STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) C.A. NO. 11-CP-10-387

PCS NITROGEN, INC.

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, *et al.*

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WITH RESPECT TO CORPORATE SUCCESSION

Plaintiff PCS Nitrogen, Inc. ("PCS Nitrogen") filed this action against several insurance companies, seeking coverage under liability insurance policies issued to an entity called Columbia Nitrogen Corporation, with respect to defense and indemnity costs PCS Nitrogen has incurred and will incur arising out of contamination and resulting environmental liability at a former industrial site located in the Neck area of Charleston ("Charleston Site"). On July 24, 2015, Defendant Continental Casualty Company ("Continental") filed a Motion for Summary Judgment ("Motion") asserting that PCS Nitrogen is not the named insured under the insurance policies Continental issued to Columbia Nitrogen Corporation and is not otherwise entitled to claim coverage under those policies. Continental therefore sought dismissal of all of PCS Nitrogen's claims. Continental's motion was joined by all other Defendants.

For the reasons set for below, the Court will GRANT the Motion and enter judgment against PCS Nitrogen on all claims.

I. FACTS

The relevant facts are undisputed.

A. The Insurance Policies

Defendants are alleged to have issued primary and/or umbrella general liability insurance policies to a corporation called Columbia Nitrogen Corporation ("Policies"). The named insured in the Policies was identified as "Columbia Nitrogen Corporation and Nipro, Inc. and any owned, controlled or affiliated company now or hereafter acquired."[1] Subject to all of their terms and conditions, the Policies stated that the insurer would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence." The Policies also stated, "Assignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon."

B. The Corporate History of Columbia Nitrogen Corporation (Old CNC)

Columbia Nitrogen Corporation ("Old CNC") was incorporated in Delaware on October 1, 1962. Old CNC acquired the Charleston Site on June 30, 1966. The Charleston Site was used for phosphate fertilizer production. Old CNC ceased production at the Charleston Site in 1972. Findings of Fact and Conclusions of Law, *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, No. 2:05-2782-CWH, ¶ 12 at 3 (D.S.C. Sept. 28, 2007) ("2007 *Ashley II* Findings"). Old CNC sold the Charleston Site to a third party in 1985.

C. PCS Nitrogen's Acquisition of Certain Assets of Old CNC

On or around October 31, 1986, Old CNC entered into a transaction under which it sold certain assets (*not* including the Charleston Site, which it had already sold off in 1985) to a new entity called CNC Corp. CNC Corp. was incorporated on September 26, 1986. CNC Corp. did

[1] In quoting policy language, the Court will refer to language in the Continental policies, but notes that the policies of remaining Defendants contain substantially similar language, as set forth in their respective Joinders.

not obtain all of Old CNC's assets or assume all of Old CNC's liabilities, but obtained certain assets and assumed certain liabilities relating to the Acquired Business, which was defined as "a business that produces and sells ammonia and nitrogen-based products." 2007 *Ashley II* Findings at 4 n.1.

Old CNC filed a certificate of dissolution on November 19, 1986. Following the dissolution of Old CNC, CNC Corp. changed its name to Columbia Nitrogen Corporation ("New CNC"). New CNC subsequently merged with a corporation called Fertilizer Industries, Inc. on or about November 29, 1989. Fertilizer Industries, Inc. changed its name to Arcadian Corporation on or about November 30, 1989. Arcadian Corporation merged with PCS Nitrogen in March 1997.

PCS Nitrogen is therefore the successor-by-merger to *New* CNC, a corporation that was created on September 26, 1986, after all the Policies at issue here expired. New CNC is not the same corporation as Old CNC, which was incorporated in 1962 and dissolved in 1986. As stated above, New CNC did not merge with Old CNC, but acquired certain of its assets and assumed certain of its liabilities.

D. PCS Nitrogen's Contentions in the Underlying Litigation

On September 26, 2005, the owner of the Charleston Site, Ashley II of Charleston, LLC, filed suit against PCS Nitrogen in federal court, alleging that PCS Nitrogen was liable for environmental remediation at the Charleston Site. Ashley II alleged that PCS Nitrogen was responsible for environmental liability at the Charleston Site because the terms of the 1986 transaction required it to assume Old CNC's liabilities. Throughout the *Ashley II* litigation, PCS Nitrogen consistently denied that it was the corporate successor to Old CNC or that it had assumed Old CNC's liabilities with respect to the Charleston Site. For example, in the federal district court, PCS Nitrogen disputed at trial that it had assumed the environmental liability

arising out of the Charleston Site, saying the Acquired Business was limited to an ammonia- and nitrogen-based fertilizer plant located in Augusta, Georgia, and denying that it was liable for Old CNC's other liabilities under any theory for successorship to corporate liability. 2007 *Ashley II* Findings at 11-22. PCS Nitrogen similarly argued on appeal that it was not the corporate successor to Old CNC under any theory, including a consolidation or merger theory or a substantial continuity test. *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 171 (4th Cir. 2013).

