perform any act beyond its role as an information conduit, as a matter of law, it cannot be negligent. As a result, Plaintiff’s cause of action for negligence should be dismissed as a matter of law.

II. Plaintiff's second cause of action for breach of fiduciary duty should be dismissed as a matter of law where, under South Carolina law, an insurance agent is not a fiduciary of an insured.

A fiduciary relationship is based on “trust and confidence reposed by one person in the integrity and fidelity of another” and exists “when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). “To constitute a fiduciary relationship, the relationship must be more than a casual relationship.” *Id.* “To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012).

Under South Carolina law, an insurance agent is not a fiduciary of a purported insured. *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002); *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 515, 839 S.E.2d 468, 475 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022). Furthermore, and stated more succinctly, in South Carolina, the sale of insurance is an arm's length commercial transaction, which does not give rise to a fiduciary relationship. *Gordon v. Fidelity & Cas. Co. of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961); *O'Connor v. Bhd. of R.R. Trainmen*, 217 S.C. 442, 60 S.E.2d 884 (1950).

As stated above with respect to negligence, a failure to prove one of the elements above results in the failure of the claim altogether. Under these facts, there is no dispute as to the role of Crescent Coast—it was a retail insurance agent which acted as a conduit between Plaintiff and a broker. There is no dispute of fact, or even allegation from Plaintiff, that Crescent Coast undertook

any express or implied duty with Plaintiff that created a special relationship to support a fiduciary relationship. As such, as a matter of law, there are no fiduciary duties owed by Crescent Coast to Plaintiff. And, thus a result, neither the existence of a fiduciary duty element nor the breach of duty element can be satisfied.

Accordingly, Crescent Coast Insurance, LLC cannot be in breach of fiduciary duties that did not exist. And the Court can dismiss Plaintiff's cause of action for breach of fiduciary duty as a matter of law.

III. Plaintiff is not entitled to punitive damages in this case.

As a matter of law, Plaintiff is not entitled to punitive damages in this case even if any party is found liable for damages. The award of punitive damages in South Carolina requires a showing of "clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011); *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 353, 683 S.E.2d 818, 823 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012) ("A plaintiff is entitled to recover punitive damages if the act complained of is determined to be willful, wanton or reckless.").

"The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* (citing *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577–78, 106 S.E.2d 258, 263 (1958). Moreover, "A conscious failure to exercise due care constitutes willfulness." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). However, as established above, there is no duty of care owed by Crescent Coast as to either tort alleged by Plaintiff. Accordingly, it is impossible

for there to even be a conscious failure to exercise due care. Moreover, while the issue of whether punitive damages should be assessed is a question for the jury, where only one reasonable inference can be deduced from the evidence, however, the question becomes one of law for the court. *Wise v. Broadway*, 315 S.C. 273, 281, 433 S.E.2d 857, 861 (1993). That is exactly what has occurred here.

Plaintiff has shown no facts that reflect conduct that is reckless, willful, or wanton on behalf of Crescent Coast. Accordingly, Plaintiff is not entitled to punitive damages.

CONCLUSION

For the reasons stated herein, Defendants Crescent Coast respectfully requests the Court grant their Motion, dismiss this case with prejudice, and grant any other such relief, legal and equitable, as the Court deems just and proper.

Respectfully submitted November 30, 2023.

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Caleb M. Riser

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**ATTORNEYS FOR CRESCENT COAST
INSURANCE, LLC**

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2020-CP-26-00808

A. TEBELE & SONS, a South Carolina)
general partnership,)
Plaintiff,)
vs.)
CERTAIN UNDERWRITERS AT)
LLOYD'S, HDI GLOBAL SPECIALTY)
SE, GENERAL SECURITY INDEMNITY)
COMPANY OF ARIZONA, and)
CRESCENT COAST INSURANCE, LLC,)
Defendants.)

**PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT OF
DEFENDANT CRESCENT COAST
INSURANCE, LLC**

The Plaintiff, A Tebele & Sons ("Tebele"), respectfully submits this memorandum in opposition to the Motion for Summary Judgment filed by the Defendant Crescent Coast Insurance, LLC (hereinafter "Crescent Coast"), as to the Plaintiff's negligence and breach of fiduciary duty causes of action. In support of its Motion, Crescent Coast contends that it owed no duty to Plaintiff beyond the mere transmittal of information, and that there is no fiduciary relationship between Tebele and Crescent Coast pursuant to Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. ap. 2002). Crescent Coast's Motion must be denied because the motion was not filed and served until November 30, 2023, providing Plaintiff with less than ten-day's notice required for such motion; the undisputed facts establish that Crescent Coast's role with respect to this matter far exceeds that of a retail insurance agent who merely transcribed information; and its reliance on Pitts is misplaced because the transaction between Tebele and Crescent Coast was not truly at arm's length, and the undisputed facts establish that the relationship between Tebele and Crescent Coast goes beyond the mere sale of insurance. In opposition to Crescent Coast's Motion

for Summary Judgment, Tebele hereby submits this memorandum in support of its position and hereby incorporates all motions, memoranda, and exhibits filed by Tebele in this action.

In the instant action, the insurance claim in dispute involves Tebele's claim for coverage under the subject insurance policy at issue in this case. Tebele paid a total premium in the sum of \$170,997.08 and, in exchange for Tebele's premium payment, the Defendant Insurers¹ issued and sold the subject insurance policy to Tebele providing coverage to Tebele, as the first named insured, and insuring various risks pertaining to Tebele's twenty-three real properties located in Horry County, South Carolina (hereinafter the "Policy"). The Policy provides coverage and payment "for direct physical loss of or damage to 'Covered Property' at an 'Insured Location' caused by or resulting from any Covered Cause of Loss."² As an all-risk property coverage policy, fire-related losses constitute a "Specified Cause of Loss" and are covered under the Policy.³ Tebele's commercial real property located at 1901 North Kings Highway in Myrtle Beach, including the building improvements situated thereon (hereinafter the "Tebele Property"), was one of the twenty-three of Tebele's real properties insured by the Policy against fire and other covered losses. The building improvements situated on the Tebele Property were destroyed by fire on February 24, 2019 resulting in a total loss (hereinafter the "Fire Loss").

The Defendant Crescent Coast is an independent agency in South Carolina that has several direct contracts with certain carriers and utilizes the Defendant Insurers' underwriters to get access to carriers such as the Defendant Insurers. (See Exhibit 1, Dep. Tr. Crescent Coast 30(b)(6) designee at 17:14-22). Specifically, Crescent Coast submits business to the Defendant Insurers'

¹ "Defendant Insurers" when referenced herein refers to the Defendants Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Company of Arizona (hereinafter collectively referenced herein as the "Defendant Insurers").

² See PL's Memo. in Supp. of Mot. for Summ. J., at Ex. O, p. 18, Policy at p. 8, § A.

³ *Id.* at p. 48, Policy at p. 38.

Amwins underwriters and those underwriters provide Crescent Coast with access to carriers which it would otherwise not have access.⁴ In conducting business with the Defendant Insurers' Amwins underwriters, the Defendant Crescent Coast operates under a written agreement or National Producer Agreement between both Crescent Coast and the Defendant Insurers' Amwins underwriters.⁵ The relationship between Tebele and the Defendant Crescent Coast began after Crescent Coast initiated contact with Tebele and solicited Tebele to procure coverage to Tebele to insure various risks, including fire-risk and fire-related losses pertaining to Tebele's twenty-three real properties, and provide coverage for fire-loss and other perils for both existing real property improvements and "additions under construction, [and] alterations and repairs to the building or structure."⁶ Joey Sutherland (hereinafter "Sutherland"), an insurance producer employed by Crescent Coast, initiated contact with Tebele and arranged a meeting in late July or early August of 2018 between Tebele and his employer at Crescent Coast, David Egan (hereinafter "Egan"), for the purpose of Crescent Coast obtaining quotes for coverage for each of Tebele's twenty-three real properties.⁷ Sutherland began soliciting Tebele to discuss Tebele's then-current property insurance information in October of 2017. (See Exhibit 2, at p. 1; Text Messages between Sutherland and Abe Tebele).

Months after Tebele's loss claim was submitted, the Defendant Insurers denied coverage relying upon a Schedule of Values (hereinafter the "SOV") referenced in a Protective Safeguards Endorsement form (hereinafter the "PSE") that was not delivered to Tebele. The referenced SOV which the Defendant Insurers relied upon to deny coverage to Tebele was prepared, at said Defendants' request and/or on said Defendants' behalf, by the Defendant Insurers' Amwins

⁴ Ex. 1 at 15:2-8.

⁵ Ex. 1 at 20:8-11; 21:2-9.

⁶ See PL's Memo. in Supp. of Mot. for Summ. J., at Ex. O, p. 18, Policy at p. 8, § A.

⁷ Ex. 1 at 22:11-23:12; 24:4-19.

underwriter and the Defendant Crescent Coast before Crescent Coast prepared the application pertaining to the Policy (hereinafter the “Property Application”) and sent it to Tebele on January 11, 2018. (See **Exhibit 3**, at p. 1; Text Messages between Egan and Abe Tebele). Tebele paid a total premium in the sum of \$170,997.08 to procure coverage for twenty-three of Tebele’s real properties, including the Tebele Property. Of the \$170,997.08 premium charged by the Defendant Insurers, \$105,870.00 was charged to Tebele for the Property Policy or “Property Coverage Form” at issue in this action. With respect to the instant motion, the following facts, among others are undisputed in this matter: (1) A new building sprinkler system was installed throughout the entirety of the building improvements situated on the Tebele Property and was under construction at the time of the Fire Loss (hereinafter the “Building Sprinkler Addition”); (2) The PSE relied upon by the Defendant Insurers to deny coverage to Tebele for the Fire Loss was not delivered to Tebele until Egan physically handed it to Tebele after the loss during Egan’s joint site inspection with the Defendant Insurers’ adjuster;⁸ (3) The broker whom Crescent Coast worked with to gain access to place coverage with respect to Tebele’s twenty-three real properties was Amwins Access Insurance;⁹ (4) Tebele delivered payment of the premium down payment to Crescent Coast, which Crescent Coast then took a percentage from as a commission payment before sending the balance of Tebele’s payment to the Amwins Access Insurance Broker;¹⁰ (5) The SOV and the 100% notation depicted thereon relied upon by the Defendant Insurers to deny coverage to Tebele is a provision or policy term which the Insurers contend precludes coverage to Tebele; (6) The SOV and the 100% notation depicted thereon was prepared, reviewed, and modified by Egan of Crescent Coast at the request of the Defendant Insurers and the Defendant Insurers’ underwriters;¹¹ (7) On

⁸ Ex. 1 at 81:5-22.

⁹ Ex. 1 at 79:13-24; See **Exhibit 4**, p. 2, 4; Egan 1/15/19 Email & Attached Premium Finance Agreement.

¹⁰ Ex. 1 at 79:18-24; 80: 8-14.

¹¹ See **Exhibit 5**, Egan Dec. 2018 Emails & Attached Schedule of Values; Ex. 1 at 87:4-23; 88:11-19; 90:7-17.

January 11, 2019, hours before Crescent Coast sent the Property Application that Egan prepared to Tebele, Crescent Coast emailed the broker who was working on the Policy notification that the Building Sprinkler Addition was not operational and that Crescent Coast had become aware of its operational status on January 10, 2019;¹² (8) After Sutherland successfully solicited Tebele and arranged an initial meeting between Tebele and Egan in August of 2018, Crescent Coast never mentioned, discussed, nor communicated to Tebele any information, requirement, condition, or other information pertaining to the Building Sprinkler Addition; (9) Crescent Coast never discussed, mentioned, nor disclosed to Tebele its involvement with the preparation of the SOV, the drafting and/or inputting of the terms and data depicted on the SOV which the Defendant Insurers relied upon to deny coverage to Tebele, nor any requirement, coverage condition, or exclusion relating to a building sprinkler system;¹³ and (10) The PSE nor any of the form's provisions, conditions, or exclusions were provided to Tebele prior to the fire loss.¹⁴

“To establish a cause of action in negligence the following three essential elements must be proven: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.” Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 301, 468 S.E.2d 292, 298 (1996). An agent has a duty to properly complete insurance applications and to properly explain the terms and limitations of coverage. Id. at 297, 468 S.E.2d at 296. “In cases involving the failure of an insurance agent or broker to maintain or procure insurance, courts have recognized an insured’s prerogative to rely on the expert knowledge of the agent or broker.” Republic Textile Equipment Co. v. Aetna Ins. Co., 293 S.C. 381, 388, 360 S.E.2d 540, 544 (Ct. App. 1987). A duty to exercise reasonable care

¹² See **Exhibit 6**, Crescent Coast email correspondence with Whitney Gurtzweiler.

¹³ Ex. 1 at 91: 12-15.

¹⁴ Ex. 1 at 95: 17-25.

in giving information exists when the insurance agent or broker has a pecuniary interest in the transaction. Winburn v. Insurance Co. of North America, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). “The fact that the information is given in the course of the defendant’s business, profession or employment is sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time.” Id. at 442, 339 S.E.2d at 146-47. A duty arises when the agent undertook to procure an insurance policy on behalf of the insured, and the agent is liable to the insured if, due to the agent’s fault or neglect, the agent procures insurance that does not provide coverage in which the agent undertook to supply. Sullivan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30, 31 (1993). When the agent does or performs any act or thing at the request or instance of an insurer, the agent becomes a dual agent and is deemed to be acting as the agent of the insurer. S.C. Code Ann. § 38-51-10. In the instant action, it is undisputed that Crescent Coast, prior to the preparation of the Property Application, prepared and/or assisted in the preparation of the SOV which the Defendant Insurers relied upon to deny coverage to Tebele. Crescent Coast neither provided the SOV to Tebele nor did Crescent Coast disclose its role in preparing a document and inputting data and information thereon which would ultimately affect the terms of coverage set forth in the Policy which Crescent Coast delivered to Tebele during a joint inspection with the Defendant Insurers’ adjuster following the Fire Loss. The undisputed facts establish that Tebele was solicited by Crescent Coast for the purposes of procuring commercial property insurance, and that Tebele relied upon Crescent Coast to procure insurance that would afford coverage to the Tebele Property in the event of a fire loss. Crescent Coast prepared the Property Application but, before Crescent Coast sent the Property Application to Tebele, it failed to disclose to Tebele its involvement in the preparation of the SOV, and its knowledge as to the operational status of the Building Sprinkler Addition. Crescent Coast had a

pecuniary interest in the transaction as it accepted Tebele's premium down payment, withheld its commission therefrom, and then delivered the remainder of the premium down payment to Amwins Access. Therefore, the undisputed facts, alone, are sufficient to submit the question of Crescent Coast's negligence to the jury.

The Defendant Crescent Coast, in its Motion and supporting memorandum, insists that there is no fiduciary duty between Crescent Coast and Tebele as a matter of law relying on Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (2002). In Pitts, the South Carolina Court of Appeals held that no fiduciary relationship exists between the insured and the insurer at the application stage. Id. Neither Pitts nor the line of cases cited by Crescent Coast state that, as a categorical matter, a fiduciary relationship cannot arise between an insurance agent and an insured. In fact, Pitts and the other cases cited by Crescent Coast leave open the possibility that a fiduciary relationship between an agent and an insured may arise if the transaction is not at arm's length or there exists other factors evidencing a relationship beyond the mere sale of insurance at the application stage. See Smith v. Universal Prop. & Cas. Ins. Co., No. 5:16-CV-03905-JMC, 2017 WL 3599590, at *4 (D.S.C. Aug. 22, 2017) (holding Pitts did not hold that a fiduciary relationship can never arise between an insurance agent and an insured; therefore, the court left open the possibility that a fiduciary relationship might arise between an agent and an insured if, for instance, the transaction is not truly at arm's length or other factors demonstrate that the parties' relationship goes beyond the mere sale of insurance). In the instant action, Tebele, the insured, was solicited by Crescent Coast for more than a year before Egan's initial meeting with Tebele in August of 2018. Before Crescent Coast prepared the Property Application and sent the application to Tebele, Crescent Coast, at the insistence and request of the Defendant Insurers' underwriters, assisted in the preparation of the SOV and the inputting of data thereon which the Defendant Insurers would

ultimately rely upon to deny coverage to Tebele. Thus, Crescent Coast was also acting as an agent of the Defendant Insurers as a matter of law long before it prepared and submitted the Property Application. Crescent Coast, in breach of its fiduciary duty, among other acts and omissions, failed to disclose to Tebele, its dual agency, the SOV, the 100% notation and other data thereon which purport to affect the Policy's terms and provisions along with the coverage afforded thereunder, or the knowledge which Crescent Coast obtained on January 10, 2019 that the Building Sprinkler Addition was not operational. Instead, Crescent Coast remained silent and thereafter prepared the Property Application and sent it to Tebele on January 11, 2019 with instructions to Tebele to just DocuSign the application to facilitate the submission and earn a large commission from the binding of a large commercial insurance policy. Thus, the undisputed facts in this action establish that the transaction was not at arm's length and goes far beyond the mere sale of insurance at the application stage.

For the reasons set forth above, Crescent Coast's Motion for Summary Judgment must be denied as there are genuine issues of material fact as to both Tebele's causes of action for negligence and breach of fiduciary duty.

Respectfully submitted,

[Signatures Appear on Following Page]

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2020-CP-26-00808

A. Tebele & Sons, a South Carolina
General Partnership,

Plaintiff,

vs.

Certain Underwriters at Lloyd's; HDI
Global Specialty SE; General Security
Indemnity Company of Arizona; and
Crescent Coast Insurance, LLC,

Defendants.

PLAINTIFF'S MOTION FOR
NEW TRIAL ABSOLUTE AND
ALTERNATIVE MOTION FOR NEW
TRIAL ADDITUR AS TO
DEFENDANT CRESCENT COAST
INSURANCE, LLC

INTRODUCTION

Plaintiff A. Tebele & Sons ("Tebele") hereby moves for a new trial absolute as to all causes of action alleged by Tebele against the Defendant Crescent Coast Insurance, LLC ("Crescent Coast"), those claims being causes of action for negligence and breach of fiduciary duty. Alternatively, Tebele moves for a new trial *nisi* additur based on the jury's verdict as to Tebele's breach of fiduciary duty claim. In this matter, Tebele asserted a breach of an insurance contract claim and a bad faith cause of action against the Defendants Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Company of Arizona (hereinafter collectively referenced as the "Defendant Insurers"), and two causes of action against Crescent Coast, one for negligence and the other for breach of fiduciary duty. The two claims alleged by Tebele against the Defendant Insurers are not the subject of this Motion. This case was tried before a jury in the Horry County Court of Common Pleas on December 4, 2023 through December 13, 2023. The court denied all motions for directed verdict at the close of all evidence and all claims alleged by Tebele were submitted to the jury. The jury returned a verdict in favor of Crescent

Coast as to the negligence cause of action. On the breach of fiduciary cause of action, the jury found for Tebele in the amount of \$15,000.00. At the conclusion of the trial, the Court granted the parties ten days in which to file any post-trial motions.

Evidence submitted at the trial as to damages was that the building located at 1901 North Kings Highway in Myrtle Beach (hereinafter the “Tebele Property”) was totally destroyed by fire on February 24, 2019 resulting in a total loss (hereinafter the “Fire Loss”), and that the subject insurance policy in force and effect at the time of the Fire Loss insured the Tebele Property in the stated value amount of \$2,850,000.00. The parties did not dispute that the building improvements situated on the Tebele Property sustained a total loss as a result of the Fire Loss, nor was any evidence to the contrary presented at trial. The Defendant Insurers denied coverage to Tebele relying upon a Protective Safeguards Endorsement (the “Endorsement”) that was not provided to Tebele until after the Fire Loss and a spreadsheet template entitled and referenced in the Endorsement as the Schedule of Values (the “SOV”) that was prepared by both the Defendant Insurers’ underwriters and Crescent Coast but never mentioned, discussed, referenced, provided, nor disclosed to Tebele. Based upon the arguments and evidence presented at trial, the parties did not dispute that, had coverage been afforded for the Fire Loss, the stated value amount of \$2,850,000.00 would have been due and payable to Tebele under the subject insurance policy. As set forth below, Tebele would show unto this Honorable Court that the verdict of the jury is inconsistent with and does not conform to the evidence regarding the amount of Tebele’s actual damages that were proven and uncontested at trial.

NATURE OF CASE

In the instant action, the subject insurance policy issued by the Defendant Insurers is a Valued Policy that provides fire insurance coverage to Tebele, as the first-named insured, for the full value of Tebele's real properties insured thereunder (hereinafter the "Policy").¹ The limits of liability under the Policy are \$22,155,400.00 per Occurrence, and Tebele paid \$105,870.00 in premiums for the Policy, including inspection fees. The Tebele Property was one of Tebele's properties insured under the Policy. The \$2,850,000.00 Stated Value or value stated in the Policy for the Tebele Property fixed by the Defendant Insurers on or before issuance is set forth in the SOV, a copy of which is attached hereto as **Exhibit 1**.

Joey Sutherland ("Sutherland"), an insurance agent employed by Crescent Coast, previously sold insurance to the tenant who occupied the Tebele Property at the time of the Fire Loss (hereinafter referred to as the "Tenant"). Sutherland testified at trial that he was previously employed by a prior tenant of Tebele and worked as a restaurant manager at the Tebele Property before his business relationship with the Tenant and employment with Crescent Coast. Sutherland also testified that he began soliciting Tebele to sell commercial property insurance in 2017 and induced Tebele to retain Crescent Coast to obtain coverage quotes for Tebele's commercial properties in the summer of 2018. David Egan ("Egan"), an insurance broker and producer and the managing partner of Crescent Coast, met with Tebele in August of 2018 to gather information to quote coverages for Tebele's commercial properties, including the Tebele Property. After meeting with Tebele, Egan entered information onto a standard pre-printed form known as an Accord Form 140 (the "Accord"), which Crescent Coast uses in the ordinary course of business to

¹ Tebele will not recite the entire factual background already set forth in its Motion for New Trial as to the Defendant Insurers filed on even date herewith but incorporates those facts herein by reference as if repeated fully herein verbatim.

send to an underwriter to provide insurance quotes. The Accord was neither signed by Tebele nor given to Tebele to review. On August 20, 2018, Egan sent an email to Whitney Northcutt, an Amwins Access employee who was involved in the underwriting of the Policy attaching the Accord and the Declarations pertaining to Tebele's then-current insurance policy insuring Tebele's real properties, including the Tebele Property. Tebele's then-current insurance policy was set to expire in January of 2019 around the time of the binding of the Policy at issue in this case, and that prior policy insured the Tebele Property and afforded coverage for fire-related losses and damages along with other perils, but did not require the Tebele Property to have an existing or operating building sprinkler system for coverage to be afforded in the event of a fire-loss or fire-related damage.

At trial, Egan testified at trial that he input the 100% sprink notation onto the SOV which the Defendant Insurers ultimately articulated to Tebele as the sole basis for denying coverage for the total loss sustained by the Tebele Property.² Egan also testified that he neither discussed the SOV with Tebele nor provided a copy of the SOV to Tebele. In fact, the SOV was prepared by the Defendant Insurers and Crescent Coast with the 100% sprink notation depicted thereon long before Egan prepared and submitted the application pertaining to the Policy in January of 2019 (hereinafter the "Application").³ Prior to Egan's preparation of the Application on January 11, 2019, Crescent Coast obtained knowledge that the new building sprinkler system addition under construction at the Tebele Property was not operational. Thereafter, Tebele received the Application emailed by Egan and electronically signed it on January 14, 2019, and Egan thereafter submitted the Application to the Defendant Insurers requesting that coverage be bound. Tebele,

² See **Exhibit 1** at p. 5, Egan Dec. 14 – Dec. 17, 2018 email corresp. & attached SOV; see also **Exhibit 2** at p. 3, Def. Insurers' 8/6/19 Coverage Denial Ltr.

³ Ex. 1.

believing that the Tebele Property and the new building sprinkler addition under construction had coverage against fire-loss and fire-related damage, paid the premiums for the Policy. Egan and Sutherland both testified at trial that they were paid a commission from the premiums paid for the Policy upon binding. The uncontradicted evidence presented at trial established that Tebele did not receive a copy of the Policy or the Endorsement until after the Fire Loss, that neither the Defendant Insurers nor Crescent Coast ever provided a copy of the SOV to Tebele, and that neither the Endorsement, SOV, nor any building sprinkler requirement was ever mentioned, discussed, referenced, provided, or disclosed to Tebele.

ARGUMENT

As the Court is aware, the jury found Tebele sixty (60%) percent negligent and Crescent Coast forty (40%) percent negligent. Thus, recovery was denied on the negligence cause of action. The jury returned a verdict in favor of Tebele on the breach of fiduciary duty claim in the amount of \$15,000.00. Evidence submitted at trial as to the damages was that the building situated on the Tebele Property was totally destroyed by fire and that the Stated Value or coverage amount pertaining to the Tebele Property under the Policy in force and effect at the time of the Fire Loss was in the amount of \$2,850,000.00 (hereinafter the "Policy Amount"). In fact, Crescent Coast, through its counsel, had previously moved the Court for an order limiting Crescent Coast's liability to the \$2.85 million Policy Amount. In addition to the \$2.85 million Policy Amount that would have been due and payable to Tebele had coverage been afforded under the Policy, Tebele presented evidence of additional and/or consequential damages which Tebele incurred as a direct and proximate result of coverage not being afforded under the Policy at trial through witness testimony, including Tebele's public adjuster, James Twaddell, as to the loss of rents, and Tebele's expert witness, Fred Shenay, as to the increased costs of construction required to replace or rebuild

the destroyed building (the difference between those construction cost amounts in 2019 and the current construction cost amounts). Shenay, as set forth in his estimate and report that was admitted into evidence at trial, estimated the referenced construction cost increase to be in the sum of \$2,088,415.29. Further, all parties to this litigation agreed that the building was a total loss, and no other damages estimate was ever offered by any party.

I. THE VALUED POLICY STATUTE AND MINIMUM DAMAGE AWARD AS A MATTER OF LAW.

The Policy at issue in this case is a Valued Policy that provides fire insurance coverage to Tebele, as the first-named insured, for the full value of the insured properties fixed by the Defendant Insurers at the time of issuance. With regard to the Tebele Property, the amount of insurance the \$2.85 million Policy Amount. Thus, the Policy is subject to South Carolina's Valued Policy Statute which provides in pertinent part that: "the amount of insurance must be fixed by the insurer and insured at or before the time of issuing the policy. In case of total loss by fire the insured is entitled to recover the full amount of insurance." S.C. Code Ann. § 38-75-20. In addition, every insurer doing business in South Carolina shall cause the location of the property insured "to be plainly written or printed on the face of each ... insurance policy written and issued by it." S.C. Code Ann. § 38-75-10. The South Carolina Supreme Court has interpreted the Valued Policy Statute "to require that in a case of total loss by fire, recovery equals the full amount of insurance under the policy." *Averill v. Preferred Mut. Ins. Co.*, 314 S.C. 49, 52, 441 S.E.2d 632, 633 (1994). The referenced statutory provision is deemed to form a part of every policy issued in South Carolina, and any conflicting policy provision will be rendered null and void. *Tedder v. Hartford Fire Ins. Co.*, 246 S.C. 163, 166, 143 S.E.2d 122, 123 (1965).

In cases involving the failure of an insurance agent or broker to maintain or procure insurance, courts have recognized an insured's prerogative to rely on the expert knowledge of the

agent or broker.” *Republic Textile Equip. Co. v. Aetna Ins. Co.*, 293 S.C. 381, 388, 360 S.E.2d 540, 544 (Ct. App. 1987). A fiduciary relationship exists between an independent insurance agent and an insured if, for instance, the transaction is not truly at arm’s length or other factors demonstrate that the parties’ relationship goes beyond the mere sale of insurance. *Smith v. Universal Prop. & Cas. Ins. Co.*, No. 5:16-CV-03905-JMC, 2017 WL 3599590, at *4 (D.S.C. Aug. 22, 2017). “If the agent or broker fails, because of his fault or neglect, to procure the insurance, or does not follow instructions, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, he is liable to [the] ... [insured] for the loss sustained thereby in the amount that would have been due under the insurance policy if it had been obtained and provided the desired coverage.” *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 421, 171 S.E.2d 486, 491 (1969). In ascertaining the amount of an agent’s liability in the event of the agent’s breach of duty or fiduciary duty, the jury, in addition to the amount of policy proceeds that would have otherwise been due under an insurance policy had the agent procured the desired coverage, may consider and award “all pecuniary losses that are the natural result of the ... [agent’s] misconduct, regardless of whether these losses could have been anticipated.” *Republic Textile Equip. Co.*, 293 S.C. at 389, 360 S.E.2d at 545.

In the instant action, had Crescent Coast not breached its obligation and fiduciary duty to procure the desired coverage which Tebele sought and purchased to provide coverage in the amount of \$2,850,000.00, a loss payment equal to the \$2.85 million Policy Amount would have been paid to Tebele following the Fire Loss as required by the Valued Policy Statute and Tebele would not have incurred the additional and/or consequential damages referenced above. Therefore, a verdict in favor of Tebele as to the causes of action against Crescent Coast must be at a minimum and no less than the \$2.85 million Policy Amount as a matter of law.

II. THE COURT SHOULD GRANT A NEW TRIAL ABSOLUTE AS TO ALL CAUSES OF ACTION AGAINST CRESCENT COAST INSURANCE, LLC.

Our courts have long held for over a century that verdicts which are inconsistent with the evidence will not be considered and that a new trial absolute should be granted in those situations. A new trial absolute is defined as a verdict which is grossly inadequate or excessive and clearly indicates a figure reached was the result of prejudice, passion, caprice or some other improper motive. See *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). The fact that the verdict is so inadequate in this case (\$15,000.00) when the damages are so great (far exceeding the \$2.85 Million Policy Amount) is a compelling reason for this Court to grant a new trial absolute. See *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d (1992).⁴

Numerous South Carolina cases have granted a new trial absolute in these circumstances or have provided a new trial *nisi* additur. Some recent examples are *Dillon v. Frazer*, 383 S.C. 59, 678 S.E.2d 251 (S.C. 2009); *Sullivan v. Davis*, 317 S.C. 462, 467, 454 S.E.2d 907, 911 (Ct. App. 1997) (new trial granted when jury awarded \$20,000.00 when plaintiff's medical bills were \$130,000.00); *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990) (verdict in the amount of \$400,000.00 actual damages and \$100,000.00 punitive damages vacated because court disapproved of the verdict on factual grounds); *New, Max G. Crosby Const. Co.*, 2000-UP-282 (S.C. App., Apr. 27, 2004) (jury verdict above the amount of construction repairs not supported by the evidence, jury verdict in the amount of \$285,942.00 was not in conformity with the evidence which is that the cost to repair the structure was \$129,930.42. This verdict is not supported by the evidence and a new trial absolute is required.); see also, *Hatfield v. Seaboard Airline Railroad*, 396 F.2d. 721 (5th Cir. 1968) (jury awarded \$1 untenable when plaintiff had uncontested damages

⁴ Further, a new trial must be granted in this case under the Thirteenth Juror Doctrine because the verdict is unsupported by the evidence.

of \$2,795.75 and substantial pain); *McKibben v. Anthony*, 185 S.C. 459, 194 S.E. 446 (1937) (trial court ordered a new trial after a jury award of \$1).

In sum, a new trial is the appropriate remedy when the verdict is inconsistent and reflects a failure to consider the uncontradicted damages. *Ralph v. McLaughlin*, 428 S.C. 320, 834 S.E.2d 213 (2019).

III. IN THE ALTERNATIVE, TEBELE REQUESTS A NEW TRIAL ADDITUR AS TO THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION.

It is well settled in South Carolina that a trial court may grant a new trial upon new facts if the judge determines the verdict is contrary to the fair preponderance of the evidence. *See McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746 (Ct. App. 2003). Unlike a motion for a directed verdict, the trial judge weighs the evidence under the Thirteenth Juror Doctrine he need not view it in the light most favorable to the opposing party. It is also well established that when there is no evidence to support a verdict or decision, an order granting new trial will be upheld.

South Carolina law provides that the plaintiff has a right to a new trial unless the defendant agrees to pay an additional amount (new trial *nisi* additur). *See Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). See also *Allstate Insurance Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993) (Motion for new trial based on the inadequacy of verdict is covered by the same principals as motion for new trial based on the excessiveness of the verdict).

In this case, a verdict of \$15,000.00 on the breach of fiduciary duty claim against Crescent Coast is totally inadequate. The only testimony which was unchallenged by either Crescent Coast or the Defendant Insurers was that the building situated on the Tebele Property was a total loss and that the coverage was in the amount of \$2,850,000.00 million. Further, Crescent Coast's counsel suggested on numerous occasions that Crescent Coast's liability was limited to \$2.85 million

Policy Amount. Under those circumstances and because the verdict is \$15,000.00, it is reasonable and appropriate for the Court to grant a new trial *nisi* additur to the sum of \$2,850,000.00, the \$2.85 million Policy Amount referenced herein. This would be a decision which would fall within the range supported by the evidence, and it would not be disturbed on appeal because Crescent Coast at trial, through counsel, argued that the limit on its liability would be the \$2.85 million Policy Amount. Finally, this Court has the power alone to grant a new trial *nisi* additur. *See O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). In sum, the consideration of a motion for new trial additur requires that this Court consider the adequacy of the verdict in light of the evidence presented. *Patterson v. Reed*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995). The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better informed view of the damages than this court. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Accordingly, great deference is given to the trial court.

In this case, the only evidence presented at trial was that the building improvements situated on the Tebele Property sustained a total loss, that the \$2.85 million Policy Amount is the amount that would have otherwise been due and payable to Tebele following the Fire Loss had coverage been afforded, and the additional and/or consequential damages exceeding the \$2.85 million Policy Amount that were sustained and claimed by Tebele as set forth above. Not one witness other than Tebele, Tebele's public adjuster, James Twaddell, and Fred Shenay testified in regard to damages. In fact, the Defendants accepted Tebele's position that the building was a total loss and that the amount of the Policy pertaining to the Tebele Property was \$2,850,000.00. **Nowhere during the trial was the figure \$15,000.00 discussed by any party to the litigation. The source and the jury's method of calculating the \$15,000.00 verdict is known. This verdict is inadequate in light of the evidence presented by any party.**

During the trial it became obvious that the damages from the fire were significant, that the Policy had not been provided to Tebele prior to the Fire Loss, that no other dollar amount or damage estimate was offered other than the amounts and estimates presented by Tebele at trial, and that the dollar amount or damage from the Fire Loss was never disputed by any party. This is exactly the situation which the South Carolina Supreme Court addressed in *Rush v. Blanchard* 426 S.E.2d 802 (1993). In *Rush*, the Supreme Court affirmed the trial court's remittitur from \$600,000.00 to \$275,000.00. The Court there noted that the trial court has wide discretionary power to reduce the amount of a verdict or to additur the amount of a verdict which in his or her judgment is either excessive or inadequate. The decision of the trial court to reduce or additur a verdict will not be disturbed unless it is clearly erroneous or a manifest error of law. Great deference is given to the trial judge especially in the area of damages.⁵ Therefore, Tebele requests a new trial *nisi* to additur the amount of the verdict.

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⁵ A new trial *nisi* additur or remittitur is a different legal doctrine than the Thirteenth Juror Doctrine. The Thirteenth Juror Doctrine is never used when the trial judge has found the verdict was inadequate or unduly liberal. The vehicle for asking additur is a new trial nisi additur.

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December 21, 2023

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2020-CP-26-00808

A. Tebele & Sons, a South Carolina
 General Partnership,

Plaintiff,

vs.

Certain Underwriters at Lloyd's; HDI
 Global Specialty SE; General Security
 Indemnity Company of Arizona; and
 Crescent Coast Insurance, LLC,

Defendants.

PLAINTIFF'S MOTION FOR
 NEW TRIAL AND JNOV
 PURSUANT TO
 RULE 59(a), SCRPC,
 AND RULE 50(b), SCRPC,
 AS TO
 DEFENDANT INSURERS

This case was tried before a jury in the Horry County Court of Common Pleas on December 4, 2023 through December 13, 2023. At the conclusion of the trial, the Court granted the parties ten days in which to file any post-trial motions. Pursuant to Rule 59(a), SCRPC, and Rule 50(b), SCRPC, A. Tebele & Sons (hereinafter "Tebele") respectfully moves the Court to grant a new trial pursuant to the Thirteenth Juror Doctrine and Judgment Notwithstanding the Verdict based on the following grounds:

1. The jury's verdict is inconsistent with the overwhelming preponderance of the evidence presented at trial.
2. The Court's legal error in failing to find an ambiguity in the insurance policy at issue in this case as a matter of law.
3. The Court's error in failing to charge to the jury the law of ambiguity in insurance contracts.

4. The Court's error in failing to hold that the insurance policy in question had an ambiguity as a matter of law.

The jury was presented with compelling evidence from Tebele's expert witness, Gerald M. Finkel, that the subject policy of insurance (the "Policy") issued by the Defendants Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Company of Arizona (hereinafter collectively referenced as the "Defendant Insurers") for the fire loss in question had an internal inconsistency in it created by the Protective Safeguards Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele. The application of the referenced Protective Safeguards Endorsement (the "Endorsement") renders the Policy ambiguous in the following manner: (1) the omission of an "AS" symbol on the Schedule of Values (hereinafter the "SOV") referenced in the Endorsement; (2) the failure of the Policy or the Endorsement to define the word "maintain" or "control"; (3) the internal inconsistency created by the application of the Endorsement to the Policy's provisions insuring the building sprinkler system addition that was under construction at the time of the fire loss rendered the Policy ambiguous; (4) the Endorsement's omission of any reference to a specific insurance policy or coverage part to which its provisions apply; and (5) the ambiguity arising from multiple protective safeguards endorsements, the Endorsement and a subsequent Protective Safeguards Endorsement (hereinafter the "Modified Endorsement") that was issued to after the submission of Tebele's loss claim to support the Defendant Insurers' interpretation of the original Endorsement to deny coverage to Tebele.

The Court as to the Defendant Insurers held that the Policy was unambiguous but allowed Plaintiff's counsel to argue the issue of ambiguity to the jury but did not charge it nor find that the Policy was ambiguous.

The jury's verdict for the Defendant Insurers is contrary to the overwhelming preponderance of the evidence and South Carolina law which holds that any ambiguity in an insurance policy must be construed in favor of the Insured. Thus, the jury's verdict can only be the result of one of the following: (1) the Court's failure to find the Policy to be ambiguous; (2) the Court's failure to properly charge ambiguity to the jury; (3) the Court's failure to find the Endorsement ambiguous due to an "AS" symbol not appearing on the Schedule of Values; and (4) the Court's decision not to find an ambiguity existed when the evidence presented at trial established that the building sprinkler system addition that was under construction at the time of the fire loss incident was insured under the Policy. (See attached Endorsement, Covered Property provisions of the Policy, and Modified Endorsement; Exhibit 1, Exhibit 2, and Exhibit 3).

Based on the following, this Court should invoke the Thirteen Juror Doctrine and order a new trial on all counts as to the Defendant Insurers. Also, as set forth below the Court, as a matter of law, should grant Plaintiff's JNOV Motion.

THE THIRTEENTH JUROR DOCTRINE

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine." *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 597, 681 S.E.2d 879,883 (2009). This is also known as "granting a new trial upon the facts." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996) (citation omitted). "The trial court has the authority to grant a new trial upon its finding that justice has not prevailed or if the verdict is inconsistent and reflects the jury's confusion." *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d

565, 571 (2013) (citing *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722). “The doctrine ‘entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.’” *Lane*, 383 S.C. at 597, 681 S.E.2d at 883 (quoting *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). “As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” *Lane*, 383 S.C. at 597, 681 S.E.2d at 883 (citation omitted). When a trial judge exercises his discretion as the thirteenth juror, “the effect is the same as if the jury failed to reach a verdict.” *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990).

Unlike when a judge evaluates a motion for JNOV and must view the evidence in a light favorable to the non-moving party, when a judge evaluates whether to grant a motion for new trial upon the facts, he must actually weigh the evidence. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (2003).¹ The trial judge has broad discretion sitting as the thirteenth juror to grant a new trial when he is convinced “that justice has not been done in the trial.” *Watson v. Town of Pendleton*, 294 S.C. 155, 157, 363 S.E.2d 234, 235 (Ct. App. 1987). The Supreme Court has gone so far as to hold that as the thirteenth juror, the trial judge has “**veto power to the Nth degree**, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.” *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313–14, 195 S.E. 638, 641 (1938) (emphasis added).

¹ Further, a motion for directed verdict is not a prerequisite to filing a motion for new trial under the thirteenth juror doctrine. *McEntire*, 353 S.C. at 632–33, 578 S.E.2d at 747–48. “Because the question of whether the evidence is legally sufficient to support a verdict—a question of law—is totally different from the question of whether the fair preponderance of the evidence supports a verdict—a question involving the exercise of discretion—there is no inconsistency in a party’s failure to move for a directed verdict and a party’s moving to have the verdict set aside as being against the fair preponderance of the evidence.” *Id.* Stated differently, “[i]t may well be that a party’s evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor.” *Id.*

“Not only does a trial judge have the discretion, but also the **duty to grant a new trial** if the jury verdict is contrary to the fair preponderance of the evidence.” *Jessup v. Hansen*, 289 S.C. 54, 56, 344 S.E.2d 618, 620 (Ct. App. 1986) (emphasis added). In other words, “**because it is obligated to see that justice is done—[the trial court] is duty-bound to grant a new trial if the evidence does not support the verdict.**” *Ex Parte Travelers Home and Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 244, 830 S.E.2d 718, 721 (Ct. App. 2019) (citing *Folkens*, 300 S.C. at 254–55, 387 S.E.2d at 267) (emphasis added).

A trial judge’s decision to act as thirteenth juror and grant a “new trial upon the facts will not be disturbed unless [his] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.” *Vinson v. Harley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996); see also *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d 565, 571 (2013) (same). A Westlaw search of “thirteenth juror” in South Carolina reveals sixty-eight reported decisions.² These decisions illustrate the breadth of the trial judge’s discretion in that only a few cases in which a trial judge has granted a new trial upon the facts have been overturned on appeal. Every one of those few, rare invocations of the thirteenth juror doctrine that were overturned involved the judge’s use of a legally flawed basis to invoke the doctrine.³ No invocation of the doctrine has ever been overturned based on the appellate court’s disagreement with the trial judge on the facts.

“The judge is not required to explain the reasons for his decision.” *Lane*, 383 S.C. at 598, 681 S.E.2d at 883. As the Supreme Court has explained:

² The search also reveals thirty-eight unreported decisions upon which Plaintiff does not rely. See Rule 268(d)(2), SCACR (providing that unreported decisions should generally not be cited).

³ *Bailey v. Peacock*, 318 S.C. 13, 14–15, 455 S.E.2d 690, 692 (1995); *Youmans v. S.C. Dep’t of Transp.*, 380 S.C. 263, 280–81, 670 S.E.2d 1, 9–10 (Ct. App. 2008); *Howard v. Roberson*, 376 S.C. 143, 148, 654 S.E.2d 877 (Ct. App. 2007); *Scoggins v. McClellion*, 321 S.C. 264, 271–72, 468 S.E.2d 12, 16 (Ct. App. 1996).

The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Folkens, 300 S.C. at 254, 387 S.E.2d at 267 (emphasis added); *Id.* at 252, 387 S.E.2d at 266 (upholding the trial judge’s grant of a new trial “upon the facts” when he stated that “he disapprove[d] of the verdict on factual grounds”); *Trivelas v. S.C. Dep’t of Transp.*, 357 S.C. 545, 552, 593 S.E.2d 504, 508 (Ct. App. 2004) (upholding trial judge’s ordering new trial pursuant to the thirteenth juror doctrine based on the judge’s simple finding that “the evidence did not justify the verdict” and “justice was not done by the jury’s verdict”).

