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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-10-00387
Appellate Case No. 2016-001140

PCS Nitrogen, Inc.,.....Appellant,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America),.....Respondents.

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VOLUME 6 OF 6

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT

C.A. NO: 2011-CP-10-387

PCS NITROGEN, INC.,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, *et al.*

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INTRODUCTION

Moving Insurers[1] are entitled to summary judgment dismissing all of PCS's[2] claims under the policies that are subject to this motion[3] because, based on the undisputed material facts and controlling law, those claims are barred by the pollution exclusion. By its terms, the exclusion bars coverage for property damage arising out of the discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape was "sudden and accidental." The allegations made against PCS in the underlying *Ashley II* litigation and the UAO, coupled with the *Ashley II* court's factual findings[4], conclusively establish that there was no "sudden and accidental" discharge of pollutants at the Site for which PCS is liable.

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[1] "Moving Insurers" are Defendants, United States Fire Insurance Company with respect to policy no. 5401893627 and Continental Casualty Company.

[2] Unless otherwise indicated, all defined terms contained in Moving Insurers' Memorandum of Law in Support of Motion for Summary Judgment ("Moving Insurers' Opening Brief") are incorporated herein.

[3] The following defendants filed papers joining Moving Insurers' Motion for Summary Judgment and also join this Reply Brief: Certain Underwriters at Lloyd's, London (with respect to the 1971-1973 London policies); Certain Aviva Companies (with respect to the 1971-1973 London policies); Certain Winterthur Companies (with respect to the 1971-1973 London policies); New London Reinsurance Company Limited (with respect to the 1971-1973 London policies); The Scottish Lion Insurance Company Limited (with respect to the 1971-1973 London policies); Starr Indemnity & Liability Company (formerly known as Republic Insurance Company); Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company); Admiral Insurance Company; United States Fire Insurance Company (with respect to policy nos. GLA 284022 and GLA 540 079751 7); ACE Property & Casualty Insurance Company, formerly known as CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company; and Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America; Certain London Market Insurance Companies, (which include: Dominion Insurance Company Ltd., Excess Insurance Company Ltd., River Thames Insurance Company, National Casualty Company, National Casualty Company of America Ltd., Argonaut Northwest Insurance Company, London & Edinburgh General, Assicurazioni Generali, SPA, Alba General Insurance Company Ltd., Stronghold Insurance Company Ltd., Harper Insurance Company Ltd F/K/A Turegum Insurance Company, and Helvetia Accident Swiss Insurance Company Ltd.); First State Insurance Company; and Providence Washington Insurance Company, as successor in interest by way of merger to Seaton Insurance Company, f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company ("Providence Washington") (together, the "Joining Insurers"). Providence Washington notes that summary judgment should be granted to it on the additional ground that PCS did not oppose its Joinder.

[4] *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd* 714 F.3d 161 (4th Cir. 2013) (hereinafter "*Ashley II*").

Therefore, there is no coverage under the subject policies, and Moving Insurers and Joining Insurers are entitled to summary judgment.[5]

PCS litigated at the trial and appellate levels in *Ashley II* how the pollutant discharges for which it is liable took place. PCS litigated—and lost—at the trial and appellate levels in *Ross*[6] the applicability of the pollution exclusion to discharges at the Site. Thus, the facts regarding the applicability of the exclusion have already been determined, and the legal conclusion that the pollution exclusion excludes coverage here has already been made. This result is inescapable for PCS. Indeed, PCS does not—and/or cannot—challenge any of the following:

- *Ross* involved the same Site, same policy language and same applicable law – South Carolina law. *See* Plaintiff PCS Nitrogen, Inc.'s Omnibus Memorandum of Law in Opposition to Defendants'; Summary Judgment Motions ("PCS Opp.") at 6–7, 18–19; *see also Ross*, 910 F. Supp. 2d at 832; and Moving Insurers' Opening Brief at 17.