E. The Federal Courts' Rulings Regarding PCS Nitrogen's Liability

The issue of whether PCS Nitrogen succeeded to Old CNC's liabilities with respect to the Charleston Site was tried in the underlying *Ashley II* case. In *Ashley II*, the court held that New CNC had contractually assumed any liability of Old CNC not specifically retained by Old CNC, because the Acquisition Agreement stated that the parties intended the transaction to be treated "as if Seller [Old CNC] were to sell and Buyer [New CNC] were to purchase the stock of Seller on the open market." 2007 *Ashley II* Findings at 12-14. Based on this, the court concluded, "The intent of DSM [Old CNC's parent company] and Old CNC and New CNC's knowledge of that intent support Ashley II's proposition that the Acquired Business includes all of Old CNC that was not specifically retained or sold to another entity." *Id.* at 14.

The court analyzed whether New CNC had succeeded to Old CNC's corporate liability under corporate succession theories, such as by *de facto* merger, mere continuation, and fraud, and it concluded that none of these theories applied. *Id.* at 17-18. It also considered whether New CNC had succeeded to Old CNC's liabilities under a theory adopted by the Fourth Circuit in an environmental case, called the substantial continuity test. *Id.* at 18 (citing *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992)). It held that there was substantial continuity between Old CNC and New CNC based on the test factors, and that New CNC

assumed Old CNC's environmental liability as a result. *Id.* at 18-19. The court also held that the circumstances warranted a conclusion of *de facto* consolidation or merger between the companies under South Carolina law (even though it earlier had expressly rejected the application of the *de facto* merger theory under federal law). *Id.* at 20-21.

PCS Nitrogen sought reconsideration of the district court's 2007 ruling, which was subsequently denied. *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 440 n.2 (D.S.C. 2011). The district court entered additional findings and conclusions regarding liability and damages in an order entered May 27, 2011. *Id.*

PCS Nitrogen appealed, challenging the district court's rulings both as to whether New CNC had contractually assumed Old CNC's liability for the Charleston Site and as to whether New CNC was the corporate successor to Old CNC under any theory. The Fourth Circuit affirmed the district court's ruling that New CNC had contractually assumed Old CNC's environmental liability stating, "[W]e must affirm the judgment of the district court holding that in the Agreement New CNC assumed Old CNC's CERCLA liabilities for the site and that PCS is therefore a PRP as a successor to Old CNC's CERCLA liability for the site." *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 (4th Cir. 2013). The Fourth Circuit explicitly did not address the other corporate succession theories used by the district court. *Id.* at 173 ("The district court held PCS liable as a successor to Old CNC under three theories. We need only address one—that New CNC either unambiguously, or based on extrinsic evidence, assumed Old CNC's liabilities for the site under the 1986 Acquisition Agreement.").

Thus, PCS Nitrogen, as successor to New CNC, was held to have contractually assumed Old CNC's environmental liabilities with respect to the Charleston Site, and the district court's alternative rulings regarding theories of corporate succession—something PCS Nitrogen itself

always denied—were not affirmed on appeal. PCS has acknowledged that those rulings are now non-binding.

II. STANDARD ON SUMMARY JUDGMENT

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (S.C. 2003) (quotations omitted). "In deciding a Rule 56 motion, the Court must view the facts and inferences, therefrom, in the light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994) (quotations omitted). "Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue of material fact." *Id.* "A party opposing a properly supported motion for summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Id.* "In order 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." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (S.C. 2011).

In its opposition brief, PCS Nitrogen admitted that "the only matter at issue with regard to PCS's rights to Old CNC's insurance interests as to the [Charleston Site] is whether Old CNC's assignment to New CNC is enforceable as a post-loss assignment." PCS Nitrogen thereby concedes there is no issue of fact with respect to the Motion; indeed, the issue of enforceability is one of law. PCS Nitrogen does not otherwise raise an issue of fact in its opposition or identify even a scintilla of evidence that could create an issue of fact. The terms of the policies and the facts of the corporate transaction are undisputed. Therefore, the Motion may be decided as a matter of law.

III. THE PARTIES' ARGUMENTS

A. The Insurers' Arguments

Continental, joined by other insurers, makes several arguments. First, Continental argues that PCS Nitrogen is not the statutory successor-by-merger to Old CNC—which PCS Nitrogen concedes. Additionally, Continental argues that PCS Nitrogen is the statutory successor-by-merger to *New* CNC, and New CNC purchased only some assets and assumed only some liability from Old CNC. Thus, New CNC is not the same corporation as (or successor-by-merger to) the insured, Old CNC.