In this case, the Court should find that the jury’s verdict was contrary to the overwhelming preponderance of the evidence and order a new trial. The Court should enter an Order granting a new trial “because the evidence did not justify the jury’s verdict and justice was not done by the verdict.”

JUDGMENT NOT WITHSTANDING THE VERDICT

South Carolina law requires the Court to grant a judgment notwithstanding the verdict (Rule 50(b), SCRPC 50) when legal questions are raised. Rule 50(b), SCRPC provides in pertinent part:

A party who has moved for a directed verdict may move to have the judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict... If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

In this case, based on the internal inconsistency in the Endorsement and other provisions in the Policy which provided for coverage for ongoing construction the Court should have held as a matter of law that the subject insurance policy was ambiguous, and, as a result, coverage must

be awarded to Tebele to resolve the ambiguity in the sum of \$2,850,000.00, the coverage amount otherwise due and payable to Tebele under the Policy had the Defendant Insurers not applied the Endorsement to deny Tebele's loss claim. Thus, the case as to whether coverage was due under the Policy should never have been submitted to the jury. The only issue which should have been submitted to the jury as to the Defendant Insurers after the Court's finding of ambiguity was whether the Defendant Insurers acted in bad faith in the handling and denial of Tebele's loss claim based on the ambiguous insurance policy.

CONSTRUCTION OF INSURANCE POLICY AND AMBIGUITY

Under South Carolina law, "[a]n insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015). The cardinal rule of contract interpretation utilized by South Carolina courts to construe an insurance policy is to "ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language in the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016). When an insurance policy, on its face, clearly expresses the entire agreement between the parties, parol or extrinsic evidence cannot be used to construe or add another term to the insurance contract. *Columbia E. Assoc. v. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). "It is well settled that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of a conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery." *Cogdill v. Equity Life & Annuity Co.*, 262 S.C. 248, 253, 203 S.E.2d 674, 677 (1974). South Carolina law very clearly requires courts to resolve any insurance policy ambiguities in favor of the insured. *See Helena Chem. Co. v. Allianz*

Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455, 459 (2004) (“Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted.”); *see also Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 525, 167 S.E.2d 420, 423 (1969) (“It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery.”). “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Diamond State Ins. Co. v. Homestead Indus.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). An insurance policy or policy provision is ambiguous when the policy language is reasonably capable of being understood in more than one way. *Williams v. Gov’t Emples. Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 711 (2014); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). In addition, an ambiguity arises if the insurance contract is silent as to a particular matter. *Columbia E. Assoc.*, 299 S.C. at 519, 386 S.E.2d at 261. “Where an internal inconsistency in an insurance policy renders it ambiguous, and the policy is susceptible of more than one reasonable interpretation, one of which provides coverage, coverage must be found as a matter of law.” *Brooklyn Bridge, Inc. v. SC. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992).

Endorsements to insurance policies are designed to enlarge, restrict, particularize, or otherwise modify some provision in the policy. *Charles v. Canal Ins. Co.*, 238 S.C. 600, 121 S.E.2d 200 (1961). Since an insurance policy is a contract between the insurer and the insured, endorsements such as riders, slips, and other outside papers, “to be considered a part thereof, must be so clearly imported into ... [the policy] as to leave no doubt of the intention of the parties. In

fact, when there is a doubt as to the intention of the parties to treat the paper as part of the policy, the courts give the benefit of doubt to the insured, and construe the policy liberally in his favor.” *Id.* at 608, 121 S.E.2d at 204. The fact that an endorsement, rider, or other outside paper is not physically attached to an insurance policy nor delivered to the insured as attached, will preclude that endorsement, rider, or other outside paper from being included or construed as part of the insurance contract. *Id.* at 607, 121 S.E.2d at 204. When an insurance policy together with any endorsements to the policy are susceptible to two or more reasonable interpretations as to its meaning and provisions, the court is bound by the long and well established rule that “the terms of an insurance policy should be construed most liberally in favor of the insured, and in case of conflict or ambiguity, a construction will not be adopted that will defeat recovery if the policy is susceptible of a meaning that will permit recovery. *Id.* at 612, 121 S.E.2d at 207. This rule applies with special force to exclusionary policy language, whether in the policy itself or any attached endorsements to the policy, which is “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.E.2d 555, 560, 614 S.E.2d 611, 614 (2005). Restrictions or limitations on coverage of which an insured has no notice are not binding on the insured. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 298 (1996); *Poston v. Nat’l Fid. Life Ins. Co.*, 303 S.C. 182, 186, 399 S.E.2d 770, 772 (1990). Where an internal inconsistency created by an exclusion renders an insurance policy ambiguous, “the court must resolve that ambiguity in favor of coverage.” *B.L.G. Enters. v. First Fin. Ins. Co.*, 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997).

STATEMENT OF FACTS

A. The Tebele Property and Tebele's Interest and Rights Related to the Property.

Tebele owns and leases a variety of commercial properties throughout Horry County, South Carolina. On or about January 14, 2019, Tebele purchased the Policy, a general liability policy, and an excess liability policy issued by the Defendant Insurers providing coverage to Tebele, as the first named insured, and insuring various risks pertaining to twenty-three of Tebele's real properties. Tebele's commercial real property located at 1901 North Kings Highway in Myrtle Beach, including the building improvements situated thereon (hereinafter the "Tebele Property"), was one of the twenty-three of Tebele's real properties insured by the Policy against fire and other covered losses when the building improvements situated thereon were destroyed by fire on February 24, 2019 (the "Fire Loss"). Tebele purchased the Tebele Property in 1990 with fee title being in the names of its individual partners, David Tebele and Edward Tebele. At that time, all of Tebele's partnership real estate properties were titled in the names of the individual partners, David Tebele and Edward Tebele. As new types of entity forms evolved which provided benefits unavailable to general partnership entities, Tebele's partners decided to form Kings Realty, LP (hereinafter "KRLP") and deeded the Tebele Property to KRLP on December 28, 1993, so KRLP would be the named fee title holder of record. Tebele is the general partnership and management company utilized by KRLP and the other Tebele family-owned entities to perform managerial services, maintain Tebele's commercial real properties, and conduct the family business, which includes procuring insurance coverage for the Tebele family-owned entities. Thus, Tebele is the entity charged with the obligation of procuring insurance coverage for the Tebele real properties, including the Tebele Property.

Tebele paid a total premium in the sum of \$170,997.08 to procure coverage for twenty-three (23) of Tebele's real properties, including the Tebele Property. KRLP along with the other entities that were part of Tebele's management company and family-owned entities were additional named insureds under each of the insurance policies issued. Of the \$170,997.08 premium charged by the Defendant Insurers, \$105,870.00 was paid by Tebele in exchange for the Policy at issue in this action. Tebele paid and delivered to the Defendant Crescent Coast Insurance, LLC (hereinafter "Crescent Coast"), a premium down payment in the amount of \$34,199.42 for coverage under the Policy. Tebele also executed and delivered to Crescent Coast a Premium Finance Agreement obligating Tebele for payment of the remaining \$136,797.66 policy premium balance. Tebele ultimately repaid the policy premium balance financed plus interest accrual. The Policy issued by the Defendant Insurers is a Valued Policy that provides fire insurance coverage to Tebele, as the first-named insured, for the full value of the insured properties fixed by the Defendant Insurers at the time of issuance. With regard to the Tebele Property, the Stated or Schedule Total Insurable Value ("TIV") fixed by the Defendant Insurers at issuance was \$2,850,000.00 and is set forth on the SOV (schedule of values) that was prepared by the Defendant Insurers and Crescent Coast prior to the preparation and submission of the insurance application pertaining to the Policy (hereinafter the "Application"). The Policy provides coverage and payment "for direct physical loss of or damage to 'Covered Property' at an 'Insured Location' caused by or resulting from any Covered Cause of Loss."⁴ As an all-risk property coverage policy, fire-related losses constitute a "Specified Cause of Loss" and are covered under the Policy.⁵

⁴ Ex. 2, p. 6, Policy at p. 8, § A.

⁵ *Id.* at p. 7, Policy at p. 38.

‘Covered Property’ is defined in the Policy to include “[a]dditions under construction, alterations and repairs to the building or structure.”⁶

From the time Tebele purchased the Tebele Property up through the Fire Loss, Tebele managed the property, leased the building improvements to tenants, and expended monies to make building improvements and procure insurance providing property and liability coverage. In June 2017, at the direction of the fire marshal for the City of Myrtle Beach, Tebele hired and contracted Crawford Sprinkler Co. of SC, Inc. (hereinafter “Crawford”), a specialist in sprinkler installation and repair, to design, construct, and install a building sprinkler system addition at the Tebele Property. Tebele paid Crawford \$236,516 for the design, construction, and installation of the building sprinkler system addition at the Tebele Property. The new building sprinkler system addition that Crawford installed throughout the entirety of the building improvements situated on the Tebele Property was still under construction at the time of the Fire Loss.

B. The Defendant Insurers Underwrote and Bound Coverage and Collected Premiums Knowing that the Sprinkler System Was Not Fully Connected.

Joey Sutherland, an insurance agent employed by Crescent Coast (hereinafter “Sutherland”), previously sold insurance to the tenant who occupied the Tebele Property at the time of the Fire Loss (hereinafter referred to as the “Tenant”). Sutherland testified at trial that he was previously employed by a prior tenant of Tebele and worked as a restaurant manager at the Tebele Property before his business relationship with the Tenant and employment with Crescent Coast. Sutherland also testified that he began soliciting Tebele to sell commercial property insurance in 2017 and induced Tebele to retain Crescent Coast to obtain coverage quotes for Tebele’s commercial properties in the summer of 2018. David Egan (“Egan”), an insurance broker and producer and the managing partner of Crescent Coast, met with Tebele in August of 2018 to

⁶ *Id.* at p. 6, Policy at p. 8, § A.

gather information to quote coverages for Tebele's commercial properties, including the Tebele Property. After meeting with Tebele, Egan entered information onto a standard pre-printed form known as an Accord Form 140 (the "Accord"), which Crescent Coast uses in the ordinary course of business to send to an underwriter to provide insurance quotes. The Accord listed each of Tebele's twenty-three commercial properties. The Accord listed information pertaining to each of Tebele's properties such as the building's construction type, the building square footage, and the percentage of the building that was sprinklered, or more specifically, the area of a particular building with a building sprinkler system. The Accord was neither signed by Tebele nor given to Tebele to review. On August 20, 2018, Egan sent an email to Whitney Northcutt (hereinafter "Northcutt"), an Amwins Access employee who was involved in the underwriting of the Policy, attaching the Accord to obtain coverage quotes from the Defendant Insurers. The Accord attached to Egan's email to Northcutt indicated that the Tebele Property was 100% sprinklered because the new building sprinkler system addition had been installed throughout the entirety of the building with only the final phases of construction remaining, mainly the tap installation, to complete construction and final testing of the system by Crawford for the new building sprinkler system addition to become operational.

At trial, Egan testified that the 100% notation on the Accord referred to the percentage of the area of the building interior, and that the same 100% notation depicted on the Tenant's August 2018 insurance application did not require the Tenant to maintain an existing building sprinkler system at the Tebele Property under the Tenant's insurance policy that was issued by the Defendant Insurers in August of 2018. During the trial, Northcutt testified to an inspection report noting the findings and observations from an October 3, 2018 site inspection of the Tebele Property that was performed and procured at the request of Amwins Access. The referenced report that was admitted

into evidence at trial, a copy of which is attached hereto as **Exhibit 4** (the “Inspection Report”), indicated that the Tebele Property had an operational building sprinkler system and was delivered to Northcutt on November 26, 2018 after it was uploaded to Amwins’ database. Soon thereafter, in early December of 2018, the SOV containing the 100% sprink notation which the Defendant Insurers solely relied upon to deny coverage to Tebele was circulated between the Defendant Insurers’ underwriters and Crescent Coast, a month before Egan prepared and submitted the Application pertaining to the Policy.⁷ Egan testified at trial that he input the 100% sprink notation onto the SOV, and that he neither discussed the SOV with Tebele nor provided a copy of the SOV to Tebele.

Prior to Egan’s preparation of the Application on January 11, 2019, Crescent Coast obtained knowledge that the building sprinkler system addition under construction at the Tebele Property was not operational. On January 11, 2019, just hours before Crescent Coast emailed the Application to Tebele for his electronic signature, Crescent Coast emailed Northcutt informing her that the building sprinkler addition under construction was not yet operational. Tebele received the Application emailed by Egan and electronically signed it on January 14, 2019, and Egan thereafter submitted the Application to the Defendant Insurers requesting that coverage be bound. Attached to the Application behind the signature page bearing the January 14, 2019 signatures of both Tebele and Egan, were a series of Accord forms identical to the Accord that Egan emailed and submitted to Northcutt on August 20, 2018. The Accord form pertaining to the Tebele Property depicting the 100% sprink notation entered by Egan in August of 2018 was attached 17 pages behind the Application’s signature page bearing the signatures of both Tebele and Egan. The uncontradicted evidence presented at trial established that Tebele did not receive a copy of the

⁷ See **Exhibit 5**, Egan Dec. 14 – Dec. 17, 2018 email corresp. and attached SOV.

Policy or the Endorsement until after the Fire Loss, that neither the Defendant Insurers nor Crescent Coast ever provided a copy of the SOV to Tebele, and that neither the Endorsement, SOV, nor any building sprinkler requirement was ever mentioned, discussed, or disclosed to Tebele.

C. The Policy and Protective Safeguards Endorsement.

The Policy issued by the Defendant Insurers is an all-risk property insurance policy that promises to “pay for direct physical loss of or damage to the [Tebele Property] caused by or resulting from any Covered Cause of Loss.” In turn, a Covered Cause of Loss is any “[r]isks of [d]irect [p]hysical [l]oss unless the loss is” either expressly excluded or limited. Subject to certain conditions and exclusions, and in the event that the Tebele Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property, demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, “extra expenses.” As an all-risk property coverage policy, fire-related losses constitute a “Specified Cause of Loss.”⁸ The limits of liability under the Policy are \$22,155,400 per Occurrence,” and Tebele paid \$105,870.00 in premiums for the Policy, including inspection fees.

The Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele provides that “[a]s a condition of this insurance, [Tebele is] required to maintain the protective devices or services listed in the Schedule above.”⁹ The Endorsement also contains an exclusion, which states: “We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which

⁸ Ex. 2 at p. 7.

⁹ Ex. 1.

you had control, in complete working order.”¹⁰ The Defendant Insurers chose not to define “maintain” or “control,” nor did they specify what Tebele was required to do in order to “maintain” the protective devices”. The following screenshot depicts the referenced “Schedule” that appears at the top of the Endorsement:

SCHEDULE	
Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any 'OTHER': (a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.	

The “AS” symbol depicted on the above-Schedule is identified in the Endorsement to reference an automatic sprinkler system as defined therein, and the insured locations to which Endorsement’s provisions apply are identified in the Schedule “as indicated on the Schedule of Values on file with the Company.” The following screenshot depicts the SOV relied upon by the Defendant Insurers to deny coverage to Tebele:

AmRisc Application / Schedule of Values

Any person who knowingly and with intent to defraud any insurance company files an application for insurance or statement of claim containing any materially false or misleading information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and subjects the person to criminal and (NY, substantial) civil penalties. In some states insurance benefits may also be denied. By submission of this application the insured and the agent represent that all information is true and correct to the best of their knowledge and that they have not deleted or altered the questions herein.

Yellow = Required

Orange = Required for ACIC

Blue = Required if habitation

Green = Required for General Liability

Gray = Required for High Hazard Quake

Properties. (Warranted)

Total # Units

Total Sq. Ft.

Avg % Occup.

Avg % Sprinklered

0

271,000

24%

B/Rents per Unit per Month

Sq. Ft. per Unit

* Bldg. No.	*Property Ty.	Location Name	Address	*Street Address	*City	*State	Is Prop Mgd or Ownr.	Date Added to Sched.	*# of Unit	*Square Foota	% Occup.	Percent Sprinkler	Sprinklered. (Y/N)	ISO Prot. Cla.	Flood Zone
1	Building		2909	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
2	Building		2911	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
3	Building		502	20th Ave S	Myrtle Beach	SC				900				1	
4	Building		3001	N Kings Hwy	Myrtle Beach	SC				17,000				1	
5	Building		3205	N Kings Hwy	Myrtle Beach	SC				8,400		0%	n	2	
6	Building		1600	E/S N Kings Hwy	Myrtle Beach	SC				10,000		0%	n	1	
7	Building	310-312	310	9th Ave N	Myrtle Beach	SC				1,000		0%	n	1	
8	Building	316-320	316	9th Ave N	Myrtle Beach	SC				3,000		0%	n	1	
9	Building	609-611	609	S Kings Hwy	Myrtle Beach	SC				3,500		0%	n	1	
10	Building		1001	N Kings Hwy	Myrtle Beach	SC				36,000		100%	y	1	
11	Building		610	W/S S Kings Hwy	Myrtle Beach	SC				25,000		100%	y	1	
12	Building		1012	S Kings Hwy	Myrtle Beach	SC				20,000		0%	n	1	
13	Building		900	Chester St	Myrtle Beach	SC				3,000		0%	n	1	
14	Building		201	Main St	North Myrtle Beach	SC				5,000		0%	n	2	
15	Building	84-96	94	S Kings Hwy	North Myrtle Beach	SC				10,000		0%	n	2	

¹⁰ *Id.*

The “AS” symbol does not appear on the SOV.¹¹ As a result, the Defendant Insurers, following the submission of Tebele’s loss claim, formulated an interpretation of the Endorsement’s Schedule’s reference to the applicable insured locations “as indicated on the Schedule of Values on file with the Company” to mean that the Endorsement’s exclusionary provisions applied to the insured locations reported as 100% sprinklered in the SOV. Thus, unbeknownst to Tebele, the Modified Endorsement was issued after the submission of Tebele’s Loss Claim to support the interpretation formulated by the Defendant Insurers which they ultimately articulated as the basis for denying coverage to Tebele on August 6, 2019. The provisions in the Modified Endorsement are identical to the provisions in the original Endorsement. The only differences between the two endorsements are the schedules depicted at the top of each document. The following screenshot depicts the Schedule that appears at the top of the Modified Endorsement:

SCHEDULE	
Symbol(s)	Location(s) Applicable
AS	All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company
Describe any "OTHER":	

The above-Schedule provides that the insured locations to which the Modified Endorsement’s exclusionary provisions apply are referenced therein as “All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company.” The Modified Endorsement was never provided to Tebele, and the Defendant Insurers contend that the Modified Endorsement was not intended to be included in or form a part of the Policy. However, the Modified Endorsement was issued after Tebele’s public adjuster informed the Defendant Insurers of the SOV’s omission of an “AS” symbol, and it is suspiciously consistent with the interpretation formulated by the Defendant Insurers to deny coverage to Tebele. Pursuant to the Defendant Insurers’ Coverage

¹¹ Ex. 5 at p. 4.

Denial Letter dated August 6, 2019, a copy of which is attached hereto as **Exhibit 6**, the Defendant Insurers denied coverage to Tebele because “[t]he ‘Schedule of Values’ on file with [the Defendant] Insurers indicates that for the Loss Location, the property was to be 100% sprinklered.”¹²

ARGUMENT

In the instant action, the jury’s verdict in favor of the Defendant Insurers is against the overwhelming weight of the evidence and is wholly inconsistent with the uncontroverted evidence adduced at trial and the ambiguities contained within the four corners of the Policy. The uncontroverted evidence presented at trial and admitted into evidence established the following facts: (1) That neither the Endorsement nor the Endorsement’s provisions were provided to Tebele until after the Fire Loss; (2) That the Endorsement was not attached to the Policy at binding nor attached to the “Amwins Property Form” that was hand-delivered to Tebele after the Fire Loss; (3) That neither the Defendant Insurers nor Crescent Coast ever mentioned, referenced, discussed, or disclosed to Tebele any building sprinkler system requirement prior to the Fire Loss; (4) That the SOV and 100% sprink notation depicted therein which the Defendant Insurers relied upon to deny coverage was prepared long before Tebele’s Application but never mentioned, referenced, discussed, or disclosed to Tebele; and (5) That the building sprinkler system addition was under construction at the time of the Fire Loss. The Endorsement contains a multitude of ambiguities rendering the Policy ambiguous, consisting of both ambiguities appearing on the face of the Endorsement and those which arise from the application of the Endorsement. Had the Court properly resolved the Policy ambiguity in favor of coverage and charged the jury as to the law of

¹² See **Exhibit 6** at p. 3, Def. Insurers’ 8/6/19 Coverage Denial Ltr.

ambiguity in insurance contracts, the jury would have rendered a verdict consistent with the evidence presented at trial and awarded coverage to Tebele.

A. The Endorsement Contains Multiple Ambiguities.

First, as a matter of law, the Endorsement is ambiguous on its face because the words “maintain” and “control” that appear in the Endorsement’s exclusionary provision are not defined in the Endorsement or the Policy; the Endorsement fails to identify which, if any, of the twenty-three insured properties to which the Endorsement’s provisions apply; and the Endorsement omits any reference to a specific insurance policy or coverage part to which its provisions apply.

“Maintain” and “control” have more than one reasonable meaning in light of the Policy’s language, rendering the exclusionary language in the Endorsement ambiguous. In the context of interpreting fire protective safeguard endorsement similar to the Endorsement at issue in this case, courts across the country have found that the terms “maintain” and “control” contained within such endorsements to be ambiguous and, as such, those ambiguities must be interpreted in favor of coverage.¹³

In *Breton, LLC v. Graphic Arts Mut. Ins. Co.*, the Fourth Circuit Court of Appeals partially affirmed the trial court’s entry of summary judgment in the insured’s favor when the carrier denied coverage for a fire loss based on a protective safeguard endorsement. 446 Fed. App’x. 598, 600 (4th Cir. 2011).¹⁴ The insured in *Breton* completely installed an automatic sprinkler system, but the “valve controlling the water to the sprinkler heads was in the closed position, rendering the ... sprinkler system inoperable.” *Id.* at 601. The carrier denied coverage for a fire loss based on an

¹³ “When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.” *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019); *see also Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) (“Our supreme court will look to other states for persuasive authority where there are no South Carolina opinions on point.”).

¹⁴ The Fourth Circuit Court of Appeals’ opinion in *Breton, LLC v. Graphic Arts Mut. Ins. Co.* is attached hereto and incorporated herein by reference as **Exhibit 7**.

endorsement that required the insured to “maintain the protective devices or services listed in the [s]chedule ... as a condition of this insurance,” including “an automatic sprinkler system[.]” *Id.* at 600. The Fourth Circuit sided with the insured and the trial court, explaining that “the word ‘maintain’ may be understood in more than one way, which supports a finding of ambiguity.” *Id.* at 603 (internal quotations omitted). While the carrier in *Breton* argued that the word “maintain” was not open to interpretation nor ambiguous because it has a “plain meaning,” the Fourth Circuit disagreed. Specifically, “[a]s used in the insurance contract, the word ‘maintain’ could be reasonably interpreted ... to refer to an obligation to continue to have an Automatic Sprinkler System,” instead of the insurer’s interpretation, which implied “regular repair obligations with respect to the Automatic Sprinkler System.” *Id.* Indeed, the exclusionary language in the *Breton* policy did not define “maintain,” but qualified it with contiguous language: “in complete working order.” *Id.* Thus, “interpreting ‘maintain’ to require ensuing operability would render the ‘in complete working order’ language in the exclusion superfluous.” *Id.*

Likewise, in *Westfield Ins. Co. v. Enter. 522, L.L.C.*, the protective safeguard endorsement relied upon by the insurer to deny coverage in that case mirrors the Endorsement at issue in the instant action. 34 F. Supp. 3d 737 (E.D. Mich. July 29, 2014).¹⁵ Like the Endorsement at issue in this action, the protective safeguard endorsement at issue in *Westfield Ins. Co.* purportedly had an exclusion that provided: “as a condition of insurance ... [the insured] is required to maintain the protective devices or services listed in the schedule above.” *Id.* at 742. The endorsement’s exclusionary provision requiring an automatic building sprinkler system was defined by the endorsement’s reference to a “P-1” code or symbol (the “Sprinkler Code”) and the endorsement’s corresponding sprinkler safeguard description. *Id.* at 742, 744. However, the Sprinkler Code was

¹⁵ The opinion espoused in *Westfield Ins. Co. v. Enter. 522, L.L.C.*, is attached hereto and incorporated herein by reference as **Exhibit 8**.

not listed in the schedule referenced in the protective safeguard endorsement that made the exclusion applicable to the insured. *Id.* at 742. The Sprinkler Code was listed in the policy declarations but not listed therein as a limitation on coverage. *Id.* The insurer argued that the applicability of the endorsement's exclusion was not ambiguous because the policy declarations detailed that the insured was required to maintain an automatic sprinkler system. *Id.* at 744. Specifically, the insurer asserted that an adequate connection could be made between the endorsement and the policy declarations because the form code or encrypted series of codes listed on the endorsement were also listed in the declarations under "forms and endorsements." *Id.* The court in *Westfield Ins. Co.* held that the "applicability of the exclusion is patently ambiguous on its face; even a reading of the policy, i.e., the endorsement and ... [the] declarations fail to adequately show that the exclusion is a condition of fire coverage." *Id.* Just as the Court should have found in the instant action, the court in *Westfield Ins. Co.* found that the exclusion and Sprinkler Code were only defined in the endorsement, and that the Sprinkler Code which made the endorsement's exclusion applicable was not listed in the schedule referenced in the endorsement. *Id.*

In the instant action, the Endorsement and the Endorsement's exclusionary provisions are nearly identical to those interpreted and held as ambiguous by the courts in *Breton* and *Westfield Ins. Co.* The Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele provides that "[a]s a condition of this insurance, [Tebele is] required to '**maintain**' the protective devices or services listed in the Schedule above." The Endorsement also contains an exclusion, which states: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to '**maintain**' any protective safeguard listed in the Schedule above, and over which you had '**control**' in complete working order." The Defendant Insurers chose not to define the

words “maintain” or “control,” nor did they specify what Tebele was required to do in order to “maintain” the protective devices described in the Endorsement. The common understanding or plain meaning of the term “maintain” is defined mean: “acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition,” or to “rebuild, repair, [or] replace.” *See Maintain, Black’s Law Dictionary* (6th ed. 1990). The term “control” has multiple meanings depending upon the context in which the term is used. With regard to a real property in which a landlord owns and leases to a tenant, the landlord surrenders possession and control of property to the tenant. “When land is occupied by a lessee ... the law of property regards the lease as equivalent to a sale of the premises for the term of the lease.” *Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992).

Tebele, like the insureds in *Breton* and *Westfield*, purchased fire coverage and the Defendant Insurers intended to issue fire coverage. The undisputed facts presented at trial establish that Tebele paid Crawford to install a new building sprinkler addition at the Tebele Property, that the new building sprinkler addition was under construction at the time of the Fire Loss, and that the Tenant was occupying the Tebele Property at the time of the Fire Loss. Thus, as a matter of law, the Tenant had both possession and control of the Tebele Property at the time of the Fire Loss. In addition, applying the Endorsement with the ordinary meaning of the term “maintain” renders the Endorsement ambiguous on its face because it is impossible for one to rebuild, repair, or replace a new building sprinkler system addition undergoing construction, or perform other acts of repairs or other acts to prevent a decline, lapse, or cessation of the insured building from an existing state or condition which lacks an existing building sprinkler system. Just like the protective safeguards endorsement at issue in *Westfield Ins. Co.*, the Endorsement’s exclusionary provision requiring an automatic building sprinkler system is defined by the Endorsement’s reference to an “AS” code or

symbol and the Endorsement's corresponding sprinkler safeguard description. In addition, the Policy's Declarations admitted into evidence at trial neither defines the "AS" symbol nor directs Tebele, as the insured, to a Policy provision which defines the "AS" symbol. Rather, page 2 of the Policy's Declarations merely lists the form code or encrypted series of codes listed on the Endorsement under "Forms Applicable to Common Forms." Like *Westfield Ins. Co.*, the "AS" symbol which, based on a plain and ordinary reading of the language appearing on the face of the Endorsement, applies the Endorsement's exclusionary provisions to the insured properties "as indicated on the Schedule of Values [SOV] on file with the Company" is not listed, depicted, nor referenced in the SOV. Therefore, the Endorsement is both patently ambiguous on its face and in the Defendant Insurers' application of its exclusionary provisions to the Tebele Property to deny coverage, and those ambiguities must be construed in favor of coverage as a matter of law.

B. The Endorsement's Resulting Internal Inconsistency Renders the Policy Ambiguous.

The Endorsement's exclusionary provisions directly conflict with the Policy's provisions that specifically insure building additions and alterations, such as the building sprinkler system addition that was under construction at the time of the Fire Loss, creating an internal inconsistency that renders the Policy ambiguous. The Policy which the Defendant Insurers sold to Tebele promises to "pay for direct physical loss of or damage to 'Covered Property' at [the Tebele Property] caused by or resulting from [fire]." Pursuant to the Policy, 'Covered Property' includes not only the building situated on the Tebele Property, but also "additions under construction, alterations and repairs to the building or structure." A building sprinkler system that is under construction at the time of a fire or other loss cannot be deemed operational at that time and would undoubtedly be covered under the Policy regardless of the system's operational status. At trial, the parties did not dispute that the building sprinkler system addition was under construction at the

time of the Fire Loss, and the evidence presented by Tebele to establish that fact and that Tebele sought and purchased the Policy to also insure and provide fire loss coverage for building improvements and additions, alterations, and repairs under construction at each of Tebele's insured commercial real properties was uncontroverted. In exchange for Tebele's premium payment, the Defendant Insurers agreed to insure and provide coverage for both the insured buildings and for building additions and alterations under construction that may be damaged or destroyed by fire, including the building sprinkler system addition that was under construction at the time of the Fire Loss. To give effect to the Endorsement's exclusionary provision would render the Policy virtually meaningless because the Endorsement, as interpreted and applied by the Defendant Insurers to deny coverage to Tebele, would exclude coverage for all claims arising from the very risk contemplated by both the Defendant Insurers and Tebele. In addition, the interpretation presented by the Defendant Insurers at trial applying the Endorsement's exclusionary provisions to the binder pertaining to the Policy would absolutely render the Policy illusory and virtually meaningless because that interpretation presented by the Defendant Insurers would exclude coverage for all fire-related loss or damage to any of Tebele's properties insured under the Policy, including both the five properties noted as 100% sprinklered on the SOV and the remainder of the twenty-three properties noted as 0% sprinklered on the SOV. Thus, the internal inconsistency created by the Endorsement and the Defendant Insurers' application of the Endorsement's exclusionary provisions to deny coverage to Tebele renders the Policy ambiguous, and that ambiguity must be construed in favor of coverage. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very risks sought to be insured renders the policy ambiguous.).

CONCLUSION

Plaintiff offers the following summary of what this Court should do:

- Plaintiff requests a judgment notwithstanding the verdict pursuant to Rule 50(b), SCRPC and that this Court review the attached exhibits and case law and find as a matter of law that the Protective Safeguards Endorsement is ambiguous consistent with South Carolina's law.
- If the Court declines to find as a matter of law that the insurance policy in this case was ambiguous, the Court should grant a new trial because it failed to charge the jury the law of ambiguity in insurance policies.

Accordingly, Plaintiff requests the relief as listed above.

Respectfully submitted,

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December 21, 2023

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2020-CP-26-00808

A. Tebele & Sons, a South Carolina
 General Partnership,

Plaintiff,

vs.

Certain Underwriters at Lloyd's; HDI
 Global Specialty SE; General Security
 Indemnity Company of Arizona; and
 Crescent Coast Insurance, LLC,

Defendants.

AMENDED
 PLAINTIFF'S MOTION FOR
 NEW TRIAL AND JNOV
 PURSUANT TO
 RULE 59(a), SCRPC,
 AND RULE 50(b), SCRPC,
 AS TO
 DEFENDANT INSURERS
 (WITHOUT EXHIBITS)

This case was tried before a jury in the Horry County Court of Common Pleas on December 4, 2023 through December 13, 2023. At the conclusion of the trial, the Court granted the parties ten days in which to file any post-trial motions. Pursuant to Rule 59(a), SCRPC, and Rule 50(b), SCRPC, A. Tebele & Sons (hereinafter "Tebele") respectfully moves the Court to grant a new trial pursuant to the Thirteenth Juror Doctrine and Judgment Notwithstanding the Verdict based on the following grounds:

1. The jury's verdict is inconsistent with the overwhelming preponderance of the evidence presented at trial.
2. The Court's legal error in failing to find an ambiguity in the insurance policy at issue in this case as a matter of law.
3. The Court's error in failing to charge to the jury the law of ambiguity in insurance contracts.
4. The Court's error in failing to hold that the insurance policy in question had an ambiguity as a matter of law.

5. The Court's error in failing to charge to the jury the doctrine of estoppel and/or waiver.

The jury was presented with compelling evidence from Tebele's expert witness, Gerald M. Finkel, that the subject policy of insurance (the "Policy") issued by the Defendants Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Company of Arizona (hereinafter collectively referenced as the "Defendant Insurers") for the fire loss in question had an internal inconsistency in it created by the Protective Safeguards Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele. The application of the referenced Protective Safeguards Endorsement (the "Endorsement") renders the Policy ambiguous in the following manner: (1) the omission of an "AS" symbol on the Schedule of Values (hereinafter the "SOV") referenced in the Endorsement; (2) the failure of the Policy or the Endorsement to define the word "maintain" or "control"; (3) the internal inconsistency created by the application of the Endorsement to the Policy's provisions insuring the building sprinkler system addition that was under construction at the time of the fire loss rendered the Policy ambiguous; (4) the Endorsement's omission of any reference to a specific insurance policy or coverage part to which its provisions apply; and (5) the ambiguity arising from multiple protective safeguards endorsements, the Endorsement and a subsequent Protective Safeguards Endorsement (hereinafter the "Modified Endorsement") that was issued to after the submission of Tebele's loss claim to support the Defendant Insurers' interpretation of the original Endorsement to deny coverage to Tebele.

The Court as to the Defendant Insurers held that the Policy was unambiguous but allowed Plaintiff's counsel to argue the issue of ambiguity to the jury but did not charge it nor find that the Policy was ambiguous.

The jury's verdict for the Defendant Insurers is contrary to the overwhelming preponderance of the evidence and South Carolina law which holds that any ambiguity in an insurance policy must be construed in favor of the Insured. Thus, the jury's verdict can only be the result of one of the following: (1) the Court's failure to find the Policy to be ambiguous; (2) the Court's failure to properly charge ambiguity to the jury; (3) the Court's failure to find the Endorsement ambiguous due to an "AS" symbol not appearing on the Schedule of Values; and (4) the Court's decision not to find an ambiguity existed when the evidence presented at trial established that the building sprinkler system addition that was under construction at the time of the fire loss incident was insured under the Policy. (See attached Endorsement, Covered Property provisions of the Policy, and Modified Endorsement; Exhibit 1, Exhibit 2, and Exhibit 3).

Based on the following, this Court should invoke the Thirteen Juror Doctrine and order a new trial on all counts as to the Defendant Insurers. Also, as set forth below the Court, as a matter of law, should grant Plaintiff's JNOV Motion.

THE THIRTEENTH JUROR DOCTRINE

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine." *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 597, 681 S.E.2d 879,883 (2009). This is also known as "granting a new trial upon the facts." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996) (citation omitted). "The trial court has the authority to grant a new trial upon its finding that justice has not prevailed or if the verdict is inconsistent and reflects the jury's confusion." *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d 565, 571 (2013) (citing *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722). "The doctrine 'entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.'" *Lane*, 383 S.C. at 597, 681

S.E.2d at 883 (quoting *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). “As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” *Lane*, 383 S.C. at 597, 681 S.E.2d at 883 (citation omitted). When a trial judge exercises his discretion as the thirteenth juror, “the effect is the same as if the jury failed to reach a verdict.” *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990).

Unlike when a judge evaluates a motion for JNOV and must view the evidence in a light favorable to the non-moving party, when a judge evaluates whether to grant a motion for new trial upon the facts, he must actually weigh the evidence. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (2003).¹ The trial judge has broad discretion sitting as the thirteenth juror to grant a new trial when he is convinced “that justice has not been done in the trial.” *Watson v. Town of Pendleton*, 294 S.C. 155, 157, 363 S.E.2d 234, 235 (Ct. App. 1987). The Supreme Court has gone so far as to hold that as the thirteenth juror, the trial judge has “**veto power to the Nth degree**, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.” *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313–14, 195 S.E. 638, 641 (1938) (emphasis added).

“Not only does a trial judge have the discretion, but also the **duty to grant a new trial** if the jury verdict is contrary to the fair preponderance of the evidence.” *Jessup v. Hansen*, 289 S.C. 54, 56, 344 S.E.2d 618, 620 (Ct. App. 1986) (emphasis added). In other words, “**because it is obligated to see that justice is done—[the trial court] is duty-bound to grant a new trial if the**

¹ Further, a motion for directed verdict is not a prerequisite to filing a motion for new trial under the thirteenth juror doctrine. *McEntire*, 353 S.C. at 632–33, 578 S.E.2d at 747–48. “Because the question of whether the evidence is legally sufficient to support a verdict—a question of law—is totally different from the question of whether the fair preponderance of the evidence supports a verdict—a question involving the exercise of discretion—there is no inconsistency in a party’s failure to move for a directed verdict and a party’s moving to have the verdict set aside as being against the fair preponderance of the evidence.” *Id.* Stated differently, “[i]t may well be that a party’s evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor.” *Id.*

evidence does not support the verdict.” *Ex Parte Travelers Home and Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 244, 830 S.E.2d 718, 721 (Ct. App. 2019) (citing *Folkens*, 300 S.C. at 254–55, 387 S.E.2d at 267) (emphasis added).

A trial judge’s decision to act as thirteenth juror and grant a “new trial upon the facts will not be disturbed unless [his] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.” *Vinson v. Harley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996); see also *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d 565, 571 (2013) (same). A Westlaw search of “thirteenth juror” in South Carolina reveals sixty-eight reported decisions.² These decisions illustrate the breadth of the trial judge’s discretion in that only a few cases in which a trial judge has granted a new trial upon the facts have been overturned on appeal. Every one of those few, rare invocations of the thirteenth juror doctrine that were overturned involved the judge’s use of a legally flawed basis to invoke the doctrine.³ No invocation of the doctrine has ever been overturned based on the appellate court’s disagreement with the trial judge on the facts.

“The judge is not required to explain the reasons for his decision.” *Lane*, 383 S.C. at 598, 681 S.E.2d at 883. As the Supreme Court has explained:

The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

² The search also reveals thirty-eight unreported decisions upon which Plaintiff does not rely. See Rule 268(d)(2), SCACR (providing that unreported decisions should generally not be cited).

³ *Bailey v. Peacock*, 318 S.C. 13, 14–15, 455 S.E.2d 690, 692 (1995); *Youmans v. S.C. Dep’t of Transp.*, 380 S.C. 263, 280–81, 670 S.E.2d 1, 9–10 (Ct. App. 2008); *Howard v. Roberson*, 376 S.C. 143, 148, 654 S.E.2d 877 (Ct. App. 2007); *Scoggins v. McClellion*, 321 S.C. 264, 271–72, 468 S.E.2d 12, 16 (Ct. App. 1996).

Folkens, 300 S.C. at 254, 387 S.E.2d at 267 (emphasis added); *Id.* at 252, 387 S.E.2d at 266 (upholding the trial judge’s grant of a new trial “upon the facts” when he stated that “he disapprove[d] of the verdict on factual grounds”); *Trivelas v. S.C. Dep’t of Transp.*, 357 S.C. 545, 552, 593 S.E.2d 504, 508 (Ct. App. 2004) (upholding trial judge’s ordering new trial pursuant to the thirteenth juror doctrine based on the judge’s simple finding that “the evidence did not justify the verdict” and “justice was not done by the jury’s verdict”).

In this case, the Court should find that the jury’s verdict was contrary to the overwhelming preponderance of the evidence and order a new trial. The Court should enter an Order granting a new trial “because the evidence did not justify the jury’s verdict and justice was not done by the verdict.”

JUDGMENT NOT WITHSTANDING THE VERDICT

South Carolina law requires the Court to grant a judgment notwithstanding the verdict (Rule 50(b), SCRPC 50) when legal questions are raised. Rule 50(b), SCRPC provides in pertinent part:

A party who has moved for a directed verdict may move to have the judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict... If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

In this case, based on the internal inconsistency in the Endorsement and other provisions in the Policy which provided for coverage for ongoing construction the Court should have held as a matter of law that the subject insurance policy was ambiguous, and, as a result, coverage must be awarded to Tebele to resolve the ambiguity in the sum of \$2,850,000.00, the coverage amount otherwise due and payable to Tebele under the Policy had the Defendant Insurers not applied the Endorsement to deny Tebele’s loss claim. Thus, the case as to whether coverage was due under

the Policy should never have been submitted to the jury. The only issue which should have been submitted to the jury as to the Defendant Insurers after the Court's finding of ambiguity was whether the Defendant Insurers acted in bad faith in the handling and denial of Tebele's loss claim based on the ambiguous insurance policy.

CONSTRUCTION OF INSURANCE POLICY AND AMBIGUITY

Under South Carolina law, “[a]n insurance policy is a contract between the insured and the insurance company, and the policy’s terms are to be construed according to the law of contracts.” *Canal Ins. Co. v. Nat’l House Movers, LLC*, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015). The cardinal rule of contract interpretation utilized by South Carolina courts to construe an insurance policy is to “ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language in the contract.” *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016). When an insurance policy, on its face, clearly expresses the entire agreement between the parties, parol or extrinsic evidence cannot be used to construe or add another term to the insurance contract. *Columbia E. Assoc. v. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). “It is well settled that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of a conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery.” *Cogdill v. Equity Life & Annuity Co.*, 262 S.C. 248, 253, 203 S.E.2d 674, 677 (1974). South Carolina law very clearly requires courts to resolve any insurance policy ambiguities in favor of the insured. *See Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) (“Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted.”); *see also Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 525, 167

S.E.2d 420, 423 (1969) (“It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery.”). “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Diamond State Ins. Co. v. Homestead Indus.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). An insurance policy or policy provision is ambiguous when the policy language is reasonably capable of being understood in more than one way. *Williams v. Gov’t Emples. Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 711 (2014); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). In addition, an ambiguity arises if the insurance contract is silent as to a particular matter. *Columbia E. Assoc.*, 299 S.C. at 519, 386 S.E.2d at 261. “Where an internal inconsistency in an insurance policy renders it ambiguous, and the policy is susceptible of more than one reasonable interpretation, one of which provides coverage, coverage must be found as a matter of law.” *Brooklyn Bridge, Inc. v. SC. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992).