- In *Ross*, PCS pursued Ross's insurers as a judgment creditor of Ross and had the full and fair opportunity to litigate coverage under Ross's policies, which were in effect for the same periods as practically all of the policies subject to this motion. *See* PCS Opp., at 6–7, 18–19; *see also* Moving Insurers' Opening Brief, at 11–12, 29–30; and *Ross*, 910 F. Supp. 2d at 831.

- Specifically, it litigated in *Ross* the applicability of the sudden and accidental pollution exclusion to contamination at the Site. *See* PCS Opp. at 6–7; *see also* Moving Insurers' Opening Brief at 12–14, 39–30; and *Ross*, 910 F. Supp. 2d at 833–34.

- The detailed findings in *Ashley II* described discharges by Old CNC, including washing out of acid chambers, dumping and creating pyramids of lead sludge on the ground, hosing the sludge into an unlined ditch that ran toward the Ashley River, discarding cut pieces of lead tank linings on the ground, and discharging process effluent to ditches, among others. *See* PCS Opp., at 5–6, 21–23; *see also Ashley II*, 791 F. Supp. 2d at 448–49.

[5] Moving Insurers and Joining Insurers do not concede that PCS has any rights to coverage under the policies subject to this motion and have simultaneously moved for summary judgment on that issue as well.
[6] *Ross Development Corp. v. Fireman's Fund Insurance Co.*, 910 F. Supp. 2d 828 (D.S.C. 2012), *aff'd* 526 F. App'x 299 (4th Cir. 2013) (hereinafter "*Ross*").

- PCS had a full and fair opportunity to argue in *Ross* that the 1971 wind storm was a "sudden and accidental" discharge that resulted in property damage, but it chose not to raise that assertion. *See* PCS Opp. at 18–19, 23–24; *see also* Moving Insurers Opening Brief, at 33.
- The UAO does not allege any facts not alleged in *Ashley II*. *See generally* PCS Opp; *see also* Ex. G to Moving Insurers' Opening Brief.
- PCS has the burden of proving the applicability of the "sudden and accidental" exception to the pollution exclusion.
- The discharge, not the resulting damage, has to be sudden and accidental in order for the "sudden and accidental" exception to the pollution exclusion to apply.

Recognizing that the undisputed material facts provide no support for its position, PCS attempts to show that the principles of collateral estoppel do not preclude it from re-litigating the applicability of the pollution exclusion. PCS's basic argument is that the *Ross* decision does not control because, in assessing the applicability of the pollution exclusion, the *Ross* court did not consider Old CNC's conduct and, instead, it considered only the conduct of Planters, the Site's previous owner. Opp. at 17-18. That argument has no merit. In determining the applicability of the pollution exclusion, what matters is whether there were "sudden and accidental" discharges, regardless of who caused those discharges. The *Ross* court determined that the exclusion in policies issued from 1972-1992 applied because none of the pollution at the Site resulted from "sudden and accidental" discharges. PCS had a full and fair opportunity in *Ross* to argue and seek to prove that "sudden and accidental" discharges—whether caused by Old CNC, Planters or someone else—led to the contamination. PCS is therefore estopped from re-litigating that issue here.

Even if it is permitted now to advance arguments it could have advanced in *Ross*, PCS fails to show why this Court's conclusion should differ from the *Ross* court's conclusion. Old

CNC's discharges are indistinguishable from the routine discharges that the *Ross* court held were not "sudden and accidental." PCS attempts to distinguish Old CNC from Planters by portraying Old CNC as something of an environmental steward because it took some measures to fix leaks at the Site and/or decrease the impact on the environment of its releases of contaminations. That characterization, however, does not transform intentional discharges of the type that the *Ross* court found were not "sudden and accidental" into discharges that are "sudden and accidental." Moreover, there can be no doubt that the demolition activity, intentional release of sludge, and the deposit of contaminated fill on the Site are not "sudden and accidental" discharges. PCS argues that Old CNC did not intend to cause pollution in undertaking those activities, but that argument relies on a faulty premise, because the inquiry under the pollution exclusion is whether there were "sudden and accidental" *discharges*, not whether the *resulting damage* was intended.