Second, Continental argues that to the extent Old CNC attempted to assign the Policies at issue in this case to New CNC, it could not do so without the consent of the insurers, according to the clear and unambiguous terms of the Policies. Old CNC obtained no such consent. Even apart from the explicit policy language, Continental argues that, under South Carolina law, contracts involving the repose of personal confidence in one party cannot be assigned by that party to another person; that insurance contracts are personal contracts subject to this rule and cannot be assigned by the insured to a new entity; and that the only exception to this rule permits assignment of a right to receive an already-due insurance payment, because the payment obligation is a chose in action. Continental argues that PCS Nitrogen does not assert that it received an assignment of a payment obligation already due from the insurers, but that it received an assignment of the Policies without consent, in violation of South Carolina law and the terms of the contracts.

Finally, Continental argues that the only basis PCS Nitrogen pleaded to claim Old CNC's insurance policy rights was that "the district court in the *Ashley II* litigation held that PCS Nitrogen is the successor to CNC." But, Continental argues, PCS Nitrogen appealed that holding, and the Fourth Circuit did not affirm on that ground. Instead, the Fourth Circuit held

that New CNC (now PCS Nitrogen) contractually assumed Old CNC's environmental liability without addressing the district court's alternative holding that New CNC was the corporate successor to Old CNC. Given that the district court holding as to corporate succession was not affirmed, Continental argues that it has no effect. Continental argues further that PCS Nitrogen is not the corporate successor to Old CNC because the substantial continuity test used by the district court under federal common law is contrary to U.S. Supreme Court precedent, as many courts have recognized, and New CNC was not the successor to Old CNC under South Carolina's *de facto* merger theory.

Accordingly, Continental and the other insurers argue there is no basis for PCS Nitrogen to claim rights to coverage under policies issued to Old CNC, and its claims must be dismissed.

B. PCS Nitrogen's Arguments in Opposition

PCS Nitrogen argues that it received a valid assignment of Old CNC's policies as part of the 1986 corporate transaction. It submits a document entitled Assignment of Insurance Benefits ("Assignment"), which was executed as part of the 1986 corporate transaction. This document states that Old CNC "does hereby transfer and assign to [New CNC], its successors and assigns forever, all of [Old CNC's] rights, title and interest, legal and equitable, in the benefits and proceeds under all of its insurance policies to the extent the same may be transferred and assigned." PCS Nitrogen contends that this Assignment assigned not only the "benefits and proceeds" of the Policies, but also the Policies themselves, giving PCS Nitrogen the full rights of the insured, including the right to call on the insurers to defend it in underlying suits and to indemnify it for any liability it may incur. PCS Nitrogen contends that the parties to the Assignment did not need to obtain the consent of the insurers to assign the Policies, because the Assignment was a post-loss assignment and under South Carolina law "no-assignment clauses are unenforceable." For this proposition, PCS Nitrogen relies on dictum from the Supreme

Court's decision in *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (S.C. 2013). It also relies on decisions from several other jurisdictions.

In response to Continental's argument that PCS Nitrogen has not been held to be the corporate successor to Old CNC, PCS Nitrogen concedes that the federal district court ruling in this regard is now non-binding. However, PCS Nitrogen asserts that it may contend it is the corporate successor to Old CNC from a blank slate, and that there is a genuine issue of material fact as to whether it is.

C. The Insurers' Arguments in Reply

Continental argues in reply that PCS Nitrogen's effort to claim that it obtained an assignment of the Policies without insurer consent contravenes South Carolina law. It argues that the Assignment on which PCS Nitrogen relies purports to assign only rights to the "benefits and proceeds" under the Policies, and then only "to the extent the same may be transferred and assigned." Continental argues this shows no attempt to assign the Policies themselves and recognition that Old CNC could not assign non-assignable rights. For further support of this assertion, Continental submits two documents prepared as part of the 1986 transaction. First, it submits a checklist of items the parties identified as needing to be done to complete the transaction and one of those items noted that, at the closing, Old CNC was to provide "Assignment of insurance policies with the consent of the insurance companies endorsed thereon." Second, Continental submitted correspondence showing that most of Old CNC's liability insurance policies were canceled for a refund premium, but as to one policy the parties sought and obtained consent from the insurer to assign the policy from Old CNC to New CNC, and the insurer issued an endorsement to that effect. Continental argues that this shows that the parties knew they had to obtain insurer consent for an assignment of policies, and in fact did so when they wanted such an assignment, but they obtained no such consent for the Policies here.

Continental argues in addition that the dictum in *Narruhn* in fact rejects PCS Nitrogen's suggestion that South Carolina would permit assignment of policies, and instead supports only assignment of an accrued chose in action. Also, it argues that all of the out-of-state cases upon which PCS Nitrogen relies either stand for the same proposition (that is, they permitted only assignment of a chose in action), failed to apply controlling state law, or are contrary to South Carolina law.