Endorsements to insurance policies are designed to enlarge, restrict, particularize, or otherwise modify some provision in the policy. *Charles v. Canal Ins. Co.*, 238 S.C. 600, 121 S.E.2d 200 (1961). Since an insurance policy is a contract between the insurer and the insured, endorsements such as riders, slips, and other outside papers, “to be considered a part thereof, must be so clearly imported into ... [the policy] as to leave no doubt of the intention of the parties. In fact, when there is a doubt as to the intention of the parties to treat the paper as part of the policy, the courts give the benefit of doubt to the insured, and construe the policy liberally in his favor.” *Id.* at 608, 121 S.E.2d at 204. The fact that an endorsement, rider, or other outside paper is not

physically attached to an insurance policy nor delivered to the insured as attached, will preclude that endorsement, rider, or other outside paper from being included or construed as part of the insurance contract. *Id.* at 607, 121 S.E.2d at 204. When an insurance policy together with any endorsements to the policy are susceptible to two or more reasonable interpretations as to its meaning and provisions, the court is bound by the long and well established rule that “the terms of an insurance policy should be construed most liberally in favor of the insured, and in case of conflict or ambiguity, a construction will not be adopted that will defeat recovery if the policy is susceptible of a meaning that will permit recovery. *Id.* at 612, 121 S.E.2d at 207. This rule applies with special force to exclusionary policy language, whether in the policy itself or any attached endorsements to the policy, which is “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.E.2d 555, 560, 614 S.E.2d 611, 614 (2005). Restrictions or limitations on coverage of which an insured has no notice are not binding on the insured. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 298 (1996); *Poston v. Nat’l Fid. Life Ins. Co.*, 303 S.C. 182, 186, 399 S.E.2d 770, 772 (1990). Where an internal inconsistency created by an exclusion renders an insurance policy ambiguous, “the court must resolve that ambiguity in favor of coverage.” *B.L.G. Enters. v. First Fin. Ins. Co.*, 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997).

STATEMENT OF FACTS

A. The Tebele Property and Tebele’s Interest and Rights Related to the Property.

Tebele owns and leases a variety of commercial properties throughout Horry County, South Carolina. On or about January 14, 2019, Tebele purchased the Policy, a general liability policy, and an excess liability policy issued by the Defendant Insurers providing coverage to Tebele, as the first named insured, and insuring various risks pertaining to twenty-three of Tebele's real properties. Tebele's commercial real property located at 1901 North Kings Highway in Myrtle Beach, including the building improvements situated thereon (hereinafter the "Tebele Property"), was one of the twenty-three of Tebele's real properties insured by the Policy against fire and other covered losses when the building improvements situated thereon were destroyed by fire on February 24, 2019 (the "Fire Loss"). Tebele purchased the Tebele Property in 1990 with fee title being in the names of its individual partners, David Tebele and Edward Tebele. At that time, all of Tebele's partnership real estate properties were titled in the names of the individual partners, David Tebele and Edward Tebele. As new types of entity forms evolved which provided benefits unavailable to general partnership entities, Tebele's partners decided to form Kings Realty, LP (hereinafter "KRLP") and deeded the Tebele Property to KRLP on December 28, 1993, so KRLP would be the named fee title holder of record. Tebele is the general partnership and management company utilized by KRLP and the other Tebele family-owned entities to perform managerial services, maintain Tebele's commercial real properties, and conduct the family business, which includes procuring insurance coverage for the Tebele family-owned entities. Thus, Tebele is the entity charged with the obligation of procuring insurance coverage for the Tebele real properties, including the Tebele Property.

Tebele paid a total premium in the sum of \$170,997.08 to procure coverage for twenty-three (23) of Tebele's real properties, including the Tebele Property. KRLP along with the other entities that were part of Tebele's management company and family-owned entities were

additional named insureds under each of the insurance policies issued. Of the \$170,997.08 premium charged by the Defendant Insurers, \$105,870.00 was paid by Tebele in exchange for the Policy at issue in this action. Tebele paid and delivered to the Defendant Crescent Coast Insurance, LLC (hereinafter “Crescent Coast”), a premium down payment in the amount of \$34,199.42 for coverage under the Policy. Tebele also executed and delivered to Crescent Coast a Premium Finance Agreement obligating Tebele for payment of the remaining \$136,797.66 policy premium balance. Tebele ultimately repaid the policy premium balance financed plus interest accrual. The Policy issued by the Defendant Insurers is a Valued Policy that provides fire insurance coverage to Tebele, as the first-named insured, for the full value of the insured properties fixed by the Defendant Insurers at the time of issuance. With regard to the Tebele Property, the Stated or Schedule Total Insurable Value (“TIV”) fixed by the Defendant Insurers at issuance was \$2,850,000.00 and is set forth on the SOV (schedule of values) that was prepared by the Defendant Insurers and Crescent Coast prior to the preparation and submission of the insurance application pertaining to the Policy (hereinafter the “Application”). The Policy provides coverage and payment “for direct physical loss of or damage to ‘Covered Property’ at an ‘Insured Location’ caused by or resulting from any Covered Cause of Loss.”⁴ As an all-risk property coverage policy, fire-related losses constitute a “Specified Cause of Loss” and are covered under the Policy.⁵ ‘Covered Property’ is defined in the Policy to include “[a]dditions under construction, alterations and repairs to the building or structure.”⁶

From the time Tebele purchased the Tebele Property up through the Fire Loss, Tebele managed the property, leased the building improvements to tenants, and expended monies to make

⁴ Ex. 2, p. 6, Policy at p. 8, § A.

⁵ *Id.* at p. 7, Policy at p. 38.

⁶ *Id.* at p. 6, Policy at p. 8, § A.

building improvements and procure insurance providing property and liability coverage. In June 2017, at the direction of the fire marshal for the City of Myrtle Beach, Tebele hired and contracted Crawford Sprinkler Co. of SC, Inc. (hereinafter “Crawford”), a specialist in sprinkler installation and repair, to design, construct, and install a building sprinkler system addition at the Tebele Property. Tebele paid Crawford \$236,516 for the design, construction, and installation of the building sprinkler system addition at the Tebele Property. The new building sprinkler system addition that Crawford installed throughout the entirety of the building improvements situated on the Tebele Property was still under construction at the time of the Fire Loss.

B. The Defendant Insurers Underwrote and Bound Coverage and Collected Premiums Knowing that the Sprinkler System Was Not Fully Connected.

Joey Sutherland, an insurance agent employed by Crescent Coast (hereinafter “Sutherland”), previously sold insurance to the tenant who occupied the Tebele Property at the time of the Fire Loss (hereinafter referred to as the “Tenant”). Sutherland testified at trial that he was previously employed by a prior tenant of Tebele and worked as a restaurant manager at the Tebele Property before his business relationship with the Tenant and employment with Crescent Coast. Sutherland also testified that he began soliciting Tebele to sell commercial property insurance in 2017 and induced Tebele to retain Crescent Coast to obtain coverage quotes for Tebele’s commercial properties in the summer of 2018. David Egan (“Egan”), an insurance broker and producer and the managing partner of Crescent Coast, met with Tebele in August of 2018 to gather information to quote coverages for Tebele’s commercial properties, including the Tebele Property. After meeting with Tebele, Egan entered information onto a standard pre-printed form known as an Accord Form 140 (the “Accord”), which Crescent Coast uses in the ordinary course of business to send to an underwriter to provide insurance quotes. The Accord listed each of Tebele’s twenty-three commercial properties. The Accord listed information pertaining to each of

Tebele's properties such as the building's construction type, the building square footage, and the percentage of the building that was sprinklered, or more specifically, the area of a particular building with a building sprinkler system. The Accord was neither signed by Tebele nor given to Tebele to review. On August 20, 2018, Egan sent an email to Whitney Northcutt (hereinafter "Northcutt"), an Amwins Access employee who was involved in the underwriting of the Policy, attaching the Accord to obtain coverage quotes from the Defendant Insurers. The Accord attached to Egan's email to Northcutt indicated that the Tebele Property was 100% sprinklered because the new building sprinkler system addition had been installed throughout the entirety of the building with only the final phases of construction remaining, mainly the tap installation, to complete construction and final testing of the system by Crawford for the new building sprinkler system addition to become operational.

At trial, Egan testified that the 100% notation on the Accord referred to the percentage of the area of the building interior, and that the same 100% notation depicted on the Tenant's August 2018 insurance application did not require the Tenant to maintain an existing building sprinkler system at the Tebele Property under the Tenant's insurance policy that was issued by the Defendant Insurers in August of 2018. During the trial, Northcutt testified to an inspection report noting the findings and observations from an October 3, 2018 site inspection of the Tebele Property that was performed and procured at the request of Amwins Access. The referenced report that was admitted into evidence at trial, a copy of which is attached hereto as **Exhibit 4** (the "Inspection Report"), indicated that the Tebele Property had an operational building sprinkler system and was delivered to Northcutt on November 26, 2018 after it was uploaded to Amwins' database. Soon thereafter, in early December of 2018, the SOV containing the 100% sprink notation which the Defendant Insurers solely relied upon to deny coverage to Tebele was circulated between the Defendant

Insurers' underwriters and Crescent Coast, a month before Egan prepared and submitted the Application pertaining to the Policy.⁷ Egan testified at trial that he input the 100% sprink notation onto the SOV, and that he neither discussed the SOV with Tebele nor provided a copy of the SOV to Tebele.

Prior to Egan's preparation of the Application on January 11, 2019, Crescent Coast obtained knowledge that the building sprinkler system addition under construction at the Tebele Property was not operational. On January 11, 2019, just hours before Crescent Coast emailed the Application to Tebele for his electronic signature, Crescent Coast emailed Northcutt informing her that the building sprinkler addition under construction was not yet operational. Tebele received the Application emailed by Egan and electronically signed it on January 14, 2019, and Egan thereafter submitted the Application to the Defendant Insurers requesting that coverage be bound. Attached to the Application behind the signature page bearing the January 14, 2019 signatures of both Tebele and Egan, were a series of Accord forms identical to the Accord that Egan emailed and submitted to Northcutt on August 20, 2018. The Accord form pertaining to the Tebele Property depicting the 100% sprink notation entered by Egan in August of 2018 was attached 17 pages behind the Application's signature page bearing the signatures of both Tebele and Egan. The uncontradicted evidence presented at trial established that Tebele did not receive a copy of the Policy or the Endorsement until after the Fire Loss, that neither the Defendant Insurers nor Crescent Coast ever provided a copy of the SOV to Tebele, and that neither the Endorsement, SOV, nor any building sprinkler requirement was ever mentioned, discussed, or disclosed to Tebele.

C. The Policy and Protective Safeguards Endorsement.

⁷ See Exhibit 5, Egan Dec. 14 – Dec. 17, 2018 email corresp. and attached SOV.

The Policy issued by the Defendant Insurers is an all-risk property insurance policy that promises to “pay for direct physical loss of or damage to the [Tebele Property] caused by or resulting from any Covered Cause of Loss.” In turn, a Covered Cause of Loss is any “[r]isks of [d]irect [p]hysical [l]oss unless the loss is” either expressly excluded or limited. Subject to certain conditions and exclusions, and in the event that the Tebele Property sustains physical damage or destruction, the Policy also provides coverage for newly acquired property, demolition cost coverage, increased cost of construction, affected outdoor property, business income losses, and, among other forms of loss, “extra expenses.” As an all-risk property coverage policy, fire-related losses constitute a “Specified Cause of Loss.”⁸ The limits of liability under the Policy are \$22,155,400 per Occurrence,” and Tebele paid \$105,870.00 in premiums for the Policy, including inspection fees.

The Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele provides that “[a]s a condition of this insurance, [Tebele is] required to maintain the protective devices or services listed in the Schedule above.”⁹ The Endorsement also contains an exclusion, which states: “We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.”¹⁰ The Defendant Insurers chose not to define “maintain” or “control,” nor did they specify what Tebele was required to do in order to “maintain”

⁸ Ex. 2 at p. 7.

⁹ Ex. 1.

¹⁰ *Id.*

the protective devices”. The following screenshot depicts the referenced “Schedule” that appears at the top of the Endorsement:

The “AS” symbol depicted on the above-Schedule is identified in the Endorsement to reference an

SCHEDULE	
Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any 'OTHER': (a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.	

automatic sprinkler system as defined therein, and the insured locations to which Endorsement’s provisions apply are identified in the Schedule “as indicated on the Schedule of Values on file with the Company.” The following screenshot depicts the SOV relied upon by the Defendant Insurers to deny coverage to Tebele:

AmRisc Application / Schedule of Values															
Any person who knowingly and with intent to defraud any insurance company files an application for insurance or statement of claim containing any materially false or misleading information, or conceals for the purpose of misleading information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and subjects the person to criminal and substantial civil penalties. In some states insurance benefits may also be denied. By submission of this application the insured and the agent represent that all information is true and correct to the best of their knowledge and that they have not deleted or altered the questions herein.															
Yellow = Required															
Orange = Required for ACIC															
Blue = Required if habitation															
Green = Required for General Liability															
Gray = Required for High Hazard Quake															
Properties. (Warranted)															
Total # Units															
Total Sq. Ft.															
Avg % Occup.															
Avg % Sprinklered															
0 271,000 24%															
BVRents per Unit per Month															
Sq. Ft. per Unit															
* Bldg. No.	*Property Ty.	Location Name	Address No.	*Street Address	*City	*State	Is Prop Mgd or Ownr	Date Added to Sched	*# of Units	*Square Footage	% Occupied	Percent Sprinklered	Sprinklered (Y/N)	ISO Prpt. Ctg.	Flood Zone
1	Building		2909	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
2	Building		2911	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
3	Building		502	30th Ave S	Myrtle Beach	SC				900				1	
4	Building		3001	N Kings Hwy	Myrtle Beach	SC				17,000				1	
5	Building		3205	N Kings Hwy	Myrtle Beach	SC				8,400		0%	n	2	
6	Building		1600	ERS N Kings Hwy	Myrtle Beach	SC				10,000		0%	n	1	
7	Building	310-312	310	9th Ave N	Myrtle Beach	SC				1,000		0%	n	1	
8	Building	316-320	316	9th Ave N	Myrtle Beach	SC				3,800		0%	n	1	
9	Building	609-611	609	S Kings Hwy	Myrtle Beach	SC				3,500		0%	n	1	
10	Building		1551	N Kings Hwy	Myrtle Beach	SC				36,000		100%	y	1	
11	Building		610	WFS S Kings Hwy	Myrtle Beach	SC				25,000		100%	y	1	
12	Building		1012	S Kings Hwy	Myrtle Beach	SC				20,000		0%	n	1	
13	Building		900	Chester St	Myrtle Beach	SC				3,000		0%	n	1	
14	Building		201	Main St	North Myrtle Beach	SC				5,000		0%	n	2	
15	Building	94-96	94	S Kings Hwy	North Myrtle Beach	SC				10,000		0%	n	2	

The “AS” symbol does not appear on the SOV.¹¹ As a result, the Defendant Insurers, following the submission of Tebele’s loss claim, formulated an interpretation of the Endorsement’s

¹¹ Ex. 5 at p. 4.

Schedule's reference to the applicable insured locations "as indicated on the Schedule of Values on file with the Company" to mean that the Endorsement's exclusionary provisions applied to the insured locations reported as 100% sprinklered in the SOV. Thus, unbeknownst to Tebele, the Modified Endorsement was issued after the submission of Tebele's Loss Claim to support the interpretation formulated by the Defendant Insurers which they ultimately articulated as the basis for denying coverage to Tebele on August 6, 2019. The provisions in the Modified Endorsement are identical to the provisions in the original Endorsement. The only differences between the two endorsements are the schedules depicted at the top of each document. The following screenshot depicts the Schedule that appears at the top of the Modified Endorsement:

SCHEDULE	
Symbol(s)	Location(s) Applicable
AS	All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company
Describe any "OTHER":	

The above-Schedule provides that the insured locations to which the Modified Endorsement's exclusionary provisions apply are referenced therein as "All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company." The Modified Endorsement was never provided to Tebele, and the Defendant Insurers contend that the Modified Endorsement was not intended to be included in or form a part of the Policy. However, the Modified Endorsement was issued after Tebele's public adjuster informed the Defendant Insurers of the SOV's omission of an "AS" symbol, and it is suspiciously consistent with the interpretation formulated by the Defendant Insurers to deny coverage to Tebele. Pursuant to the Defendant Insurers' Coverage Denial Letter dated August 6, 2019, a copy of which is attached hereto as **Exhibit 6**, the Defendant Insurers denied coverage to Tebele because "[t]he 'Schedule of Values' on file with [the

Defendant] Insurers indicates that for the Loss Location, the property was to be 100% sprinklered.”¹²

ARGUMENT

In the instant action, the jury’s verdict in favor of the Defendant Insurers is against the overwhelming weight of the evidence and is wholly inconsistent with the uncontroverted evidence adduced at trial and the ambiguities contained within the four corners of the Policy. The uncontroverted evidence presented at trial and admitted into evidence established the following facts: (1) That neither the Endorsement nor the Endorsement’s provisions were provided to Tebele until after the Fire Loss; (2) That the Endorsement was not attached to the Policy at binding nor attached to the “Amwins Property Form” that was hand-delivered to Tebele after the Fire Loss; (3) That neither the Defendant Insurers nor Crescent Coast ever mentioned, referenced, discussed, or disclosed to Tebele any building sprinkler system requirement prior to the Fire Loss; (4) That the SOV and 100% sprink notation depicted therein which the Defendant Insurers relied upon to deny coverage was prepared long before Tebele’s Application but never mentioned, referenced, discussed, or disclosed to Tebele; and (5) That the building sprinkler system addition was under construction at the time of the Fire Loss. The Endorsement contains a multitude of ambiguities rendering the Policy ambiguous, consisting of both ambiguities appearing on the face of the Endorsement and those which arise from the application of the Endorsement. Had the Court properly resolved the Policy ambiguity in favor of coverage and charged the jury as to the law of ambiguity in insurance contracts, the jury would have rendered a verdict consistent with the evidence presented at trial and awarded coverage to Tebele.

A. The Endorsement Contains Multiple Ambiguities.

¹² See **Exhibit 6** at p. 3, Def. Insurers’ 8/6/19 Coverage Denial Ltr.

First, as a matter of law, the Endorsement is ambiguous on its face because the words “maintain” and “control” that appear in the Endorsement’s exclusionary provision are not defined in the Endorsement or the Policy; the Endorsement fails to identify which, if any, of the twenty-three insured properties to which the Endorsement’s provisions apply; and the Endorsement omits any reference to a specific insurance policy or coverage part to which its provisions apply.

“Maintain” and “control” have more than one reasonable meaning in light of the Policy’s language, rendering the exclusionary language in the Endorsement ambiguous. In the context of interpreting fire protective safeguard endorsement similar to the Endorsement at issue in this case, courts across the country have found that the terms “maintain” and “control” contained within such endorsements to be ambiguous and, as such, those ambiguities must be interpreted in favor of coverage.¹³

In *Breton, LLC v. Graphic Arts Mut. Ins. Co.*, the Fourth Circuit Court of Appeals partially affirmed the trial court’s entry of summary judgment in the insured’s favor when the carrier denied coverage for a fire loss based on a protective safeguard endorsement. 446 Fed. App’x. 598, 600 (4th Cir. 2011).¹⁴ The insured in *Breton* completely installed an automatic sprinkler system, but the “valve controlling the water to the sprinkler heads was in the closed position, rendering the ... sprinkler system inoperable.” *Id.* at 601. The carrier denied coverage for a fire loss based on an endorsement that required the insured to “maintain the protective devices or services listed in the [s]chedule ... as a condition of this insurance,” including “an automatic sprinkler system[.]” *Id.* at 600. The Fourth Circuit sided with the insured and the trial court, explaining that “the word

¹³ “When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions.” *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019); see also *Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) (“Our supreme court will look to other states for persuasive authority where there are no South Carolina opinions on point.”).

¹⁴ The Fourth Circuit Court of Appeals’ opinion in *Breton, LLC v. Graphic Arts Mut. Ins. Co.* is attached hereto and incorporated herein by reference as **Exhibit 7**.

‘maintain’ may be understood in more than one way, which supports a finding of ambiguity.” *Id.* at 603 (internal quotations omitted). While the carrier in *Breton* argued that the word “maintain” was not open to interpretation nor ambiguous because it has a “plain meaning,” the Fourth Circuit disagreed. Specifically, “[a]s used in the insurance contract, the word ‘maintain’ could be reasonably interpreted ... to refer to an obligation to continue to have an Automatic Sprinkler System,” instead of the insurer’s interpretation, which implied “regular repair obligations with respect to the Automatic Sprinkler System.” *Id.* Indeed, the exclusionary language in the *Breton* policy did not define “maintain,” but qualified it with contiguous language: “in complete working order.” *Id.* Thus, “interpreting ‘maintain’ to require ensuing operability would render the ‘in complete working order’ language in the exclusion superfluous.” *Id.*

Likewise, in *Westfield Ins. Co. v. Enter. 522, L.L.C.*, the protective safeguard endorsement relied upon by the insurer to deny coverage in that case mirrors the Endorsement at issue in the instant action. 34 F. Supp. 3d 737 (E.D. Mich. July 29, 2014).¹⁵ Like the Endorsement at issue in this action, the protective safeguard endorsement at issue in *Westfield Ins. Co.* purportedly had an exclusion that provided: “as a condition of insurance ... [the insured] is required to maintain the protective devices or services listed in the schedule above.” *Id.* at 742. The endorsement’s exclusionary provision requiring an automatic building sprinkler system was defined by the endorsement’s reference to a “P-1” code or symbol (the “Sprinkler Code”) and the endorsement’s corresponding sprinkler safeguard description. *Id.* at 742, 744. However, the Sprinkler Code was not listed in the schedule referenced in the protective safeguard endorsement that made the exclusion applicable to the insured. *Id.* at 742. The Sprinkler Code was listed in the policy declarations but not listed therein as a limitation on coverage. *Id.* The insurer argued that the

¹⁵ The opinion espoused in *Westfield Ins. Co. v. Enter. 522, L.L.C.*, is attached hereto and incorporated herein by reference as **Exhibit 8**.

applicability of the endorsement's exclusion was not ambiguous because the policy declarations detailed that the insured was required to maintain an automatic sprinkler system. *Id.* at 744. Specifically, the insurer asserted that an adequate connection could be made between the endorsement and the policy declarations because the form code or encrypted series of codes listed on the endorsement were also listed in the declarations under "forms and endorsements." *Id.* The court in *Westfield Ins. Co.* held that the "applicability of the exclusion is patently ambiguous on its face; even a reading of the policy, i.e., the endorsement and ... [the] declarations fail to adequately show that the exclusion is a condition of fire coverage." *Id.* Just as the Court should have found in the instant action, the court in *Westfield Ins. Co.* found that the exclusion and Sprinkler Code were only defined in the endorsement, and that the Sprinkler Code which made the endorsement's exclusion applicable was not listed in the schedule referenced in the endorsement. *Id.*

In the instant action, the Endorsement and the Endorsement's exclusionary provisions are nearly identical to those interpreted and held as ambiguous by the courts in *Breton* and *Westfield Ins. Co.* The Endorsement relied upon by the Defendant Insurers to deny coverage to Tebele provides that "[a]s a condition of this insurance, [Tebele is] required to 'maintain' the protective devices or services listed in the Schedule above." The Endorsement also contains an exclusion, which states: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to 'maintain' any protective safeguard listed in the Schedule above, and over which you had 'control' in complete working order." The Defendant Insurers chose not to define the words "maintain" or "control," nor did they specify what Tebele was required to do in order to "maintain" the protective devices described in the Endorsement. The common understanding or plain meaning of the term "maintain" is defined mean: "acts of repairs and other acts to prevent a

decline, lapse or cessation from existing state or condition,” or to “rebuild, repair, [or] replace.” *See Maintain*, *Black’s Law Dictionary* (6th ed. 1990). The term “control” has multiple meanings depending upon the context in which the term is used. With regard to a real property in which a landlord owns and leases to a tenant, the landlord surrenders possession and control of property to the tenant. “When land is occupied by a lessee ... the law of property regards the lease as equivalent to a sale of the premises for the term of the lease.” *Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992).

Tebele, like the insureds in *Breton* and *Westfield*, purchased fire coverage and the Defendant Insurers intended to issue fire coverage. The undisputed facts presented at trial establish that Tebele paid Crawford to install a new building sprinkler addition at the Tebele Property, that the new building sprinkler addition was under construction at the time of the Fire Loss, and that the Tenant was occupying the Tebele Property at the time of the Fire Loss. Thus, as a matter of law, the Tenant had both possession and control of the Tebele Property at the time of the Fire Loss. In addition, applying the Endorsement with the ordinary meaning of the term “maintain” renders the Endorsement ambiguous on its face because it is impossible for one to rebuild, repair, or replace a new building sprinkler system addition undergoing construction, or perform other acts of repairs or other acts to prevent a decline, lapse, or cessation of the insured building from an existing state or condition which lacks an existing building sprinkler system. Just like the protective safeguards endorsement at issue in *Westfield Ins. Co.*, the Endorsement’s exclusionary provision requiring an automatic building sprinkler system is defined by the Endorsement’s reference to an “AS” code or symbol and the Endorsement’s corresponding sprinkler safeguard description. In addition, the Policy’s Declarations admitted into evidence at trial neither defines the “AS” symbol nor directs Tebele, as the insured, to a Policy provision which defines the “AS” symbol. Rather, page 2 of

the Policy's Declarations merely lists the form code or encrypted series of codes listed on the Endorsement under "Forms Applicable to Common Forms." Like *Westfield Ins. Co.*, the "AS" symbol which, based on a plain and ordinary reading of the language appearing on the face of the Endorsement, applies the Endorsement's exclusionary provisions to the insured properties "as indicated on the Schedule of Values [SOV] on file with the Company" is not listed, depicted, nor referenced in the SOV. Therefore, the Endorsement is both patently ambiguous on its face and in the Defendant Insurers' application of its exclusionary provisions to the Tebele Property to deny coverage, and those ambiguities must be construed in favor of coverage as a matter of law.

B. The Endorsement's Resulting Internal Inconsistency Renders the Policy Ambiguous.

The Endorsement's exclusionary provisions directly conflict with the Policy's provisions that specifically insure building additions and alterations, such as the building sprinkler system addition that was under construction at the time of the Fire Loss, creating an internal inconsistency that renders the Policy ambiguous. The Policy which the Defendant Insurers sold to Tebele promises to "pay for direct physical loss of or damage to 'Covered Property' at [the Tebele Property] caused by or resulting from [fire]." Pursuant to the Policy, 'Covered Property' includes not only the building situated on the Tebele Property, but also "additions under construction, alterations and repairs to the building or structure." A building sprinkler system that is under construction at the time of a fire or other loss cannot be deemed operational at that time and would undoubtedly be covered under the Policy regardless of the system's operational status. At trial, the parties did not dispute that the building sprinkler system addition was under construction at the time of the Fire Loss, and the evidence presented by Tebele to establish that fact and that Tebele sought and purchased the Policy to also insure and provide fire loss coverage for building improvements and additions, alterations, and repairs under construction at each of Tebele's insured

commercial real properties was uncontroverted. In exchange for Tebele's premium payment, the Defendant Insurers agreed to insure and provide coverage for both the insured buildings and for building additions and alterations under construction that may be damaged or destroyed by fire, including the building sprinkler system addition that was under construction at the time of the Fire Loss. To give effect to the Endorsement's exclusionary provision would render the Policy virtually meaningless because the Endorsement, as interpreted and applied by the Defendant Insurers to deny coverage to Tebele, would exclude coverage for all claims arising from the very risk contemplated by both the Defendant Insurers and Tebele. In addition, the interpretation presented by the Defendant Insurers at trial applying the Endorsement's exclusionary provisions to the binder pertaining to the Policy would absolutely render the Policy illusory and virtually meaningless because that interpretation presented by the Defendant Insurers would exclude coverage for all fire-related loss or damage to any of Tebele's properties insured under the Policy, including both the five properties noted as 100% sprinklered on the SOV and the remainder of the twenty-three properties noted as 0% sprinklered on the SOV. Thus, the internal inconsistency created by the Endorsement and the Defendant Insurers' application of the Endorsement's exclusionary provisions to deny coverage to Tebele renders the Policy ambiguous, and that ambiguity must be construed in favor of coverage. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994) (The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very risks sought to be insured renders the policy ambiguous.).

CONCLUSION

Plaintiff offers the following summary of what this Court should do:

- Plaintiff requests a judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCF and that this Court review the attached exhibits and case law and find as a matter of law that the Protective Safeguards Endorsement is ambiguous consistent with South Carolina's law.
- If the Court declines to find as a matter of law that the insurance policy in this case was ambiguous, the Court should grant a new trial because it failed to charge the jury the law of ambiguity in insurance policies.

Accordingly, Plaintiff requests the relief as listed above.

Respectfully submitted,

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December 27, 2023

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2020-CP-26-0808

A. TEBELE & SONS, a South Carolina
general partnership,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT LLOYD’S;
HDI GLOBAL SPECIALTY SE; GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA; and CRESCENT COAST
INSURANCE, LLC,

Defendants.

**CERTAIN UNDERWRITERS AT
LLOYD’S, LONDON; HDI GLOBAL
SPECIALTY SE, AND GENERAL
SECURITY INDEMNITY COMPANY OF
ARIZONA’S RESPONSE IN OPPOSITION
TO PLAINTIFF’S AMENDED MOTION
FOR NEW TRIAL AND JUDGMENT
NOTWITHSTANDING THE VERDICT**

Defendants, the Certain Interested Underwriters at Lloyd’s, London subscribing to Policy Number AQS-190065 (“the Underwriters”), HDI Global Specialty SE (“HDI”), and General Security Indemnity Company of Arizona (“General Security Indemnity”) (collectively the “Insurers”) respectfully submit to this Honorable Court their Response in Opposition to Plaintiff’s Amended Motion for New Trial and Judgment Notwithstanding the Verdict (“JNOV”) as to Defendant Insurers, pursuant to South Carolina Rules of Civil Procedure 50 and 59, the Local Rules of this Court, and applicable law. Both Motions should be denied.

I. SUMMARY OF ARGUMENT

The jury’s complete defense verdict in favor of the Insurers on the breach of contract and bad faith counts was justified by the evidence presented to them during this eight-day trial. In its combined Motions for JNOV and New Trial, Plaintiff continues to confuse the issues in this case. It attempts to convince this Honorable Court that insurance contract interpretation is a question of *fact* that the Court should weigh in on via the thirteenth juror doctrine. At the same time, Plaintiff also tells the Court to re-interpret the subject insurance contract (“Policy”) and

render judgment notwithstanding the verdict as a matter of law. Plaintiff is not entitled to the relief it seeks, in either instance.

The thirteenth juror doctrine requires the Court to disagree with the verdict and “hang the jury” based upon the facts evaluated by the jury under the law charged by the Court. However, Plaintiff’s Motion instead attacks the law presented to the jury regarding the lack of ambiguity in the Policy. This is improper.

As to “evidence” relating to contract interpretation, this Honorable Court, upon careful reflection, properly granted the Insurers’ Sixth Motion in Limine, in part¹, by holding the Policy language at issue to be unambiguous; properly denied Plaintiff’s request to re-consider that ruling during the jury charging conference after evidence closed; and appropriately instructed the jury. The Court alone interprets the Policy. While the Court gave Plaintiff broad latitude during trial to argue that the Claim should have been paid based upon the Policy language and the facts, the insurance contract’s interpretation remains a question of law. This Honorable Court did not commit any legal error in finding the Policy unambiguous. Nor was Plaintiff prejudiced by the Court’s charge on the Policy’s plain language, because the charge did not instruct the jury to accept a specific party’s offered interpretation of the Policy.² This Honorable Court should decline Plaintiff’s attempt to waste precious judicial resources to redo a trial merely because

¹ The ruling was only “in part” because the Insurers’ Sixth Motion in Limine also sought to preclude presentation of evidence or argument to the jury asserting ambiguity of the Policy. While the Court held the policy was unambiguous before trial opened, as Insurers sought, the Court allowed Plaintiff to present testimony and argument during trial advancing Plaintiff’s various “alternate” interpretations of the Policy, such as those set forth in Plaintiff’s post-trial Amended Motion, and heard argument upon Plaintiff’s request for re-consideration of its ruling of “no ambiguity” during the jury charge conference prior to closing arguments. Despite all this, the Court correctly maintained its ruling of “no ambiguity” and so charged the jury.

² This Honorable Court correctly instructed the jury that the Policy was unambiguous. The Court’s charges did not impede the jury from accepting Plaintiff’s arguments, made throughout trial from opening to closing, that the Policy did not require Plaintiff to have an operational automatic sprinkler system at 1901 N. Kings Hwy in Myrtle Beach, South Carolina (“Property”). Rather, after weighing the evidence, the jury unanimously rejected Plaintiff’s self-serving contentions.

Plaintiff did not like the result. The result was based on ample evidence supporting and justifying it. Plaintiff's Motion for a new trial as to the Insurers and invocation of the thirteenth juror doctrine should be denied.

Further, this Honorable Court must deny Plaintiff's JNOV Motion. Plaintiff never presented a motion for a directed verdict at the close of the evidence to preserve such arguments. Resultantly, black letter South Carolina law deems Plaintiff has waived the JNOV Motion.

II. EVIDENCE ADDUCED AT TRIAL

The live or recorded testimony of thirteen (13) witnesses, including multiple experts, was presented at trial in this matter—nearly all of them in Plaintiff's case-in-chief. Additionally, portions of Plaintiff's deposition testimony were read into the record, and the Parties each introduced dozens of documents as record exhibits. The record provides ample support for the jury's verdict in favor of the Insurers. While no trial transcript yet exists, based upon collective notes and memory of counsel, the Insurers below provide an overview of key evidence presented that justifies the jury's verdict in response to Plaintiff's contentions in its Motions.

The sum total of the record allowed the jury to justifiably find no breach of contract by the Insurers, and no bad faith conduct by the Insurers, because:

- The Property did not have an Automatic Sprinkler System when the fire occurred; and
- The Policy required an Automatic Sprinkler System at the Property;

Rather than confront these obvious truths, Plaintiff elected to hurl theory after theory at the jury as distraction, including, e.g., that the Insurers "knew" the Property was unprotected from fire damage despite Plaintiff's inaccurate attestation that it was, or that Plaintiff was somehow not actually required to have sprinkler protection because its manager did not physically receive the Policy, even though its authorized producing agent clearly received it. Ultimately, the jury

accepted that the Insurers' declination of coverage decision was correct and concluded that their investigation of the Claim and decision-making process was reasonable and not in "bad faith."

A. No Sprinkler System Protected the Property on the Date of the Fire, and Plaintiff Knew it.

Two of Plaintiff's own witnesses, Captain Steven Marinaro and Mr. Mike Dover, both testified that the Property at issue did not ever have a fully installed, automatic sprinkler system. Mr. Dover confirmed that because the sprinkler pipes and risers were not connected to the City of Myrtle Beach water supply, it would be incorrect to say that the Property had a 100% installed sprinkler system or that the Property was 100% sprinklered.³ No evidence at trial indicated otherwise.

Express testimony was adduced at trial to show that Plaintiff knew the system was unconnected to water 30 days after Plaintiff signed the insurance application indicating it was 100% sprinklered, and did not tell the Insurers or anyone else. Mr. Dover testified that he attended a site inspection of the Property on February 13, 2019 with Mr. Abraham Tebele, Plaintiff's manager, to discuss completion of the Property's sprinkler system. Thus, Plaintiff knew, after the Policy was bound and before the fire, that the Property remained unsprinklered. Mr. Tebele confirmed this during his testimony at trial and conceded that he never told any of the defendants about his February 13, 2019 site inspection and the lack of an operable sprinkler system after that date and before the fire. Undisputedly, Plaintiff's (incorrect) January 14, 2019 insurance application identifying the Property as 100% sprinklered remained the most current information the Insurers had received about the Property and its sprinkler at all times between January 14, 2019 and the date of the fire. The jury was entitled to weigh Plaintiff's allegations through this prism, including the merits of its arguments and Mr. Tebele's personal credibility.

³ In other words, Mr. Dover, a sprinkler contractor, confirmed that Plaintiff's signed January 14, 2019 insurance application identifying the Property as 100% sprinklered was incorrect.

B. Plaintiff's Unsuccessfully Attacked the Policy Terms and Conditions.

During trial, in spite of the Court's ruling that the Policy was not ambiguous, Plaintiff attempted to show the Policy was ambiguous and/or breached by the Insurers based upon the Policy's definition of "Covered Property" in the Property Coverage Form, as well as based upon a misguided reading of the relationship between the Protective Safeguards Endorsement of the Policy and the Schedule of Values ("SOV") referenced within it. The jury was justified in rejecting Plaintiff's proffered analysis of the Claim facts under the Policy language.

For example, Plaintiff elicited testimony from Mr. Jim Twaddell, Plaintiff's public adjuster, regarding the alleged importance of the absence of the "AS" abbreviation on the SOV. Notwithstanding, on cross-examination, Mr. Twaddell was confronted with one of his own emails wherein he conceded that the SOV shows the Property was to have an automatic sprinkler system. He then conceded that the SOV does indeed show a sprinkler system listed for the Property. The Insurers, when declining coverage in writing for the Claim, explained their logical reasoning as to why Mr. Twaddell's original argument about the "AS" notation was incorrect. The jury was justified in agreeing that the Insurers' explanation was the more logical and compelling one.

Other witness testimony further supported the correctness of the Insurers' claim decision, based upon a plain reading of the Protective Safeguards Endorsement and its reference to five (5) sprinklered properties, including the Property at issue here, as shown on the SOV. For example, Mr. Mark Melvin, who testified by deposition, personally underwrote and assembled the Policy, and explained that the policyholder already knows which locations are required to have an automatic sprinkler system "based upon the [insurance] application and the Schedule of Values, as it reflects all the information from the application." Mr. Melvin testified that he did not

prepare the SOV; it was submitted to him with the representation that the Property was 100% sprinklered. He prepared the initial quotes and subsequently the Binder and Policy on behalf of the Insurers with the understanding that the Property was indeed 100% sprinklered as represented in Plaintiff's submission. Further, he testified that it would not be accurate to identify the Property as 100% sprinklered if the automatic sprinkler system was not connected to a water source.

Additional witnesses corroborated Mr. Melvin's testimony and gave further justification for the jury's verdict. Mr. Clark Hanness, from the United Kingdom, testified as representative of the Underwriters that the Protective Safeguards Endorsement required the Property to be sprinklered, as shown by the SOV and Plaintiff's insurance application. He explained the bases for the decision of the Insurers to decline the Claim, as expressed in writing, including how the Policy language applied to the facts of the Claim. Similarly, Mr. Terry Tadlock, Crescent Coast's expert on the standard of care of insurance agents, testified that the "AS" symbol used within the Protective Safeguards Endorsement is not placed on schedules or statements of value, and that the 100% sprinklered notation conveys that an automatic sprinkler system was supposed to be in place at the Property.

In yet another failed attack on the Policy, Plaintiff presented expert law professor Mr. Gerald Finkel regarding purported confusion from the Policy's definition of "Covered Property." He contended the unfinished nature of the sprinkler system actually entitled Plaintiff to coverage, effectively eliminating any impact of Plaintiff's non-compliance with the Protective Safeguard Endorsement. Yet on cross-examination at trial, Mr. Finkel agreed that the presence of Covered Property per the terms of the Policy did not mean an insurance claim for that Covered Property is automatically covered regardless of cause or compliance with conditions. Further, Mr. Finkel

conceded that the fact that damage may befall property while it is being repaired does not invalidate other parts of the Policy, such as the Protective Safeguards Endorsement. Mr. Finkel's reluctant concessions are consistent with the testimony offered by Mr. Hanness and the Insurers' expert, Mr. Bernd Heinze, who explained that the definition of "Covered Property" did include the incomplete sprinkler components, and that had those components been damaged by a cause of loss other than fire, such damage may have been compensable. But, all fire damage to any "Covered Property" was precluded by the Protective Safeguard Endorsement. The jury was justified in choosing to accept Hanness and Heinze's testimony.

Mr. Tebele, testifying for Plaintiff, conceded that the Plaintiff's historical insurance policies for the same locations, including the prior year's policy, contained similar protective safeguards endorsements. Plaintiff even had to correct the prior year's endorsement, which inadvertently initially applied to properties that had no automatic sprinkler system. This showed the jury that Plaintiff was sophisticated enough to know how to make changes to its Policy after binding, including changes to the sprinkler system status. Yet, the jury saw evidence that Plaintiff did nothing to advise the Insurers that its insurance application on January 14, 2019 incorrectly stated that the Property was 100% sprinklered. Plaintiff remained silent after receiving the insurance binder which explicitly stated the Protective Safeguards Endorsement applied to the Policy and despite Mr. Tebele inspecting the Property and the unconnected sprinkler system on February 13, 2019 with Mr. Dover of Crawford Sprinkler. As such, the jury was justified to hold Plaintiff accountable for its failure to correct the inaccurate application Mr. Tebele signed, and its failure to comply with the Protective Safeguard Endorsement language.

C. Plaintiff Offered at Best Minimal Evidence of Purported Contents and Loss of Business Income.

The jury was not only justified in agreeing that the Insurers' Claim decision was correct and its process in reaching it reasonable, but also had justification for awarding no Contents or Business Income damage, even if they had ruled otherwise. While it was undisputed at trial that Plaintiff's building sustained significant damage, Plaintiff's presentation of evidence regarding a loss of business income and contents damages was sparse, at best. Mr. Saul Martinez testified about the building loss considering the time elapsed with no repairs performed by Plaintiff, but Mr. Martinez did not offer any testimony regarding any loss of business income or contents owned by Plaintiff within the building.

Plaintiff's purported damages expert, Mr. Fred Shenay, likewise testified regarding damage figures for the building only. He testified that he did not know what, if any, contents were within the building at the time of the fire. Nor did Mr. Shenay offer any testimony regarding loss of business income.

Mr. Twaddell, Plaintiff's public adjuster, testified that he retained a building consultant to prepare an estimate relative to the building, and separately retained different individuals to evaluate the purported contents damages and loss of income. While the building estimate procured by Mr. Twaddell was admitted into evidence, the calculations and supports he apparently procured relative to contents and loss of income were not introduced into evidence. Nor did Mr. Twaddell provide any testimony explaining the results of that investigation.

Mr. Tebele did not provide any testimony regarding the contents purportedly lost at the Property. He did provide limited testimony regarding historic income generated at the Property between 2010 and 2014 when the Property was fully occupied. Of course, he also agreed that the Property was only partially occupied by a single tenant at the time of the fire. He even testified

that this sole tenant was in the process of being evicted and owed approximately \$41,000.00 in unpaid rent.

Given the paucity of evidence regarding any contents or loss of income at issue at the close of Plaintiff's case, the Insurers moved for a directed verdict on those issues. This Honorable Court agreed there was not much evidence of the contents and business income loss, but allowed these issues to go to the jury for its evaluation. The jury was justified in finding no breach or bad faith relating to these elements of coverage.

III. LEGAL ANALYSIS

A. The Thirteenth Juror Doctrine Does Not Justify Granting a New Trial, and the Policy Is Not Ambiguous.

This Court should not invoke the thirteenth juror doctrine to disturb the jury's verdict and "hang the jury" here. The thirteenth juror doctrine gives a trial judge "authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." *See Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). Trial courts can, and do, deny requests for new trials that invoke the thirteenth juror doctrine. *See id.* (holding trial court did not abuse its discretion in denying motion for new trial even though liability was admitted, only causation and damages were at issue, and jury returned a defense verdict); *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (Ct. App. 2011). Invoking the thirteenth juror doctrine is inappropriate when the jury was properly instructed and rendered a finding justified by the evidence. *See id.*

A thirteenth juror doctrine analysis is not an invitation for the Court to re-visit *legal* rulings, such as the Court's rulings as to insurance policy interpretation. Whether a contract contains an ambiguity or not is a question of law for the court, not a question of fact for the jury. *See Hutchinson v. Liberty Life Insurance Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013); *see*

also *Beaufort County School District v. United National Insurance Co.*, 392 S.C. 506, 526, 709 S.E.2d 85, 95-96 (2011). Further, ambiguity does not exist unless a contract is capable of being understood in more than one way when correctly applying the law of contract interpretation. *See Beaufort County School District v. United National Insurance Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (2011) (holding courts must read the insurance contract as “a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity’”); *Davis v. Davis*, 372 S.C. 64, 76, 641 S.E.2d 446, 452 (Ct. App. 2006).