In a desperate, last ditch attempt to create an issue of material fact where none exists, PCS highlights a wind storm that occurred in 1971. As shown below, however, the *Ashley II* court did not find that the storm was the cause of any property damage for which PCS is liable. And though PCS could have argued in the *Ross* case that the storm was a "sudden and accidental" discharge, it never mentioned the storm, and for good reason: the storm did not cause any property damage for which any clean-up liability was imposed. Thus, even if there could be a question of fact regarding the wind storm (which there is not), it is not an issue of *material* fact that would support denial of this motion.

In sum, the Court should grant summary judgment to Moving Insurers and Joining Insurers because the pollution exclusion bars PCS's claims, and PCS is collaterally estopped

from re-litigating the application of the pollution exclusion to discharges of contaminants at the Site.

ARGUMENT

I. The Pollution Exclusion Precludes Any Duty to Defend.

The pollution exclusion precludes PCS's claim that any of the Moving Insurers or Joining Insurers has a duty to defend. The duty to defend is determined by comparing the allegations of the complaint, as well as other facts available to the insurers, to the policy. *See USAA Prop & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (S.C. 2008). Here, when the allegations made against PCS in *Ashley II* and the UAO, coupled with the facts found by the *Ashley II* court, are compared to the subject policies, it is clear that there was no "sudden and accidental" discharge of pollutants for which PCS is liable.

Judge Seymour's detailed findings of fact in *Ashley II* show beyond dispute that the discharges of pollutants at the Site, for which PCS has been held liable, were intentional and/or routine, not "sudden and accidental." Nowhere in the complaints filed against PCS in *Ashley II* or the UAO is there an allegation of any "sudden and accidental" discharge. *See* Moving Insurers' Opening Brief, Exhibits C-D, G. Moreover, PCS's argument that there is "a possibility" of a sudden and accidental discharge collapses under its own weight when examined in the context of the *Ashley II* pleadings, UAO and findings by the *Ashley II* and *Ross* courts. The *Ross* court rejected the very same argument by PCS, finding no duty to defend (or indemnify) under policies containing the identical pollution exclusion because the very same "complaints [in *Ashley II*] raised no possibility that the discharge was 'sudden and accidental...'" *Ross*, 526 F. App'x at 305. An insurer "has no duty to defend an insured where the damage

caused was for a reason unambiguously excluded under the policy." *Id.* (quoting *Clegg*, 377 S.C. at 661; 661 S.E.2d at 797). Because the pollution exclusion unambiguously excludes coverage for the contamination at the Site, Moving Insurers and Joining Insurers have no duty to defend PCS.

II. The *Ashley II* Court's Factual Findings Foreclose the Possibility That Any Discharges of Pollutants by Old CNC Were "Sudden And Accidental."

Pursuant to established South Carolina law as already applied to this Site, the pollution exclusion precludes PCS's claims against Moving Insurers and Joining Insurers. PCS, as the party claiming coverage, has the burden of proving applicability of the "sudden and accidental" exception, something it has failed to do. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462, n. 5 (S.C. 2004). In *Helena Chemical*, the Supreme Court of South Carolina applied the identical pollution exclusion to the insured's "'incidental release of pesticides during routine operation of grinding pesticide into dust, loading, unloading, bagging, and formulating pesticides.'" *Helena Chem.*, 357 S.C. at 642; 594 S.E.2d at 460. Like this case, *Helena Chemical* also involved leaks from pipes and tanks which were part of routine business operations. *Helena Chem.*, 357 S.C. at 643–644, 594 S.E.2d at 461. The court held that coverage for such discharges is precluded by the exclusion because the discharges were part of normal business operations, and, therefore, cannot be considered "unexpected and accidental." *Id.* Here, as painstakingly cataloged by the *Ashley II* court, the discharges at the Site for which PCS is liable were part of routine, day-to-day operations and/or were otherwise intentional. *Ashley II*, 791 F. Supp. 2d at 448–52. Such discharges cannot be characterized as "unexpected and accidental." *See Ross*, 910 F. Supp. 2d at 832–35; *see also Helena Chem.*, 357 S.C.at 640,

594 S.E.2d at 460 (holding that "property damage caused by pollution arising from ordinary business operations is not covered"). As such, the pollution exclusion precludes coverage.