Finally, Continental argues that PCS Nitrogen effectively concedes that it is not the corporate successor to Old CNC under any theory by failing to present any argument on that issue and by failing to identify any issue of fact. It contends that the facts of the corporate transaction are undisputed, and based on those facts New CNC contractually assumed Old CNC's environmental liability (as the Fourth Circuit affirmed). Because a premise of the *de facto* merger theory is that the corporate transaction has left claimants no one to sue, Continental argues that the *de facto* merger theory is inapplicable here because New CNC, by assuming the liability of Old CNC, clearly gave claimants someone to sue upon its dissolution.

IV. DISCUSSION

A. PCS Nitrogen's Theories to Obtain the Insurance Rights of Another Corporation Have No Validity

Despite the fact that PCS Nitrogen is not the same corporation as Old CNC, PCS Nitrogen claims to be entitled to Old CNC's liability insurance rights under two theories: (1) that Old CNC contractually assigned its insurance rights to New CNC (PCS Nitrogen's predecessor); and (2) that PCS Nitrogen was held, in the *Ashley II* litigation, to be Old CNC's corporate successor. Neither theory has any validity. Even if Old CNC purported to assign its insurance under long-expired insurance policies, it could not do so without the insurers' consent, which was not given. In addition, the district court's alternative holding that PCS Nitrogen was Old

CNC's successor under two theories was appealed, and that holding expressly was not affirmed on appeal, leaving it a nullity and entitled to no effect—as PCS Nitrogen now concedes. Therefore, there is no valid judicial decision holding that PCS Nitrogen is Old CNC's successor.

PCS Nitrogen's effort to argue that it is the corporate successor to Old CNC is unsupportable. The theory used by the district court to find that PCS Nitrogen was a corporate successor under federal law has been rejected by the United States Supreme Court, and its conclusion that there was a *de facto* consolidation or merger under South Carolina law is not only at odds with its own conclusion that there was **no** *de facto* merger under federal law, it is also contradicted by South Carolina law. Indeed, under any definition there was no *de facto* merger. Thus, PCS Nitrogen's effort to claim Old CNC's insurance rights has no basis.

B. Old CNC Did Not Assign the Policies

As a factual matter, it is undisputed that the Assignment upon which PCS Nitrogen relies did not assign rights to the Policies in full, but assigned only rights to the "benefits and proceeds" under the Policies "to the extent the same may be transferred and assigned." This language and other contemporaneous documents show the parties' understanding that assignment of the Policies in full would require consent of the insurers, and in one instance they actually obtained the consent endorsement of one insurer to effect such an assignment. PCS Nitrogen's attempt to interpret the Assignment as a broad policy assignment, when on its face it attempts only to assign benefits and proceeds to the extent such could be assigned, is belied by the document itself and the parties' conduct at the time. Therefore, there is no basis in fact for PCS Nitrogen's claim that it received an assignment of the Policies and all rights thereunder.

It is undisputed that no benefits and proceeds were then owing to Old CNC under the Policies here, at least as far as is relevant for the Charleston Site, because no underlying claims had even been asserted against Old CNC. Thus, the insurers could have had no obligation to pay

benefits and proceeds to Old CNC then. Consequently, as a factual matter, the Assignment did not assign the Policies, and there were no then-owing proceeds that could have been assigned at the time.

C. Old CNC Could Not Add or Substitute New CNC as the Insured Without the Insurers' Consent, Which They Did Not Give

Even if the Court were to credit PCS Nitrogen's claim that Old CNC attempted to assign the Policies, for which there is no evidence, the argument that it obtained Old CNC's insurance rights fails as a matter of law.

a) Insurance Contracts Are Personal to the Insured and Cannot Be Assigned Without Insurer Consent

The law recognizes personal contracts as those whose purpose is dependent on the character, credit, and substance of a specific party for its fulfillment. *Green v. Camlin*, 229 S.C. 129, 133, 92 S.E.2d 125, 127 (S.C. 1956). Rights under personal contracts cannot be assigned by that party to third persons, even where the contract does not specifically bar such assignment. *Id.*

South Carolina law recognizes that insurance contracts are personal to the insured, and therefore the insured may not assign the policy to third parties without insurer consent. Indeed, an insured cannot unilaterally make a new person or entity an insured under the policy without the insurer's consent. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 154-55, 64 S.E.2d 258, 264 (S.C. 1951) (prohibition on assignment of life insurance policy "obviously refers to a situation where the insured undertakes to assign his policy of insurance during his lifetime"); *see also Hack v. Metz*, 173 S.C 413, 420, 176 S.E. 314, 317 (S.C. 1934) ("if the assignment be not made with the consent of the [insured] and the insurer, it is void").