Plaintiff invokes the thirteenth juror doctrine, which requires this Honorable Court to consider the facts shown at trial. Factually, ample evidence was presented among the thirteen (13) trial witnesses, deposition excerpts read, and exhibits admitted supporting the verdict of the jury in favor of the Insurers on breach of contract and bad faith. An overview of such evidence is provided, *supra*.

Rather than recite *factual* bases requiring the Court to “hang the jury” as the thirteenth juror, Plaintiff instead re-argues a legal question—whether the Policy is ambiguous or not—and relatedly whether the Court correctly instructed the jury that the Policy is not ambiguous. Reconsidering whether the Policy is ambiguous as a matter of law is a legal determination outside the scope of the thirteenth juror doctrine, which is reliant upon an evaluation of the facts at issue.

Regardless, this Court already properly determined that the Policy is not ambiguous, and correctly instructed the jury in that regard.⁴ Plaintiff incorrectly argues that the Protective

⁴ Plaintiff’s Motion argues that the Court erred “in failing to charge to the jury the doctrine of estoppel and/or waiver.” Even if at trial Plaintiff had adduced evidence of a material misrepresentation by the Insurers relied upon to Plaintiff’s detriment (to support estoppel), or evidence of an intentional relinquishment of a known right by the Insurers (to support waiver), neither of which were ever adduced, Plaintiff waived any error of the Court to charge to the jury on “estoppel and/or waiver” by failing to request any such charges be given. *See*

Safeguards Endorsement is ambiguous because it uses the abbreviation “AS,” when defining the phrase Automatic Sprinkler. Because the Endorsement applies to locations “indicated on the Schedule of Values on file with the Company,” Plaintiff offers the interpretation that the “AS” symbol should have appeared explicitly on the SOV.⁵ Plaintiff’s argument completely ignores that the SOV explicitly states that the Property was to be sprinklered, and that it was sprinklered 100%, just like the four (4) other locations with connected systems denoted on the SOV. Plaintiff likewise ignores that its interpretation is *per se* unreasonable because it renders the entire Protective Safeguards Endorsement surplusage. *See Sullivan Management, LLC v. Fireman’s Fund Ins. Co.*, 437 S.C. 587, 591, 879 S.E.2d 742, 744 (2022) (deeming interpretation that would render provisions mere surplusage unreasonable). Plaintiff’s interpretation cannot be accepted where an interpretation that gives meaning to the Policy’s terms already exists, as it does here, since the SOV does identify the Property as both (1) having a sprinkler system, and (2) being 100% sprinklered, both of which are consistent with the information contained in Plaintiff’s signed insurance application.

Plaintiff also incorrectly takes issue with the Protective Safeguards Endorsement’s use of the word “maintain.”⁶ The word “maintain” does not create an ambiguity in the Policy.⁷ Plaintiff

Wells v. Halyard, 341 S.C. 234, 240, 533 S.E.2d 341, 344 (Ct. App. 2000). This asserted error does not entitle Plaintiff to any relief.

⁵ Plaintiff also errs to the extent it attempts to interject an AmWINS Special Risk Underwriters template of a similar protective safeguards endorsement, produced during written discovery but never relied upon by the Insurers, to create an illusion of ambiguity. The Insurers have never relied upon or cited the template form language. Plaintiff’s own expert, Mr. Finkel, testified his agreement with this premise. Insurers’ declination correspondence did not reference it. Further, the template form, if somehow considered to be a part of the Policy, which it is not, would still have required an automatic sprinkler system be connected to water at the Property. No ambiguity exists, as Plaintiff had no automatic sprinkler system as required under either form.

⁶ The Insurers note that Plaintiff waived and abandoned its current arguments regarding “maintain,” as Plaintiff did not present these arguments at all at trial, during any oral argument on Motions in Limine, in any directed verdict motion, or at the charge conference.

agrees that it did not “maintain” an automatic sprinkler system at the Property, and tries to couch that as an ambiguity. *See Plaintiff’s Motion for New Trial, at p. 22 (agreeing that a property that “lacks an existing building sprinkler system” does not fall within the “ordinary meaning of the term ‘maintain’”).* No ambiguity exists. Plaintiff simply did not comply with the “ordinary meaning” of the Protective Safeguards Endorsement. Plaintiff did not maintain an automatic sprinkler system at the Property as required. The jury was justified in so ruling.

Plaintiff’s attempt to twist the Policy’s Covered Property definition, which includes “additions under construction, alterations and repairs to the building or structure” “[i]f not covered by other insurance,” into a weapon to repudiate the Protective Safeguards Endorsement also fails. The Policy’s “Covered Property” definition does not amend or abrogate any condition precedent or the Policy’s other defined terms, including “Covered Cause of Loss.” Nor does South Carolina law permit such a reading. *See Beaufort County School District v. United National Insurance Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (2011) (holding courts must read the insurance contract as “a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity’”); *see also McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 574-75 (2009) (“If a contract contains a condition precedent, that condition must either occur or it must be excused before a party’s duty to perform arises.”). While the Insurers agree that Covered Property sustained damage, the Property did **not** comply with all requisite conditions precedent and the damages resulted from an **excluded** cause of loss as opposed to a

⁷ *See United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 495-96 (4th Cir. 1998) (ruling against policyholder appropriate when protective safeguard was not in place at property); *Goldstein v. Fidelity and Guarantee Insurance Underwriters, Inc.*, 86 F.3d 749, 753 (7th Cir. 1996) (enforcing protective safeguard when sprinkler system was not in operation); *Chaucer Corporate Capital (No. 2) Ltd. American Way Cellular, Inc. v. Travelers Property Casualty Co. of America*, 216 Cal. App. 4th 1040, 1055-56, 157 Cal. Rptr. 3d 385, 397-98 (2013) (finding insurer has no duty to investigate policyholder’s insurance application responses and property’s lack of operational automatic sprinklers violates enforceable policy condition); *Berenato v. Seneca Specialty Insurance Co.*, 240 F. Supp. 3d 351, 360 (E.D. Pa. 2017) (“[Insured] had no reasonable expectation of coverage with the [sprinkler] system shut off . . .”).

Covered Cause of Loss. *See also Sullivan Management, LLC v. Fireman's Fund Insurance Co.*, 437 S.C. 587, 879 S.E.2d 742 (2022) (recognizing that a covered loss, not just "covered property," is required to trigger coverage under a property insurance policy). Considering all relevant Policy provisions reveals that Plaintiff's repudiation argument lacks merit. The jury justifiably agreed and ignored this line of argument from Plaintiff.

The Property never complied with the Endorsement's unambiguous condition precedent. Plaintiff never completed installation of an Automatic Sprinkler System, let alone "maintain[ed]" it at the Property. The empty pipes and sprinkler heads were never connected to water or in service. As a result, they could never have responded to a fire. The Loss Event, a fire, caused the damages for which Plaintiff sought indemnification. Simply, empty piping and sprinkler heads never connected to any fire suppressant, water or otherwise, failed to comply with the Protective Safeguards Endorsement. The jury justifiably reached the correct verdict as to the Insurers; the Insurers did not breach the Policy and they did not act in bad faith.

B. Plaintiff Waived Any Basis to Seek Relief via the JNOV Motion Because It Never Moved for a Directed Verdict.

At the onset of trial, Plaintiff adamantly took the position that this Honorable Court was required to submit every issue it presented to the jury, including interpretation of the Policy. *See, e.g., Plaintiff's Memorandum in Opposition to Insurers' Sixth Mo[t]ion in Limine as to Ambiguity of Insurance Policy, p. 2* (arguing the issues "are properly reserved for submission to the jury as the finder-of-fact"). Blessed now with hindsight as to the jury's verdict, Plaintiff adopts the novel position that "[t]he only issue which should have been submitted to the jury as to the Defendant Insurers . . . was whether the Defendant Insurers acted in bad faith . . ." In other words, Plaintiff now incorrectly argues that the Court was required as a matter of law to find the Insurers liable for \$2,850,000.00 for breach of contract from the onset of trial. Plaintiff is wrong

about ambiguity for the reasons stated above. Furthermore, Plaintiff did not even present this argument via pre-trial motion or during trial. Plaintiff did not move for directed verdict on this or any other basis against the Insurers.

A motion for judgment notwithstanding the verdict does nothing more than renew a directed verdict motion. *See RFT Management Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 331, 732 S.E.2d 166, 171; *see also Rule 50(b) of South Carolina Rules of Civil Procedure*. “[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.” *See RFT Management Co.*, 399 S.C. at 331, 732 S.E.2d at 170–71. So “[w]hen a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.” *See id.*

Plaintiff did not move for a directed verdict at all, let alone for a directed verdict for its entire breach of contract cause of action and the entire \$2,850,000.00 limits of insurance for the Property. Those total limits include \$250,000.00 for contents and \$100,000.00 for alleged loss of business income. Plaintiff barely survived the Insurers’ motion for a directed verdict on these components given the lack of supporting evidence for them at the close of Plaintiff’s case. Plaintiff did not move for a directed verdict. Plaintiff knew the jury, even if it was inclined to rule against the Insurers, still needed to weigh the (at best sparse) evidence supporting Plaintiff’s purported contents damages and loss of business income to determine if those amounts were in fact, established by the evidence. Plaintiff never moved for a directed verdict against the Insurers. Thus, Plaintiff’s JNOV Motion must be denied.

IV. CONCLUSION

WHEREFORE, the Certain Interested Underwriters at Lloyd’s, London subscribing to Policy Number AQS-190065, HDI Global Specialty SE, and General Security Indemnity

Company of Arizona respectfully request that this Honorable Court enter an order denying Plaintiff's Amended Motion for New Trial and Judgment Notwithstanding the Verdict as to Defendant Insurers. The Insurers also request that the Court grant such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT** was served this 10th day of January, 2024 by electronic means via the South Carolina E-Filing System to the following:

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/s/ Roman C. Harper
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CIVIL CASE NO. 2020-CP-26-0808
	)	
A. Tebele & Sons, a South Carolina	)	
General Partnership,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANT CRESCENT COAST
	)	INSURANCE, LLC'S MEMORANDUM IN
	)	OPPOSITION TO PLAINTIFF'S MOTION
	)	FOR NEW TRIAL ABSOLUTE AND
	)	ALTERNATIVE MOTION FOR NEW
Certain Underwriters at Lloyd's, HDI	)	TRIAL ADDITUR AS TO DEFENDANT
Global Specialty SE, General Security	)	CRESCENT COAST INSURANCE, LLC
Indemnity Company of Arizona, and	)	
Crescent Coast Insurance, LLC	)	
	)	
Defendants.	)	
	)	

Defendant Crescent Coast Insurance, LLC ("Crescent Coast") hereby submits this Memorandum of Law in Opposition to Plaintiff A. Tebele & Sons, A South Carolina General Partnership's ("Tebele" or "Plaintiff") Motion for New Trial Absolute and Alternative Motion for New Trial Additur as to Crescent Coast, filed December 21, 2023.

BACKGROUND AND TEBELE'S MOTION

Tebele has moved this Court for an order granting a new trial absolute or, in the alternative, a new trial *nisi additur*. Tebele's motion follows the jury's verdict in this case finding: no liability against Certain Underwriters at Lloyd's, HDI Global Specialty SE, and General Security Indemnity Company of Arizona ("Insurers"); Tebele was 60% negligent (compared to 40% negligence as to Crescent Coast) as to the cause of action of negligence against Crescent Coast; and that Crescent Coast breached a fiduciary duty to Tebele. As to the breach of fiduciary duty cause of action, the jury awarded Tebele \$15,000.00 in damages.

In the motion, Tebele correctly notes that Joey Sutherland ("Sutherland"), an agent of Crescent Coast, also worked in the restaurant business and had previously worked for a restaurant

tenant of Tebele's who occupied 1901 Kings Highway ("Subject Property"). Tebele and Sutherland both testified they knew each other through the restaurant business. Sutherland, being an insurance agent, would contact Tebele from time to time offering to help Tebele secure insurance for Tebele's commercial properties. In the summer of 2018, Tebele decided to seek insurance quotes for his twenty-three commercial properties through Crescent Coast. Tebele met with Sutherland and David Egan ("Egan"), the principal and managing agent of Crescent Coast, in August of 2018 to prepare the initial Acord applications to be used in obtaining the insurance quotes. During this time, Tebele testified he was also seeking quotes through his insurance broker at the time, McGriff Insurance. Tebele was simultaneously seeking quotes from McGriff and Crescent Coast in the hopes of obtaining the most favorable insurance premiums.

When Egan met with Tebele in August of 2018, they reviewed the information needed regarding Tebele's twenty-three commercial properties, including, as relevant for this case, whether the properties contained working fire sprinklers. Egan testified that Tebele informed him a sprinkler system was being installed at the Subject Property, that the system covered 100% of the property, and the sprinkler system was expected to be fully functioning well before the policy renewal date of January 15, 2019. As such, Egan testified Tebele instructed him to mark the Subject Property as being 100% sprinklered on the Acord application. It is undisputed that Tebele *never* updated or otherwise informed Crescent Coast of the status of the sprinkler installation after that August 2018 meeting. Tebele claims he never executed the August, 2018 initial Acord application; however, Tebele's statement is misleading, as this application was the baseline application to begin the process of obtaining quotes and served as the basis for the application he did review and sign prior to coverage being bound.

With that in mind, on January 14, 2019, Tebele executed a signed Acord application, which was submitted to AmWins Brokerage of the Carolinas (“AmWins Brokerage”). It is uncontroverted that the application noted the Subject Property was “100%” sprinklered. It is also undisputed Tebele acknowledged that the information contained on the application was true and accurate to the best of his knowledge. The application, containing the information supplied by Tebele, indicated the value of the property was \$2,500,000. The total amount of commission earned by Crescent Coast was approximately \$17,000¹ – which is determined as 10% percentage of the total premium for all three policies (property, excess and general liability) obtained by Crescent Coast for Tebele. Notably, Tebele called Egan and Sutherland in his case in chief, and made the commission received by Crescent Coast an issue at trial.

The policy was bound on January 15, 2019, and a binder was provided to Tebele by Egan on January 17, 2019. Contrary to Tebele’s contention that the sprinklers were never discussed with him or that he did not receive any information containing sprinkler endorsement language prior to receiving the hardcopy policies, the binder indicated which coverage forms were included with the policy, including the Protective Safeguard Endorsement at issue in the lawsuit. The property insurance coverage for the subject property was \$2,500,000 (based on Tebele’s information). The policy likewise contained coverage for lost business income with limits of \$100,000, and coverage for internal contents of \$250,000. Thus, the total policy amount relevant to this case was \$2,850,000.

Meanwhile, the sprinkler system at the Subject Property was never fully completed. Michael Dover (“Dover”), a representative for Crawford Sprinkler Company (the sprinkler

¹ Notably, David Egan testified that Crescent Coast waived the commissions for the excess and general liability policies prior to Tebele agreeing to go with Crescent Coast for his 2019 insurance policies.

company hired by Tebele to install the sprinkler system at the subject property), testified that the sprinkler system was fully installed inside the building, but it had not yet been connected to the water main. Dover's testimony made clear that Tebele was well aware of the status of the sprinkler system installation throughout the construction, and, in fact, Tebele met with Dover and a representative of Carolina Tap and Bore (the entity responsible for connecting the sprinkler system to the water main) on February 13, 2019 – just eleven days before the fire. Again, Tebele conceded on cross-examination that he never informed Crescent Coast that the sprinkler system was not actually operational after the August 2018 meeting, even after the February 13, 2019 onsite meeting where he saw the unconnected pipe for himself.

A fire occurred at the subject property on February 24, 2019. It is not disputed that the fire caused severe damage to the property. After the fire, Crescent Coast assisted Tebele in the submission of a claim. After an extensive investigation by the Insurers, they denied coverage for the claim – citing, *inter alia*, the language of the Protective Safeguard Endorsement which required a functioning sprinkler system. Tebele misleadingly claims that Tebele did not receive a full copy of the policy, including the Protective Safeguards Endorsement, until after the fire. David Egan's testimony made clear that production of the policy to Tebele was not simply a matter of forwarding a single document. Rather, Egan testified the policy was transmitted to him in several parts, and he had not even received the entirety of the policy documents until after the fire occurred. Egan and Crescent Coast's standard of care expert, Terry Tadlock ("Tadlock"), made clear to the jury that it is appropriate for an insurance agent to ensure all policy documents are received, organized, and reviewed for accuracy before production to the client. Tebele further claims he never received the Schedule of Values. This statement is likewise misleading, as both Egan and Tadlock made clear that the Schedule of Values was an internal document required by AmWins entities during

the underwriting process, and it is not common or expected for insurance agents to provide it to clients. Furthermore, multiple witnesses testified that the information included in the Schedule of Values is the same information included with the January 14, 2019 Acord application that Plaintiff reviewed and signed.

Tebele initiated this action against the insurers and Crescent Coast on February 3, 2020. He asserted causes of actions against the Insurers for breach of contract and bad faith. As to Crescent Coast, Tebele pled, in the alternative, causes of action for negligence and breach of fiduciary duty. Tebele claimed he suffered damages “to include the damages sustained from the fire damage to the Insured Property”

At trial, in his case-in-chief, Tebele presented testimony from his independent adjuster, James Twadell, and expert Gerald Finkel. Neither offered any testimony that Crescent Coast breached any applicable standard or duty of care. The only witness of Tebele who offered any negative testimony of Crescent Coast was Mr. Tebele himself. Even so, Tebele acknowledged he knew the sprinkler system was not actually completed prior to the fire loss, yet he never informed Crescent Coast of the status of the installation after their initial meeting in August 2018. Tebele repeatedly referenced a January 11, 2019 email from Crescent Coast to Whitney Northcutt of AmWins Access (the underwriter for the policy of Tebele’s tenant at the Subject Property, Melissa Garcia d/b/a La Casona Restaurant), wherein a Crescent Coast employee informed Northcutt that Garcia had called and informed them that the Subject Property was 100% sprinklered but the water had not been “turned on” by the landlord. Tebele sought to use this email to imply Crescent Coast knew the sprinkler system was inactive, and, therefore, was liable for submitting the application executed by Tebele indicating the Subject Property was 100% sprinklered. Crescent Coast refuted these contentions with testimony from Sutherland and Egan that on January 11, 2019 Tebele was

not a client of Crescent Coast, the notification happened on a separate policy, the notification from the tenant said the landlord had not turned the water – not that the system was not functional – and, most importantly, that Crescent Coast did what it was required to do when such a notification is received – it notified the broker, in this case AmWins Access.

At the close of trial, Tebele requested approximately six million dollars in damages. Although Tebele pled his case against Crescent Coast in the alternative to the Insurers, the verdict form permitted the jury to find against the Insurers and Crescent Coast.

The jury deliberated for nearly six hours and sent two questions to the Court. At the end of deliberations, the jury returned a defense verdict for the Insurers, found Tebele 60% negligent as to the negligence cause of action against Crescent Coast which barred Tebele's recovery on the negligence claim, and awarded \$15,000.00 to Tebele under the breach of fiduciary duty cause of action against Crescent Coast.

Tebele has now moved the Court for a new trial absolute or, in the alternative, a new trial *nisi additur*. The crux of Tebele's argument is that the evidence presented at trial that the damage suffered to the building, internal contents, and Tebele's inability to rent out the property was in excess of the \$2.85 million policy limits so the baseline for any damages awarded should be the full value of the policy, notwithstanding any deliberation or determination of appropriate damages by the jury. Tebele presented evidence of the cost to repair the property through cost estimator Fred Shenay, and evidence of damaged contents and lost rents through his own testimony and his independent adjuster James Twaddell. Despite asking the jury for nearly \$6 million dollars, Tebele now argues he is entitled to the full policy amount. In support, Tebele first argues the "valued policy statute" (S.C. Code Ann. § 38-75-20) required a minimum award of the policy limit. Next, Tebele argues he is entitled to a new trial absolute on all causes of action because the awarded

verdict was inadequate. Finally, Tebele requests a new trial *nisi additur* as to the breach of fiduciary duty cause of action.

Crescent Coast will now address each of these arguments, in turn, and respectfully requests that Tebele's motion be denied.

LEGAL STANDARD

A new trial absolute should be granted "only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008); *see also O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). Similarly, a new trial *nisi additur* should not be granted absent "[c]ompelling reasons." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). The court must uphold a jury's finding of actual damages if there is any evidence on which the jury could have based their findings. *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 648 (Ct. App. 1990).

ARGUMENT

As an initial matter, Tebele displays the glaring weakness of its position by limiting the motion to the basic argument that the damages awarded to him under the breach of fiduciary duty cause of action were insufficient. In other words, Tebele has made no argument that the jury's determination as to the *merits* of its claims should be disturbed by the Court. Thus, the jury's finding that Tebele was 60% comparatively negligent should be allowed to stand. In the sake of completeness, we will first turn to Tebele's arguments, starting with damages.

I. Tebele's citation to the "valued policy statute" (S.C. Code Ann. § 38-75-20) is misplaced and without merit.

For the first time in this case, Tebele relies on the "valued policy statute" to serve as a measure of his damages. Tebele argues that the statute provides that an insured is entitled to recover the full amount of a fire insurance policy where a total loss has occurred. At no point during trial or, more critically, during the charging conference, did Tebele ever raise the argument that the valued policy statute should serve as the basis for his measure of damages. Tebele cannot now argue to the Court he is entitled to the policy amount by reference to a statute which was never raised until after the jury rendered its verdict. *See, e.g., Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 495, 514 S.E.2d 570, 574 (1999) (holding a party must request or object to a jury charge for any objection relating to same to be preserved).

Further, Tebele's reliance on the statute is without merit. He argues that, had Crescent Coast not breached a fiduciary obligation to Tebele which prevented the fire loss from being covered under the policy, he would have been entitled to the full policy amount under the statute. Tebele's argument misconstrues the purpose of the valued policy statute. "A valued policy statute was first adopted as a part of the law in this state in 1896. This statute required the parties to a fire insurance contract to agree upon the value of the property to be insured and required that such value be stated in the policy. The purpose of this legislation was to eliminate controversy after the loss occurred. *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 531, 183 S.E.2d 315, 317 (1971), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

The purpose of the valued policy statute is to establish a clear framework for establishing policy limits and valuing fire losses. The statute governs insurers writing policies in this state. The statute does not establish a *per se* rule that an insurance agent is liable for the policy amount in the event of a loss. Tebele has cited no authority that the statute serves as a measure for

calculating damages under a breach of fiduciary duty cause of action against an insurance agent. Rather, Tebele improperly cites to *Riddle-Duckworth, Inc. v. Sullivan*, (253 S.C. 411, 421, 171 S.E.2d 486, 491 (1969)) and *Republic Textile Equip. Co. of S.C. v. Aetna Ins. Co.*, 293 S.C. 381, 389, 360 S.E.2d 540, 545 (Ct. App. 1987)². Both of those cases assess, *inter alia*, the measure of damages against an insurance agent in *negligence* cases.

Tebele points out in his motion that counsel for Crescent Coast had previously argued to the Court for an order limiting Crescent Coast's potential liability to the policy amount of \$2.85 million. Indeed, while Crescent Coast moved, pursuant to *Riddle-Duckworth*, to establish the cap of Tebele's potential damages at the policy amount, because Tebele was expected to argue for damages well in excess of the policy amount, it should be made clear that Crescent Coast never argued to the court that the policy amount should serve as the only measure of damages. Crescent Coast also made multiple arguments – in motion and at trial – that it had no liability to Tebele and, even if it did – which is denied – the Plaintiff's measure of damages was irrelevant, unreliable, unhelpful and speculative.³

² Tebele also cites to *Smith v. Universal Prop. & Cas. Ins. Co.*, (No. 5:16-CV-03905-JMC, 2017 WL 3599590, at *4 (D.S.C. Aug. 22, 2017)) for the proposition that a fiduciary relationship existed between Tebele and Crescent Coast. As Crescent Coast previously argued to the Court during summary judgment and directed verdict, under South Carolina law, an insurance agent is not a fiduciary of an insured. *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002); *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 515, 839 S.E.2d 468, 475 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022). Crescent Coast submits there was no evidence required to establish a fiduciary relationship: it did not receive consideration beyond the mere payment of the premium/commission; Tebele never made a specific request for advice; and there was no course of extended course of dealings over a period of time between Tebele and Crescent Coast.

³ See Motions in Limine (and memorandum of law supporting the same) to Limit Damages and to Exclude Testimony and Opinions of Plaintiff's Expert Fred Shenay, filed by Crescent Coast on November 24, 2023.

Neither *Riddle-Duckworth* nor *Republic Textile* espoused a *per se* rule that the policy amount should serve as the only measure of damages. As such, Tebele's reliance on these cases and the valued policy statute to argue the policy amount should serve as the baseline for a jury award against Crescent Coast is without merit.

II. A new trial absolute against Crescent Coast would be improper.

Tebele argues that a new trial absolute should be granted because the verdict in this case was so grossly inadequate that it clearly indicates it was the result of "prejudice, passion, caprice, or some other improper motive" by the jury. Tebele argues that because he submitted evidence of damages in excess of the policy limits, any award below the policy limits merits a new trial.

First, it should be noted that Tebele asks for a new trial absolute on "all causes." However, he does not appear to have made any substantive argument that the jury's determination of 60% comparative negligence was improper.⁴ Instead, his arguments appear limited to the mere fact the damages he was awarded are inadequate. Tebele was not awarded any damages under the negligence cause of action where his negligence was found to be greater than that of Crescent Coast. Thus, to the extent Tebele seeks a new trial absolute as to his negligence cause of action, he has failed to set forth any reasons in support of same. Crescent Coast opposes any request for a new trial absolute as to the negligence cause of action, which is supported by the wealth of evidence presented to the jury regarding Tebele's comparative negligence.

As to the damages awarded under the breach of fiduciary duty cause of action, under South Carolina law, "[t]he jury's determination of damages . . . is entitled to substantial deference."

⁴ Indeed, Tebele's motion is devoid of any discussion of the ample evidence submitted to the jury at trial of his own wrongdoing, including but not limited to his affirmation that he never informed Crescent Coast about the status of the sprinkler system installation at 1901 N. Kings Highway after their August 2018 meeting.

Wright v. Craft, 372 S.C. 1, 35, 640 S.E.2d 486, 505 (Ct. App. 2006). “Compelling reasons must be given to justify invading the jury’s province by granting a new trial to adjust damages.” *Id.* Critically, “[t]he jury’s verdict will not be overturned if **any evidence** exists that sustains the factual findings implicit in its decision.” *Id.* (Emphasis added).

South Carolina law employs a basic proximate cause analysis in calculating damages for breach of fiduciary duty: “Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant.” *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004).

The verdict form given to the jury did not provide any ability for the jury to itemize or otherwise explain the measure of damages it arrived to. There is, however, ample evidence in the record – introduced by the Plaintiff – supporting the jury’s award of damages. Tebele introduced evidence of the commissions to be received by Crescent Coast with multiple witnesses. Plaintiff’s Exhibit 28 noted the total premium for *all* policies on *all* properties was \$170,997.08. The jury heard testimony that Crescent Coast’s expected commission was to be 10% of the total premium or \$17,099.71.⁵ Further, the jury heard testimony that Crescent Coast waived commissions totaling approximately \$6,000 under the excess and liability policies to secure Tebele’s business. As a result, it stands to reason that the \$15,000.00 awarded to Tebele closely resembles the evidence presented at trial of commissions Crescent Coast actually received or was entitled to collect. This was evidence that was placed before the jury *on Tebele’s own volition*.

The jury, after considering seven days of testimony and evidence, could have found the damages proximately caused by Crescent Coast was the commissions owed to it from Tebele’s

⁵ There was also testimony that 10% of the full premium value went to the applicable brokers as commissions.

payment of the premium. A jury's use of this measure of damages is proper. The jury plainly noted Tebele's own comparative negligence under the negligence cause of action, and, therefore, must not have found the evidence of his entitlement to the full policy amount (or damages in excess of the same) to be credible. Therefore, the jury could easily have determined that not all of Tebele's claimed damages were proximately caused by the breach of fiduciary duty. The jury was charged that actual or compensatory damages serve to place the injured party in the same position they were in prior to the damages received. They were further charged that damages could not be left to conjecture, guesswork or speculation. Here, the jury's verdict is supported by the evidence of Tebele's premium and Crescent's commission received from same. Thus, there is ample evidence to support a jury finding that the amount it awarded Tebele would place him in a same or similar position but for Crescent Coast's apparent breach of fiduciary duty. Crescent Coast argues that any other damages beyond that amount were unduly speculative. As such, the jury's verdict should stand, and Tebele's request for a new trial absolute should be denied.

III. The Court should not grant a new trial *nisi additur* as to the award of \$15,000 under the breach of fiduciary duty cause of action.

Finally, Tebele requests that this Court grant an *additur* to the verdict amount of the breach of fiduciary cause of action. Tebele makes the same arguments he made previously that, simply because there was evidence of severe damage to the building, he is entitled to the full policy amount.

Under South Carolina law, when a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). "The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict

in light of the evidence presented.” *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). The court in *Waring* noted: “[t]he granting of new trials upon the ground of inadequacy of damages occurs less frequently than the granting of new trials upon the ground of excessive damages, probably because detection of inadequacy of damages is not as easy as is detection of excessiveness.” *Id.* at 258, 533 S.E.2d at 911.

Tebele argues that the only evidence of damages before the jury was presented by him, and, because it was uncontroverted, the award of \$15,000.00 is grossly inadequate. However, “[t]he fact that testimony is not contradicted directly does not render it undisputed [because] [t]here remains the question of the inherent probability of the testimony.” *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). A factfinder is also not required to believe a plaintiff’s evidence of uncontradicted damages. *Steele v. Dillard*, 327 S.C. 340, 343-44, 486 S.E.2d 278, 280 (Ct. App. 1997). Even if damages are uncontested, the factfinder may consider other factors showing that the plaintiff is not entitled to the full amount of those damages, such as that the damages are attributable to other causes. *Id.* at 344, 486 S.E.2d at 280. More importantly, the factfinder is free to disagree with the plaintiff’s presented amount of damages. *Id.*

Again, as more fully explained above, the jury had ample evidence and full discretion to employ a valid measure of damages by way of fixing a verdict correlative to the amount of commissions received by Crescent Coast. Furthermore, it was in the jury’s discretion to assess the evidence presented, including that of the conduct of the Plaintiff, as well as his presented measure of damages, and find that the damages awarded were an appropriate measure for the breach of fiduciary duty they determined. To accept the Plaintiff’s position, that additur to the verdict amount to the full value of the policy, would be to ignore South Carolina law on the appropriate measure of damages for the breach of fiduciary duty cause of action, but, more importantly, it

means disregarding the jury's province for evaluating the evidence and testimony and awarding the damages that comport with the same. In this case, because the jury's verdict was supported by the evidence, its verdict should be allowed to stand and Plaintiff's motions should be denied.

CONCLUSION

For the reasons set forth above, Crescent Coast respectfully requests this Court deny Tebele's post-trial motions as to it as a matter of law.

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**ATTORNEYS FOR CRESCENT COAST
INSURANCE, LLC**

January 10, 2023

1 A. Tebele and Sons,) Court of Common Pleas
2 Plaintiff,) Fifteenth Judicial Circuit
3 vs.) Case No.: 2021-CP-26-00808
4 Certain Underwriters at Lloyd's, et al.,
5 Defendants.

6 -----

7 Transcript of Record
8 December 4, 2023 to December 13, 2023
9 Horry County, South Carolina

10 **B E F O R E:**

11 The Honorable, Presiding Judge, Alex Hyman

12 -----

13 **A P P E A R A N C E S:**

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23 Dominic Starr, Esquire

24 Julie A. Kevish
25 Official Court Reporter

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E-X-H-I-B-I-T-S

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PLAINTIFF'S EXHIBITS/DESCRIPTION**ID EV**

4

Plaintiff's 1 Deed

291 291

5

Plaintiff's 2 Deed

291 291

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157 157

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291 291

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157 157

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Plaintiff's 9 Email

462 462

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291 291

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Plaintiff's 11 Email

467 467

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Plaintiff's 12 Policy Dec Pages

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Plaintiff's 13 Email

473 473

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Plaintiff's 14 Email

472 472

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Plaintiff's 15 --

19

Plaintiff's 16 --

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Plaintiff's 17 Email

660 660

21

Plaintiff's 18 Email

660 660

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Plaintiff's 19 --

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Plaintiff's 20 --

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Plaintiff's 21 Email

482 482

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Plaintiff's 22 --

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21	Plaintiff's	88 --		
22	Plaintiff's	89 --		
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	PLAINTIFF'S EXHIBITS/DESCRIPTION	ID	EV
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1	DEFENDANT'S EXHIBITS/DESCRIPTION	ID	EV
2	Defendant's 1 lease	821	821
3	Defendant's 2 --		
4	Defendant's 3 --		
5	Defendant's 4 --		
6	Defendant's 5 --		
7	Defendant's 6 --		
8	Defendant's 7 --		
9	Defendant's 8 --		
10	Defendant's 9 --		
11	Defendant's 10 agreement		
12	Defendant's 11 --		
13	Defendant's 12 Text Messages	830	830
14	Defendant's 13 --		
15	Defendant's 14 --		
16	Defendant's 15 --		
17	Defendant's 16 --		
18	Defendant's 17 --		
19	Defendant's 18 --		
20	Defendant's 19 --		
21	Defendant's 20 --		
22	Defendant's 21 --		
23	Defendant's 22 --		
24	Defendant's 23 application		
25	Defendant's 24 email		

1	DEFENDANT'S EXHIBITS/DESCRIPTION		ID	EV
2	Defendant's	25 Binder	710	710
3	Defendant's	26 --		
4	Defendant's	27 email		
5	Defendant's	28 email	683	683
6	Defendant's	29 email-ID ONLY		
7	Defendant's	30 --		
8	Defendant's	31 Policy	603	603
9	Defendant's	32 Schedule of Values Page	603	603
10	Defendant's	33 Fire Endorsement Page	603	603
11	Defendant's	34 Email	685	685
12	Defendant's	35 photos	343	343
13	Defendant's	36 --		
14	Defendant's	37 Copy of Contract	329	329
15	Defendant's	38 Letter	603	603
16	Defendant's	39 Letter	603	603
17	Defendant's	40 --		
18	Defendant's	41 Proof of Loss	603	603
19	Defendant's	42 Request Letter	603	603
20	Defendant's	43 Estimate	348	348
21	Defendant's	44 Ex Under Oath-ID ONLY		
22	Defendant's	45 --		
23	Defendant's	46 Declination Letter	603	603
24	Defendant's	47 --		
25	Defendant's	48 --		

1	DEFENDANT'S EXHIBITS/DESCRIPTION	ID	EV
2	Defendant's 49 --		
3	Defendant's 50 --		
4	Defendant's 51 --		
5	Defendant's 52 --		
6	Defendant's 53 letter	332	332
7	Defendant's 54 letter	332	332
8	Defendant's 55 --		
9	Defendant's 55-A Email	905	905
10	Defendant's 55-B Email	361	361
11	Defendant's 55-C Email	360	360
12	Defendant's 55-D Email	355	355
13	Defendant's 55-E Email	357	357
14	Defendant's 55-F Email	353	353
15	Defendant's 55-G --		
16	Defendant's 55-H Email	363	363
17	Defendant's 56 --		
18	Defendant's 57 --		
19	Defendant's 58 --		
20	Defendant's 59 --		
21	Defendant's 60 Email	560	560
22	Defendant's 61 Email	560	560
23	Defendant's 62 --		
24	Defendant's 63 --		
25	Defendant's 64 Quote	702	702

1	DEFENDANT'S EXHIBITS/DESCRIPTION	ID	EV
2	Defendant's 70 Email	711	711
3	Defendant's 77 Email		
4	Defendant's 109 Email	709	709
5	Defendant's 104 Email	718	718
6	Defendant's 105 Email	718	718
7	Defendant's 103 Email	718	718
8	Defendant's 81 Email		
9	Defendant's 86 Email		
10	Defendant's 87 Invoice		
11	Defendant's 88 Fire Permit		
12	Defendant's 90 6-10-17		
13	Defendant's 91 2-14-17		
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P-R-O-C-E-E-D-I-N-G-S

**(Whereupon proceedings convened Monday, December 4,
2023)**

THE COURT: Ladies and gentlemen of the jury, I thank you again for again for being so punctual coming up. What we have now is part of the jury selection process because we are back. With that being said, Madam Clerk, have you placed the jurors under oath?

(Potential jury was sworn)

THE COURT: Thank you, ladies and gentlemen. Again, as I said before, this is the voir dire process where there are certain questions that I will have to ask you that will actually relate to this case. The case that is in front of you is A. Tebele and Sons South Carolina General Partnership versus Certain Underwriters at Lloyds HDI Global Specialty SE General Security Indemnity Company of Arizona and Crescent Coast Insurance, LLC. This is a case involving an insurance claim in regards to a fire on the property that was located in Horry County. I am going to ask the attorneys to stand and introduce themselves, as well as any clients that they might have here. I'm right-handed, so we're going to start on the right. Yes, sir?

MR. CONNELL: My name is Gene Connell, and I'm a lawyer in Surfside. I practice law with Ed Kelaher, Sid Connor and Lisa Davis, and this is Mr. Tebele, he's the owner of the

1 property in question. It's located at 1910 North Kings
2 Highway. Some of you that lived here earlier or lived here a
3 long time, it's the old Camelot Movie Theatre.

4 MR. DESCHAMPS: I'm Trey DesChamps. I practice law
5 in Myrtle Beach, and I'm also representing A. Tebele and Sons.

6 THE COURT: Yes, ma'am?

7 MR. WATSON: Hi everybody, my name is Andy Watson and
8 I'm an attorney with the lawfirm called Butler Weihmuller Katz
9 Craig based in Charlotte. My colleague, Roman Harper is from
10 my firm is here, as well, and we have co-counsel Dominic Starr
11 from the McAngus group here in Horry County, and my clients,
12 our clients are insurance company entities, Certain Interested
13 Underwriters at Lloyd's of London who are here represented by
14 Mr. Clark Hanness sitting over there with the beard. Also, we
15 have a representative from HDI Global Specialty, another
16 insurer, Thomas Pietzonka, sitting next to him in the gallery
17 is here, and we have a third client, General Security Indemnity
18 Company of Arizona.

19 MR. RISER: Good afternoon everybody. My name is
20 Caleb Riser. I represent Crescent Coast Insurance, LLC. I
21 work for a lawfirm called Richardson Plowden in Robinson, PA.
22 Here with me is Marian Scalise and Brandi Zilbermann from our
23 firm.

24 (Voir Dire)

25 THE COURT: Alright, ladies and gentleman, now that

1 MR. HARPER: Thank you, Your Honor.

2 THE COURT: Yes, sir?

3 MR. HARPER: This motion in limine is regarding the
4 purported ambiguity in the policy that's been asserted by
5 plaintiff as a means to try to get around the plain language of
6 policy, Your Honor. I'll note that the plaintiff's opposition
7 says that we have agreed the policy is ambiguous. I dispute
8 that we've agreed to that, and I don't see anywhere on the
9 record that stated where we have stated that. To us, Your
10 Honor, the policy is clear to protect the safeguards,
11 endorsement, applies and includes coverage per the principles
12 of contract interpretation that are observed in the State of
13 South Carolina. However, Your Honor, even if the policy were
14 to be deemed ambiguous, in other words, if Your Honor were to
15 find the reasonable interpretation which could render coverage
16 purported to the policyholder, by law, the Court has to make
17 that decision, the Court then has to adopt that reasonable
18 interpretation because that is insurance law in the State of
19 South Carolina. There is no jury question about one
20 interpretation. I'd like to walk Your Honor through the policy
21 to help explain the issues that have arisen and the purported
22 ambiguity arguments that have been asserted by the plaintiff.
23 I'll turn you, first, Your Honor, to the protected safeguards
24 endorsement itself. I don't know if Your Honor has a copy of
25 that.

1 THE COURT: Is it one of your exhibits?

2 MR. HARPER: It is an exhibit, it's Exhibit one.

3 It's towards the back of Exhibit one. It was at the bottom of
4 page: Amwins 000092.

5 THE COURT: I don't have a copy of that with this.

6 MR. HARPER: I'd be happy to provide a copy to Your
7 Honor.

8 THE COURT: Yes. If you got one, that would be
9 great.

10 MR. HARPER: Yes, I do.

11 THE COURT: Thank you.

12 MR. HARPER: Your Honor. This is a protective
13 safeguards endorsement that's at issue in this case and we
14 tried to bring this up at summary judgment. Both parties
15 agreed that the contract interpretation with this provision was
16 for the Court at that time. Unfortunately, the summary was not
17 both parties. We tried to give Your Honor a heads up on this,
18 as well, through a status conference a few weeks ago. This is
19 the policy language that's put out in the provision, and as
20 you'll see, Your Honor, the protective safeguards endorsement
21 has a Subsection A. As a condition of this insurance, it
22 applies to this insurance policy, Your Honor. You are required
23 to maintain the protective devices or services listed in the
24 schedule above. Above in the schedule, Your Honor, there are
25 three symbols listed. You'll note that protective safeguards

1 to which this endorsement applies for subsection A again are
2 identified by the following symbols. Your Honor, you'll see
3 that there are actually five symbols available under this
4 protective safeguards endorsement form that could have been
5 included as applicable in the schedule above. Two of these
6 symbols were not included because two of these symbols don't
7 apply to this policy to this insurance to quote the
8 endorsement. The symbols that do apply, ASAA and other, AS,
9 Your Honor, as defined here as an automatic sprinkler system,
10 including the way the supervisor services it. It means any
11 automatic fire protective or extinguishing system including
12 connected sprinklers and discharge nozzles and fittings, et
13 cetera, Your Honor. Your Honor, it's undisputed that this
14 sprinkler system at this property was not connected. It wasn't
15 an automatic sprinkler system in service at this property. The
16 question then is, what locations is this applicable to? Per
17 the schedule, again, as counsel has noted, there were a bunch
18 of properties, I don't think it was 25, but as noted, there
19 were a bunch of properties on this policy, so instead of
20 listing out we're trying to cramp in a bunch of addresses here,
21 as indicated on the scheduled values on file with the company.
22 The scheduled values, Your Honor, that was on file with the
23 company has been provided as Exhibit two.

24 THE COURT: Do you have a bigger version of that?
25 When I printed it out, my eyes are pretty good.

1 MR. DESCHAMPS: Your Honor, I can have it printed out
2 to see it.

3 MR. HARPER: I have no objection to that.

4 THE COURT: I mean, that could help me.

5 MR. HARPER: I'm not sure that's any bigger.

6 THE COURT: Just tell me what it says.

7 MR. HARPER: Sure, Your Honor, it lists all the
8 properties on the policy. No parties disputed this was the
9 schedules value on file with the company.

10 THE COURT: This is 20 -- just looking at numbers it
11 appears to be 23 properties?

12 MR. HARPER: Correct, Your Honor, and 1901 North
13 Kings Highway is on here. It's listed at number 10, I believe.
14 Yes, Your Honor, number 10.

15 THE COURT: Well, I can't see on this exhibit, but is
16 there a column on this that also has what the safeguard
17 endorsements are?