The *Ashley II* Complaint alleges the following routine operations by Old CNC involving discharges, none of which can be characterized even remotely as "sudden and accidental":

- In 1966, Old CNC purchased the Site, where it "operated a phosphate fertilizer granulation plant and produced phosphate and nitrogen-based fertilizers until 1972." Ex. C. to Moving Insurers' Opening Brief, at ¶ 15.

- "The production of phosphate fertilizers involved producing sulfuric acid and mixing this acid with phosphate rock. Sulfuric acid was produced at the Site by burning sulfur in the presence of oxygen to for sulfur trioxide. Water was then passed over packing media to react with the sulfur trioxide gas to form sulfuric acid. Crushed phosphate rock was then mixed with the sulfuric acid, and was further mixed, solidified and cured, ultimately reaching the level of phosphate acceptable for fertilizer. The final product was then crushed and bagged for shipment." *Id.* at ¶ 17.

- "Waste products generated by the phosphate fertilizer production process at the Site included air emissions of particulates, fluorides, ammonia, and sulfur oxides and wastewaters containing phosphates, fluorides, sulfates, and gypsum. Wash down waters containing acid and soluble lead were discharged onto the ground surface or into nearby drainage ditches. Solid wastes included pyrite cinders containing lead and arsenic and spent packing material, both of which were possibly used as fill material onsite." *Id.* at ¶ 18.

The *Ashley II* First Amended Complaint alleges the following routine operations involving discharges by Old CNC, which, again, cannot be characterized as "sudden and accidental":

- Old CNC "disposed of hazardous substances at the . . . Site through discharge of liquid and solid wastes onto the ground, through leakage of chemicals (including acid and lead), through washing out the sludge in lead acid chambers onto the ground, through discarding of lead panels on the ground, and otherwise." Ex. D to Moving Insurers' Opening Brief, at ¶ 24.

- Old CNC "disposed of hazardous substances at the Site by causing contaminated fill material to be brought onto the Site and used for grading, filling and site improvement purposes." *Id.* at ¶ 25.

- Old CNC "disposed of hazardous substances at the Site by causing the buildings and other structures on the Site to be demolished and hazardous materials contained in those buildings and structures to be released onto the ground of the Site." *Id.* at ¶ 26.

- Old CNC "disposed of hazardous substances at the Site by causing soil, fill material and demolition debris, all containing hazardous substances, to be relocated and dispersed throughout the Site." *Id.* at ¶ 27.

In *Ashley II*, Judge Seymour described Old CNC's routine operations that resulted in the discharge of contaminants at the Site:

- "Arsenic and lead were present in CNC's finished product, normal superphosphate fertilizer." *Ashley II*, 791 F. Supp. 2d at 448.

- Old CNC personnel periodically and routinely "washed lead sludge that built up in the acid chambers through a four by six inch hole cut into the bottom of each chamber onto the ground. This resulted in a pyramid of sludge under each chamber that was two feet wide, and two to three feet high. Each pyramid of sludge was then hosed with a 225 foot long fire hose into an unlined ditch that ran toward the Ashley River." *Id.* at 448-449.

- The sludge that washed out of the acid chambers in Old CNC's acid plant contained a mixture of lead sulfate, comprised of lead and acid. *Id.* at 449.

- Pieces of lead were cut out and discarded onto the ground during periodic repairs of the lead acid chambers. *Id.*

- "The onsite manufacturing processes generated liquid process effluent that contained fluorosilicic acid and lead that was discharged into drainage ditches, releasing these contaminants across the Site and into the marsh and the Ashley River." *Id.*

- "Over time, periodic releases of acid, either from the washing out of the lead chambers or acid spills from line leaks and tank leaks, mobilized both lead and arsenic through the soil." *Id.* at 450.