In addition, insurance contracts typically prohibit assignment of any interest under the policy without insurer consent, as the Policies do here. Such prohibitions are enforceable. *Hack*,

173 S.C. at 420, 176 S.E. at 317. "Contract provisions prohibiting the assignment of rights under the contract will ordinarily be upheld, depending on the particular facts and circumstances." 29 Williston on Contracts § 74:22 at 352.

b) The Limited Exception Permitting Assignment of the Right to Insurance Proceeds as a Chose in Action Does Not Apply Here

(1) South Carolina Draws a Clear Distinction Between Assignment of a Policy and Assignment of a Claim

In South Carolina, as in other states, an insured cannot assign all rights under a policy without insurer consent. A limited exception to this rule applies, however, when an insurer's contingent contract obligation matures into a current obligation to pay a sum of money—that is, when the thing insured against has occurred and there is no other condition to payment. Then, the law views the right to receive payment as something new: as a debt owing to the insured, or a species of property that the common law called a chose in action.[2] Courts treat the insurer's already-accrued obligation to pay a sum of money as assignable, notwithstanding a prohibition on assignment in the policy. *See Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344-45, 745 S.E.2d 90, 93-94 (S.C. 2013). Although the Supreme Court's discussion of the issue in *Narruhn* was dictum, it quoted Couch on Insurance as saying, "the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim." *Id.* at 344, 745 S.E.2d at 94. Such a right to receive money payment "'is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.'" *Id.* (quoting 17 Williston on Contracts § 49:126).

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[2]A chose in action has been defined as (1) A proprietary right in personam, such as a claim for damages in tort; (2) the right to bring an action to recover a debt, money or thing; and (3) personal property owned by one person but possessed by another, the owner is able to regain possession through a law suit. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343 n.3, 745 S.E.2d 90, 93 n.3 (S.C. 2013) (quoting Black's Law Dictionary at 275 (9th ed. 2009)).

PCS Nitrogen asserts that *Narruhn* supports its position that all policy rights may be assigned after loss. But *Narruhn* did not involve an assignment of policies, which is what PCS Nitrogen seeks here. The Supreme Court's comment that "an assignment *after* a loss has already occurred does not require an insurer's consent," in context, referred to assignment of a chose in action for accrued money due, a chose in action which could be assigned to the claimant, and did not refer to substitution of insureds. *Id.* at 344, 745 S.E.2d at 94 (emphasis original). The Court further explained that "the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer *of a contractual relationship* while the assignment after loss *is the transfer of a right to a money claim*;" "a vested claim against the insurer . . . can be freely assigned or sold *like any other chose in action* or piece of property." *Id.* at 344-45, 745 S.E.2d at 94 (emphasis added; citations omitted). Plainly, the Court did not, by its statements, support the notion that the claimant *against* the insured could *become* the insured after the assignment. Thus, what *Narruhn* observed, in dicta, was merely that an accrued right to receive a payment from an insurer could be assigned, as it is a chose in action. It rejected the contention that a *contractual relationship* could be assigned without consent. *Narruhn* therefore does not support PCS Nitrogen's argument.

In fact, *Narruhn* was only repeating what other South Carolina cases previously said and which PCS Nitrogen does not rebut. Those cases similarly recognize that assignment of a right to payment, as a chose in action, may be made only after the insured has that right to payment. *E.g., Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 447 S.E.2d 869 (S.C. 1994) ("An assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment.").

(2) In the Context of Liability Insurance, a Chose in Action Accrues Only After Judgment of Liability Has Been Entered, or There Has Been a Settlement Among the Claimant, the Insured, and the Insurer

With respect to liability insurance, the insured does not have an assignable chose in action until it has a right to payment from the liability insurer. Under the terms of the policies here and South Carolina law, the insured has a right to payment only when a judgment for covered damages is entered against the insured or when it enters into a settlement with the claimant and the insurer. Continental's policies provide as follows:

> **Action Against Company** No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.*

In addition, Continental agreed to indemnify the insured only for "sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies." The insured is legally obligated to pay only when a judgment is entered against it or when it enters into a settlement with the claimant and the insurer. *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (S.C. 1968) ("No right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay."). Therefore, the duty to indemnify and a chose in action to recover an indemnity payment do not arise, at a minimum, until there is such a judgment or settlement and all conditions to coverage are met. *See Narruhn*, 404 S.C. at 344-45, 745 S.E.2d at 93-94.[3]

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[3] While the right to obtain the insurer's obligation to indemnify a judgment may be assigned once a judgment against the insured is entered (assuming there is coverage), the right to obtain the insurer's obligation to defend may never be assigned. The duty to defend is an obligation to provide the services of an attorney to represent the insured in defense of underlying suits. This duty cannot be reduced to a sum of money owing to the insured that the insured can assign to third parties. *Javorek v. Superior Court (Larson)*, 17 Cal. 3d 629, 644-45, 552 P.2d 728, 740 (1976).