18 MR. HARPER: Yes, Your Honor, it says percent
19 sprinkler Y or N. And for 1901 North Kings Highway it says
20 100 percent sprinkler and a Y is in the column for sprinkler
21 yes or no. There are other properties on here that are listed
22 zero percent, "n" for no. There are five properties listed as
23 sprinkler including the subject property, and Mr. Mark Melvin
24 has testified, this is what this means. He was being
25 underwriter who assembled this policy and was looking at the

1 scheduled values that got submitted to him during the
2 application process. Your Honor, therefore the insurers look
3 at schedule values and says: 100 percent sprinkler system,
4 yes. Sprinkler endorsement applies to this location. I'll
5 note that also on the document protective safeguards
6 endorsement itself that there is a subsection B, which includes
7 an exclusion to the extent coverage is potentially brought into
8 play. We will not pay for loss or damage caused by resulting
9 from fire -- fire that failed to maintain safeguard listed in
10 the schedule above and in which you had control in complete
11 working order. So there are two different parts of this
12 safeguards endorsement. First is a condition proceeding that
13 the insured had to comply with having a sprinkler on a
14 sprinkler system at the property, and that never happened.

15 THE COURT: Answer me this. These documents, Mr.
16 Connell said that his client did not get these documents until,
17 what exactly -- four days after the fire? I guess what I'm
18 trying to ask is, are these documents that are just sent
19 between --

20 MR. HARPER: Your Honor, this is a long-running issue
21 in this case. Let me explain: Mr. Tebele will concede has
22 testified that he didn't receive a physical copy of the policy
23 before the fire. That's his testimony. Mr. Tebele is not the
24 plaintiff in this litigation and this case isn't about whether
25 the policy is enforceable or not. So delivery of this policy

1 which is the last for binding coverage performing an insurance
2 contract, that's not an issue for this Court. The plaintiff
3 has to assume that this policy is in play in order to obtain
4 the coverage they're seeking through this litigation. So Mr.
5 Tebele's disappearing act on the delivery side of things is
6 really quite confound. More so, Your Honor, because Crescent
7 Coast is admittedly the retail agent representing plaintiff,
8 the entity in this transaction, and Crescent Coast admits they
9 received the policy with the protective safeguards endorsement
10 attached to it on February 7th of 2019. The policy that has
11 the applicable language was in their hands prior to fire, and
12 that matters because they were the agent of A. Tebele and Sons
13 a general partnership just as much as a representative upon Mr.
14 Abraham Tebele could be an agent of that entity.

15 THE COURT: But they weren't also a representative of
16 Lloyd's?

17 MR. HARPER: No, Your Honor, they were not. That is
18 a legal determination of agency rendered by plaintiff's expert,
19 Mr. Finkel, and he's basing that on the Sloan case from 1929 in
20 the 1922 civil code that that case cites to, and that statute
21 is no longer in play and that legal determination by Mr. Finkel
22 is erroneous.

23 THE COURT: Well, if they didn't have some kind of
24 agreement in place with Lloyd's how did they receive a
25 commission?

1 MR. HARPER: Their commission agreement would have
2 been, Your Honor, with either the plaintiff or the wholesaler
3 Amwins Broker of the Carolinas that we're dealing with.

4 THE COURT: Alright. Counsel? Yes, sir.

5 MR. DESCHAMPS: Yes, sir, Your Honor. One, this
6 endorsement and exclusion is both -- to me, it's both patently
7 and has a late ambiguity, and the South Carolina Supreme Court
8 they abandoned the extinguishment between patent and latent
9 ambiguities and in determining whether the interpretation of an
10 insurance contract is for a court or a jury. First the Court
11 determines whether there is ambiguity, and if there is the
12 extrinsic evidence on the intent of the parties goes to the
13 jury. As Harbin versus Williams, a Court of Appeals, 2019
14 case, this policy, it has several ambiguities, and I'll try to
15 do this visual thing to see. Number one, the policy has a
16 provision, that's going to be upside down. Okay. So that
17 number 5(a), this insurance also covers additions under
18 constructions, alterations and repairs to the building and
19 structure. The sprinkler system was being installed, it had
20 not been finished, I guess the interior piping was completed.
21 The tap company had tapped in the water but they hadn't
22 connected it to the riser outside. They probably had another
23 month and then the sprinkler company would have to do the
24 testing. So this coverage here purports to insure something
25 that's under construction. Now, let's see. This protective

1 safeguard endorsement --

2 THE COURT: And I've got that in front of me.

3 MR. DESCHAMPS: Okay. And most of your endorsements,
4 for example, this is in front of that protective safeguard
5 endorsement, this is equipment breakdown, and there's other
6 endorsements, as well, that you see, and most of your policy it
7 will say this endorsement modifies the insurance provision
8 provided under the equipment breakdown coverage form or if it
9 applies to the property form it will say the property form, but
10 this safeguard doesn't identify which coverage form it applies
11 to. We'll just leave that there for now. Number three, there
12 is no property identified anywhere on this thing, so I don't
13 know how you know which property you're going to go to. The
14 schedule of values was never given to Mr. Tebele, he did not
15 get it until after he submitted his loss claim and he got
16 through his adjuster or who is going to testify in this case.
17 The actual insurance policy was given to Mr. Tebele by Crescent
18 Coast at the loss scene. That was a joint inspection, I
19 believe the carrier's adjuster was there, as well, handed him
20 the policy, and this schedule of values that they are
21 referencing, I guess the Crescent Coast's rule of a dual agent,
22 one of, I guess, the facts and evidence is that in December of
23 '18, so you had your application that Crescent Coast sent to
24 Mr. Tebele in January 11, 2019, this was December of 2018, the
25 Amwins people sent Crescent Coast the schedule of values to

1 input data and to review it, modify or whatnot, and this is a
2 document that the carriers were relying on to deny coverage, so
3 Crescent Coast by getting that document inputting this data
4 were kind of, you know, adding terms, provisions, that were
5 affecting the policy provisions that would determine coverage.
6 We still don't know who exactly prepared this schedule of
7 values, we don't know who input the 100 percent sprink.
8 notation, we don't know where it came from. So I mean, this
9 thing is ambiguous all over the place, and the jury has got to
10 hear these facts.

11 THE COURT: I'll let you respond.

12 MR. HARPER: Yes, Your Honor, and I appreciate that.
13 I absolutely disagree with the fact that the jury hears this at
14 all. The policy interpretation for an insurance -- the
15 contract interpretation for an insurance policy in the State of
16 South Carolina is for this Court. The Court decides whether
17 it's unambiguous or ambiguous. The Court if it decides it's
18 ambiguous determines the reasonable interpretation -- the
19 multiple reasonable interpretations that could be given to the
20 policy provisions, and then the Court says goes to the insured,
21 I have to construe this in a way that affords coverage if there
22 is a reasonable interpretation that does afford coverage.
23 That's all for the Court to do.

24 MR. HARPER: Well, Harbin v. Williams says the jury
25 determines the intent of the parties.

1 MR. DESCHAMPS: Your Honor, plaintiff himself has
2 cited Chicago that cited the Brooklyn Bridge, and both of these
3 cases state that as a matter of law if there's a reasonable
4 interpretation that creates an ambiguity in the policy in that
5 reasonable interpretation affords coverage for an insured, that
6 is adopted as a matter of law.

7 THE COURT: And I understand what you're saying,
8 however, I don't know what this plaintiff even knew. I mean, I
9 don't know where this information came about that there was a
10 sprinkler that was in this place. I mean, you got three
11 different, however you want to call it, insurance companies,
12 agents of an insurance company, there's three different groups
13 underneath one insurance, and none of them, apparently, went to
14 inspect it to see that there was no sprinkler system in place
15 before binding a \$140,000.00 policy?

16 MR. HARPER: Your Honor, none of the insurers on this
17 policy inspected the property prior to binding the policy.
18 They are entitled under South Carolina law to request an
19 insurance application, which they did. They're entitled to
20 rely upon the determination -- or the information provided by
21 the proposed insured on that insurance application. That's a
22 South Carolina --

23 THE COURT: But on the 2018, or whatever that
24 document was --

25 MR. HARPER: The application signed by plaintiff was

1 January 14, 2019, the day before the policy was bound.

2 THE COURT: But the 2018 one specifically says:
3 Sprinkler system under construction.

4 MR. DESCHAMPS: Your Honor, that's where that October
5 of 2018 report comes, when it becomes relevant, because
6 that's -- it noted that the property was sprinklered.

7 THE COURT: Right.

8 MR. DESCHAMPS: And that's about the only place I
9 think that it would have come from.

10 MR. HARPER: Your Honor, again, my clients did not
11 have that reported. That report was not considered in binding
12 this policy. Even if it were, Your Honor, it's only consistent
13 with the testimony that's come from plaintiff itself, which it
14 said, we had a sprinkler system being installed at the property
15 and the plaintiff had said, we thought it was going to be in
16 operation by the time the policy was bound so that's why we
17 didn't worry about it. That's not on my client, and getting
18 back to the question of contract interpretation --

19 THE COURT: Answer my question on this then. As far
20 as the ambiguity that has been stated by plaintiff's counsel in
21 regards to, I don't know if that was the front page of the
22 policy, number five that said it was under construction.

23 MR. DESCHAMPS: It was on page eight. Well, where it
24 defines covered property.

25 MR. HARPER: Can we talk about ambiguity for this,

1 Your Honor? I will walk you through it and you will see that
2 it's not unambiguous at all.

3 THE COURT: Okay.

4 MR. HARPER: If I could turn Your Honor to our
5 Exhibit one.

6 THE COURT: Is this the protective safeguards?

7 MR. HARPER: No excerpted portion of the property.
8 If you'll turn to Amwins 30.

9 THE COURT: Under which motion, I'm still trying to
10 find out which portion.

11 MR. HARPER: We're still under the sixth motion in
12 limine. It's attached to the motion memo, memo. Permission to
13 approach, I can hand it to you.

14 THE COURT: Let me check to see if I have it here.

15 MR. HARPER: It's the same place where you got the --
16 earlier in that same exhibit, a few pages before.

17 THE COURT: Property damage coverage.

18 MR. HARPER: Yes, sir.

19 THE COURT: Okay. Go ahead.

20 MR. HARPER: This, Your Honor, is the main coverage
21 form for the property portion of this policy. This is the
22 beginning of, if you'll note at the bottom of this page eight
23 of 40, but prior to that you've got some declarations pages and
24 some other verbiage. This is the real kick off what we call in
25 the industry the insuring agreement for the property portion.

1 This is how you get coverage for your building. If you'll
2 note, Your Honor, what the plaintiff didn't discuss was the
3 coverage provision, A, coverage: We will pay for direct
4 physical loss of or damage to covered property at insured
5 location caused by resulting from any covered cause of loss.
6 Your Honor will note there are some capitalized terms there,
7 covered property and covered cause of loss. You have to have
8 both of those conditions. You have to meet all conditions in
9 the policy first and you have to then have covered property
10 that sustains direct physical loss or damage by covered cause
11 of loss. Again, the protective safeguards endorsement had a
12 condition and it had an exclusion. The condition wasn't met.
13 The exclusion to the extent of the condition can't conceivably
14 have been deemed to have been met without the sprinkler system
15 connected at the property. Exclusion converts the lack of a
16 sprinkler system into an excluded cause of loss, not a covered
17 cause of loss. Plaintiff on day one of this policy incepting
18 had covered property at this location. The building, it was
19 covered property. We don't dispute that the building, the
20 sprinkler system that was being put in the building, we don't
21 dispute that was covered property, but covered property in and
22 of it itself doesn't allow the plaintiff or an insured to make
23 a claim and request coverage under the policy. If that were
24 the case, Your Honor, and it's the argument they're advancing,
25 if that were the case, on day on of the policy, no fire,

1 nothing, nothing wrong with the building, insurers, please
2 tender to me my 2.5 million dollars for this building because I
3 have covered property, that's not how the insurance works, Your
4 Honor. You have to have covered property that sustained direct
5 physical loss by a covered cause of loss and you have to have
6 met conditions in the policy. For example, Your Honor, there's
7 a section in this.

8 THE COURT: Where does it say that on eight?

9 MR. HARPER: Say what?

10 THE COURT: You said conditions. It's only a covered
11 cause of loss if it meets certain conditions.

12 MR. HARPER: Right, Your Honor.

13 THE COURT: Where does it say that?

14 MR. HARPER: But my point is it says here, you have
15 to have covered property -- because of cause of loss, but that
16 language itself doesn't say disregarding any conditions that
17 are in the policy, it doesn't say that.

18 THE COURT: Wouldn't you consider that ambiguity in
19 itself?

20 MR. HARPER: No, Your Honor. There are conditions in
21 this policy, for example, clear as day, you can't commit fraud.

22 THE COURT: Well, I haven't heard anything about
23 committing fraud.

24 MR. HARPER: I agree, Your Honor, but you have heard
25 about a sprinkler system not being connected. My point is, to

1 the extent that you have a sprinkler system that's -- as a
2 condition of this insurance you have to have a sprinkler system
3 connected to this property, what reasonable interpretation can
4 we give to that condition --

5 THE COURT: The only factual basis I've seen, period,
6 is that there was a document that specifically said it was
7 under construction.

8 MR. HARPER: Agreed, Your Honor, but the sprinkler
9 system was being installed at the property, so again, that
10 becomes, that means it's covered property. The sprinkler
11 itself, the building itself, we don't dispute that it was
12 covered property. That term doesn't mean you get coverage, I'm
13 going to pay you a claim. As I said for Your Honor, if I were
14 to convert this meaning of the policy as the reasonable
15 interpretation, we would agree on the situation where now under
16 this policy all the covered property, all 23 properties are
17 covered property because they're listed here. You'll see, Your
18 Honor, covered property means as use in this policy means the
19 type of property described in section A-1, in A-2, property not
20 covered, so we have two different distinctions here, property
21 covered, property not covered, and the covered property --

22 THE COURT: Do you have A-2?

23 MR. HARPER: It's right here, Your Honor.

24 MR. WATSON: It's on the next page.

25 MR. HARPER: A-1 and A-2, on the next page.

1 THE COURT: I don't have the next page, is what I'm
2 saying.

3 MR. WATSON: May I approach?

4 THE COURT: Yes. I don't know if when it was filed
5 one of you filed the first page.

6 MR. HARPER: Again, Your Honor, the only purpose of
7 this section of the policy is to define specifically the type
8 of physical things that are receiving consideration for
9 coverage under this policy. Beyond that, they have to then
10 compliance with the conditions of the policy, and this section
11 doesn't say once you get the covered property disregard
12 conditions, you can commit fraud and you can not notify the
13 police if you need to, you can not have a sprinkler system in
14 place even though it says somewhere else in the policy. It
15 doesn't say any of that, it just says what is covered and what
16 is not covered property. What are we insuring, what is the
17 actual thing that is the subject of this insurance. From that
18 there are other parts of the policy that come to play before a
19 covered claim exists. Again, you have to have met the
20 conditions and you have to have a direct physical loss or
21 damage resulting from a covered cause of loss. There is no
22 ambiguity in this statement that the additions would be covered
23 property. Stated a different way, Your Honor, there are
24 properties on the schedule of values that, again, weren't noted
25 to be sprinkled, and so the protective safeguards endorsement

1 wouldn't apply to those properties that weren't 100 percent
2 sprinklered that were represented to be 0 percent sprinklered.
3 If a hurricane comes through and destroys a building that was 0
4 percent sprinklered the condition from the protective
5 safeguards endorsement does not apply to preclude coverage.
6 The sprinkler system itself, assuming that the sprinkler system
7 or some other additional repairs are being made to that
8 property, would still be included in the property covered
9 section of this policy, so what this provision does, it says
10 you insure it even though you are making this addition if
11 something new that wasn't maybe, you know, at the time of the
12 initial inception of the policy wasn't something that was in
13 place, it's something that would still be
14 receiving consideration as something within the scope of
15 potential coverage to the extent the conditions of the policy
16 are met and to the extent the damages from a direct physical
17 loss resulting from a covered cause of loss, supposedly a
18 excluded cause of loss.

19 THE COURT: I'll let you respond.

20 MR. DESCHAMPS: Just real quickly, Your Honor, number
21 one, the construction provision on this page eight, the
22 applying the safeguard and the way the carrier wants to
23 interpret it, it just creates an internal inconsistency in the
24 policy. Think about it, one of the reasons why interpretations
25 when you construe this whole policy together, is it makes

1 sense. You look at the safeguard and it says, maintain, the
2 word, maintain. Well, maintain means to keep an existing
3 state. So if you have an existing sprinkler system then you
4 have to maintain it. If you're building a new one -- I mean,
5 if you maintain it that means you got to keep the status quo
6 and that doesn't make sense. This thing was ambiguous all over
7 the place.

8 MR. HARPER: Your Honor, regarding that last
9 statement, from my client's position, all we knew was that the
10 property was 100 percent sprinklered. As per the January 14,
11 2019 application of the insured and scheduled value submitted
12 with the insured's application.

13 MR. DESCHAMPS: The schedule of values was done in
14 December of 2018 and never given to Mr. Tebele. The
15 application was submitted after that, so we don't know where
16 the 100 percent and the scheduled values came from.

17 MR. HARPER: Again, to address the schedule of value
18 and the policy delivery issues, Your Honor, Crescent Coast has
19 testified that they have the policy. Crescent Coast is the
20 agent of the insured.

21 MR. DESCHAMPS: Going back to South Carolina
22 Insurance versus Price, a condition or limitational coverage
23 that the insurer has never -- has no knowledge of, has never
24 been made aware of, does not apply to that insurer.

25 MR. HARPER: And, again, Your Honor, the insured here

1 is not Mr. Abraham Tebele, it's the partnership, the
2 partnership's agent, Crescent Coast, had this information.

3 THE COURT: Well, his partnership have it?

4 MR. HARPER: His partnership's agent is Crescent
5 Coast.

6 THE COURT: I'm asking you if his partnership had it.

7 MR. HARPER: Through their agent, Crescent Coast.
8 The way this insurance works, Your Honor, is the market has
9 their general agent, Amwins Special Risk Underwriters, who has
10 binding authority on their behalf. A wholesaler approaches
11 them, and in this case it was Amwins Brokerage of the
12 Carolinas, it could have been any other wholesaler who works
13 with Amwins Special Risk Underwriters, and Amwins Special Risk
14 Underwriters, according to testimony of Mark Melvin, all they
15 do is they receive applications from these wholesalers that
16 aggregate these high coastal properties for their type of risk
17 for the market that they play in, and once the insurance
18 application received, they can consider whether they would be
19 willing to receive a rate risk and put a premium on it or not,
20 they transfer that information to the wholesaler, the
21 wholesaler then gives that back to the retail agent who is
22 representing the insured. The retail agent in this case is
23 Crescent Coast. They are the agent of the insured. Our
24 clients never had any direct contact with Mr. Abraham Tebele or
25 any other representatives of the partnership other than

1 Crescent Coast, and that was through the wholesaler Amwins
2 Brokerage of Carolina.

3 THE COURT: So you're saying the application said
4 that it was 100 percent sprinklered?

5 MR. HARPER: Yes, Your Honor, signed January 14, 2019
6 by Abraham Tebele on behalf of the partnership.

7 MR. DESCHAMPS: The application, also, on the first
8 page, top right-hand corner says Amwins Access was the
9 underwriter, and that is the general agent that's listed on his
10 premium finance agreement.

11 MR. HARPER: I'm not sure Your Honor what that has to
12 do with anything here, and again, that application wasn't
13 prepared by my clients, the application was prepared by
14 Crescent Coast and/or plaintiff and submitted to my clients.

15 MR. DESCHAMPS: Well, the document that the carrier
16 relies on to exclude coverage was the schedule of values which
17 was prepared before A. Tebele and Sons ever even had the
18 application to even look at.

19 MR. HARPER: That, Your Honor, is not reflected of
20 the record because per the record, per the testimony of the
21 plaintiff, the application was initially prepared back in
22 August of 2018. We have a copy from the August of 2018 that
23 said 100 percent sprinklered back then. That is isn't the
24 application that got signed by Mr. Tebele and submitted at that
25 time. It was signed later, January 14, 2019. At that time, as

1 of that date, Mr. Tebele representing on behalf of the
2 plaintiff, A. Tebele and Sons saying, this property is 100
3 percent sprinklered. The schedule of value that's been
4 timeline of his preparation, I don't see how it's relevant at
5 all since the schedule of values is only consistent with the
6 information that was in the application, so our underwriter,
7 Mark Melvin Amwins Special Risk Underwriters receives an
8 application dated January 14, 2019 that says it's 100 percent
9 sprinklered with the submission of the schedule of values.
10 Another one is prepared that says 100 percent sprinklered, it's
11 the same information. Based on that submission, the issues of
12 policy referring to the schedule of values as indicative of
13 where the locations are and where this protective safeguard
14 endorsement applies. At the end of the day, Your Honor, this
15 Court has to decide, is this language clear and unambiguous, or
16 is there a reasonable interpretation of all the language at
17 play here that can afford coverage to the insured.

18 THE COURT: But I also have to make a finding, again,
19 of whether or not he's even seen the language of this.

20 MR. HARPER: Your Honor, I don't see how it's --

21 THE COURT: I know that's your argument, but it's not
22 their argument.

23 MR. HARPER: Your Honor, under the law, his argument
24 that the individual, Mr. Abraham Tebele didn't see this policy,
25 has not to do with the contract interpretation. That's stuff

1 would have to do with whether the contract was enforceable or
2 not. They have to have the contract enforced to be able to
3 cover under the contract. How can they say the contract wasn't
4 delivered, which is the last step required to make the contract
5 enforceable, but we want coverage under it?

6 THE COURT: They can definitely say that if they pay
7 money and they think they had insurance and they want to make a
8 claim on that insurance. I mean, what you're saying is, well,
9 you can't have it both ways. You can't say that, well, you
10 didn't get a copy of it so now you don't have insurance when
11 they've been told they had insurance on the property, is that
12 your argument?

13 MR. HARPER: My argument, Your Honor, is first, they
14 indisputably have the policy. Mr. Abraham Tebele did not and
15 does not need a copy of this policy under South Carolina law
16 for this policy to be enforced. Delivery of the policy was
17 accomplished by giving copies of the policy to Crescent Coast,
18 the retail agent of the plaintiff hired --

19 THE COURT: We're going to agree to disagree on that,
20 and as far as the ambiguity, I find that there is ambiguity in
21 the contract.

22 MR. HARPER: What is the ambiguity, Your Honor, if I
23 may?

24 THE COURT: Well, for one, the construction clause,
25 and again, I'm not convinced that just by sending it to

1 Crescent Coast that it is all the sudden, they're in some was
2 in a partnership with this person as commercial assets, I don't
3 find that.

4 MR. HARPER: So Your Honor, to clarify the ruling
5 then, you're ruling that the coverage doesn't hold coverage for
6 this loss?

7 THE COURT: I'm sorry, say that again?

8 MR. HARPER: Your ruling that the policy doesn't hold
9 coverage for this loss?

10 THE COURT: I'm saying that the contract is ambiguous
11 in its terms.

12 MR. HARPER: Your Honor, under the law, insurance
13 law, the area, if you find there's an interpretation that
14 renders the coverage afforded to the insured, we have to adopt
15 that interpretation --

16 THE COURT: Well, none of the -- if it's a latent
17 ambiguity or not, it could still go to the jury as to what the
18 damages may be.

19 MR. HARPER: In their brief, Your Honor, the
20 plaintiff cited to the correct case law on what happens with
21 this issue. It's on page two of their opposition. It is well
22 settled, and I'm reading the citation from the copy: it is well
23 settled that the terms of an insurance policy should be
24 construed most liberally in favor of the insured and that in
25 the case of a conflict or ambiguity, a construction will not be

1 adopted that defeats recovery if the policy is reasonably
2 susceptible of a meaning that would prevent recovery. It's
3 also in Brooklyn Bridge, turning over to the next page, page
4 three. On the top of page three of their brief: Where an
5 internal inconsistency in that insurance policy renders it
6 ambiguous and the policy is susceptible of more than one
7 reasonable interpretation, one of which provides coverage must
8 be found as a matter of law.

9 THE COURT: Well, and what is your thoughts as far as
10 whether or not there are multiple determinations of how that
11 could come out? I mean, if a jury finds that --

12 MR. HARPER: Your Honor, the jury doesn't find the
13 contract interpretations.

14 THE COURT: I understand what you're saying, but what
15 I'm asking you is in regards to the ambiguities there, I mean,
16 what they've also got in their plain language here, it says:
17 Insurance policy, where is that --

18 MR. DESCHAMPS: I think the first page I cite Harbin
19 v. Williams.

20 THE COURT: Harbin v. Williams is the case that I'm
21 referring to.

22 MR. HARPER: Harbin v. Williams, Your Honor, is an
23 advocate, it does cite to a Supreme Court case that wasn't
24 insurance field. I'll note the quote itself for Harbin is less
25 than a glowing endorsement of this approach. It says that the

1 Supreme Court has seemingly discarded distinction between
2 blatant and patent ambiguities, less than convinced, it seems.
3 The Supreme Court case that they are citing to, Williams versus
4 GEICO is the Supreme Court case relevant to the insurance
5 industry. I'll admit, Your Honor, there is a stray citation in
6 that case about ambiguities in the general contest of general
7 contract law that says these issues can be presented to the
8 jury. That didn't have any bearing, though, on the actual
9 ruling of the Williams verses GEICO case which was an insurance
10 case, why? Because the Court in that case said, this case,
11 this contract presents a question that is unambiguous. As a
12 matter of law this Court finds that the interpretation is this.
13 In other words, Your Honor, the case, Williams versus GEICO,
14 the portion of that case that is relied upon and less than
15 convinced in Harbin v. Williams is dicta. We have these other
16 cases and insurance law is clear is there is a reasonable
17 interpretation that Your Honor finds affords coverage, it goes
18 to the insured. The insured is deemed to have coverage under
19 the policy and that interpretation stands. That, of course,
20 would require the Court to determine or state the reasonable
21 interpretations that you are finding that generate in the
22 Court's mind ambiguity under the policy. I'm reading over the
23 Harbin case and it's pretty clear that it says there's an
24 ambiguity that deals with a question of fact, that the trial
25 Court is to submit that ambiguity to the jury. In this, I

1 think that the ambiguity could certainly be a question of fact.
2 I mean, you have, and I don't know if it's the application of
3 the contract or if it's the actual contract, one would be a
4 latent ambiguity and one would be a patent ambiguity, but in
5 that regards we don't know who provided the factual basis for
6 the binding of this document, and that in itself gives me a
7 little bit of pause. I mean, I know you're saying that he was
8 the one who signed it, I haven't heard him testify to that, and
9 I don't know if he said that in his deposition or not. You did
10 say that he provided one in August that he would not sign, or
11 somebody provided to him.
12 Via discovery, Your Honor, for purposes of the contract
13 interpretation several concerns with the policy, the policy,
14 and the documents incorporating of scheduled values, and to the
15 extent Your Honor finds the policy ambiguous, there's an
16 interpretation that could render coverage affordable under the
17 policy and we would just request the ruling then that Your
18 Honor is stating what is the reasonable interpretation so that
19 we can understand that moving forward.

20 THE COURT: Well, I think that it's reasonably
21 interpreted that, I mean, if it says right here: If not
22 covered by their insurance additions under
23 construction alterations and repairs to the building or
24 structure. I understand that you keep pointing out the A-2,
25 but I don't see anything in A-2 that specifically bars it.

1 MR. HARPER: No, Your Honor, the point of A-2 is to
2 say what property is not covered.

3 THE COURT: Correct.

4 MR. HARPER: It's not the point to say whether
5 coverage applies or not. This covered property section doesn't
6 say plaintiff. Again, I refer you back up to A, the major A
7 that's on this policy. You have to have covered property that
8 sustains direct physical loss by a covered cause of loss.

9 THE COURT: So again, would fire not be a covered
10 cause of loss?
11 No, because excluded by the protective safeguards and an
12 exclusion, it becomes an excluded cause of loss. Again, the
13 condition also in the protective safeguard endorsement applies.
14 The conditions not get aggregated by the definition of covered
15 property.

16 THE COURT: So what would that cover under then?

17 MR. HARPER: Your Honor, this would be covered
18 property.

19 THE COURT: No, I'm saying, additions under
20 construction, alterations and repairs to building construction.
21 When would that ever be, I mean, if you were?

22 MR. HARPER: Again, Your Honor, the example I gave
23 earlier. For example, let's forget the safeguards endorsement
24 for a moment. Hypothetically, Mr. Tebele's partnership, the A.
25 Tebele and Sons partnership has property zero percent

1 sprinklered. It would not be an issue of if this building was
2 damaged by a hurricane and repairs being made, we wouldn't get
3 it done and say, oh, it's not covered property because these
4 repairs are new additions that weren't on the building at the
5 time of the risk incepting.

6 THE COURT: What if they just wanted to update?

7 MR. HARPER: Agreed. They're doing an update, it's
8 covered property. We're not disputing that, Your Honor.

9 MR. WATSON: May I try to assist the Court, Your
10 Honor? I think we're getting bogged down in some of this
11 that's off the portion of marks. This portion of policy that
12 Mr. Harper keeps bringing us back to, covered property, capital
13 C, capital D, all that is defining is which property is being
14 insured. What property is the subject of this insurance. We
15 your, A, building, we insure your, one, completed additions,
16 all the way down to five, if you're doing construction on your
17 property, we insure that, it is capable of being insured, we
18 are undertaking that risk. In order for it to then be actually
19 a covered event there had to have been direct physical loss to
20 those items by a covered cause of loss. It's multiple steps.
21 Just because -- everyone -- it isn't undisputed that repair
22 work that's going on in the building at the time of the loss
23 that's otherwise covered, the repair work is part of that
24 covered property, covered damage, it's what we agreed to
25 insure, but that doesn't change the other parts of the policy

1 that still have to apply to be able to be indemnified to be
2 reimbursed for the damage. All this section does is to define
3 what the insurers are intending to insure. It's your building
4 and if you're fixing up your building, this policy can cover
5 that, it can cover business personal property, it can cover
6 fixtures, and equipment. That's what we can insure. And then
7 in the next page they say all these things that we are not
8 contemplating insuring, like, animals and contraband and the
9 land it sits on, but that's just one section of this policy.
10 That tells you what we are insuring. Then you have to go on to
11 the next part, which is what causes of loss do we insure these
12 things for? Fire is a covered cause of loss, except here
13 because they did not comply with the protective safeguard
14 endorsement, this quote, unquote, capital C, capital D, covered
15 property, the claim for that covered property is not
16 reimbursable because you didn't have what you were supposed to
17 have in terms of the sprinkler system, so I think because the
18 word says "covered property" it's throwing things off in the
19 reading, but this is simply to define the scope of what the
20 policy's intending to insure, not making a determination on a
21 claim.

22 MR. DESCHAMPS: Your Honor, the sprinkler system, my
23 client A. Tebele and Sons spend \$200-some thousand dollars to
24 update and add a sprinkler system, I don't see how building a
25 sprinkler is not an addition to a building.

1 MR. WATSON: If the fire was allowed to be covered
2 and the sprinkler system that was partially finished burns up,
3 the insurance pays for that, that's the point, it's considered
4 part of the building and it's part of what we insured, the
5 problem isn't that, the problem is, you were supposed to have a
6 sprinkler system to prevent the fire from happening in the
7 first place that you told us you had, and you didn't. That's
8 why there is no covered event, no covered cause of loss.
9 Nobody denied the claim saying, your repair under construction
10 sprinkler system is not, Capital C, Capital D, covered
11 property. We'll stipulate that it's Capital C, Capital D,
12 covered property, that's not the issue in this case, but what
13 happened is Mr. Finkel and his expert opinion tried to say,
14 take that provision and wipe out an endorsement that was
15 requested saying you have to have a sprinkler system, and
16 that's an interpretation of the policy that the Court can do.

17 MR. CONNELL: Your Honor, the problem is is there's
18 an internal inconsistency between the construction part of the
19 policy, as you've already figured out, and the sprinkler
20 endorsement, and so that -- I mean, they can't take it away in
21 one hand and give it in another. I mean, that is clearly an
22 ambiguity for the jury to hear about, and we ought to be
23 allowed to offer extrinsic under Harbin to do that, and Your
24 Honor is going to hear about that from the Amwins Brokers,
25 from, I suspect, Crescent Coast, and from the plaintiff that,

1 as you have already heard, paid \$140-some thousand dollars for
2 a policy that gave him nothing, nothing.

3 THE COURT: Anything else?

4 MR. WATSON: The point of this motion is to draw to
5 the attention something that was the subject of cross motions
6 for summary judgment where the parties stipulated in front of
7 Judge DeBerry that the determination of the ambiguity is a
8 legal question policy interpretation for the Court.
9 Unfortunately, the Court did not make the determination,
10 despite both sides agreeing that it should. Unfortunately, and
11 we're now here on the eve of trial, and we're apparently going
12 to be potentially sending this issue of policy interpretation,
13 whether something is ambiguous or not, that's the Court's job,
14 to this jury, and if we're going to do it, we're going to do
15 it, but I would like the record to be clear on what the ruling
16 is as to this motion in limine so we know sort of the state of
17 play in terms of what is can going to be presented to the jury,
18 what is not going to be presented to the jury in terms of these
19 issues, because I haven't really heard plaintiff's counsel
20 spell out one, two, three, here's -- ambiguity number one is
21 this term, this term is ambiguous. Then the Court can just
22 say, I find that it is ambiguous, or I find that it is not
23 ambiguous. They'd rather just say -- have you spill through
24 pages and say, it's all internally inconsistent, I can't figure
25 it out. They have to actually identify what these ambiguities

1 are so the Court can make a ruling on whether it is or is not.
2 I don't find a single place in their opposition memo where they
3 actually spell out what the ambiguity is. You can't just say
4 the whole policy is ambiguous, you have to actually identify,
5 here's the term or here's the section, or here's the provision
6 that we're talking about.

7 MR. DESCHAMPS: Your Honor, I thought I did point
8 that out. I mean, earlier I went through it, number one, the
9 protective safeguard doesn't identify the property it applies
10 to, it doesn't have this endorsement modified as equipment
11 breakdown coverage or the property coverage form. The schedule
12 of values was attached to policy and never given to the
13 plaintiff and there's no symbols of the schedule of values.
14 There's a number of ambiguities on the construction provision
15 on page eight of the policy. I mean, I think there's latent
16 and patent ambiguities all over the thing.

17 THE COURT: Well, and like I previous stated when I
18 went to print this out, I don't know if just the first page got
19 filed, or what, but I didn't have the whole policy. So what
20 I'm going to do on this, because I just now do have the whole
21 policy, I'm going to read through it. I'm going to withhold
22 the ruling on this until the morning and have a chance to take
23 a look at everything as well as some of the cases that you all
24 cited.

25 MR. RISER: Your Honor?

1 THE COURT: Yes?

2 MR. RISER: If I could?

3 THE COURT: Yes.

4 MR. RISER: Caleb Riser from Crescent Coast
5 Insurance.

6 THE COURT: Yes.

7 MR. RISER: This is not my motion. Whether or not
8 there is ambiguity in the policy is not the purview of Crescent
9 Coast. Crescent Coast doesn't write policies, they don't
10 interpret them, they don't make coverage decisions. I will
11 say, though, if in your review, if the Court determines that
12 there is an ambiguity of the policy, that before its coverage
13 Crescent Coast insurance would then have no claims against it
14 because the claims of breaching fiduciary duty and negligence
15 against Crescent Coast Insurance are pled in the alternative,
16 so in effect, the plaintiff has pled breach of contract for not
17 paying the loss, and/or bad faith in not paying the loss, and
18 then their alternative claims are negligence and breach of
19 fiduciary duties against Crescent Coast insurance, if there is
20 no policy, and so I just want the Court to that into
21 consideration when you're reviewing the policy, and also, that
22 also affects the additional motions that Crescent Coast has for
23 you today.

24 THE COURT: Alright. Let's go onto defendant's
25 motion seven.

1 THE COURT: Alright. Mr. DesChamps, I just got your
2 memorandum. I'm going to take it under advisement, as well,
3 and read these two cases, just so I can get a better
4 understanding.

5 MR. DESCHAMPS: Yes, sir, I apologize for filing that
6 last night.

7 THE COURT: That's alright.

8 MR. DESCHAMPS: I'm glad my wife's back is all I got
9 to say, but I hanged in tough, I didn't complain until she got
10 back.

11 THE COURT: I understand. That takes us to your
12 motion for summary judgment; is that correct?

13 MR. ADAMS: Yes, Your Honor, Hunter Adams here on
14 behalf of Crescent Coast.

15 THE COURT: Yes, sir.

16 MR. ADAMS: I know this has been a long day, so I'll
17 try to be brief. Really the reason why we filed this motion
18 was to clarify exactly what duties were my client under during
19 the facts of this litigation, and Mr. Riser informed the court
20 earlier, we're sued in the alternative, meaning, if the
21 insurers win and successfully disclaim coverage, then the cause
22 of action against us is triggered and essentially what they're
23 suing for is failure to procure a policy, and throughout this
24 motions argument there's been a lot of facts going back and
25 forth about who knew what, when, what do the provisions mean,

1 but ultimately, Your Honor, what I think is important for this
2 Court to know is under South Carolina law, the duty of an
3 insurance agent, there is limitations. It's not a cart
4 blanche, if you go to an insurance agent and ask for a policy
5 then if the policy for some reason is disclaimed and the
6 agent's liable. There's a case that I think is on point, Your
7 Honor, that's Trotter versus State Farm mutual auto insurance
8 which is 297 S.C. 465, 377 S.C. 2d 343 and Trotter, which was
9 authored by Judge Bell, I know you all were talking about him
10 earlier, it's fairly similar here in which the insured went to
11 an insurance agent and he wanted -- he owned a business and
12 there was a company truck, and he said, I want full coverage
13 for my truck, much in the way that Mr. Tebele may testify and
14 say he went to Crescent Coast and said, I would like building
15 insurance for my properties, and in obtaining that coverage the
16 agent never made any undertaking or agreement to advise him.
17 They received the policy. He never disclaimed an exclusion in
18 the policy to the insured, and in this case an employee
19 liability exclusion, and ultimately, the insured was driving
20 with an employee, the employee was injured, sued the insured
21 and the carrier denied coverage due to the employee exclusion,
22 and it's important because the Trial Court was reversed because
23 Judge Bell writing for the Court said, an insurance agent in
24 South Carolina has no duty to advise an insured absent an
25 explicit or an implied undertaking, and Your Honor, I think the

1 facts here are clear that there was never an undertaking by
2 Crescent Coast, either explicitly or implicitly to advise Mr.
3 Tebele of what a protective safeguard endorsement is, about
4 whether it does or does not exist, and about whether the
5 application should be indicated as 100 percent sprinklered or
6 not, and I know there is a big factual dispute about where this
7 100 percent came from. Well, I can tell you, Your Honor, based
8 on the allegations in the Complaint and discovery conducted
9 today, I don't think there could be really any good faith
10 argument that Crescent Coast fraudulently put it in there
11 without any information or info from Mr. Tebele, that number
12 came from him. Now, that begs the question, okay, well, what
13 should Crescent Coast have done? Well, again, there's no duty
14 to advise. What our job is as an insurance agent is to take
15 the information supplied by a perspective insured and transmit
16 it to, in this case an Amwins underwriting entity to try to
17 obtain the policy. It's not our job to advise them, it's not
18 our job to explain policy terms, it's not our job to tell them
19 one way or another what the application should have contained,
20 rather, it's to transmit the information, that was done. Now,
21 Trotter looks at, okay, well, what factors do you examine to
22 see whether there was an implied undertaking, and the factors
23 there are whether the agent received consideration beyond
24 payment of a premium. That did not happen here, that's
25 undisputed. In fact, Mr. Egan, forewent the premium on the CTL

1 policy and excess umbrella policy, so if anything they received
2 less compensation. Another factor is whether there was an
3 explicit request for advice. Again, I don't think there is any
4 testimony or evidence that will be offered or has been offered
5 that Mr. Tebele explicitly asked him for advice on this
6 provision. Finally, whether a reasonable insurance agent in
7 that position would have thought there would have been a duty
8 to advise, and that's based on the relationship between the
9 parties. The relationship between Crescent Coast and Mr.
10 Tebele existed for barely over a year. There was absolutely no
11 extended relationship between the two parties. So under that,
12 Your Honor, for the basic negligence cause of action, when you
13 look at the clearly established South Carolina law, the
14 evidence that's been generated, there's not disputing material
15 fact that the duty that was imposed upon Crescent Coast was not
16 reached.

17 The second cause of action they have brought is
18 breach of fiduciary duty, which is even a higher standard than
19 negligence, and Your Honor, there's a case on point that
20 actually looks at whether an insurance agent is a fiduciary of
21 perspective insured, and that case says, it's Steele versus
22 Victory Savings Bank, 295 S.C. 290 368 S.C. 2d 91, and there it
23 says: An applicant for an insurance policy does not stand in a
24 fiduciary relationship with an insured that incite to the
25 Supreme Court says in you Wren (phonetic) versus Fidelity

1 Casualty of New York, and this is the Court's language here,
2 finding no relationship of trust or confidence existed between
3 the insurance applicant and the insurance agent, so I think
4 it's pretty clear that Mr. Tebele is going to have to make a
5 special showing much like the negligence action that we
6 undertook to have some sort of special relationship beyond
7 that, which was what the evidence actually is, a conduit of
8 information to assist him in obtaining a policy.

9 Finally, Your Honor, we move to, for summary
10 judgment, as punitive damages, this Court knows you need clear
11 and convincing evidence of at least grossly negligent conduct.
12 I don't think there's any dispute of fact that we're not
13 negligent, let alone grossly negligent, so I'm happy to answer
14 any questions, but those are the grounds we seek summary
15 judgment for.

16 THE COURT: Counsel?

17 MR. DESCHAMPS: Yes, sir, Your Honor, real quick, and
18 I think I kind of got into somewhat of this argument last time.
19 My memo addresses it, and I did hand an opinion up to you.
20 It's a district court case from 2017, Smith versus Universal
21 Property Casualty Insurance Company. Now, what we have, real
22 simple just going off the document, the undisputed document
23 evidence, I'll attach those as exhibits. If you take a look at
24 Exhibit two, those are the text messages starting in 2017 when
25 Mr. Sullivan at Crescent Coast soliciting Mr. Tebele come, you

1 know, let's talk about getting you some insurance, insurance on
2 your property. Then you look and go back to, go down and turn
3 over to, you have your exhibit five, and that is Mr. Egan. His
4 e-mail correspondence with the underwriters in December with a
5 schedule of values attached, and what you see there is, this
6 schedule of values was sent to Mr. Egan, it had that hundred
7 percent notation and asked Mr. Egan to input data, which this
8 is the document the carrier would later use as the basis to
9 exclude coverage. Mr. Tebele was never informed about this
10 document, never given to him, he didn't get it until he got it
11 through his public adjuster post laws after he filed his loss
12 claim. That in and of itself is just taking an insurance
13 application and submitting it. Then you'll see in exhibit four
14 is Mr. Egan's e-mail in the attached premium finance agreement,
15 again, with Amwins Access, and then I put his deposition
16 excerpts as Exhibit one, but those alone show that we have more
17 than just the taking of an application and submitting it.

18 THE COURT: What is UW? It says, I'm going to send
19 you the direct e-mail with UW but number broke down, I can
20 email it separate.

21 MR. DESCHAMPS: UW? Underwriter, I assume.

22 THE COURT: Okay. Got you.

23 MR. DESCHAMPS: I just think those exhibits alone
24 show that we have something a little more than just your
25 standard processing of an application.

1 THE COURT: Yes, sir?

2 MR. ADAMS: Briefly in response, Your Honor. The
3 evidence submitted and referred to by Mr. Tebele's counsel is
4 consistent with a standard commercial insurance application
5 procedure. You're going to have communications between an
6 agent and a repetitive insured. That doesn't impose an
7 additional duty beyond what we discussed in the chart. You're
8 going to have a schedule of values that's created again, that
9 doesn't create an additional duty. Okay? The duty is to
10 assist the insured with completing the application. That
11 happened. The application signed by Mr. Tebele indicated the
12 property was 100 percent sprinklered, and again, they cited to
13 no case law for factual basis to insinuate why Mr. Egan or
14 anyone else from Crescent Coast had an affirmative duty to try
15 to correct that.

