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February 17, 2017

The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *PCS Nitrogen, Inc. v. Continental Cas. Co.*,
Appellate Case No. 2016-001140

Dear Ms. Kitchings:

On behalf of our client, Defendant-Respondent Continental Casualty Company, and with the concurrence of all Defendants-Respondents in the above-referenced case, we respectfully submit this letter to the Court pursuant to Rule 208(b)(7), SCACR, in response to the letter-submission of Plaintiff-Appellant PCS Nitrogen, Inc. ("PCS") dated February 2, 2017.

PCS submits to the Court a copy of an opinion from the Supreme Court of New Jersey in *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co.*, saying the opinion addresses the "precise issues" before the Court in this case. Rule 208(b)(7) limits responses to such submissions and requires they be made "without argument." Accordingly, without seeking to argue any issue, Defendants-Appellees show the Court that *Givaudan Fragrances* does not address the "precise issues" before the Court because the facts of this case are distinguishable. The decision furthermore is unpersuasive and should not be followed.

First, in *Givaudan Fragrances*, the insured had actually specifically assigned to the new corporation "all rights to insurance coverage" under all of the insurers' policies. The decision held that, under the circumstances of the case, the insured could do so. Here, by contrast, the insured, Columbia Nitrogen Corporation, did *not* contractually assign all of its insurance rights to PCS, but assigned only rights to "proceeds" "to the extent the same may be transferred and assigned." R. p. 2233. As the trial court held, this language clearly did not attempt to assign the policies *in toto*, or any other non-transferable right, but only money proceeds already due. R. p. 13. Indeed, when Columbia Nitrogen did intend to assign entire policies to PCS, it specifically obtained the consent of the insurer to do so—but it did not obtain consent from any of the insurers here for any of their policies. R. pp. 2354-56; *see* Joint Final Brief of Respondents at 13-16. *Givaudan Fragrances* therefore does not support PCS's attempt to argue that it should obtain Columbia Nitrogen's insurance rights in the absence of any assignment.

Second, *Givaudan Fragrances* is further distinguishable on the ground that, there, the new corporation was a sister corporation of the original insured, and the two companies remained under the same corporate ownership; they had not been adverse to each other, and, given their relationship, the court viewed the assignment as not increasing risk for the insurers. Slip op. at 40. Here, by contrast, PCS *sued* Columbia Nitrogen's corporate

parents (who were insureds under the policies), alleging that Columbia Nitrogen knew of and "substantially contributed" to environmental contamination at the site. R. pp. 238-88, at 270-71; *see* Joint Final Brief of Respondents, at 11-12. PCS is therefore *adverse* to Columbia Nitrogen and acted grossly contrary to Columbia Nitrogen's interests. For that reason it is adverse to and has a conflict of interest with Columbia Nitrogen's insurers. Having helped to establish the insured's liability and to increase that liability, PCS cannot claim that the insurers' risk is unaltered if they are forced into a contract with PCS, to pay PCS's attorneys' fees for the liability it helped establish, as well as to pay for that liability itself.

Finally, *Givaudan Fragrances* does not purport to apply South Carolina law, and its discussion of other states' law as permitting wholesale assignment of liability insurance policies at any time after the policy period misreads nearly all of that law. The cases discussed by *Givaudan Fragrances* do not broadly permit assignment of all rights to insurance any time after a liability policy terminates.[1] Rather, as explained in the Joint Final Brief of Respondents (at 30-38), those cases stand for a limited "chose in action" exception to the general rule enforcing the policies' consent-to-assignment clause, an exception applicable only to money already due to be paid because all contingencies to payment have been satisfied. Defendants-Respondents do not re-argue this point here, but refer the Court to their brief and the opinion of the court below. Suffice it to say that *Givaudan Fragrances* does not discuss what a chose in action is or analyze why the law permits assignments of choses in action—but only choses in action—without the consent of the other contract party. The decision fails to acknowledge that the universal black-letter law of contracts bars one party to a contract from abandoning its contract obligations and putting a stranger into a contractual relationship with another and never has permitted wholesale assignment of all rights and obligations under a contract—a novation by force—without the other party's consent.

For these reasons, Defendants-Respondents believe *Givaudan Fragrances* is unpersuasive and should not be followed. However, to the extent the Court deems it helpful, Defendants-Respondents suggest that the Court permit supplemental briefs, of up to ten pages, for example, from each side to argue why *Givaudan Fragrances* should or should not be followed.

We thank you for your courtesies in this matter.

WALL TEMPLETON & HALDRUP, PA

Morgan S. Templeton

MST/sjs
cc: All Counsel of Record, *via electronic mail only*

[1] The one exception is *Fluor Corp. v. Superior Ct.*, 61 Cal. 4th 1175, 354 P.3d 302 (2015), which Defendants-Respondents addressed in their Joint Final Brief of Respondents (at 36-38).

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