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Under the policies' language and South Carolina law, an insured has no right to the insurer's payment obligation—no chose in action—until its liability has been established by judgment or by a settlement to which the insurer has agreed, and it has no ability to assign such a chose in action until then.

The question is not when loss occurs, but when a payment obligation arises. Yet even if when the loss occurred was relevant, loss, in the context of insurance for liability for injury to third parties, occurs only when the third party obtains a judgment against the insured. The insured contingency, for a *liability* policy, is not a third party's injury; it is the insured's *liability* for that injury. *See Park*, 251 S.C. at 413, 162 S.E.2d 709 at 710.

Accordingly, even if the exception allowing assignments notwithstanding the consent-to-assignment clause were categorized as a post-loss exception, the loss in the third-party liability insurance context must be the event that fixes the insured contingency, that prevents any split in interest between the insurer and the insured in defeating liability and that eliminates the potential increase in risk to the insurer: a judgment against the insured. As no such judgment was ever entered against Old CNC, the post-loss exception PCS Nitrogen advocates does not apply.

c) PCS Nitrogen's Reliance on Out-of-State Authorities Is Misplaced

PCS Nitrogen urges the Court to follow cases from other jurisdictions, which it claims permit insurance policies to be assigned at any time after third-party injury occurs. These cases are not controlling here, but regardless they either do not support PCS Nitrogen's argument, are distinguishable, or are contrary to the law of the state whose law they purported to apply. PCS Nitrogen attempts to frame the issue as being between cases constituting a majority view and those constituting an extreme minority. In fact, as discussed below, nearly all decisions have the same view, with some cases in other jurisdictions failing to follow it: Insurance policies may not

be assigned *in toto* to a new insured without insurer consent, but a policyholder may assign only an accrued right to receive money from an insurer as a chose in action. As discussed above, this precisely mirrors South Carolina law.

Several of the cases cited by PCS Nitrogen involved assignment of a chose in action for an accrued money claim, not assignment of policies to make a new person or entity an insured. For example, in *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 160 N.E. 145, 145-46 (Ill. 1928), the insured's car had already been stolen when he assigned the claim for recovery from his insurer. The court held that a claim is assignable after "nothing remains to be done except pay the money." *Id.* at 146. The insurer's consent would have been required "if [the claimant] had bought the automobile covered by the policy prior to the time it was stolen and an attempt had been made *to assign the policy*." *Id.* at 146 (emphasis added). Instead, after the car was stolen the insured's claim "became a chose in action." *Id.* In these cases the insurer's payment obligation had accrued and the insured attempted to assign was the right to receive an accrued payment. The insured did not attempt to make a new person or entity an insured. Therefore, this case conforms to South Carolina law and do not support PCS Nitrogen's argument.

Other cases upon which PCS Nitrogen relies are clearly distinguishable. *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015), explicitly rested its holding on the court's interpretation of an 1872 California statute, which the court concluded required overturning aspects of its recent precedent in *Henkel Corp. v. Hartford Acc. and Indem. Co.*, 62 P.3d 69 (Cal. 2003). *Fluor*, 354 P.3d at 330. No such statute exists here. Moreover, *Fluor* overturned *Henkel* only to the extent it was inconsistent with the views expressed in that opinion. *Id.* at 304 & 333. Accordingly, *Henkel's* holding that insurance rights do not transfer by operation of law to a new corporate entity that assumes some of the insured's tort liability—precisely what happened

here—remains good law. *Henkel*, 29 Cal. 4th at 941-43, 62 P.3d at 73-74.[4] Another case cited by PCS Nitrogen similarly rejects the by operation of law theory. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 129-30 (Ohio 2006). *Pilkington* also did *not* hold that that the duty to defend could be assigned at all, failing to reach a majority on that issue. *Id.* at 123. *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006), is also distinguishable. It rested its holding on the conclusion that the insurer's payment obligation could arise before a judgment against the insured in the underlying case. *Id.* at 1225-26. By contrast, the Supreme Court of South Carolina has held that a liability insurer's payment obligation does *not* accrue until judgment. *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (S.C. 1968) ("No right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay."). *Egger* therefore is at odds with South Carolina law.

In sum, all of the cases upon which PCS Nitrogen relies either permitted only assignment of a chose in action (not assignment of policies to a new insured), failed to adhere to the state law they interpreted, or are inconsistent with South Carolina law. Therefore, the Court declines to follow them here.

d) PCS Nitrogen's "Windfall" Argument Has No Merit

PCS Nitrogen contends that the consent-to-assignment clause should not be enforced as to do so would grant the insurers a windfall. It contends that the insurers "happily took premiums" from Old CNC and now seek to walk away from their obligations.