16 MR. DESCHAMPS: Because they sent him the application
17 with the 100 percent mark that he never seen after they knew
18 the sprinkler was operational, that's in exhibit five that he
19 got correspondence to Whitney Northcutt, then they sent him the
20 application on January 15th --

21 MR. ADAMS: Your Honor --

22 MR. DESCHAMPS: -- they took the premium, they got
23 the commission and sent it off to the underwriter.

24 MR. ADAMS: They signed it. Unless he wants to tell
25 the jury that he didn't --

1 MR. DESCHAMPS: He signed it but it was given to
2 him -- He didn't prepare the application, it was prepared by
3 someone who knew that things aren't operational and they sent
4 it to him, and Mr. Egan's text messages are in there in Exhibit
5 3 and it says, all you got to do is Docusign them.

6 MR. ADAMS: Again, Your Honor, I don't see how that
7 creates any liability under the line of cases in the case law.

8 THE COURT: The other issue is is whether or not he
9 was supposed to be there as far as whether or not that was
10 supposed to be checked, and there is an e-mail here between
11 David Egan and Hollan Delany, Amwins broker to the Carolinas
12 where they are having trouble editing it, I'm sorry, I gave you
13 the noncompatible version. I mean, there's obviously some
14 trouble going on there.

15 MR. RISER: Your Honor, if I may?

16 THE COURT: I'm just saying, it creates a factual
17 issue.

18 MR. RISER: The schedule of values is, it's beyond
19 even why it's been such an issue in this case. The schedule of
20 values is based on the information from to accord applications.
21 The first one was submitted on August 20, 2018. Another one
22 was submitted on November 27, 2018, all after sitting down with
23 Mr. Tebele and going over his property and checking the boxes
24 and putting the correct information in there. The schedule of
25 values submitted from the underwriter back to Crescent Coast

1 for review and in December of 2018 has the same information on
2 it as the application, including the one that Mr. Tebele signed
3 three weeks later.

4 THE COURT: I'm assuming Mr. Tebele is going to
5 testify that he didn't tell him that it was 100 percent
6 operable.

7 MR. CONNELL: Here's the real problem, and they don't
8 want to talk about it. January 11th, they sent an e-mail to
9 the underwriter, it's not 100 percent sprinklered.
10 January 14th Crescent takes the money and writes the policy,
11 and they know, they know it's not 100 percent sprinklered at
12 that time. They don't want to talk about that, but that's the
13 crux of the case. They took the premium to get their
14 commission when they knew it wasn't so.

15 MR. DESCHAMPS: If I just may add real quick, exhibit
16 three, the text message between Egan and Tebele, you can see in
17 there where it says, I sent you the Docusign for the property
18 application, or something of that nature. If you notice, if
19 you go to Exhibit 6, that's where Mr. Egan's text message was
20 sent after Crescent Coast sent Ms. Northcutt or Gurtzweiler an
21 email saying the sprinkler wasn't operational, so that's in and
22 of itself going to bring a factual issue.

23 MR. RISER: Let's use the language that's actually in
24 that email. It was that the landlord hadn't turned the water
25 on. Furthermore, that notice came from someone else. It came

1 from La Casona, it came from a third party. Mr. Tebele never
2 gave Crescent Coast any update on the sprinkler system
3 construction in 1901 North Kings after August of 2018.

4 THE COURT: You make a compelling argument, but I
5 find that there is factual issues there and I'm going to send
6 it to the jury.

7 MR. RISER: And Your Honor, just for clarity in the
8 record, it's denied without prejudice.

9 THE COURT: That's correct.

10 MR. RISER: Thank you.

11 MR. ADAMS: We have omnibus motion in limine. We can
12 run through them real quick. I think a lot of this hopefully
13 shouldn't be too controversial for the Court.

14 THE COURT: Okay.

15 MR. ADAMS: Our first motion is exclusion of evidence
16 that the motion -- the omnibus motion had been filed, we'd ask
17 that that be granted, Your Honor.

18 MR. CONNELL: Which one was it again, I'm not sure I
19 understand what you're saying there.

20 MR. ADAMS: The exclusion that is that this motion,
21 the omnibus motion has been filed or any ruling by the Court in
22 this motion suggests they're referring that Crescent Coast move
23 to prohibit proof, so basically no testimony that Crescent
24 Coast is trying to hide anything by filing of this motion.

25 THE COURT: By the motions, okay.

1 **(Whereupon proceedings reconvened Tuesday, December 5, 2023)**

2 THE COURT: I had taken certain matters under
3 advisement yesterday. There is one that I'm still going to
4 withhold my decision on, that's the issue of equitable
5 estoppel. Quite frankly, I think I can better make that
6 decision after hearing some testimony, so I'm going to do that.
7 In regards to ambiguity, after taking a look at the entire
8 contract, while there may be some issues with it, I don't find
9 on its face that it's ambiguous, so in that regard, I am going
10 to allow testimony, though, and allow you to attack any way you
11 want to. Some of the forms, as far as forms that were
12 generated and who they may be by, but as far as your motion in
13 regards to ambiguity, I'm going to grant that. As far as the
14 motion to limit damages, I did read over those cases, I find
15 that the Republic Textile case is the one that was controlling,
16 specifically it states that: Losses upon the policy's face
17 value were not an issue in Riddle-Duckworth and ordered the
18 case the restricted coverage of the policy amount. I am going
19 to allow you to put up evidence greater than what your motion
20 in limine as far as damages. The Genay, again, I'm going to
21 hear testimony on that to determine if we need to proffer that,
22 that would be find and I'll qualify at that point. I think
23 that was everything that we took under advisement.
24 Any other matters that we need to take up before we begin this
25 trial?

1 MR. CONNELL: So Your Honor, you're going to allow
2 testimony about ambiguity but --

3 THE COURT: Well, I'm going to allow them to attack
4 the documents that were -- whether that's the -- and I'm sorry
5 if I don't remember the term that was used from the Amwins as
6 far as the schedule of values. If you want to attack that to
7 say, who made this, how was it made, how was this formulated,
8 I'm going to allow you to attack that because I don't know how
9 that was made. While it's an exhibit in the contract, the
10 formation of that, I don't know how that was made, so I am
11 going to allow you to attack that. In regards to the terms,
12 it's going to be kind of tough to attack the terms and say
13 they're ambiguous when he didn't receive the contract until
14 after the fact. So in regards to the contract on its face
15 value, I don't find that the terms are ambiguous, but again, I
16 will allow you to attack who formulated the value sheet that
17 had all the different -- was it 23 properties --

18 MR. CONNELL: Yes, sir.

19 THE COURT: -- and that.

20 MR. CONNELL: Okay. And that will include the
21 construction issue about --

22 THE COURT: Yes.

23 MR. CONNELL: Okay. That's good. Thank you.

24 MR. WATSON: Just so I'm clear, Your Honor, at the
25 point -- it's not a matter for openings, but at the point that

1 Your Honor's going to charge, they are going to be charged in
2 accordance with what you just ruled regarding ambiguity?

3 THE COURT: Correct.

4 MR. WATSON: Thank you.

5 MR. RISER: Your Honor?

6 THE COURT: I'm sorry, go ahead.

7 MR. RISER: We've begun the process when we came out
8 of looking through exhibits to see if we can do some
9 stipulations. We're happy to keep going with that process
10 before or after openings.

11 THE COURT: Well, and if you all need more time, I
12 mean, I think the jury just got here. I'd rather let them sit
13 back there for a few minutes while you all do that than bring
14 them out, take them in, bring them out, take them in, that kind
15 of thing, but again, it's up to you all. I don't want to waste
16 anybody's time.

17 MR. WATSON: It's up to you guys.

18 MR. CONNELL: Let's talk about it, we might could
19 streamline it.

20 MR. WATSON: Sure, okay.

21 THE COURT: Gene, do you have something else?

22 MR. CONNELL: No. I just want to make sure that we
23 could argue ambiguity at some point during the trial and during
24 opening and closing, right?

25 THE COURT: Well, and I guess what I'm asking you is

1 what ambiguity are you talking about? Are you talking about
2 the formation, or are you talking about the actual contract?

3 MR. CONNELL: The formation and the contract.

4 THE COURT: The formation, I'm going to allow you to
5 argue all you want on that, but maybe it wasn't gathered in the
6 appropriate way, the information, that kind of thing, if that's
7 factually accurate, I don't know. Again, I'm trying to rule on
8 stuff that I haven't heard any testimony on, but the face of
9 the contract, I do not find it to be ambiguous. Okay?

10 MR. CONNELL: Alright. That helps. Thank you, Your
11 Honor.

12 THE COURT: Alright. Well, do you want me to give
13 you all ten minutes then before we bring the jury out to see if
14 to you all can -- I would like to streamline openings into
15 first witnesses, if we can. If we need to take a break after
16 openings, that's fine, too.

17 MR. CONNELL: Let's do it now, that way --

18 MR. RISER: It might take a little more than ten.

19 THE COURT: Why don't you all do this, tell a bailiff
20 here, or tell the deputy once you're all ready, he'll holler.

21 MR. CONNELL: Thank you.

22 THE COURT: Thank you.

23 **(Recess taken.)**

24 MR. RISER: Counsel went through plaintiff's exhibits
25 one by one and I'm ready to put stipulations that I'm happy to

1 exceptions to anything that I've said to the jury by the
2 plaintiff?

3 MR. CONNELL: No, Your Honor.

4 THE COURT: By the defense?

5 MR. WATSON: No, Your Honor.

6 THE COURT: In regards to note taking, you may take
7 notes during this trial, however, please remember that some
8 people are better note takers than others. I don't want in any
9 way for somebody's note taking ability to in any way distract
10 someone else. The recollection of an individual juror should
11 be considered as reliable as note taking -- excuse me. The
12 recollections of individual jurors, I want you to consider
13 those, but remember that each person listens and may do things
14 differently. I also warn you that when you are taking notes
15 you may not notice the body by language of a witness which may
16 be used by you when deciding a witness's credibility, so use
17 caution when you're taking notes. Alright? Anything else from
18 the plaintiff?

19 MR. CONNELL: No, Your Honor.

20 THE COURT: From the defense?

21 MR. WATSON: No further.

22 MR. RISER: None, Your Honor.

23 THE COURT: Plaintiff may begin your opening.

24 **(Attorney Connell presented an opening statement at**
25 **this time on behalf of the Plaintiffs)**

1 MR. CONNELL: Thank you, ladies and gentlemen. I'm
2 sure that you just jumped for joy when you got your jury
3 summons, you know, \$15.00 a day to come over here and listen to
4 a bunch of lawyers talk. I want to kind of explain to you why
5 it is important, and in order for me to do that I need to talk
6 to you a little bit about the system. So Horry County, as you
7 all know, is the biggest county in South Carolina. It's the
8 biggest county east of the Mississippi river. It's the size of
9 Rhode Island. There are about 8,000 thousand people living
10 here and the court system has about 12,000 pending cases a
11 year. So you're going to hear about this case, you're going to
12 hear about what happened back in 2019, and so we've been
13 waiting since 2019 to get a jury to decide what to do in this
14 case, so I apologize that you got a summons right before
15 Christmas, and you have to sit here and you have to meet people
16 you don't know and you have to go to lunch when you're told and
17 you have to come back every day, but I want you to know that it
18 is really important because some day one of you might be here
19 waiting for your time, so it's not normal that you have a case
20 that might last a week, it's usually two or three days, but
21 this case that you're gonna hear about in a few minutes is an
22 important case and it talks about a lot of issues. So what I
23 usually like to do when I start a trial is to tell you what the
24 rules are, at least what the rules are that you're going to
25 hear, and there are really four five rules. Number one is, the

1 judge has already said this, you don't get to talk about the
2 case among each other until the case is over, kind of like the
3 Paul Harvy, you've heard him on the radio, he said the rest of
4 the story, the same thing goes here. Number two, this is the
5 big one. It has to be unanimous at the end, all 12 have to
6 agree. If the alternates are here at the end of the case you
7 all will be excused. I'm sorry you have to sit through it, but
8 if somebody gets sick, somebody has a child problem, one of be
9 you all would be in the case. Number three, this is not a
10 criminal case. There's a lot of dispute sometimes when you
11 come in here because people think someone's going to jail. No
12 one is going to jail in this case and that is something you
13 need to understand. This is a civil case.

14 Alright, so civil case, what does that mean? As
15 you've probably already heard, and from what you know from your
16 civics class in high school, burden of proof, two burdens of
17 proof. Criminal case is beyond a reasonable doubt. You think
18 of the blind lady whose got the little scales, and beyond a
19 reasonable doubt is all the way to the bottom. You try to send
20 someone to jail, you've got to prove beyond a reasonable doubt
21 Civil case, much different, same sales, preponderance of the
22 evidence, a slight tipping of the scale. The judge will tell
23 during the end of the trial what that means, but it just means
24 a tipping of some sort. This is a preponderance of the
25 evidence case, a civil case. Now, I'd like to consider it like

1 this, everybody watches football, all sorts of sports. I don't
2 have to in a preponderance of the evidence case throw the ball
3 down the field and score ten touchdowns, I don't have to do
4 that. All I have to do is move the ball beyond the 50-yard
5 line. Now, I think you're going to find a lot more than that,
6 but sometimes jurors wonder what preponderance is, it's a
7 slight tipping, a feather's weight. I got a feather on this
8 side, that's the tipping of the scales. Alright. Now, usually
9 the jurors are the voice of reason, they set to community
10 standards, they tell the rest of us how to live our lives and
11 there are certain rules that we all abide by, as you all know.
12 We have traffic lights, we stop at those stop making a left
13 hand turn. The same kind of rules apply in the courtroom, and
14 so you're going to hear about some of those during this case
15 and one of the rules are expert witnesses, what they are, lay
16 witnesses, what they are. You're going to get a ream of paper,
17 all sorts of documents, and we're going to try to explain that
18 to you, I'm going to try to explain that to you in layman's
19 terms, because a lot of what we hear in the law is not in
20 layman's terms, so those are the kind of things I'm going to
21 talk to you about. Now, this question comes up, I've been
22 doing this a long time. This question comes up a lot during
23 trials. So for some reason a lot of jurors think that we are
24 listening to them or that we have lights or videos back there,
25 we can't listen to what you all say. Alright? So whatever

1 happens back there is secret, and so you don't have to be
2 worried that we've got a camera in there watching you because
3 we're not going to do that, and the reason why we're not going
4 to do that is because you all took an oath, and you took an
5 oath that you would try this case based on what you hear from
6 this courtroom. Now, that's somewhat difficult at times
7 because you go home and your spouse or your kid or somebody
8 else says, well, what are you doing here, and you can't talk to
9 them about that, and I know that's hard to do, but we'll try to
10 move through it so you don't have to do that for more than a
11 few days. Now, let me talk to you about the case a little bit.
12 This is Mr. Tebele right here. Stand up, Mr. Tebele, and my
13 cocounsel, Trey DesChamps. You can sit down. Now, Mr. Tebele
14 is, you'll see on the caption of the case, the lawsuit says:
15 A. Tebele, Limited Partnership, so you got to understand what
16 that is. Mr. Tebele's father and brother came to the Myrtle
17 Beach area back in 1953. They came here, they were foster kids
18 that really had to find something to do and they opened a
19 little store, if you will, on Eighth Avenue in Myrtle Beach,
20 and from that little store the Tebele businesses have grown to
21 about 23 properties, I believe today, and those 23 properties
22 are -- now, Mr. Tebele's uncle and his father are both dead
23 now, and Mr. Tebele is the managing partner of this group, and
24 the partnership consists of Mr. Tebele, his two -- his brother
25 and sister, his mother, his uncle's wife, and their two

1 children, a very small company that they have spent over 75
2 years building. You're going to hear Mr. Tebele, he's going to
3 talk to you about how his dad got here, how hard they worked
4 over all these years and what he's done as the managing
5 partner. Now, you're also going to hear about the properties
6 that they have been able to purchase over these many years
7 working many hard hours, and one of the properties you're going
8 to hear about is 1910 North Kings Highway. Now, you remember
9 yesterday I said don't go to 1910 North Kings Highway, don't
10 drive by, don't look at it, you'll see plenty of pictures, if
11 you want to go to it later on we, may take you, it just depends
12 on what happens in the case. But 1910 North Kings Highway used
13 to be, for people who lived here a long time, like myself, used
14 to be the old Camelot movie theatre in Myrtle Beach. Back in
15 the 1980's and '90's, most people here are not as old as I am,
16 but it used to be the Camelot movie theater, and Mr. Tebele's
17 family bought it in 1990, and after becoming a movie theatre it
18 was a series of restaurants, there was a Mexican restaurant
19 there and there was another restaurant there, and so what
20 you're going to hear is kind of a story from Mr. Tebele about
21 how hard they worked and what they've done over the years.

22 Now, the case, that's what we're here about. Mr.
23 Tebele and his family had been collecting rent from the
24 Hispanic restaurant that was in there and a fire occurred on
25 February 24, 2019, and it was a significant fire, and you'll

1 hear testimony and I think the defendants will agree with me
2 that the place was a total loss and so one of the questions
3 you're going to be asked to decide is how much money Mr.
4 Tebele is entitled to for the loss that he suffered, and you're
5 going to hear about the cost to rebuild the building, the loss
6 of rents, you're going to hear about the debris costs, and from
7 2009 until today, it's been sitting there, and the reason it's
8 been sitting there is because Mr. Tebele doesn't have the money
9 to rebuild the building, and you're going to hear about that
10 Now, you're probably thinking like everybody else,
11 right, well why can't he rebuild it? So Mr. Tebele bought an
12 insurance policy from these guys over here, the one that won't
13 pay, and so you're going to hear how that happened. So Mr.
14 Tebele, when he purchased an insurance policy he had one with a
15 group called BB&T, a local agency in the Myrtle Beach area, and
16 he was approached by a Joey Sutherland from Crescent Coast, way
17 over at the end, you'll see a Crescent Coast Insurance
18 Company -- or insurance agency, and he was approached by Mr.
19 Sutherland that said, hey, we're selling policies, do you want
20 to buy one, we can save some money and get you more for your
21 buck. So Mr. Tebele, said, like anybody, I'd like to save some
22 money on my insurance, so I'll buy it. During the course of
23 all of this part of the old movie theater was closed because
24 the City of Myrtle Beach required us to build a sprinkler
25 system, the sprinkler system, and so Mr. Tebele and his family,

1 his brother's and sisters and cousins and the two widows, all
2 agreed that in order to upgrade this to facility that they
3 would put a sprinkler system in, and a sprinkler system in a
4 place as big as this was about \$225,000.00, and that sprinkler
5 system was starting to be put in into the building in 2018, and
6 most of it was complete at the time of the fire. So one
7 caveat, because it's difficult to put a sprinkler system in and
8 you've got to have certain technology, it was not hooked up to
9 the water outside the building, so when Mr. Sutherland came to
10 Mr. Tebele, solicited him to buy coverage, Mr. Tebele said, I'm
11 putting the sprinkler system in here, it's almost finished, but
12 I don't have it. So what did Mr. Sutherland do, he and Mr.
13 Egan seated over at the last table here, agreed to write a
14 policy of insurance, a policy that would cover the building.
15 Now, the sprinkler system was not able to be put in until -- it
16 never got in before the fire, but it's an extensive process and
17 it was not able to be finished before the fire, so they got a
18 policy. They bought a policy, Mr. Tebele bought it sight and
19 seen. On February 2019 the fire occurred and burned the place
20 to the ground. Mr. Tebele had bought the coverage in January
21 of 2019 from Crescent Coast. Crescent Coast had purchased the
22 policy through an underwriter from Lloyd's of London and three
23 other insurance companies, they are all listed on the lawsuit,
24 you'll see them. One is an English company, one is a German
25 company, I believe, and one is from Arizona, and so you can buy

1 a policy of insurance through Lloyd's where each or a number of
2 insurance companies will share the risk, and that's what you'll
3 see in this case, but the important point about the case that
4 you should consider is January 11, 2019, the policy was bound,
5 Mr. Tebele got a notice of binder and agreed to pay them
6 \$140,000.00 to cover all of these properties. So he told them
7 during the course of the negotiation that this system was
8 noting hooked up but it was close to being hooked up and it
9 should be hooked up soon. January the 14th, three days later,
10 I think I got this right -- sorry, January, 11th, Mr. Tebele
11 and his family paid the premium. Someone from Crescent Coast
12 wrote an e-mail to the broker and said, hey, we know this is
13 not sprinklered, it's not finished at this point. So they had
14 knowledge, ladies and gentlemen, that it was not finished but
15 it was in the end stages. Mr. Tebele was constructing, or
16 having the sprinkler system constructed on a regular continuous
17 basis until the fire. So what happened then? Mr. Tebele calls
18 Crescent Coast and says, I've had a terrible fire, let's talk
19 about this. They go down the Thursday after the fire,
20 February 24, 2019, and for the first time Mr. Tebele is given
21 the policy, he's never seen the policy before, they give him
22 the policy. It has a sprinkler requirement in the policy,
23 something that Crescent Coast, the broker Amwins and Lloyd's
24 all knew about, and we're going to show this to you through the
25 course of this trial. And so as a result of all of that the

1 insurance company said, hey, we're not going to pay this claim.
2 We don't care that you paid the \$140,000.00, we don't care you
3 that you had this e-mail, we don't care about anything, we're
4 not going to pay, and so that comes to why we are here today.

5 We are suing two different defendants, and we're
6 suing the Lloyd's entities for a breach of contract and we're
7 suing them for bad faith, and bad faith and breach of contract
8 are legal terms, as you all probably figured by now, but breach
9 of contract is, you've breached a contract with us. We paid
10 you the money for this coverage, you never gave us the
11 coverage, you've never fixed our building, bad faith. Bad
12 faith is you have acted unreasonably as an insurance company,
13 you have withheld a product that we're entitled to, you have
14 withheld paying for our damages, you have acted unreasonably,
15 and so we're going to have during the course of the trial
16 probably the preeminent expert of South Carolina on bad faith,
17 a guy named Gerald Finkel, he taught at the University of South
18 Carolina Law School for years, over 40 years, he's testified
19 30-some times, and he's going to talk to you and he's going to
20 tell you why this action by Lloyd's was improper, inappropriate
21 and fraudulent.

22 Now, we also have a second suit. We're trying two
23 cases at one time her, folks. We're trying the case against
24 Crescent, that's Crescent Coast Insurance Agency, they are at
25 the end of the table over here. We're trying the case against

1 what they did, they were negligent in the handling of the
2 policy, and we're suing them for negligence and a breach of
3 fiduciary. Now, again, the fiduciary duty is a fancy legal
4 word, but all fiduciary duty means is that you had a
5 responsibility to us. You came to us and offered this
6 coverage, you decided to undertake this coverage, and you
7 offered this to us and you owe us. So you have two different
8 defendants in the case, the Lloyd's entities represented by Mr.
9 Watson, and then the other entity represented by Caleb over
10 there, and they're going to tell you all sorts of stuff about
11 this, but they can't get over a couple big hurdles in the case.
12 We paid the premium, we never got the policy. The policy
13 provides for payment during construction. Even to this day
14 they have never offered to refund the money to us. We pay for
15 the premium on what happened in this case. So I've kind of
16 given you a 10 to 15 version of what you're going to hear in an
17 ad nauseam for the next two or three or four days.

18 I want to close with this, this is the only time that
19 Mr. Tebele and his family, his brothers and sisters and his
20 cousins gets to come to court, we don't get a do over, and
21 unlike in football there's no where you can look later on on
22 video and see if something was done wrong, we don't get any of
23 that in the Court system, where you all go back there and make
24 a decision in this case, it will be a final decision because
25 the 12 of you all would have decided that. So this is not the

1 kind of situation that you see on TV every morning where some
2 guy says, hey, I got hurt in an accident and I want a million
3 dollars, you know, this is not that kind of situation at all.
4 Mr. Tebele had millions of dollars in losses that he still
5 hasn't recovered from, and we will ask you at the end to reward
6 him that so that he can be made whole again. Thank you.

7 THE COURT: Thank you, Mr. Connell. Mr. Watson?

8 MR. WATSON: May it please the Court?

9 THE COURT: Yes, sir.

10 **(Attorney Watson presented an opening statement on**
11 **behalf of the Defendants, Certain Underwriters at Lloyd's)**

12 MR. WATSON: Once upon a time there was a business
13 run by a family, Mr. Tebele here, and this family owned lots of
14 properties, properties in Myrtle Beach, properties you may be
15 familiar with, restaurants, department stores were here,
16 grocery stores, strip malls, and they were the landlord leasing
17 out all these properties for 20, 30, years or more. Then one
18 year in 2018 they decided to purchase insurance, actually, let
19 me step back. They purchased insurance every year, and their
20 managing partner, Mr. Tebele, went through the process of
21 identifying what insurance they wanted for each and every one
22 of these buildings for which his family business was owned.
23 Along the way after all the years of purchasing insurance, as
24 Mr. Connell stated, he changed insurance agencies and bought a
25 policy through Crescent Coast, and he went through the process,

1 the evidence will show, he went through the process building by
2 building with them about what insurance they needed for each
3 building. Now, some of these properties required sprinkler
4 systems to operate, and you can surmise what those would be,
5 the restaurants, the ones working with open flames, or things
6 that could combust. Those properties were listed on their
7 insurance application as requiring a sprinkler system. The
8 rest of them, those were about five of the 24. The other 19
9 didn't require sprinkler system, and there's a place on his
10 application to sign whether it's 0 percent sprinklered or
11 100 percent sprinklered, and Mr. Tebele did that on behalf of
12 his family's business through Crescent Coast and for the 1901,
13 I think Mr. Connell said 1910, it's 1901 North Kings Highway,
14 the property that had the fire, his application said
15 100 percent sprinklered, and it wasn't just there on it's own,
16 on behalf of the family business Mr. Tebele signed that
17 application saying it was true and accurate and the insurance
18 contract shortly thereafter began. Now, the process of
19 purchasing an insurance contract in a commercial situation like
20 this is not dissimilar, you know, a lot jurors probably don't
21 purchase commercial insurance in this fashion, but in terms of,
22 like, a car purchase, something that everybody does, you know,
23 I don't just go to Japan to Nissan and purchase a car. Nissan
24 delivers their cars to a distributor somewhere in the U.S.,
25 they distribute it to some regional outlet, it eventually gets

1 to my local car dealership and I can go in there and I buy it,
2 but I never talk to all those other people in the steps along
3 the way. Well, the way this policy was purchased was just like
4 that. Tebele and Sons, this family business, went to their
5 local person, Crescent Coast, and it went through the process,
6 and you'll hear witnesses talk about what that process was of
7 how my clients, that I'll introduce in a moment, entered this
8 contract and bound coverage for A. Tebele and Sons for all of
9 these 24 locations. This process proceeded, and there's
10 paperwork that shows when the coverage started, which was
11 January 15, 2019. And then the proof of this is passed along
12 down the chain from different entities, until it reaches
13 Crescent Coast, who is acting on behalf of their customer,
14 Tebele and Sons. So the evidence will then show once this
15 policy went in force, and by the way, when these policies are
16 delivered, you'll hear testimony from a gentleman named Mark
17 Melvin, who is the actual person who put this policy together
18 on behalf of my clients, and it's a 80, 90 page set of forms,
19 and it doesn't just generate the day the policy is purchased,
20 but it's put together over a few weeks, but similar to when one
21 buys a car at the dealership and you have insurance the moment
22 you walk away and you get the policy later, similarly, that's
23 what happened here. The policy was agreed to be purchased, the
24 money was paid, and then a couple weeks later the policy forms
25 were delivered, however, what was delivered instantly was a

1 list. These are all the forms in the policy you just bought
2 and that list is delivered to Crescent Coast who then can talk
3 their customer as much or little as they want about what these
4 forms mean. Well, one of these forms is the one we're here
5 about today. It's called a protective safeguard endorsement.
6 In short, and you'll see it with many witnesses and you'll have
7 it to read, it's one page, and it has two key parts. One is,
8 as a condition of that coverage, of that insurance, to get the
9 insurance you must have an automatic sprinkler system, and it
10 points to, it says which location should it be at. It
11 references something called a schedule of values that lists the
12 address of all of these 24 locations and the five where he said
13 it has sprinklers, you're required to have it there, and the 19
14 where it doesn't have sprinklers, you're not required to have
15 it there. This fire occurs at 1901 North Kings Highway, which
16 he signed an application for saying it's 100 percent
17 sprinklered, and you're about to see pictures and video showing
18 exactly what happens if a building is not protected by a
19 sprinkler system. It was a big bad fire, nobody is going to
20 doubt that. The building, while it may not have been burned to
21 the ground, has heavy, heavy damage, and nobody is going to
22 contest that. Tebele and Sons made an insurance claim to my
23 clients, and let's talk about who my clients are. We have one
24 representative from each of the three entities that combined,
25 as Mr. Connell described, to share in this risk and provide the

1 money to back him for this policy. The first is a group of
2 insurers called the Underwriters at Lloyd's of London. It's a
3 set of individuals and corporations that work through the
4 London insurance market to provide coverage. Mr. Clark Hannes,
5 if you would stand up briefly, he is here, he's a member of one
6 of those syndicates, and he has flown over from the UK to be
7 with you here this week, and they have a percentage of the
8 risk. Next, the second insurer is called HDI Global Specialty,
9 Mr. Thomas Pietzonka, he is coming from Germany to be here,
10 they have a portion of the risk that they undertook, and
11 lastly, General Security Indemnity of Arizona, Mr. Dustin
12 Bollinger is in here, he came from Chicago to be in her, and
13 all these folks came to be here because this is an important
14 case, and it's important because they issued a contract -- they
15 entered a policy, but these policies are actually contracts,
16 and the contracts have terms, and the terms of this contract
17 had to be followed, and as I started, I think I veered off for
18 a second, the one-page protective safeguard endorsement said:
19 As a condition of the insurance you must have an automatic
20 sprinkler system, and specifically, in the event of a fire if
21 you don't have an automatic sprinkler system in complete
22 working order, your claim is not covered, it's excluded, and
23 that's the provision by which my clients made their decision on
24 the claim. So what did they do? Well, these insurers
25 delegated their power to investigate the claim, to U.S. base

1 entities here locally. They hired a field adjustor named
2 Lauraleigh Weaver who went and took pictures and talked to Mr.
3 Tebele. They hired a cause and origin expert to evaluate what
4 was the cause of this fire and the evidence will show that this
5 was not deemed arson or an intentionally set fire in any way,
6 it was deemed an accidental fire. They then asked, once they
7 discovered that there was a concern, because this property when
8 the purchase of the insurance occurred was supposed to be
9 100 percent sprinklered, but not only did the sprinklers not go
10 over, it was determined that they were not even connected.
11 There's a pipe, and you'll see a picture, there's a pipe
12 sticking up out of the ground that was supposed to have an
13 elbow on it going into the building, it's hard for a sprinkler
14 system to work that way. So my clients had questions and they
15 gave Mr. Tebele and his family business a chance to explain,
16 why did this happen, you said it was going to have an automatic
17 sprinkler system and I, on their behalf, they retained me -- so
18 back in July of 2019 I sat across the table from Mr. Tebele and
19 asked him these questions, and you'll get copies of this
20 testimony. In essence, his story at the time was, I thought it
21 would be connected, I signed it because I thought it would be
22 connected by then, and that was a gamble that my clients did
23 not take, a risk that they did not choose to insure, that you
24 told us it was going to have protection from fire by a
25 sprinkler system that you never even hooked up. So what did

1 they do? The evidence will show, and you'll see a paper trail,
2 how they did it, they took all the information that they
3 gathered and they issued a letter in August of 2019 saying,
4 we're declining coverage for your claim. They explained
5 through the policy provisions, they explained through the facts
6 in their investigation what they discovered and why. It was a
7 reasonable process and evidence will show it was the only
8 answer. So what is your all's job here in this case? As Mr.
9 Connell said, there are two cases going on at the same time.
10 He sued my clients, the insurers, and he has sued Crescent
11 Coast, the retail agent locally that procured policy for them.
12 All of the facts and all of the conversations and all of the
13 transactions that you're going to hear about, about how this
14 policy was performed and who said what to whom about purchasing
15 this policy, those are geared towards the issues for the retail
16 agent and what was told to whom and what was A. Tebele and Sons
17 told and, and how did can that come to be. You're going to
18 hear a lot of different time names of entities, particularly,
19 there's an entity -- there's companies that all start with the
20 name Amwins, but that are different corporations in different
21 cities with different people doing different things. The only
22 entity that my clients directly interacted with was called
23 Amwins Special Risk Underwriters. That's a company that Mr.
24 Melvin, who I mentioned put the policy together, works for.
25 You're going to hear other discussion about other Amwins

1 entities, such as Amwins Access based in Mount Pleasant, Amwins
2 Brokerage of the Carolinas in Charlotte. Those are, just like
3 with the car example, those are the different players along the
4 way that may have played a role, and you'll understand when you
5 hear to testimony who played what role, but you're going to
6 have to focus on that, but while you're doing that understand
7 that is not having anything to do with my clients and why they
8 are here. They are here because the Tebele and Sons business
9 disagrees with their claim decision, so when it comes to my
10 clients and the insurers, you really only have to answer two
11 questions: Did they make the right decision in declining this
12 claim, yes or no, and was it reasonable what their decision
13 was? The evidence will show that it was not only reasonable
14 and appropriate, but it was obvious in the picture of the pipe,
15 and it was never connected today the building, compared to the
16 signature on the application telling my clients that it was
17 100 percent sprinklered is really all you're going to need to
18 know to come to that conclusion. In the end the evidence will
19 show that this family business took a gamble on its own, and
20 unfortunately, they lost. Thankfully, no one was killed in
21 this incident, there were some injuries that you may hear
22 about, but this was a risk that they took and not one that my
23 clients took. Thank you for your time and attention during
24 this case.

25

1 **(Attorney Riser presented an opening statement at**
2 **this time on behalf of the Defendant, Crescent Coast)**

3 MR. RISER: Good morning. I'm the son of a nearly
4 deaf man, so I can get loud. I apologize if I yell at you. My
5 name is Caleb Riser, and my colleague with, stand up, is Hunter
6 Adams. It's our pleasure to represent local Little River,
7 South Carolina retail insurance agency, Crescent Coast
8 Insurance. I'll refer to it during the trial as Crescent Coast
9 for short. It's managing member is with me, you'll see
10 throughout the trial, I'll ask him to stand up, it's David
11 Egan. Thank you, David.

12 Much has already been said about insurance coverages
13 and policy terms, but the evidence will show, Crescent Coast is
14 a retail insurance agency. It's a liaison between clients,
15 like the Plaintiff in this case, A. Tebele and sons and
16 insurance brokers or carriers to get them the coverage they
17 request, that's what they do. Let's talk about what they don't
18 do. Crescent Coast does not write the insurance policies.
19 They don't determine what endorsements or exclusions of
20 coverage apply to particular insurance policies. Crescent
21 coast simply takes the information that's provided to it by its
22 clients, like Mr. Tebele in this case, and puts that
23 information on applications to be reviewed by the people who do
24 determine how the policies will be written. Also, Crescent
25 Coast doesn't independently verify the information provided to

1 it by its clients, because the clients themselves verify that
2 information before a policy is bound. So what does that mean
3 for the case and what will the evidence show about how this
4 matter happened? You'll hear from Crescent Coast employees,
5 Joey Sutherland and David Egan. A Crescent Coast agent, Joey
6 Sutherland, he knew Mr. Tebele a long time from the restaurant
7 business. Mr. Sutherland works in the insurance business part
8 time, he works in the restaurant business part time. In 2018,
9 Mr. Sutherland did ask Mr. Tebele if he'd be interested in
10 moving his company's insurance business from his other local
11 agent to Crescent Coast. That included his property insurance
12 as well as general liability and excess insurance policies.
13 The plaintiff's current insurance term was set to expire on
14 January 14, 2019. In August, 2018, so five months before the
15 new policy term, Mr. Tebele sat down with Crescent Coast
16 representatives, Joey Sutherland and David Egan to begin the
17 process of filling out insurance applications. Mr. Tebele was
18 doing the same thing with his current agency to see who would
19 have a better price, and I don't blame him. As part of that
20 process Mr. Tebele was asked questions about his company's 23
21 properties, including their values, their square footage, their
22 use, if the properties had tenants, and how those were
23 protected, like, alarm systems, fire sprinklers, and the like.
24 This is important, because the applications also have a box to
25 check, yes, if the building has sprinklers, and to say how much

1 of the building is covered by the sprinklers. Regarding the
2 property at issue, 1901 North Kings Highway, Mr. Tebele gave
3 all the relevant information on that property, including that
4 it had a value of 2.5 million dollars, that there was a
5 restaurant in the building, and most importantly that the
6 property had a sprinkler system that was currently being
7 installed and would be done well before the insurance renewal,
8 so he instructed Crescent Coast to check the box, yes, for 100
9 percent sprinklered. Mr. Tebele never gave Crescent Coast
10 anymore information about the status of the sprinkler system
11 under construction at 1901 North Kings after that August 2018
12 meeting, and the process of compiling all the information on 23
13 commercial properties worth 22 million dollars takes a long
14 time, and Crescent Coast also worked with Mr. Tebele to make
15 changes or corrections on the application from time to time
16 over that five-month period. David Egan will tell you that
17 although Crescent Coast had direct relationships with some
18 insurance carriers, it did not have relationships with
19 insurance carriers that have the resources to cover a real
20 estate portfolio the size of the plaintiff's property. Because
21 of that Crescent Coast reached out to a company called property
22 called Amwins Access through its employee, Whitney Northcutt,
23 to send the first amplification on August 20, 2018 to start the
24 process of getting Mr. Tebele some quotes for his expected
25 premiums. As you've already heard, Amwins is a company that

1 has divisions that work with different size insurance carriers
2 that agents like Crescent Coast don't have access to,
3 otherwise. Amwins group has divisions like Amwins Access and
4 Amwins Brokerage of the Carolinas, these are terms you'll hear
5 throughout the trial. Ms. Northcutt, from Amwins Access
6 referred Mr. Egan to a man named Barrett Sellers, one of her
7 colleagues, at Amwins Brokerage of the Carolinas. They handled
8 larger portfolios of property like those of the plaintiff.
9 Crescent Coast then worked with Amwins Brokerage for the next
10 four-and-a-half months to work towards getting coverage bound.
11 During that time Mr. Tebele never updated Crescent Coast on the
12 status of the sprinkler construction at 1901 North Kings after
13 their August, 2018 meeting. Over the next few months Crescent
14 Coast submitted two more applications to Amwins Brokerage on
15 November 27, 2018, and then the final one on January 14, 2019,
16 the day before coverage started. Nothing changed on those
17 applications related to the sprinkler system at 1901 North
18 Kings because Mr. Tebele never updated Crescent Coast on that
19 status. During the process of communicating with Amwins
20 Brokerage, quotes for the cost of the premiums were given to
21 Crescent Coast, and then they were sent to Mr. Tebele or his
22 employees. Those insurance quotes include information on them
23 about the sprinkler endorsement language that you've already
24 heard some about today. It wasn't until just before coverage
25 was bound in January of 2019 and about the time that the last

1 application was filed or sent into Amwins Brokers, that Mr.
2 Tebele even decided to go with Crescent coast, other than his
3 current agency. Mr. Egan, you'll hear from him, he even waived
4 Crescent Coast commissions on the general liability and excess
5 coverages leaving \$6,000.00 on the table to try and obtain Mr.
6 Tebele's business. The final insurance application submitted
7 to Amwins Brokerage on January 14th is of special interest, it
8 requires signatures. It's the only one that they signed during
9 this process. It requires signatures from the agent, Mr. Egan,
10 and the client, Mr. Tebele. The evidence will show that the
11 signers of that document signed just below the section that
12 says this: The undersigned is an authorized representative of
13 the applicant and represents that reasonable inquiry has been
14 made to obtain the answers to questions on this application. He
15 or she represents that the answers are true, correct, and
16 complete to the best of his or her knowledge. That application
17 was sent by Mr. Egan to Mr. Tebele on January 11th, 2019 and
18 was e-signed by Mr. Tebele three days later on January the
19 14th. It was transmitted to Amwins Brokerage that day so that
20 the coverage could start. The coverage for the full package of
21 the property, excess and general liability, they were bound,
22 that means coverage started on January 15, 2019. Binders,
23 you'll hear about in trial, or copies of statements that
24 confirmed coverage and the amounts and other information about
25 the policies and the conditions of the policies, were

1 transmitted to Crescent Coast from Amwins Brokerage, on the
2 15th. They were forwarded to Mr. Tebele two days later on the
3 17th. Those binders include language about the sprinkler
4 endorsement that you heard about already this morning. Mr.
5 Tebele never asked any questions about the sprinkler
6 endorsement or any other coverages or forms during the
7 application process, because he was focused on the premium
8 cost. After coverage was bound on January 15, 2019, Mr. Tebele
9 never communicated anything about the sprinkler system at 1901
10 North Kings, but he did contact Crescent Coast about making
11 some changes to the policies with reference to his other
12 properties. At least two properties were not communicated to
13 Crescent Coast by Mr. Tebele during the application process,
14 and were therefore left off. There were also some address
15 changes on properties that were listed. Those additions and
16 changes were communicated by Crescent Coast to the broker
17 immediately. That caused Amwins Brokerage to have to issue
18 what's called endorsements to the policies, which took the full
19 policy longer to receive. Regarding those policies you'll hear
20 that Crescent Coast has to review the policy language to make
21 sure that it's correct and accurate before hard copies can be
22 given to a client. It's also Crescent Coast's policy with
23 clients like the plaintiff who have multiple policies and lots
24 of properties, to wait until the full package arrives, to print
25 out the policies, bind them, and give them to the client in one

1 full package.

2 In this case, the body of the property policy was
3 received by Crescent Coast on February 7, 2019, but the
4 endorsements that were caused by the requested changes didn't
5 come in until later. The excess in general liability policies
6 that were written by the carriers didn't arrive to Crescent
7 Coast until February 22nd, not even one full business day
8 before the fire happened on the 24th. The endorsements to the
9 property policy didn't arrive until after the fire. So what
10 does that mean? The claim is correct. Mr. Tebele did not get
11 printed copies of the policies until after the fire, but his
12 coverage was already bound. During the five or six weeks
13 between the binding of the policy and the fire, Mr. Tebele
14 never communicated to Crescent Coast any update about the
15 sprinkler system construction at 1901 North Kings. What does
16 that matter? Well, the evidence will show, and you'll hear
17 from Mike Dover of Crawford Sprinkler, the company who Tebele
18 contracted with to provide the sprinkler system design and most
19 of its construction, that the sprinkler system had been in the
20 planning processes or under construction for nearly two years
21 in February 2019, but it was never finished. The interior?