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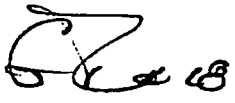
[4] PCS Nitrogen also cites *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476 (W.D. Wash. 1996), but that court was obliged to follow the Ninth Circuit's decision in *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992), which purported to apply Washington and California law. But *Northern Insurance's* by operation of law theory was rejected by the Supreme Court of California in *Henkel*, and that aspect of *Henkel* was not overturned by *Fluor*. *B.S.B.* therefore provides no authority.



The Court disagrees. The insurers have not walked away from their insured, Old CNC. As counsel stated in oral argument, if Old CNC were sued, and if it were held liable, and if that liability were covered, they would pay. Yet it is undisputed that PCS Nitrogen did not sue Old CNC, even though it sued Old CNC's parent companies, DSM N.V. and DSM Chemicals North America, Inc., and ultimately lost its claims against them. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 n.4 (4th Cir. 2013). There may be reasons why PCS Nitrogen could not sue Old CNC, but those reasons relate to Old CNC's liability. PCS Nitrogen's problem therefore is a liability problem, not an insurance problem. It may not seek to upend South Carolina law to obtain insurance to which it is not entitled to circumvent that problem. Holding PCS Nitrogen to the consequences of the law of liability does not provide the insurers with a windfall.

e) PCS Nitrogen Does Not Allege Assignment of a Chose in Action, But Assignment of All Policy Rights in Violation of South Carolina Law

PCS Nitrogen does not allege that Old CNC suffered a judgment covered by liability insurance, for which it had a right to payment from its insurers that it assigned to New CNC. Nor could it, as indeed no underlying claim had even been alleged against Old CNC by the time of the 1986 Assignment, and Old CNC had not even sought coverage for any claim—so it could not have had an accrued right to insurance recovery that it could transfer to New CNC. Instead, PCS Nitrogen alleges that it received *all* of Old CNC's insurance rights by virtue of the 1986 Assignment, and it seeks to step into Old CNC's shoes for all purposes as the insured, including as to a duty to defend. That is not an assignment of a chose in action for money payment, but an assignment of a contractual relationship—an attempt at a novation, to which the insurers did not

agree—that is clearly precluded by the contracts and South Carolina law.[5] Accordingly, there is no basis for PCS Nitrogen's theory that it obtained Old CNC's insurance rights by assignment.

D. PCS Nitrogen Is Not the Corporate Successor to Old CNC under Federal or State Law

PCS Nitrogen has conceded that the federal district court ruling upon which it relied as a basis for claiming corporate succession to Old CNC was not affirmed on appeal and is a nullity. PCS Nitrogen nevertheless asserts that it is Old CNC's corporate successor, but it presents no argument based on the facts of the corporate transaction to support its claim. Moreover, it fails to identify any issue of fact not resolved in the *Ashley II* case regarding the corporate transaction that would require trial here. PCS Nitrogen may not simply assert that a question of fact exists; instead it must meet its burden as the non-moving party to show an issue of fact exists. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Indeed, the facts of the Assignment are undisputed, and PCS Nitrogen's failure to present any argument on the law effectively concedes that it has no opposition to Continental's Motion on this issue.

Any argument that PCS Nitrogen is the corporate successor to Old CNC is unsupported. The district court's ruling that New CNC was the successor to Old CNC is directly contrary to U.S. Supreme Court and South Carolina precedent.

a) The Substantial Continuity Test Is No Longer Good Law

The district court purported to hold that New CNC was successor to Old CNC under a test called the substantial continuity test. 2007 *Ashley II* Findings at 18-19. The substantial continuity test, used by few federal courts, applies federal labor law precedents to cases under

[5] Attempting to assume the *duties*, as well as obtain the rights, of one party to a contract is not an assignment, as the duties under a contract can never be assigned away without the consent of the party to whom they are owed. 29 Williston on Contracts § 74:27 at 412-13. "Novation is the word appropriate for such a changed relation, and an attempt by one party to force a novation on the other party to a contract will excuse the latter." *Id.* § 74:37 at 466.

the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, crafting a federal common law of corporate succession and requiring corporations that satisfied its test to assume the environmental obligations of their alleged predecessors. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992).

The district court relied solely on *Carolina Transformer* as its authority for using the substantial continuity test. The premise of this test, however—that a federal common law determines inter-corporate liability issues in CERCLA cases—was rejected by the U.S. Supreme Court in *United States v. Bestfoods*, 524 U.S. 51, 61-63 (1998). There, the issue was whether a parent corporation could be liable for the CERCLA liabilities of a subsidiary. The Court noted, "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *Id.* at 61. The Court continued, "[N]othing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." *Id.* at 62. Accordingly, "CERCLA is thus like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Id.* at 63. *Bestfoods* has been interpreted as rejecting *Carolina Transformer* and other cases that adopt a federal substantial continuity test at odds with state corporation law. *See New York v. National Svcs. Indus., Inc.*, 352 F.3d 682, 683 (2d Cir. 2003) ("after *Bestfoods*, the substantial continuity test cannot be applied to determine successor liability under CERCLA"); *Action Mfg. Co. v. Simon Wrecking Co.*, 387 F. Supp. 2d 439, 451-52 (E.D. Pa. 2005) ("the majority view, and the national trend, is to reject the substantial continuity

test"). The district court's reliance on the substantial continuity test was therefore contrary to Supreme Court precedent, and PCS Nitrogen does not argue otherwise.