22 A. Sprinklers were in installed, but the tap for the water
23 line was never completed. You'll hear that Mr. Tebele was
24 fully aware of the process of the sprinkler system construction
25 and the fact that it wasn't completed, but he never told

1 Crescent Coast any different than his representation in August
2 of 2018 that it would be completed well before the insurance
3 renewal. Then you heard from plaintiff's counsel that Crescent
4 Coast knew that the construction wasn't complete on January the
5 11th. Let me talk to you about that briefly. A name you're
6 going to hear is Melissa Garcia, and the plaintiff's counsel
7 didn't identify the Latin restaurant by name, but it was called
8 La Casona. La Casona restaurant was also a client of Crescent
9 Coast and a tenant in a portion of 1901 North Kings. Its
10 owner, Melissa Garcia also came to Crescent Coast through a
11 relationship with Joey Sutherland. Ms. Garcia sought a policy
12 for her restaurant in August 2018. Her policy was bound on the
13 23rd of August through Amwins Access that I spoke about
14 earlier. Well, what difference does that make? I expect to
15 hear from Joey Sutherland that on January 11, 2019, Ms. Garcia
16 called him to say she was informed by an inspector that the
17 landlord had not turned the water to the sprinkler system in
18 the building. Mr. Sutherland didn't know what that meant, and
19 it wasn't explained to him what that meant, but he immediately
20 instructed Crescent Coast office manager, Sandra Nenna, to look
21 up the policy and contact the broker to let them know in case
22 it affected Ms. Garcia's coverage. Ms. Nenna emailed Whitney
23 Northcutt of Amwins Access and reported what Ms. Garcia said,
24 that day, January 11th, the same day as the call. Ms.
25 Northcutt said it's noted for the file. Mr. Sutherland will

1 testify that he acted promptly on the policy on which he was
2 contacted, Ms. Garcia's. Mr. Tebele never updated Crescent
3 Coast about the sprinkler system construction at 1901 On North
4 kings after August of 2018. I'm almost done, I promise.

5 Finally, you'll hear from Crescent Coast expert
6 witness, Terry Tadlock. He's a retail insurance agent with
7 over 40 years experience and even teaches courses for agents.
8 He will testify that given all of the information I've laid out
9 to you over the last few minutes, that Crescent Coast did not
10 violate any applicable standards of care or industry standards
11 for retail insurance agents and its interactions with Mr.
12 Tebele, with Ms. Garcia, or the insurance brokers. In other
13 words, Mr. Tadlock's opinion at Crescent Coast did nothing
14 wrong in this case, and it's my plea that after you've heard
15 all of the testimony and all of the evidence in this case
16 you'll agree and return a verdict for my client, Crescent Coast
17 Insurance, as to the claims against it. Thank you for your
18 time and attention. I appreciate your service.

19 THE COURT: Thank you, Mr. Riser. Mr. Connell, Mr.
20 DesChamps?

21 MR. DESCHAMPS: Yes, sir, Your Honor. Plaintiff will
22 call Captain Steven Marinaro.

23 **CAPTAIN STEVEN MARINARO WAS DULY SWORN AT THIS TIME**
24 **AND TESTIFIED AS FOLLOWS:**

25 THE CLERK: Please state your name for the Court.

1 THE WITNESS: My name is Steve Marinaro. I'm the
2 Captain at the Myrtle Beach Fire Department.

3 **DIRECT EXAMINATION**

4 BY MR. DECHAMPS:

5 Q. Good morning, Mr. Marinaro. How are you doing?

6 A. Doing good.

7 Q. Okay. Mr. Marinaro, where do you live?

8 A. I live in Myrtle Beach at 1482 Caledonia Drive.

9 Q. And what do you do for a living?

10 A. I am a Deputy Fire Marshal for the City of Myrtle Beach.

11 Q. Okay. And how long have you been a Deputy Fire Marshal
12 for the City of Myrtle Beach?

13 A. For just a little bit under -- about a month under seven
14 years.

15 Q. A month under seven years?

16 A. Yes.

17 Q. And as a Deputy Fire Marshal, like, if there's a fire
18 incident, what, typically, do you do as a Deputy Fire Marshal,
19 kind of walk us through the --

20 A. What we usually do is we get there. The alarm will come
21 out in the -- we'll get paged on an alarm that comes out on a
22 structure fire and at that time, we listen in to see if they
23 call for an investigator and when they call for an
24 investigator, we go in, or if staff is called back, then all
25 the staff personnel that's available goes back in, and that

1 would be the Fire Marshal and the other Deputy Fire Marshals.

2 Q. Okay. And so does he -- does a deputy fire marshal --
3 do they go with the first responders?

4 A. No.

5 Q. Okay.

6 A. No. Deputy Fire Marshal, if you're on call, then you
7 know you have to respond to any fire that is going to be under
8 investigation, and we're on call for two weeks every seventh
9 week.

10 Q. Okay. And when -- as a Deputy Fire Marshal, when you
11 initially go to the fire scene, is the fire suppression
12 complete, or is it still ongoing?

13 A. No, it's -- the majority of the times, the fire is still
14 active.

15 Q. Okay. For people like me, I don't really know much
16 about the fire suppression and what goes on at the fire scene,
17 can you kind of walk us through that? When first responders
18 get on the scene, what's the process to put out the fire?

19 A. First responders, when the -- the first engine usually
20 gets there. The -- the -- they'll give a size up of what's
21 going on, and so dispatch knows. If they need extra resources,
22 they'll call for it at that time. This -- they'll go ahead and
23 they'll be the first due in on an attack for the fire, and the
24 second engine usually is the water supply, and then you have a
25 ladder truck, and that would be for ventilation, a rescue

1 vehicle, that would be for a search, you have a squad that
2 would respond, and the squad would be, usually, like, a RIT
3 team for a backup in case something happens to firefighters
4 inside. An ambulance will arrive, and you have your battalion
5 chief at the time, and a safety officer.

6 Q. Okay. And then, I guess, can you take us through the
7 process of the typical, when you would start your investigation
8 on-site?

9 A. Well, as soon as I get on scene, I will report to
10 incident command, and I talk -- the sort of incident command
11 that knows that I'm there, and at that point, we'll find out if
12 there's any witnesses, find out who they are, get information
13 from them of name, phone number, if they wanted to give us a
14 phone number or whatever, do a walk around the building, see
15 what the building looks like. We do not go inside to do an
16 investigation until the actual area has been -- air monitoring
17 has been cleared for us to go in.

18 Q. I don't know if it varies, but how long does that take?

19 A. It could --

20 Q. Varies, can it be hours or --

21 A. It could be hours, on the fire that we're talking about,
22 originally, I was called in a little after 8:00 in the morning,
23 and we didn't get inside the building until right about maybe
24 1:00 in that area, so they were fighting the fire all of that
25 time.

1 Q. Okay. And what location was that?

2 A. 1901 North Kings Highway.

3 Q. Okay. Now, when you're -- when you complete your
4 investigation, do you prepare any kind of incident report, or?

5 A. Yes. There's an incident report, and we pretty much put
6 that -- we came down there. We take pictures. We do a
7 physical inspection of the area. Sometimes we can't do it
8 right at that time, we have to come back to do it, but we leave
9 a vehicle that's there to make sure that there's no flare-ups
10 or rekindling of the fire.

11 Q. Okay. And so Myrtle Beach Fire Rescue, they take
12 pictures at the scene during fire suppression; is that correct?

13 A. During fire suppression, there's pictures that are
14 usually taken. The battalion chief has one in their car, and
15 we have a drone, IT person that sets up a drone. At the time I
16 don't know if they had the heat signature for it, but now we do
17 have thermal imaging on it.

18 MR. DECHAMPS: Okay. I'm going to mark this as
19 Exhibit 32, has been stipulated in the evidence.

20 **(Plaintiff's Exhibit No. 32 was marked for identification.)**

21 MR. DECHAMPS: I'm marking as 32.

22 THE COURT: Okay.

23 BY MR. DECHAMPS:

24 Q. Mr. Marinaro, I'm going to hand you what I'm introducing
25 into evidence as Exhibit 32. Do you recognize that document?

1 A. Yes, this is the final incident report.

2 Q. Okay. And did you prepare this incident report?

3 A. I prepared most of it. It's a collaboration between the
4 deputy fire marshals that were on the scene, plus, it goes to
5 the fire marshal, and he goes through it at the end, and if he
6 has anything, questions, or anything like that, he'll take care
7 of it, he'll ask us about it, and we'll take care of any kind
8 of problems.

9 Q. Okay. I guess to take us in a general view, was this
10 report -- did you complete this report after the fire? How
11 long --

12 A. Yes, this is after the fire. It was probably completed
13 about a day after -- oh, I'm sorry, it wouldn't be a day after.
14 It was probably on that Tuesday, and I believe the fire was on
15 Saturday.

16 Q. Okay.

17 A. It takes a few days to do that, put the pictures
18 together, talk to everybody.

19 Q. And were you the on-site investigator at 1901 North
20 Kings Highway?

21 A. Yes, sir.

22 Q. Okay. And do you recall as the -- when you got the
23 distress call, or when you arrived at 1901 North Kings Highway,
24 was the fire suppression complete, or?

25 A. No, not at all.

1 Q. And if you'll look at your report, I have a few
2 questions.

3 A. Uh-huh.

4 Q. If you'll look at, go to the 2nd page. Let's see.

5 MR. DECHAMPS: I'll mark this as Exhibit 54. We've
6 stipulated that as an aerial photo.

7 **(Plaintiff's Exhibit No. 54 was marked for**
8 **Identification.)**

9 BY MR. DECHAMPS:

10 Q. I'm going to hand you an aerial photo of 1901 North
11 Kings Highway. Okay, Mr. Marinaro, if you could get your --
12 the report as well.

13 A. Okay.

14 Q. On page 2, you see where it says, A side exterior, B
15 side exterior, C side exterior?

16 A. Yes.

17 Q. Okay. And do you see the picture on the big screen?

18 A. Right. C side is usually the address side, so that
19 would be Kings Highway side.

20 Q. Okay. And --

21 A. B --

22 Q. -- up on this screen?

23 A. B side is going to be -- on the screen, it's going to be
24 the right side there, but it's -- to us, it's the left as we're
25 looking at the building. That's just upside down.

1 Q. Okay, so okay, up top we have Highway Business 17.

2 A. Yes.

3 Q. So at the top, what side is that?

4 A. That's A side.

5 Q. Okay. And then where is B side?

6 A. B side is going to be that street side that's on the
7 right. That's going to be B side of the building.

8 Q. Okay, and then C?

9 A. C side would be the rear.

10 Q. Okay, and then D?

11 A. D will be anything that's exposed on the left side of
12 that.

13 Q. Okay. So we have A, B, C, D?

14 A. Uh-huh.

15 Q. Okay. Now, were there any photographs taken at the
16 scene?

17 A. Yes, there was.

18 Q. Okay. And were there any videos, drone videos?

19 A. There could be a video of the drone, I don't know, I did
20 not see any of that.

21 Q. Do you know if one was recorded, or?

22 A. I -- I do not know.

23 Q. You haven't seen them?

24 A. (No audible response.)

25 MR. DECHAMPS: Do you have the drone video? Hold on

1 a minute. I'm going to mark these right here as what is
2 stipulated as 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72.

3 **(Plaintiff's Exhibit Nos. 61, 62, 63, 64, 65, 66, 67,**
4 **68, 69, 70, 71, 72 were marked for identification.)**

5 MR. DECHAMPS: Exhibits 61, 62, 63, 64, 65, 66, 67,
6 68, 69, 70, 71, 72.

7 BY MR. DECHAMPS:

8 Q. Alright, Mr. Marinaro, this is drone footage from Myrtle
9 Beach Fire Rescue from the -- I guess, the first responders who
10 arrived on the fire scene. Do you recognize what portion of
11 the structure that is?

12 A. Yes.

13 Q. And what is that?

14 A. That's the roof.

15 Q. Okay. Do you know why there's so much smoke coming out
16 of the top of the roof?

17 A. Because there's still a fire that's going on inside
18 there. It doesn't look like there's any conversion at this
19 point.

20 Q. I'm sorry, can you repeat that?

21 A. I said the fire is still burning, and it doesn't look
22 like any conversion at this point.

23 Q. And "conversion," what do you mean by that?

24 A. That would be, like, steam conversion. That's if when
25 you're putting water on a fire, you'll get a steam, a lot of

1 steam coming out. The smoke is not exactly the right color.
2 It's like a grayish smoke there. If you get a nice pure white
3 smoke usually coming out, it's where you're getting some
4 conversion. So that means you're putting water on, directly
5 onto the fire.

6 Q. Okay. Do you see on the roof where there's darker
7 colors, I guess?

8 A. Yes.

9 Q. What is that?

10 A. That's from heat from underneath. It's actually
11 degrading the roof inside and coming through the roof. So
12 that's most prominently on a tarred and a papered roof. So
13 it's heating up that tar, so that's why it's turning black
14 there, plus, you have the heat coming up into there.

15 Q. Now, is it near the HVAC unit, it looks like?

16 A. Yes.

17 Q. What is that?

18 A. This fire coming out of that AC unit, it's from the
19 opening underneath coming into where the air handle would come
20 into the compressor unit.

21 Q. And does that flame coming through the roof, does that
22 indicate anything that's going on in the interior of the
23 building?

24 A. Just that there is still fire inside.

25 Q. Okay. It looks like -- what is that that just appeared

1 on the screen?

2 A. Those are master streams. So there is two trucks that
3 are there, and they have a master stream on the top. They're
4 putting water into the building now because they cannot do
5 anything from the inside, so the -- the reason why nothing
6 probably was going on right before that is that they evacuate
7 the building to make sure nobody's inside the building, and now
8 at this point they're going to try to drown out the fire from
9 the top.

10 Q. And how long does this process take, or does it vary?

11 A. It varies each -- for each fire, the way the building is
12 constructed.

13 Q. So at what point are you able to go inside the
14 structure?

15 A. We do not go inside until the air monitoring has been
16 cleared, that it's within the safe zones, and at that point
17 we'll go inside there, because the only thing that we wear is
18 usually a respirator, that's about it.

19 Q. So the bottom side there, that would be the A side,
20 right?

21 A. Yes, that's the A side.

22 Q. And is that smoking or condensation on the screen?

23 A. It's a little bit of both. What they're just trying to
24 do is, it's raining inside that building.

25 Q. Okay. And now it looks like the smoke's got two

1 different colors, what was that?

2 A. I couldn't say exactly.

3 Q. Alright. Mr. Marinaro, we're going to show the video
4 from the fire engine during the initial response. I'm going to
5 go ahead and put these -- these are the videos on disk. We
6 stipulated to these.

7 THE COURT REPORTER: Which exhibit?

8 MR. DECHAMPS: That would be 56 here.

9 **(Plaintiff's Exhibit No. 56 was marked for**
10 **identification.)**

11 BY MR. DECHAMPS:

12 Q. Yeah. Yes. Okay, Mr. Marinaro, can you kind of take us
13 through that as far as the south end?

14 A. That's a vehicle that's going towards the -- going
15 northbound now on Kings Highway.

16 Q. And that's Highway 17 Business in Myrtle Beach; is that
17 right?

18 A. Yes, sir.

19 Q. Okay. And where are they going now?

20 A. He's probably just trying to find a -- a place to locate
21 the vehicle.

22 Q. Looks like they are not -- is that 1901?

23 A. That's 1901. That's the B side of the building. And
24 this video might be from a command vehicle, I'm not sure that
25 he's doing his -- instead of a walk around, he's doing a drive

1 around to see --

2 Q. Okay.

3 A. -- what's going on.

4 Q. And was that smoke that he just drove into?

5 A. I can't say for sure. It was a foggy morning in that
6 morning. It looks pretty heavy, though.

7 Q. Now, you know what they're doing?

8 A. They're getting ready to, I guess, fight the fire.

9 Q. Okay.

10 A. So that's possibly a command vehicle that's taking this
11 video.

12 Q. And is that the 1901 property right there --

13 A. That's --

14 Q. -- right front?

15 A. -- right. That would be the secondary building that's
16 connected to it.

17 Q. Alright. What side is that, A side or B side?

18 A. That's going to be D side, but we don't have that listed
19 on as a -- the A, B, C, and D is mainly of what we -- the
20 building that the fire is contained to at this point.

21 Q. Okay, I understand.

22 A. So it looks like the truck kind of forced entry into
23 that front door.

24 Q. And at this time was the fire still ongoing?

25 A. Yes.

1 Q. And why are they trying to gain entry?

2 A. To put the fire out.

3 Q. Okay. Alright. Mr. Marinaro, this is a drone video,
4 and I believe that's showing the roof, I believe?

5 A. That's the roof, yes.

6 Q. And it looks like there's some firefighters on the roof.

7 A. Very possible.

8 Q. You see that? Okay. That appears to be the roof. See
9 that dis-colorization around the HVAC? What is --

10 A. That's from the fire below. That's where the main part
11 of the fire was, is right in that area there.

12 Q. Okay. And see the roof there? It looks like it's kind
13 of sloped or kind of --

14 A. It is sloped.

15 Q. Okay. What -- I guess, what does that mean? What does
16 that show?

17 A. There was heat to the supports to the roof there for a
18 decent amount of time, so the roof is starting to fall in, and
19 I believe there was bar joist in there, so the bar joist is
20 probably separated from the outside wall where it's attached
21 to. So the outside wall there would be the D side wall and the
22 AC units between the weight on there, plus the water weight
23 that they put on there to put the fire out.

24 Q. Okay. What's a bar joist?

25 A. A bar joist is, it's metal. It's like a metal truss

1 that goes across the top of the ceiling to hold the roof into
2 place.

3 Q. Okay. If you take a look at your incident report on
4 page 2, the top paragraph, does that -- do you see where it
5 talks about a bar joist, is that what you were just talking
6 about?

7 A. Yes.

8 Q. Mr. Marinaro, do you see the firemen over here on the --

9 A. Yes, sir.

10 Q. -- bottom left?

11 A. Yes, sir.

12 Q. Can you explain what they're doing?

13 A. They're probably --

14 Q. Looks like poking of the wall.

15 A. They're probably just checking roof conditions at that
16 point there. I'm not -- I mean, that's -- I'm just speculating
17 that.

18 Q. Okay. Over here at the top, it looks like a little bit
19 of smoke coming out. It looks like this roof looks more bowed
20 or sloped in. Can you explain what this fireman over here is
21 doing on top of the --

22 A. He's probably looking --

23 Q. -- slope?

24 A. -- for an extension of the fire if it was against that
25 wall, to see if it came up that wall.

1 Q. And are they doing that to check to see if it was safe
2 to go inside, or why are they --

3 A. I -- I don't know what their plan of action was.

4 MR. DECHAMPS: This is Plaintiff's Exhibit 61. I'll
5 hand you a hard copy, that's easier to see.

6 BY MR. DECHAMPS:

7 Q. I'll hand you a hard copy. That's easier to see. Can
8 you just kind of explain to the Jury what that depicts real
9 generally in a general sense, like, the side of the building?

10 A. That's A side, which would be the address side on North
11 Kings Highway, and you have a lot of truck there that it does
12 their -- either ventilation they could do or they can do
13 suppression with that, and then you have a engine that's to the
14 left of it, and they're supplying somebody else another
15 vehicle, or they're connected to a 5-inch water supply line.

16 Q. Okay. I'm going to hand you Exhibit 62. And what does
17 that picture show in a general sense?

18 A. It shows the -- the roof. The main damage is going to
19 be on the D side there, and it's discolored, so you -- the roof
20 sheathing itself is pretty much gone, you're probably down to
21 just the membrane that's there, and it looks like something was
22 in the center there. I'm not sure if that was a skylight or a
23 scuttle hole, or whatever.

24 Q. And you tell us, you referenced the membrane, can you
25 tell us what that is?

1 A. It's just what the roof is made of. You put -- you have
2 the bar and joist that is your base support for -- you can have
3 plywood up there, there's different membranes that go up there,
4 and then sometimes there will be tar on top of that or
5 sometimes gravel on top of that. It's just, we call it a
6 built-up roof, and over the years go by, a lot of times the
7 roof is not just taken off, another roof is just put on top of
8 that one.

9 Q. Okay. I want to make a trade. I'm going to hand you
10 Exhibit 63. Okay. Can you tell us in a general sense what 63
11 shows?

12 A. It shows a firefighter that's up on there on the parapet
13 side of the wall there, and he's got a hose line with him, she
14 has a hose line with her, and they're most probably looking for
15 an extension for the fire, if it went up into the wall there,
16 so they can put the fire out from there.

17 Q. Okay. I'm going to show you -- well, if you go back to
18 your report and just kind of explain, I guess, your
19 investigation process, where you start out, if you need to
20 refresh your memory of the top area on page 2, the bottom
21 sentence?

22 A. Okay. What I usually do is start on the outside, and
23 I'll do a walk around the outside, and it's listed on the
24 report of A side exterior. The front structure, address side
25 on North Kings Highway, this area showed lightly burned debris

1 extending from the front door down to the parking area, which
2 had been carried by the excess of water draining into the
3 building, or from the building. Then I do walk around the side
4 B, which would be the left side: Light debris found in the
5 parking area. Two 4x5-inch sections of siding had been removed
6 with the assistance of a K12 saw. So they used the saw in
7 trying to get through the block there from the structure wall
8 to provide penetration avenues for the fire suppression team.
9 One large section of the duct work was found on the ground next
10 to the doorway, the doorway which led "blow" grade. It says
11 "blow grade," but it should be "below" grade. It was filled
12 with water and debris. C side, the structure has a bank of
13 commercial hood exhaust fans protruding from the block wall,
14 the wall directly above the base of the state. The fans were
15 covered with black residue, the smoke appeared to be escaping
16 the building through the unsealed areas between the fan and the
17 block wall. The top of the block wall revealed an approximate
18 6-inch hole from the PVC pipe that had melted and fallen
19 directly below its location on the ground. D side, nothing
20 significant was found on the D side.

21 Q. Okay. Do you recall from the -- or from which portion
22 of the interior sustained the most damage?

23 A. D side, on the interior.

24 Q. Okay. I'm going to show you some interior photos
25 inside, see if you can identify the section of the interior

1 wood.

2 MR. DECHAMPS: So Plaintiff's Exhibit 64.

3 BY MR. DECHAMPS:

4 Q. Do you know what area that is?

5 A. It's just a walkway and hallway.

6 Q. Okay. And what -- can you kind of explain what kind of
7 damage that is, or?

8 A. That's all of the Sheetrock or whatever it is on the
9 wall that has been knocked down from fire suppression, or it
10 just fell down because it heated the fire due to burning the
11 studs.

12 MR. DECHAMPS: And then 65, Plaintiff's Exhibit 65.

13 BY MR. DECHAMPS:

14 Q. Real quick, just do you know what side of the building
15 or area?

16 A. I do not remember where that was.

17 Q. Okay. Is that the same type of damage that you
18 explained?

19 A. Yes. It's all due to the fire damage.

20 Q. And I'll show you Exhibit 66.

21 A. That's basically the same as the last one. It's a
22 little different at the angle.

23 Q. Okay. And Exhibit 67, on that one?

24 A. The same thing. It just shows a little bit more of the
25 ceiling where the actual roof was opened, and from the heat,

1 just the roof degraded and pretty much just melted and burnt
2 away, and a lot of that stuff on the floor is from the roof,
3 ceiling, and then, of course, some of the Sheetrock that was
4 there.

5 Q. Did the fire burn through the roof?

6 A. Yes, uh-huh.

7 Q. And I'll show you Plaintiff's Exhibit 68. Is that the
8 interior?

9 A. That's the interior, it looks like it's looking towards
10 the bar area that was there.

11 Q. Okay. And the bar area, do you know where --

12 A. The bar area was --

13 Q. -- was that?

14 A. I believe it was on the B side.

15 Q. Okay. I'm going to show you Plaintiff's Exhibit 69.

16 A. That's about the same as the other one, just a little
17 bit higher angle.

18 Q. Okay. And Plaintiff's Exhibit 70?

19 A. Same thing, just showing the studs. There's a couple of
20 studs that are there that aren't burned, and then you have the
21 top plate of your wall that's all charred, and the Sheetrock is
22 missing. It looks like some kind of a plumbing, a vent that's
23 there.

24 Q. What's that stuff that looks like piping or, like, pipe?
25 What is that?

1 A. It's some kind of a vent. I don't know. It could be
2 part of the sprinkler system or a vent.

3 Q. Okay. And Exhibit 71?

4 THE WITNESS: Okay. That's inside facing the D side
5 wall.

6 BY MR. DECHAMPS:

7 Q. Inside, do you mean, say, if you walk in the front side
8 on the 17?

9 A. It's going to be on the right-hand side.

10 Q. And then see the top on Exhibit 71?

11 A. Yes.

12 Q. Is that the roof of --

13 A. That's the roof missing.

14 Q. So that's a hole in the roof?

15 A. That's a hole in the roof, and I believe that one
16 section that's there that's kind of hanging down was the AC
17 unit. We had an AC unit that was kind of hanging down from the
18 roof there.

19 Q. Oh, wow. So there's a heat pump hanging off the top?

20 A. Yes.

21 Q. I'm going to show you Exhibit 72.

22 A. That's the same area facing towards the D side.

23 Q. Okay. Same area.

24 MR. DECHAMPS: We're going to Plaintiff's Exhibit 73.

25 **(Plaintiff's Exhibit No. 73 was marked for**

1 **identification.)**

2 THE WITNESS: Okay. That's looking towards D side,
3 more to the left of what we just looked at prior.

4 BY MR. DECHAMPS:

5 Q. Okay. I'm going back to the incident report in Exhibit
6 32. I believe it's stated: You did a calls and an origin
7 investigation. Can you explain exactly what that means?

8 A. We tried to find out exactly area of origin where the
9 fire started and what caused it.

10 Q. Okay. And then this one, did you do that investigation
11 for 1901?

12 A. We did. Pretty much what we found was the area of
13 the -- where the fire started, but not the exact cause.

14 Q. Okay. And what area was that?

15 A. That's D side. It's on D side on some of those pictures
16 that you had there where there was a platform that was there
17 and a little DJ stand where I -- during my investigation, what
18 I found was that that's where it started was underneath that
19 flooring that was there. It was raised off the ground, it
20 wasn't ground level.

21 Q. Okay. And the fire, do you know if it was intentional,
22 accidental?

23 A. We have it as accidental, that's how we ruled it from
24 the investigation that we did, plus the samples that the
25 investigator for the insurance company pulled. The samples

1 were for any kind of accelerant that would be spread out
2 through that, and nothing was found.

3 Q. And the insurance company you're referring to, is that
4 the insurance company listed on the 1st page of that report?

5 A. I have no idea who it was -- I deal with him. He was an
6 investigator. His name is John Stewart.

7 Q. Okay. Turning to the 1st page of your report, there's a
8 Melissa Garcia. Do you know --

9 A. Yes.

10 Q. -- who she is?

11 A. Melissa was the owner or part owner of the restaurant
12 that was there.

13 Q. Okay. And under -- well, in two different places where
14 it says: Insurance company. It says, Broker, David Egan. Do
15 you know David Egan?

16 A. I believe I've talked to him on the phone when this
17 first happened.

18 MR. DECHAMPS: Your Honor, I'd like to publish
19 Exhibits 32, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66,
20 67, 68, 69, 70, 71, 72, 73, and then one of these.

21 THE COURT: I've got that all of these stipulated to
22 previously.

23 MR. DECHAMPS: Yeah, I'd like to publish all these to
24 the Jury. I think I have these right here. I'll make sure. I
25 have a bad habit of taking exhibits. Alright. Thank you,

1 Captain Marinaro. I have no further questions. Please answer
2 any questions opposing Counsel may have.

3 **CROSS-EXAMINATION**

4 BY MR. HARPER:

5 Q. Good morning, Captain Marinaro.

6 A. Good morning, sir.

7 Q. My name is Roman Harper, Counsel for the insured
8 defendants in this litigation. Isn't it true, Captain
9 Marinaro, that prior to the fire at the property, that a
10 sprinkler system was being installed there?

11 A. Yes.

12 Q. And in fact, you were from time to time inspecting the
13 property and the progress of that sprinkler system, correct?

14 A. Not the progress of it, just to do an inspection of it.

15 Q. Prior to the fire, though, you were at the property and
16 you observed that the sprinkler system had not been completed?

17 A. Yes, sir.

18 Q. And at the time of the fire, the sprinkler system wasn't
19 operational?

20 A. No, sir.

21 Q. If the building had been 100 percent sprinklered with an
22 operational sprinkler system, would that have assisted the fire
23 suppression efforts of the fire department?

24 A. In my opinion, yes.

25 Q. I understand from your report, Captain Marinaro, that

1 one or more individuals were injured as well in the fire; is
2 that correct?

3 A. Yes, sir.

4 Q. Are they okay?

5 A. Yes.

6 Q. I'm glad to hear that. I'm sorry they were injured.
7 I'm glad everything was okay. That is all the questions I have
8 for you at this time, Captain Marinaro. Thank you.

9 A. Thank you, sir.

10 THE COURT: Any Cross?

11 MR. RISER: None from Crescent Coast, Your Honor.

12 THE COURT: Redirect?

13 MR. DECHAMPS: No, sir, Your Honor, I don't have any
14 Redirect. Your Honor, may Captain Marinaro be excused from the
15 subpoena?

16 THE COURT: Any objection from the defense excusing
17 this Captain?

18 MR. RISER: None from Crescent Coast, Your Honor.

19 MR. HARPER: Nothing from the Insurer Defendants Your
20 Honor.

21 THE COURT: Sir, you may be excused. Thank you.

22 THE WITNESS: Thank you very much, sir.

23 THE COURT: It's 11:00. Let's take a brief -- or I'm
24 sorry, it's about 12:00. Counsel, for your next witness, how
25 long do you need?

1 MR. CONNELL: Not long, Your Honor, 20 minutes.

2 THE COURT: Okay. We're going to do one more
3 witness, and then we'll break for lunch. Okay? Please call
4 your next witness.

5 MR. CONNELL: Mr. Martinez.

6 **SAL MARTINEZ WAS DULY SWORN AT THIS TIME AND**
7 **TESTIFIED AS FOLLOWS:**

8 THE REPORTER: Please be seated. Please state your
9 name for the Court, please.

10 THE WITNESS: Sal Martinez. Yes, sir.

11 **DIRECT EXAMINATION**

12 BY MR. CONNELL:

13 Q. Mr. Martinez, tell us what you do for a living, please,
14 sir.

15 A. I am a structural engineer.

16 Q. How long have you been a structural engineer?

17 A. For 30 years.

18 Q. And what is a structural engineer?

19 A. A structural engineer designs and analyzes buildings,
20 whether they're commercial, industrial, residential or
21 otherwise.

22 Q. Structural engineer, is that someone who's licensed by
23 the state of South Carolina?

24 A. Correct.

25 Q. And when were you licensed?

1 A. In 2003.

2 Q. And do you have a PE certificate, too, I take it?

3 A. I do.

4 Q. And can you explain to the jury what a PE certificate
5 is, please, sir?

6 A. A professional engineer or somebody who's gone through
7 two stages of testing, has passed those tests, and reports to
8 each state under which they're licensed, annually, biannually,
9 or sometimes every three years to certify that their
10 information is the same.

11 Q. Alright. How do you get to be a PE?

12 A. You have to attend an accredited four-year institution,
13 achieve a bachelor's of science in civil engineering, and you
14 have to pay your dues from there, and you have to have -- you
15 have to have practiced under a licensed engineer four years
16 before you're eligible to take the final exam.

17 Q. How long does it take in total to be a PE, about eight
18 years?

19 A. At least, yes.

20 Q. Alright. And how long have you been practicing
21 engineering in the Myrtle Beach area?

22 A. For 20 years.

23 Q. And did you practice anywhere else prior to coming to
24 the Myrtle Beach area?

25 A. Not under my professional license. Only as an engineer

1 in training.

2 Q. And are you the owner of Martinez & Associates
3 Structural Engineers?

4 A. I am.

5 Q. And so what's the difference between a regular civil
6 engineer and a structural engineer?

7 A. A civil engineer handles storm water, subdivision
8 planning, and a structural engineer deals specifically with
9 buildings.

10 Q. And is your practice only structural engineering?

11 A. Only structural engineering, correct.

12 Q. Now, how many buildings in the Myrtle Beach area have
13 you done structural engineering assessments of reports on?

14 A. Over 300.

15 Q. In the 20 years?

16 A. Yes.

17 Q. And does that include fire losses like what we have
18 here?

19 A. It does.

20 Q. Does it include some of the buildings on the oceanfront
21 that apparently had sinking problems from --

22 A. Not necessarily sinking -- sinking problems, excuse me,
23 but from degradation, exposure, concrete malformations, a
24 number of deficiencies that happen through coastal exposure.

25 Q. Do you go into buildings and determine whether they're

1 structurally safe for humans to either go to or live in?

2 A. I do.

3 Q. How many times have you done that?

4 A. Again, probably over 1,000 times.

5 Q. Alright. How about fire losses? How many fire losses
6 have you investigated in the past?

7 A. Probably over 100.

8 Q. What is your opinion to a reasonable degree of
9 engineering certainty as to whether or not this building is a
10 building that can be rebuilt?

11 A. I would recommend against the reoccupation of the
12 building as it is and that it would need to require extensive,
13 if not complete reconstruction.

14 Q. Alright. When you say extensive, if not complete
15 reconstruction, you're talking about taking down the whole
16 building and starting over?

17 A. Essentially, yes. We're asked at times to grade
18 components and after an event such as a fire or hurricane,
19 which ones can be salvaged, which ones can't, and we go from
20 there.

21 Q. Alright. Did you write a report in regard to this
22 particular building?

23 A. I did.

24 Q. And who hired you to look at the building?

25 A. Mr. Tebele.

1 Q. Alright. And when did you go look at the building in
2 this case --

3 A. It would have been --

4 Q. -- according to your report?

5 A. -- in the May to June time frame of 2019.

6 Q. Alright. Have you had a chance to look at your report
7 before today?

8 A. I have.

9 Q. Alright. Can you tell me specifically what parts of the
10 building you looked at?

11 A. We looked at the perimeter wall structure, the roof
12 structure comprised of bar joists, the metal decking, some of
13 the second-story areas of the northern portion of the building
14 where the restaurant is, and we -- I declined to go within what
15 had previously been the Kono Restaurant or the previous movie
16 theater portion because of the conditions of the roof.

17 Q. You didn't want to get on the roof because you're afraid
18 you might fall through?

19 A. We didn't want to go on the roof or I didn't want to go
20 within that portion of the building.

21 Q. And you didn't even want to go inside the building
22 because you were afraid that it was unsafe; is that right?

23 A. That's correct.

24 Q. Alright. Have you seen all the photographs that have
25 been presented?

1 A. I have.

2 Q. Are those true and accurate representations of what you
3 saw when you did your report?

4 A. Yes.

5 Q. And have you seen the drone video just a few minutes ago
6 when you were here?

7 A. I did.

8 Q. And is that the type of fire loss you've seen in the
9 past?

10 A. Not -- not to that extent commonly.

11 Q. Alright. And what conclusion did you reach in your
12 report, if you would tell us, please, sir? I think you used
13 the word "severe," would you explain what you mean by that?

14 A. So when we grade components, we go from a scale of 1 to
15 5 with 4 being more critical and 5 being severe, and so the 4's
16 and the 5's that we grade generally recommend they be addressed
17 immediately or in the case of when components are severe, we
18 recommend that they be demolished and rebuilt.

19 Q. Alright. And is it your recommendation that the
20 building be demolished and rebuilt?

21 A. It is.

22 Q. Alright. Did you take some photographs of the area?

23 A. I did.

24 Q. Let me take a look at this. How many photographs did
25 you take?

1 A. It looks like we took 14.

2 Q. Alright. And let me get them up here and we'll see a
3 few questions about those. Alright. So we've got your report
4 up on the video here, Exhibit Number 37. Is that your report
5 that you wrote?

6 A. It is.

7 MR. CONNELL: And Michelle, go to the photos, if you
8 would, please.

9 BY MR. CONNELL:

10 Q. Are those the photos of the building?

11 A. They are.

12 Q. Alright. The first photo at the upper left corner, what
13 is that exactly?

14 A. That is the northern portion of the building complex --

15 Q. Alright. And why did you take that?

16 A. -- on elevation.

17 Q. Alright. Why'd you take that photo?

18 A. We always like to represent the overall perspective of
19 the building.

20 Q. Okay. And then, yes, so the building right below -- or
21 the photo right below that, the front right of room upper
22 joist, why'd you take that photo?

23 A. We generally walk through the accessible portions of the
24 building and record what we find along the way.

25 Q. Alright. And photo number 3 entitled: Bar joist and

1 structural steel soffit covered. Why don't you take that
2 photo?

3 A. The drop ceiling was down, so it looked like to me that
4 it had sustained some damage and we always want to see the
5 condition of the metal decking if it's exposed.

6 Q. Alright. How about photo number 4? Why did you take
7 that?

8 A. Again, progressing to a different portion of the
9 building. We want to be able to record our findings in that
10 area.

11 Q. Alright. And photo number 5, the top right hand corner.
12 Why'd you take that one?

13 A. It was in a different area of the building and an area
14 where wood construction was more common, which constituted the
15 second level of the restaurant.

16 Q. Okay. And photo number 6?

17 A. Was the pathway to that area.

18 Q. Alright. And photo number 7?

19 A. To record the condition of the bar joist of the
20 restaurant area.

21 Q. Photo number 8?

22 A. This was a different area --

23 Q. A different area of the bar?

24 A. -- where the water damage was --

25 Q. Alright. Extensive water damage?

1 A. Yes.

2 Q. Alright. Photo number 9?

3 A. This was recording some soot damage from the fire.

4 Q. Okay. Photo number 10?

5 A. That gives a really good perspective of the severity of
6 the damage within the Kono Restaurant or the southern portion
7 of the building.

8 Q. You wrote, severe fire and water damage; would that be
9 correct?

10 A. That's correct.

11 Q. Alright. Photo number 11?

12 A. Again, depiction of severe damage within that portion of
13 the building.

14 Q. Alright. And photo number 12 is just to show -- orient
15 you as to where the building was; is that right?

16 A. That's correct. The front elevation of the --

17 Q. And photos 13 and 14?

18 A. Gives an idea of the condition of the rear of the
19 building.

20 Q. Okay. And your conclusion at the end of the report was:
21 More critical to severe; is that right?

22 A. That's correct.

23 Q. Alright.

24 MR. CONNELL: Alright, Your Honor, we'd offer Exhibit
25 Number 37 in evidence.

1 THE COURT: 37, does that have one that was -- was
2 that stipulated?

3 MR. HARPER: No, Your Honor. No objection.

4 MR. RISER: None for Crescent Coast.

5 THE COURT: 37 is admitted into evidence.

6 **(Plaintiff's Exhibit No. 37 was marked for**
7 **identification and admitted into evidence.)**

8 MR. CONNELL: I'd like to give that to the Jury, Your
9 Honor.

10 THE COURT: I'm sorry?

11 MR. CONNELL: I'd like to give that to the jury, Your
12 Honor.

13 THE COURT: Yes, sir.

14 MR. CONNELL: That's all the questions I have.

15 MR. HARPER: No questions, Your Honor.

16 **CROSS-EXAMINATION**

17 BY MR. ADAMS:

18 Q. Mr. Martinez, my name's Hunter Adams, I represent
19 Crescent Coast. I just have a couple questions for you. You
20 were hired by Mr. Tebele to go into the building and make some
21 general observations as a structural engineer as to the status
22 of the building; is that a fair statement?

23 A. Correct.

24 Q. And in compiling this report that was just offered into
25 evidence, this isn't a final scope of repair or recommendation

1 necessarily. It's just an initial set of observations; is that
2 right?

3 A. It's not a scope of repair, but there are
4 recommendations offered.

5 Q. Right. And certainly, some of the sections of the
6 building were severely damaged, and I don't think you were
7 asked about this, but your report separates the building into
8 the north side, which you said is the Kono Steakhouse, and the
9 South side, which is La Casona Grill, and La Casona is where
10 the fire happened; is that right, in the south side?

11 A. It's my understanding, yes.

12 Q. In the north side, the Kono Steakhouse, you said that
13 was water damage, but not necessarily fire damage; is that
14 right?

15 A. Correct.

16 Q. And you never actually went in; is that right, to the
17 north side?

18 A. We did go into the -- I did go into the north side. I
19 had somebody with me, so I stated "we," but I didn't go into
20 the south side.

21 Q. Okay. I understand. Your report lists, severe
22 conditions, and then it also lists some conditions that are,
23 moderate to more critical, and in looking at it, you say the
24 ceiling wall -- the ceiling and wall covering loss. You list
25 that as a condition that you rated at number 2, so that's more

1 on the moderate side, not severe; is that right?

2 A. That's correct.

3 Q. And in your report, you recommend: Removal of all
4 drywall and ceiling components; is that right?

5 A. Correct.

6 Q. And so I want to ask, if you answered Mr. Connell's
7 question earlier that you recommended demolition of the entire
8 building, why would you, in your report, list repairs such as
9 remove the drywall if it's all getting demolished anyways?

10 A. Well, you have to understand that the water and the
11 duration of time that it sits and creates mold within a
12 building is a huge factor, so if you ask me present tense
13 should the building be demolished, yes. At the time, there was
14 a portion of that building, particularly the north side, that
15 could have been saved if it had done so within a certain time
16 frame, we're talking within two months to three months, tops,
17 to that report, but the longer you let a building marinate
18 within a moist environment, the less likely you are to be able
19 to remediate it.

20 Q. So you just said the north side of the building could
21 have been saved, right, if the building owner or whoever was
22 capable of hiring a contractor to do so took timely action to
23 make sure that the building was saved; is that a fair
24 statement?

25 A. Correct.

1 Q. And consistent with that, you noted that there's a wall
2 separating the north side and the south side, and your report
3 says: Further study would be required to determine the effect
4 of the separation that is labeled the separation wall, the
5 removal of that separation wall. So in essence, you
6 recommended or at least noted that further study could have
7 been done to see if the north side of the building could have
8 been saved; is that right?

9 A. Correct.

10 Q. You were never hired to do that, were you?

11 A. No.

12 MR. ADAMS: Okay. No further questions, Your Honor.

13 MR. CONNELL: Just one, Your Honor.

14 **REDIRECT EXAMINATION**

15 BY MR. CONNELL:

16 Q. So if the insurance company had paid in two or three
17 months, it would be a different situation; is that right?

18 MR. ADAMS: Objection, calls for speculation.

19 THE COURT: I'm going to allow him to answer your
20 question.

21 MR. ADAMS: Can you ask him one more time?

22 BY MR. CONNELL:

23 Q. So if the insurance company had paid the claim like they
24 were supposed to in the first two or three months, some of the
25 parts of your report --

1 MR. HARPER: Argumentative.

2 MR. CONNELL: I haven't finished asking the question
3 yet, Your Honor.

4 THE COURT: You may finish the question.

5 BY MR. CONNELL:

6 Q. So if the insurance company had paid the claim in the
7 first two or three months, the issues about the mold and the
8 sheetrock might have been different; is that right?

9 A. Correct.

10 MR. CONNELL: Alright. No further questions.

11 MR. ADAMS: One briefly, Your Honor.

12 **RECROSS-EXAMINATION**

13 BY MR. ADAMS:

14 Q. Do you ever talk to any insurance companies in this
15 case?

16 A. No.

17 Q. Did you talk to my client, Crescent Coast?

18 A. No.

19 Q. You were just hired in your capacity as a structural
20 engineer?

21 A. Correct.

22 Q. You have no opinions about coverage decisions by --

23 A. I don't.

24 MR. CONNELL: Objection, Your Honor, that's --

25 THE WITNESS: I don't.

1 MR. CONNELL: -- beyond the scope in re-cross.

2 MR. ADAMS: You asked about the insurance carrier's
3 involvement and whether it should have been paid and what would
4 happen if it was paid.

5 THE COURT: I'm going to sustain the objection.

6 MR. ADAMS: Okay, no further questions.

7 THE COURT: Can he be released, Your Honor, from his
8 subpoena?

9 MR. HARPER: No objection, Your Honor.

10 MR. ADAMS: None for Crescent.

11 THE COURT: Alright, Mr. Martinez, you may be
12 excused. Alright, ladies and gentlemen, that was right at
13 about 20 minutes. Why don't we break for lunch? It's 12 after
14 12:00. Let's try to be back here at 1:30. We'll try to start
15 promptly at 1:30, so maybe try to be back at 1:20.

16 **(Recess Taken)**

17 THE COURT: Alright, Madam, Forelady, I hope that you
18 had a good lunch. We're going to get started back. Mr.
19 DesChamps, you may call your next witness.

20 MR. DESCHAMPS: Your Honor. Plaintiff calls Mike
21 Dover.

22 **MIKE DOVER WAS DULY SWORN AT THIS TIME AND TESTIFIED**
23 **AS FOLLOWS:**

24 THE CLERK: Please be seated. Can you state your
25 name for the Court, please?

1 THE WITNESS: My name is Mike Dover. I'm employed at
2 the Crawford Sprinkler Company.

3 **DIRECT EXAMINATION**

4 BY MR DESCHAMPS:

5 Q. Hi, Mr. Dover. How long have you been employed at
6 Crawford Sprinkler?

7 A. 49 years and 8 months.

8 Q. Okay. And where's Crawford Sprinkler located?

9 A. In Lugoff, South Carolina.

10 Q. Okay. And what do you do at Crawford Sprinkler?

11 A. I do estimating.

12 Q. Okay. Anything else?

13 A. No, sir.

14 Q. Okay. Can you explain what you do as an estimator?

15 A. Estimator, you just take -- generally, I will make a
16 preliminary type little layout of the building off of plans or
17 a survey, and then once I determine the size, I'll just price
18 it up, put the price together for it.

19 Q. Okay. I'll step back a little bit. What kind of
20 business does Crawford do?

21 A. They install fire sprinklers.

22 Q. Fire sprinklers?

23 A. Yes, sir.

24 Q. Like in buildings?

25 A. Buildings, any type where they need for fire

1 suppression, fire systems.

2 Q. Do they do -- is it commercial, residential, or both,
3 or?

4 A. Both.

5 Q. Okay. When Crawford does a sprinkler job or installs a
6 new sprinkler at a building, can you kind of explain the
7 process from step one to installation?

8 A. Yes. Usually, after we put a price together, if it's
9 accepted, then we have the design department that will design
10 the system, put it on paper, do the submittal work to the
11 authorities that need to review it. Once it's reviewed and
12 accepted, then it's fabricated, pipes fabricated, sent to the
13 site and install it.

14 Q. Okay. So I guess we have step one, you got to design
15 it; is that correct?

16 A. Correct.

17 Q. Okay. And do you do any estimates for the design?

18 A. That's all part of the total estimate when we put the
19 price together.

20 Q. Alright. And then can you take me -- so is that like
21 kind of, like, plans for a building? So you get a design like
22 drawings?

23 A. Yes, sir.

24 Q. Okay. And then what happens after that?

25 A. After the design is completed, it's submitted to the

1 authorities for review. It will either be the state or the
2 local authority, whichever that authority having jurisdiction
3 might be.

4 Q. Okay. Will that be like a county or a city, or?

5 A. Sometimes city, county, sometimes -- and as well as the
6 State of South Carolina.

7 Q. Okay. How long -- typically, how long does the design
8 process take as far as getting --

9 A. That --

10 Q. -- the plans drawn?

11 A. That depends on the size of the building, the size of
12 the project, what all you have to do, but usually it could take
13 anywhere from two weeks to two months.

14 Q. Okay. And so you get the design or the drawings, and
15 then you submit them to the governmental authority; is that
16 correct? Do you get like a permit?

17 A. Correct.

18 Q. Okay. And then once you obtain the permit, what happens
19 next?

20 A. With the approval and the permit, once that's all
21 obtained, then it goes to fabrication.

22 Q. Okay. And what is fabrication?

23 A. That means the pipe is put together, cutting lengths,
24 everything ordered, and heads, sprinkler heads, the pipe
25 hangers, pipe fittings, and it's fabricated usually at one --

1 at our spot -- at our shop or some fabricating location, then
2 it's sent to the job site.

3 Q. Okay. So you bring all that piping and stuff to the job
4 site, and then what happens?

5 A. Then that's when the installation starts.

6 Q. Okay. And I guess broadly, and I guess as simple as you
7 can, what is the installation process, like, what does that
8 going to take?

9 A. That's when you -- installers will be at the job site,
10 they'll start at some point in the building and then run the
11 pipe, hang the pipe, put it in place and just go from that
12 point.

13 Q. Okay. And then once, I guess, all the piping is
14 installed in the building, then what's next?

15 A. Usually, you have to have a service line brought into
16 the building to connect to the pipe on the inside of the
17 building, once it's all put in place, then you test it, put the
18 water on it, and everything's signed, sealed, buttoned up, and
19 ready to go.

20 Q. And what do you mean by service line? What exactly is a
21 service line?

22 A. That's a water line from the -- normally, a sprinkler
23 system is fed typically from the municipal system from the
24 outside, like a city main, and make connection to the city
25 main, bring it to and into the building, and then that's --

1 once it gets into the building, that's when the inside
2 installation can go from that point on throughout the building.

3 Q. And before you get the main line, do you have to get a
4 separate drawing for that, or --

5 A. That's --

6 Q. -- is that all part of the same thing?

7 A. That's usually -- yes, sir. That's usually included as
8 part of our plan, part of our drawing, part of our submittal.
9 It depends on exactly who it's going to, sometimes the civil,
10 outside people will have that part of their drawings, if not,
11 it'll be included as ours.

12 Q. Okay. And once it's connected to the main line, is
13 there anything else left to do until the construction, I guess,
14 is complete?

15 A. You will have a line coming in, the line might have a
16 valve pit or a box where the meter and the backflow preventers
17 might be, and then it's all tied into the building, and that's
18 where the interior installation connects inside the building.

19 Q. Okay. Do you have to do any kind of testing or
20 anything?

21 A. Yes.

22 Q. Can you -- as simple as you can, can you explain that?
23 Is that called pressure testing?

24 A. Yeah. When you test it, once you get it installed, you
25 put water on the system, either from the city connection that

1 has been made or you can use it by hose, put it on the system.
2 Check for leaks. If there's no leaks, then you put a pressure
3 test on it, pump the pressure up to see that it holds for a
4 certain length of time at a certain pressure.

5 Q. Okay. Is there anyone that has to do that pressure
6 testing, or who typically does that?

7 A. We -- our installers do that. They do the pressure
8 test, and then you might call for an inspector to come and
9 witness the test, like the city inspector or whoever that
10 insurance inspector might be, they may witness the test, as
11 well.

12 Q. Okay. And then I guess what is the final step or what
13 is the final act to make the construction or installation of a
14 sprinkler complete?

15 A. Well, the final test would be once the system's
16 installed and been hydrostatically or pressure tested, then you
17 go through a final test. That alarm system has to be hooked up
18 to it, as well. We don't install the alarm system. We just
19 furnish the switches on the system that the alarm system hooks
20 to, but the alarm system and the water fire sprinkler system
21 has to be completed and tied in together in order for it to
22 pass a complete inspection.

23 Q. Okay. Now, Crawford, in your experience, as far as
24 doing jobs, do y'all do -- install sprinklers all over the
25 state or just a certain area?

1 A. Throughout the state.

2 Q. Okay. Upstate?

3 A. Upstate.

4 Q. Y'all ever do any Myrtle Beach?

5 A. Myrtle Beach. All of South Carolina, we're licensed in
6 North Carolina and Georgia, as well, but primarily in South
7 Carolina.

8 Q. Do you remember if y'all did a job at a location at 1901
9 North King's Highway?

10 A. Yes, sir.

11 Q. -- at Myrtle Beach? And do you recall -- do you
12 remember who hired Crawford to do that job?

13 A. Yes, sir.

14 Q. And who was that?

15 A. Mr. Tebele.

16 Q. It's been awhile, but I'm going to hand you over what
17 we've already stipulated as Plaintiff's Exhibit 3 into
18 evidence. I'm going to do Plaintiff Number 4, as well. Mr.
19 Dover, I'm going to hand you what's stipulated as evidence,
20 Plaintiff's Exhibit 3. It's like an estimate dated March of
21 2016, I believe, and is there an amount on there, an estimated
22 amount?

23 A. Yes, sir.

24 Q. And how much is that?

25 A. That was \$21,789 for design of the system.

1 Q. That's for the design?

2 A. Yes, sir.

3 Q. Is that for the plans?

4 A. No. That -- Yes, sir. That was to design the plan and
5 have the plans printed out and submitted.

6 Q. Okay. And that's Crawford's --

7 A. That's the design.

8 Q. That Crawford's estimate?

9 A. Yes, sir.

10 Q. And can you tell me the date on that? I might have
11 misspoke.

12 A. March 6th, 2017.

13 Q. Okay. So March 6th, 2017, y'all -- is when y'all
14 started designing this building sprinkler for 1901; is that
15 correct?

16 A. Yes, sir.

17 MR. DESCHAMPS: There they are. I'm going to go
18 ahead and mark these Plaintiffs 42 and 43, we've stipulated to
19 both of those being admitted in evidence.

20 BY MR DESCHAMPS:

21 Q. Mr. Dover, I'm going to hand you what's been stipulated
22 into evidence as Plaintiff's Exhibit 42 and 43. Now, those
23 might be a little repetitive. I think 42 is just the
24 first-floor plans.

25 A. Yes, sir.

1 Q. And I'm not sure, if you could look at that and verify
2 that for me.

3 A. Yes, sir, first-floor fire sprinkler plans.

4 Q. Okay. And can you tell me exactly, I guess, what it
5 shows in a broad sense, the general dimensions? What do those
6 first-floor plans show as far as the drawing? You don't have
7 to tell me the little tiny print.

8 A. We --

9 Q. Just like the drawings on there, what -- the shapes.
10 Somebody like me that can't really read plans. Can you --

11 A. Oh, yeah. This --

12 Q. Can you help me out?

13 A. Okay. The title block, it's just called a title block,
14 the name of the project, and then it says what -- first-floor
15 plans. Of course, it also has the piping layout with the sizes
16 and all on it. It's got the head counts, pretty much, and the
17 larger print would indicate the hangers and the fittings and
18 whatever.

19 Q. Does it show the inside of the building?

20 A. That is the inside piping on the first floor.

21 Q. Okay. Alright. Let's go to the next one, that's 43.

22 A. Yeah.

23 Q. There's four sheets in there. Look at that for a
24 second.

25 A. That's also the first floor, well, part of it.

1 Q. Okay. So are the first four sheets in there, as well?

2 A. Yes. Both of these are plans on the first floor.

3 Q. And then what about the sheets attached on Exhibit 43?

4 Is there a second floor on there?

5 A. It looks like the first floor only on 43. Now, the
6 Exhibit 42 does have an upper floor.

7 Q. That's what I asked for. I'm sorry. I got my numbers
8 mixed up.

9 A. 42 has first and second.

10 Q. Okay. So 42, the next page, that's the second-floor
11 drawing?

12 A. The last sheet is the upper floor.

13 Q. Okay.

14 A. Yes.

15 Q. Okay. So going through this process, you got your plans
16 for the sprinkler, and what's next? What's the next step for
17 this job? Is that when you get the --

18 A. These are the copies that will be submitted to the
19 authorities for review.

20 Q. Okay.

21 A. Once it's approved then our design department takes
22 these plans, and then they will do a listing of all the
23 material and order it for fabrication.

24 Q. And once that happens, because I know in some places,
25 more so than others, but do you get like a permit from the city

1 or from the county or something?

2 A. Yes. The permit from City of Myrtle Beach is part of
3 the review.

4 Q. I'm going to show you, I'm going to mark this
5 Plaintiff's 5, we've stipulated this, as well. Mr. Dover,
6 Plaintiff's Exhibit 5, and that's two pages, can you tell me
7 what that first page is?

8 A. This first page in Exhibit 5 is, it looks like the
9 application for the review and the permit.

10 Q. So is that the application for the permit?

11 A. This is the application for the permit.

12 Q. And is Crawford who applied for it?

13 A. Yes.

14 Q. Okay. And what's the date of that application? Does
15 that have a date on there?

16 A. Yes, sir.

17 Q. When was the --

18 A. Date received was 06/08/2017.

19 Q. Okay.

20 A. Date of issue was 06/13/2017.

21 Q. Okay. And you go to the next page.

22 A. Yes.

23 Q. And what's that?

24 A. Those -- this is the fee for the permit.

25 Q. Okay. Is that the receipt or the actual permit?

1 A. It looks like a receipt on this page, yes, sir.

2 Q. Okay. And then on the 1st page, is there a contractor,
3 does it identify a contractor on there?

4 A. Yes, sir.

5 Q. And who's that?

6 A. Crawford Sprinkler Company.

7 Q. Okay. So going through this process again, you got the
8 permit, and now what's next?

9 A. That's when the -- you get the material listed and ready
10 for fabrication to get it sent to the job, order the material.

11 Q. Okay. But for your customer, Mr. Tebele, did the
12 Crawford and Mr. Tebele have like an estimate or a contract or
13 some sort of agreement?

14 A. For the cost?

15 Q. For the installation.

16 A. Installation cost.

17 Q. The installation and -- because we already did the
18 design.

19 A. Yes, sir.

20 Q. Maybe this will refresh your memory, Plaintiff's Exhibit
21 4.

22 A. Yes, sir.

23 Q. And what is Exhibit 4?

24 A. Exhibit 4 is the call for the installation, labor,
25 material and installation, and it breaks down the south side

1 and the north side, which is the designated south side, phase
2 A, north side, phase B.

3 Q. Okay. Does that have a signature page on there? Is
4 there any signatures on the second page?

5 A. Yes, sir, third page.

6 Q. Third page. Who signed that?

7 A. Mr. Tebele.

8 Q. Okay. And then Crawford signed that?

9 A. Crawford signed it and Mr. Tebele.

10 Q. Okay. And is that the agreement for the installation of
11 the sprinkler system?

12 A. Material installation, yes, sir, that's for the inside.

13 Q. And that's for 1901?

14 A. Yes, sir.

15 Q. North King's Highway?

16 A. Yes, sir.

17 Q. And how much is the contract amount on there?

18 A. Total amount?

19 Q. Is there an amount?

20 A. \$214,727.00.

21 Q. Okay. And what's the date on there again?

22 A. The date of the letter was June 10th, 2017, and the date
23 -- signing date from Mr. Tebele was June 26th, 2017.

24 Q. And is there any kind of completion date on there or
25 anything?

1 A. No, sir.

2 Q. Okay. So now we have, I guess, the agreement of the
3 contract for the installation, we got the design, and so what's
4 next for 1901 North King's Highway?

5 A. To get the material ordered and on site and the
6 installation started.

7 Q. Okay. Do you recall how long that took, or?

8 A. No, sir, I don't.

9 Q. How long does that -- I guess, how long does that
10 process take in a generalized sense?

11 A. Well, it depends on the size of the building, type of
12 building, more than anything else, yes, sir.

13 Q. So you get the materials, and then do you have -- you
14 have to bring them here and install them; is that correct?

15 A. Yes, sir, it would be shipped into here.

16 Q. Do you recall approximately when y'all started the
17 construction at the 1901?

18 A. The installation, no, sir. I do not.

19 Q. Do you recall that as far as a year, or a part of a
20 year, late '17 or early '18?

21 A. I don't recall.

22 Q. Okay.

23 A. I really don't.

24 Q. Do you recall -- well, strike that. I'm sorry. Did
25 y'all do any work for the underground main or to install or to

1 connect the sprinkler to the water supply?

2 A. Crawford did not install or furnish the installation.
3 That was a utility contractor actually did the outside work.

4 Q. And that utility contractor, do you remember who that
5 was?

6 A. Yes, sir, it was Carolina Tap & Bore. They're in West
7 Columbia, South Carolina.

8 Q. Okay. And so did they give you, I hope I'm using the
9 right word, did they give you bids, or anything like that?

10 A. Yes, sir, they put a proposal together for that.

11 Q. Okay.

12 MR. DESCHAMPS: Mark this as Plaintiff's Exhibit 41.
13 This has also been stipulated into evidence.

14 BY MR DESCHAMPS:

15 Q. Plaintiff's Exhibit 41, can you tell me what that is?

16 A. That is the proposal from Carolina Tap & Bore.

17 Q. Okay. And who was the proposal to?

18 A. The proposal was sent to Crawford Sprinkler Company.

19 Q. Okay. And how much is the proposal? Is there an amount
20 on there?

21 A. Yes, sir. \$39,893.00.

22 Q. Okay. And that was for the underground main, am I
23 saying that right, or the main line?

24 A. That was to make the tap with the City of Myrtle Beach
25 and brought the line into the building completing the outside

1 supply.

2 Q. And do you know, did Carolina Tap do any kind of
3 drawings of the main, because we got the sprinkler drawings,
4 and?

5 A. We actually put that on our plans when it was submitted,
6 so that was submitted as part of our drawings.

7 MR. DESCHAMPS: Okay. I'm going to mark that as
8 Plaintiff's Exhibit 6.

9 BY MR DESCHAMPS:

10 Q. I'm showing you what's been stipulated into evidence as
11 Plaintiff's Exhibit 6.

12 A. Okay.

13 Q. And what's that? Can you tell me what that is?

14 A. That was, it looks like a sketch that was prepared by
15 Caroline Tap & Bore.

16 Q. Okay. Does that -- what does it show? Does it show the
17 main?

18 A. It does, it shows the main, the actual tap, the valve
19 box, and the line brought to the building, or towards the
20 building.

21 Q. Okay. And did Carolina Tap, did they do -- did they do
22 any of that work in there?

23 A. Yes, sir.

24 Q. Put the main in, or?

25 A. Yes, sir, they did. Most of all of it up to about, I

1 think there were, I'm going to guess, maybe 12 feet from the
2 building, approximately, 10 to 15 feet, approximately.

3 Q. Okay. And I guess, to connect it, what, did they have
4 some kind of device to connect it on the building, or?

5 A. They were going to bring it in and bring it up and bring
6 through the wall to get it in the building.

7 MR. DESCHAMPS: Okay. Let's me see if I can blow it
8 up. I'm visual. Look from over here. I don't think you can
9 see from here.

10 THE COURT: Have him come down.

11 THE WITNESS: Okay.

12 THE COURT: You can step down.

13 MR. DESCHAMPS: Why don't you come down here so
14 everybody can see what this stuff is.

15 Q. Kind of explain the -- if you could explain what is like
16 circle -- what's all that circle stuff and that squiggly line.

17 A. To begin with, I think this is a sketch Richard Young
18 made who was with -- owner of Caroline Tap & Bore in order to
19 get his material together, and looks like the material list,
20 something, and that's what he proposed it was based upon in
21 order to get into the building, and we're showing -- there's a
22 valve box. You see the square or the rectangle? That is the
23 meter box, the valve box, and then you've got a new hydrant
24 that was added and shown at this point right here. That's the
25 new hydrant, then that's the tap to the city line.

1 Q. Okay. And so that circle, is that a fire hydrant?

2 A. Yes, sir.

3 Q. Alright.

4 A. That's was a -- the line that's going into the building.

5 Q. And then what is this down here where you're --

6 A. The big circle?

7 Q. Yeah. What's that?

8 A. That's just the designated area where he's got all his
9 equipment, and what he got for going in there.

10 Q. Okay. Is that -- was that the underground or --

11 A. That's -- that's what he -- he put that together. I'm
12 assuming that's what he put together in order to get his
13 materials together to price it out.

14 Q. Okay. And was any of that done?

15 A. Yes, sir.

16 Q. That stuff going there?

17 A. All that, everything up to where it turns in, close to
18 where the building's at, I'm guessing, 10, 12 --

19 Q. What's that -- okay. So we got the circle, what is that
20 squiggly line, arrow, that goes under that road or over it?
21 What is that?

22 A. Actually, this is actually where he's got his drawing
23 going into the building, and that squiggly line right there is
24 a blow up of that location. He just kind of puts it in a
25 bigger picture --

1 Q. Oh, okay.

2 A. -- so he can see what he's got.

3 Q. So --

4 A. Both are the same.

5 Q. I guess the phrase, the tap, like, tap into the main,
6 what does that mean?

7 A. That's when he actually makes the tap to the main. City
8 main, that's the city main he's hooking on to. He put a sleeve
9 on it, put a tapping valve, or he can cut his line and put a
10 line connection onto that city line.

11 Q. And that's in that circle thing?

12 A. Yes, sir. Actually, this is where it's at, but he could
13 have brought it down here and put it in a big circle so it
14 could be seen better, but right here is where that tap is at,
15 right there.

16 Q. Okay. And then when you go over, you have squiggly line
17 --

18 A. Yeah.

19 Q. And then I see fire lines --

20 A. Yeah. See where the building is, you've got the
21 building right in that corner right there.

22 Q. Okay. So that corner, that little dot is the building?

23 A. It's the -- it's the 19th main, and that's where the
24 city main is at. That's the city main right here. He just
25 kind of expanded and magnified it in that big circle.

1 Q. Okay. So that -- I guess, that line on the other side
2 of the 19th Avenue, that's the water line?

3 A. Yeah, that's correct.

4 Q. And that red line going that way, that's -- the edge of
5 the 1901 building, that's where it just had to go connect to
6 the building?

7 A. That's right.

8 Q. Okay. Got it. Take your seat. I think I got it.

9 A. Okay. Alright.

10 Q. When Carolina Tap, when they submitted the proposal to
11 Crawford, did you send that on to Mr. Tebele?

12 A. Yes, sir.

13 MR. DESCHAMPS: Mark this as Plaintiff's Exhibit 8.
14 I'm going to go ahead and mark all these. I'm going to put
15 them right in. It will be faster. I got Plaintiff's Exhibit
16 45 and Plaintiff's Exhibit 44 and Plaintiff's Exhibit 40. I
17 have a 40 and a 44. I've just marked 40.

18 BY MR DESCHAMPS:

19 Q. I'm going to show you what's been stipulated into
20 evidence as Plaintiff's Exhibit 8, the email from you to Mr.
21 Tebele.

22 A. Yes.

23 Q. And do you recall sending that email to Mr. Tebele?

24 A. Yeah.

25 Q. And what's the date on that?

1 A. June 4th, 2018.

2 Q. Okay. And what were you sending to Mr. Tebele in that
3 email?

4 A. I sent him a copy of the proposal from Carolina Tap &
5 Bore.

6 Q. Okay. And that's a proposal -- what exhibit is that?

7 A. Exhibit 41.

8 Q. Okay. Do you mind stating the date on that email again?

9 A. June 4th, 2018.

10 Q. Okay. Do you recall when Crawford finished the, I
11 guess, putting all the pipes in the inside of the building?

12 A. We had -- the interior installation was about 95 or 90
13 percent complete and the only thing -- the biggest part left
14 was the riser that was going to connect to the underground once
15 they brought into the building, and I don't remember the exact
16 date that we got it to that point.

17 Q. Maybe this is will refresh your memory. I'm handing you
18 what's been stipulated into evidence as Plaintiff's Exhibit 45.
19 Do you recognize that? The print's a little blurry, unless
20 it's my contacts.

21 A. Yeah, I remember it, yes, sir.

22 Q. Okay. Is that an email?

23 A. It looks like an email, yes, sir.

24 Q. A couple of emails. Are you in that email?

25 A. Yes, sir.

1 Q. Okay. Alright. And is that email from Mr. Tebele?

2 A. It's a response. I had sent him an email, and that is a
3 response from Mr. Tebele, yes, sir.

4 Q. Okay. What did you say in that email?

5 A. Mine or his?

6 Q. What did you say? Is it something about the tap?

7 A. I was letting him know the plans had been approved by
8 the city and the permit was paid for and picked up.

9 Q. Okay. And did Mr. Tebele respond or say anything?

10 A. When can these guys get -- yeah, he wanted to know when
11 they could get started. Once you get that permit and all in
12 hand, then you can go ahead and make arrangements to get the
13 work done, and Mr. Tebele was asking about when that could be.

14 Q. Okay. What was the date of that email? Mr. Tebele's at
15 the top, I forgot, sorry.

16 A. August 31st, 2018.

17 Q. Okay. I'm going to show you what's been stipulated into
18 evidence as Plaintiff's Exhibit 44. I think this is an email
19 Mr. Tebele forwarded to you that same day.

20 A. The 31st, yes, sir.

21 Q. Okay. And what's the date on that email that he
22 forwarded it to you at the top?

23 A. August 31st, 2018.

24 Q. Okay. So as of August 31st, 2018, was all y'all -- I
25 guess, the inside pipes, were they all done? Were they all

1 installed?

2 A. They were not totally completed, but down to a certain
3 point. We just had to get the riser completed in the building
4 and connect it to the city of main. For the most part the pipe
5 was pretty much completed in the building.

6 Q. Okay.

7 A. Not 100 percent, but pretty much.

8 Q. And in that email that Mr. Tebele forwarded to you, the
9 Richard Young fellow in there, who does he work for?

10 A. Caroline Tap & Bore.

11 Q. Okay.

12 A. Yes.

13 Q. Okay. And who were they again, the Carolina Tap?

14 A. Caroline Tap & Bore are utility contractors from West
15 Columbia.

16 Q. Okay. Now, do you recall -- do you know when they
17 started their underground work?

18 A. Not the exact start date, I do not.

19 Q. Okay. Do you know, I guess from August 31st to 2018, do
20 you know when they were scheduled to first go out there at any
21 time, or?

22 A. No, sir, I do not recall.

23 Q. Okay. What's the first date you remember the Carolina
24 Tap people out there?

25 A. I remember meeting them out there, Mr. Tebele and myself

1 and Carolina Tap & Bore, Joshua Young with Carolina Tap & Bore.
2 They had already run it up to it in 12, 15 feet in the building
3 and we were -- met -- we met just to determine exactly how we
4 were going to get in the building, and once that was
5 determined, the next week they were supposed to go and get the
6 material together and then go and complete it.

7 Q. Okay. So as of August 31st, 2018 -- well, Carolina
8 Tap's job, from the sketch to do the underground main, how much
9 time would that take? Well, like how long of a job was that?

10 A. For them to do the actual work?

11 Q. To do the underground mains to connect it so y'all can
12 finish.

13 A. Depending on how long it would take to get the city to
14 approve and permit, I mean, to make sure that they're together
15 with it, they could probably, I would say no more than three
16 weeks, two or three weeks.

17 Q. That's assuming they just get approval right away?

18 A. Yeah.

19 Q. Okay.

20 A. And that's when you approve -- we got the approval from
21 the city. If they had to -- of course, they had to build the
22 vault and the pit, and they had to put the new hydrant in, but
23 probably their work would be, I would say, three weeks, two or
24 three weeks.

25 Q. Do you know on this job, did they have to submit any

1 kind of drawings to the city before they got approved or
2 anything?

3 A. No, that was all part of ours.

4 Q. Okay.

5 A. That was all part of ours.

6 Q. So on August the 31st, it was ready to go for Carolina
7 Tap to do their thing?

8 A. Yes, sir.

9 Q. And you previously testified you were on site with them,
10 Carolina Tap --

11 A. Yes.

12 Q. -- Mr. Young.

13 A. Yes, on the 13th.

14 Q. When was that?

15 A. February 13th.

16 Q. Of '18, '19?

17 A. Yes, sir.

18 Q. February 13th, 2019? And what was y'all doing there?

19 A. We were just confirming how we were going to get into
20 the building from his main into the building, into that room
21 where the riser -- sprinkler riser supply was going to be, and
22 once we -- the three of us met out there, we decided how we
23 were going to do it. They were going to go back, get the
24 material together and then come back the next week and put it
25 in.

1 Q. So do you know -- do you know what, I guess, took
2 Carolina Tap so long from August -- going back to August and
3 you're now in the February 2019, and they still weren't done,
4 do you know what delayed them or what --

5 A. Not really. I mean, they know we were putting the
6 system in the building, but I don't really know what their
7 schedule was from August to February.

8 Q. Okay.

9 A. I know that they're -- when we met on the 13th, they
10 were completely finished with the vault -- the vault --
11 hydrant, the tap was all made. I'm not sure when they started,
12 but it was completed up to within this short distance of the
13 building.

14 Q. How about February 24th? Did you go there at anytime
15 after February 24th of 2019?

16 A. I was -- I was notified either on Monday or Tuesday,
17 either the 25th, I'm not sure what date, of the fire. That was
18 the week they were going to plan on going back and actually
19 bring it in the building, and I called them and told them that
20 they had the fire, for them to kind of hold off at that time
21 until we got further word.

22 Q. Yes, sir. I guess there wasn't any point finishing the
23 tap after the fire?

24 A. Yes, sir.

25 Q. So at the time of the fire was the sprinklers still

1 under construction? Were y'all not done?

2 A. It was pretty much pretty far along. All we had to do,
3 the most part we had to do was finish the riser once we got in
4 the building.

5 Q. Okay. I'm going to show you what's been stipulated into
6 evidence as Plaintiff's Exhibit 40.

7 A. Okay.

8 Q. You recognize that?

9 A. Yes, sir. I know what it is.

10 Q. Okay. Tell us what it is.

11 A. That is a ledger of showing payments issued, invoices
12 issued, and received from Crawford to Mr. Tebele.

13 Q. Okay. So is that showing what Mr. Tebele paid y'all to
14 install that sprinkler?

15 A. Yes, sir.

16 Q. Okay. And how much, was that?

17 A. The total was 226,468.82.

18 Q. Can you repeat that? I didn't quite hear you. \$226,000
19 and --

20 A. \$226,468.82.

21 Q. And that was just for the building sprinkler inside?

22 A. Yes, sir, interior system.

23 Q. Okay. Is there anything Mr. Tebele could have done to
24 get this construction complete before the fire?

25 A. I'm not aware of anything other than -- it looked to me

1 like probably everything was within two weeks of completion
2 anyway, one to two weeks.

3 Q. But he couldn't have done anything to make Carolina Tap
4 speed it up, could he?

5 A. No, they could -- well, even if they had speeded theirs
6 up, they couldn't have finished theirs until we -- we couldn't
7 have got the building completed until both parties completed
8 together.

9 Q. Okay. And then once it's completed, can anybody do the
10 pressure testing, or --

11 A. I was understanding that we'd already put water on the
12 system just to check for leaks, but I'm not sure if it was
13 really pressure tested to the 200-pound acceptable test, but I
14 was told that water was put on the system to check for leaks
15 prior to that.

16 Q. Okay. But as of February 24th, y'all still had more
17 construction to do?

18 A. Probably -- yeah, just finishing out the connection on
19 the inside, for the most part. Now, I'm not sure about the
20 fire alarm because we didn't have anything to do with fire
21 alarms. In order to get a completely 100 percent, fire alarm
22 had to be completed and connected, as well.

23 MR. DESCHAMPS: Okay. Your Honor, I'd like to
24 publish exhibits, Plaintiff's Exhibit 40, 44, 45, 8, 41, 4, 5,
25 42, 43, and 3, and 6. Let me put them in order.

1 THE COURT: Alright. And I have these exhibits
2 stipulated previously.

3 MR. DESCHAMPS: I'm going to put them in order, 4, 5,
4 6, 8, 40, 41, 42. Okay. Next time I'll stay in order, I
5 promise. Thank you, Mr. Dover, I have no further questions.
6 Please answer any questions of the opposing counsel.

7 **CROSS-EXAMINATION**

8 BY MR. HARPER:

9 Q. Good afternoon, Mr. Dover.

10 A. Yes, sir.

11 Q. Roman Harper, on behalf of the insurer Defendants, we
12 met previously. Mr. Dover, isn't it true that you had already
13 begun working on the plans for Mr. Tebele and his business's
14 property, the sprinkler system, as of May of 2016?

15 A. I'm not sure about the date, but I know we worked on it
16 for a good little bit.

17 Q. Does that document help refresh your memory, Mr. Dover?

18 A. Okay.

19 Q. Back in May of 2016 you were already discussing with Mr.
20 Tebele the sprinkler system, correct?

21 A. Yes, sir.

22 Q. And I'll take that back from you, sir. Plaintiff's
23 Counsel showed you some documents earlier with a signature by
24 Mr. Tebele on the documents; do you recall that?

25 A. On the documents?

1 Q. That he showed you moments ago, was the signature by Mr.
2 Tebele?

3 A. Which ones now?

4 Q. For example, he showed you this document.

5 A. Okay. Yes, sir.

6 Q. Besides Mr. Tebele's signature, is there an entity name?

7 A. What was the question, sir?

8 Q. Beside Mr. Tebele's signature, if you could look at
9 that?

10 A. Yes, sir.

11 Q. Is there an entity that he was signing on behalf of?

12 A. Tebele Investment Group. Tebele --

13 Q. Isn't it true, Mr. Dover, that he was signing on behalf
14 of King's Realty Management?

15 A. Correct, realty Management, yes.

16 Q. And I believe you testified, Mr. Dover -- I'll take that
17 back from you. Isn't it correct, Mr. Dover, that you testified
18 that on February 13th of 2019, you were at the property?

19 A. That's correct.

20 Q. And Mr. Tebele was with you?

21 A. Yes, sir.

22 Q. And at that time the sprinkler system was not completed?

23 A. It was not, no, sir.

24 Q. Mr. Tebele, you, and I think you said Josh Young of
25 Carolina Tap & Bore were there and saw the sprinkler system and

1 saw that it was not connected?

2 A. Correct.

3 Q. So the sprinkler system wasn't connected when the fire
4 happened either?

5 A. Correct.

6 Q. The system was never in service, correct?

7 A. That's correct.

8 Q. It would not be accurate to say that the property was
9 100 percent sprinkled, right?

10 A. It was not, that's right.

11 Q. And it would not be accurate to say the sprinkler system
12 was 100 percent installed, correct?

13 A. That's correct.

14 Q. And in the event of a fire at this location, was there
15 any possibility that the sprinkler system was going to activate
16 to suppress the fire?

17 A. Not at that location at that time, no, sir.

18 MR. DESCHAMPS: Thank you for you time, Mr. Dover.

19 THE WITNESS: Yes, sir.

20 MR. RISER: And Your Honor, to save us a little time,
21 I think we've already stipulated to some entries and
22 Defendant's exhibits. Exhibits 77, 81, 86, 87, 88, 90, and 91.

23 THE COURT: Mr. DesChamps; is that correct, is that
24 correct that they've been stipulated to?

25 MR. DESCHAMPS: Yes. If those are the same ones that

1 we looked at before.

2 MR. RISER: Yes, sir.

3 **CROSS-EXAMINATION**

4 BY MR. RISER:

5 Q. Mr. Dover, it's good to see you. Thanks for being here.
6 You testified earlier, you dealt with Mr. Tebele on putting a
7 sprinkler system in the North King's Highway building as early
8 as 2016, right?

9 A. We started the conversation, yes, sir.

10 Q. Okay. I'm going to hand you what's been marked as
11 Defendant's Exhibit 77. Can you tell me what that document is?

12 A. Yes, sir. It just looks like an information letter.

13 Q. A letter from?

14 A. From Crawford Sprinkler to Mr. Tebele, information
15 telling him about what type of system we thought might need to
16 be installed.

17 Q. Okay. And what's the date on there?

18 A. The letter date was July 13th, 2016. The email date was
19 December 21, 2016.

20 Q. Okay. Do you know why a sprinkler system was being
21 planned to put in that building?

22 A. Not exactly, I do not.

23 Q. Do you know if the city or the county had a code
24 requirement?

25 A. No, I don't.

1 Q. Okay. Alright. What's the normal lead time for a
2 project of this size?

3 A. As far as --

4 Q. From beginning to end. If you were unimpeded, what's
5 the normal lead time?

6 A. Two things to consider, architecturally, if you got
7 plans it would help to speed up the process. We had a few
8 plans, very sketchy, but it wasn't a complete set of building
9 plans. Those were two buildings connected, and it all had to
10 be surveyed, physically surveyed, both buildings, the whole
11 project.

12 Q. Is performing a physical survey required for every job
13 you do?

14 A. Oh, yes, yes. Before you can provide the plans for
15 review and approval from the authority, you pretty much have to
16 survey the building or have plans to work off.

17 Q. Okay, that's what I was asking. So if you had plans to
18 work with, or an existing survey, that would help speed it up?

19 A. It would, yes, sir.

20 Q. Okay.

21 A. Yes, sir.

22 Q. Alright. Why did this job take so long, if you were
23 talking about it in 2016 and it wasn't finished in 2019?

24 A. It was just -- it was -- I don't have any reason it took
25 too long other than it was just a -- it wasn't a very simple

1 project. It was kind of complicated with different ceilings,
2 different sizes, different floors, it just took time to
3 physically put it all together and get everything in motion and
4 get it all completed.

5 Q. And Crawford Sprinkler kept Mr. Tebele informed
6 throughout the process?

7 A. Pretty much as we could, we stayed in -- we stayed in
8 touch, yes, sir.

9 Q. Okay. And we've already talked about it, and I don't
10 need to show it to you again, but Crawford Sprinkler contracted
11 with Mr. Tebele's company, King's Realty, to do that work,
12 correct?

13 A. Yes.

14 Q. And you didn't have any contract with Melissa Garcia;
15 did you?

16 A. No, sir.

17 Q. Do you know who Ms. Garcia is?

18 A. She was a tenant, correct?

19 Q. Yes. She was the tenant in the building. You didn't
20 have any contract with her?

21 A. No.

22 Q. Okay. What's been marked as Exhibit 90, I'm going to
23 hand to you. It's already -- you've already talked about it
24 under a different exhibit number?

25 A. Correct.

1 Q. But can you identify that document again?

2 A. This is the letter of proposal.

3 Q. The signed contract?

4 A. The signed contract.

5 Q. Okay.

6 A. Yes.

7 Q. And --

8 A. That's for the interior installation.

9 Q. Do you know if having a signed contract was required to
10 get a permit?

11 A. I can't say 100 percent, I know we have to have the
12 price and we have to have a cost in order to get the permit,
13 but I don't know about the actual signature.

14 Q. I'm going to hand you what's been marked as --

15 A. I just can't answer that.

16 Q. I'm sorry.

17 A. I'm -- I'm just -- I don't --

18 Q. I understand, not a problem. I'm going to hand you
19 what's been marked as Exhibit 88.

20 A. Okay.

21 Q. Can you tell me what that is?

22 A. That is the building permit, fire permit for the
23 installation.

24 Q. And that included the underground work?

25 A. That -- yes. I think it does include the underground,

1 as far as the plan goes, it does, yes, sir.

2 Q. Okay. And Crawford Sprinkler recommended Carolina Tap &
3 Bore to Mr. Tebele?

4 A. Yes, sir.

5 Q. You forwarded, I think you talked about it earlier on
6 Plaintiffs 41, you forwarded an estimate from Carolina Tap &
7 Bore for their work to Mr. Tebele in June of 2018, right?

8 A. I provided that, yes, sir.

9 Q. Okay. I'm going to hand that to you just for your
10 identification again, Defendant's 86.

11 A. Yes, sir.

12 Q. That's Carolina Tap & Bore's proposal?

13 A. Yeah. That's Carolina Tap & Bore's proposal.

14 Q. That proposal was accepted?

15 A. Yes, sir.

16 Q. How long would Carolina Tap & Bore's work take if they
17 were able to start right away?

18 A. The physical installation, probably, I'm guessing,
19 depending on that vault, about probably three weeks. It might
20 take longer if they had to actually build a vault or if they
21 had one bought in. I don't know whether they built it or had
22 it prefab and delivered, but there's different way to do that,
23 but probably about three weeks, depending on that vault, yes.

24 Q. Okay. It took a lot longer than that to get it done,
25 though, didn't it?

1 A. Physically, I don't -- I'm not sure exactly --
2 physically, how long it took. As far as the material,
3 acquisition material and all, getting the okay, accepted by the
4 city, I'm not sure how long that would take.

5 Q. And unfortunately, Carolina Tap & works -- Carolina Tap
6 & Bore's work was not completed?

7 A. No, sir, not -- not totally completed.

8 Q. And that's because the fire happened before it could be
9 completed?

10 A. That's correct.

11 Q. I'm going to hand you what's been marked Exhibit 87.
12 Can you tell me what that is?

13 A. That's an invoice from Carolina Tap & Bore.

14 Q. What's the date on that invoice?

15 A. May 14th, 2019.

16 Q. And that's after the fire on February the 24th?

17 A. Yes, sir.

18 Q. Did Carolina Tap & Bore have a contract directly with
19 Mr. Tebele, or was it with Crawford Sprinkler?

20 A. Mr. Tebele.

21 Q. Okay. Did you forward this bill --

22 A. Yes.

23 Q. -- that's in Defendants 87 to Mr. Tebele?

24 A. Yes. I'm pretty sure we did. The reason I say that is
25 because I don't do the invoicing, but I'm sure that the lady,

1 once she prepared that, she sent it right on to Mr. Tebele.

2 Q. Okay. And again, Mr. Tebele knew the status of the
3 sprinkler construction, and especially the tap had not been
4 made in the fall of 2008, correct -- excuse me, 2018?

5 A. Correct.

6 Q. And because you were communicating with him about it?

7 A. Yes.

8 Q. And so and he also knew that it was not installed in
9 January 2019; is that right?

10 A. Not 100 percent.

11 Q. He knew that the tap construction had not been
12 completed?

13 A. It was within a certain distance of the building.

14 Q. He also knew that it had not been completed in February
15 of 2019, right?

16 A. Correct.

17 Q. And that's because he'd not been billed for it, he'd not
18 been billed for the work?

19 A. I'm not sure about the billing.

20 Q. Well, you just identified Carolina Tap & Bore's bills.

21 A. Well, I don't send those invoices out.

22 Q. Understood.

23 A. Yeah.

24 Q. But if the bill -- if the bill from Carolina Tap & Bore
25 had a March 14th date on it, then it's safe to say that he'd

1 not been billed for that before the fire happened?

2 A. I couldn't answer that for sure. He probably had been,
3 and the reason I say that, Carolina Tap & Bore should send our
4 office an invoice to provide to Mr. Tebele. I don't know what
5 the dates or how many she had before that.

6 Q. Okay.

7 A. She might have had one previously before that date.

8 Q. Okay. Maybe that's a better -- this looks like a final
9 bill then.

10 A. Yeah.

11 Q. Okay.

12 A. Looks like it, yeah.

13 Q. So a final bill had not been submitted by Carolina Tap &
14 Bore prior to the fire?

15 A. I can't answer that.

16 Q. Alright.

17 A. I don't know when they send those invoices out.

18 Q. But again, Mr. Tebele was at that meeting with you on
19 February the 13th, 2019?

20 A. Yes, sir.

21 Q. Did Mr. Tebele ever communicate with you a deadline of
22 January the 15th, 2019, to get this construction done?

23 A. I do not recall.

24 Q. Did he give you any deadline to get it done?

25 A. I don't recall.

1 Q. Okay. Crawford Sprinkler never dealt with Crescent
2 Coast Insurance during their work at 1901 North Kings; did
3 they?

4 A. As far as I know.

5 Q. And do you have any idea how Crescent Coast is involved
6 in this litigation?

7 A. No, sir.

8 MR. RISER: Okay. Those are the questions I have.
9 And Your Honor, with permission, I would like to publish
10 Exhibits 77, 81, 86, 87, 88, 90, and 91.

11 THE COURT: As long as that's been stipulated to.

12 MR. RISER: Yes, Your Honor.

13 THE COURT: Alright. You may publish them to the
14 jury. Hang on, sir. Sir, not quite yet.

15 THE WITNESS: Okay. Yes, sir. I got you.

16 MR. RISER: Thank you, Mr. Dover.

17 THE WITNESS: Yes, sir.

18 THE COURT: Redirect, Mr. DesChamps?

19 MR. DESCHAMPS: Thank you, Your Honor. Real quick.

20 **REDIRECT EXAMINATION**

21 BY MR. DESCHAMPS:

22 Q. Now, Mr. Dover, Mr. Tebele's insurance policy says it
23 covers property under construction, so my question is, when the
24 1901 building burned down, was the sprinkler -- building
25 sprinkler system under construction at that time? Was it still