b) PCS Nitrogen Is Not Old CNC's Successor Under De Facto Merger Theories

The district court's reliance on South Carolina law regarding when a court may find a consolidation or merger occurred was equally unjustified. The court said, "Under South Carolina law, a corporation which acquires the assets of another corporation does not assume the liabilities of the predecessor corporation unless ... (2) the circumstances surrounding the transaction warrant a finding of consolidation or merger of the two corporations." 2007 *Ashley II* Findings at 19-20 The court cited *Simmons v. Mark Lift Indus., Inc.* 366 S.C. 308, 622 S.E.2d 213 (S.C. 2005), for this broad proposition. *Simmons*, however, merely declined to answer certified questions tendered to it, saying the corporate succession issues were resolved by prior South Carolina law. 366 S.C. at 312, 622 S.E.2d at 215.

In fact, the prior cases cited in *Simmons*, as well as another South Carolina Supreme Court case cited by the district court in *Ashley II*, do not support the district court's conclusion that this surrounding circumstances exception was as malleable as the district court suggested. In those earlier South Carolina cases, the circumstances that might warrant a finding of merger were such that creditors of the predecessor would have no remedy to obtain repayment and would have no one to sue. *See Brown v. American R. Express Co.*, 128 S.C. 428, 432, 123 S.E. 97, 99 (S.C. 1924); *Huggins v. Commercial & Savings Bank*, 141 S.C. 480, 506-08, 140 S.E. 177, 185-86 (S.C. 1927) (cited by district court in *Ashley II*; emphasizing *Brown's* "leaving no one to be sued" point and noting, "There was in the *Brown* case no evidence to show that the purchasing corporation had *expressly* agreed to assume the payment of the debts of the selling corporation.") (emphasis original). In contrast to the facts in *Brown* and *Huggins*, the creditors

of Old CNC in *Ashley II* did have a remedy and did have someone to sue, precisely because, as the district court held, New CNC did expressly assume Old CNC's liabilities. 2007 *Ashley II* Findings at 17. As a result, there was no basis for the district court's holding that, under South Carolina law, the surrounding circumstances warranted a finding that there was a merger.

Indeed, the surrounding circumstances analysis of *Brown* and *Huggins* is a *de facto* merger analysis, which the district court held did not support a finding of merger under federal law. 2007 *Ashley II* Findings at 17. The *de facto* merger test the district court used looks at "when one corporation takes all of another's assets without providing consideration that can be made available to meet the claims of the predecessor's creditors." *Id.* In support of this proposition, the district court cited *United States v. Davis Memorial Hosp.*, No. 90-2495, 1992 U.S. App. LEXIS 4298 (4th Cir. Mar. 9, 1992), which also identified the following factors for *de facto* merger analysis: "(1) continuity of management, personnel, physical location, assets, and general business operations (i.e., continuity of enterprise); (2) continuity of ownership; (3) prompt cessation of the seller corporation's operations; and (4) assumption by the purchaser of obligations ordinarily necessary for the uninterrupted continuation of normal business operations of the seller." *Id.* at *7. South Carolina's surrounding circumstances analysis looks at whether "the purchaser had bought all the assets of the seller," with "no express agreement that the purchaser would be responsible," and had otherwise "acquired and taken over the business of the [seller]." *Huggins*, 141 S.C. at 506-07, 140 S.E. at 185-86; *see also Brown*, 128 S.C. at 432, 123 S.E. at 99. Both tests therefore depend on purchase of all assets and continuing the prior corporation's business operations, *without assuming the seller's liability*. The tests are the same. The district court's conclusion that there was no *de facto* merger under federal law cannot be reconciled with its conclusion that there was a *de facto* merger under South Carolina law.

The district court's alternative corporate succession rulings therefore have no effect not only because they were not affirmed on appeal, but also because they were legally untenable. PCS Nitrogen is not the corporate successor to Old CNC under any theory, and it cannot claim Old CNC's rights to insurance coverage as a result.

V. CONCLUSION

For the foregoing reasons, the Court hereby grants Continental's Motion for Summary Judgment with respect to Corporate Succession, and the Motions and Joinders of other Defendants) and will enter judgment in favor of Defendants and dismissing all of PCS Nitrogen's claims with prejudice.

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Judge of the Circuit Court of South Carolina

March 18, 2016
Columbia, South Carolina