- "During CNC's ownership of the Site, material was brought onto the Site and used as fill. Locations at which fill material was placed are contaminated and require remediation." *Id.*

- "Demolition involved dismantling and washing out the acid chambers and acid towers, and excavating the acid tank and associated piping. Heavy equipment was required to demolish and remove the structures, and to remove the pilings on which the structure was built. Demolition of the plant would have disturbed the subsurface soil to a depth of at least two feet." *Id.*

Lastly, the UAO, which adopts the *Ashley II* court's findings of fact, likewise makes no reference to any "sudden and accidental" discharges. Ex. G to Moving Insurers' Opening Brief.

PCS attempts to distinguish *Helena Chemical* on the basis that the court in that case considered testimony by former employees. *See* PCS Opp. at 21. Here, the Court has the benefit of far greater evidence, consisting of comprehensive findings of fact rendered by Judge Seymour after presiding over a trial lasting seventeen days, during which multiple fact and expert witnesses provided hours of testimony about the details of decades of discharges during routine operations that resulted in contamination of the Site. *See Ashley II*, 791 F. Supp. 2d at 440 (noting length of trial). The uncontroverted findings of fact by the *Ashley II* court, the allegations contained in the *Ashley II* Complaint and First Amended Complaint as well as the UAO, all demonstrate the complete absence of any "sudden and accidental" discharges of hazardous substances by Old CNC at the Site. *See generally* Moving Insurers' Opening Brief, Exhibits C–D, G. Thus, if there is any difference between this case and *Helena Chemical*, it is that this Court has a much more robust record to consider.

Moreover, contrary to PCS's assertions, the *Ashley II* findings of fact ***do*** focus on the routine discharge of pollutants at the Site. *See, e.g., Ashley II*, 791 F. Supp. 2d at 492 (setting forth grounds for imposition of liability on PCS, including the fact that all the lead and arsenic on the Site after Planters' period of operations was introduced by CNC, and that "CNC knew that its manufacturing operations contaminated the site"). While PCS claims that the *Ashley II* court

"made numerous findings supporting that the 'release' of pollutants was unexpected", PCS points to nothing in the *Ashley II* trial or appellate court opinions where any such determination was made and, as described above, the findings of fact and other rulings establish just the opposite —that the releases that caused contamination at the Site were intentional and/or a part of normal business operations. *See generally Ashley II*, and *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013).

PCS's reliance upon *Greenville Cty. v. Ins. Reserve Fund*, 313 S.C. 546, 443 S.E.2d 552 (S.C. 1994), to support a finding that the "sudden and accidental" exception applies is misplaced. There, the court addressed only the issue of how to interpret the term "sudden." *Greenville*, 313 S.C. at 547; 443 S.E.2d at 553. The court deemed the word "sudden" to be capable of multiple interpretations and construed it to mean "unexpected." 313 S.C. at 548; 443 S.E.2d at 553. As the district court in *Ross* recognized, *Greenville* is distinguishable on the grounds that "[n]either the South Carolina Supreme Court nor the lower appellate court discussed or considered whether the pollution in that case was '*accidental.*'" *Ross*, 910 F. Supp. 2d at 841 (emphasis added). Thus, contrary to PCS's assertions, the *Greenville* court *did not* find that the dumping of hazardous waste was "unexpected *and accidental*." *See* PCS Opp. at 22; *see also Greenville*, 313 S.C. at 548, 443 S.E.2d at 553.

The Fourth Circuit in *Ross* also rejected PCS's reliance on *Greenville*, holding that the sudden and accidental "exception's plain language requires that the *discharge*, not the pollution damage, be 'sudden and accidental.'" *Ross*, 526 F. App'x at 304 (emphasis added). There can be no dispute that Old CNC discharged hazardous substances on the Site through routine disposal practices, fill activities, and demolition, and the resulting damage arose out of those

discharges, thus falling within the ambit of the pollution exclusion. *See Ashley II*, 791 F. Supp. 2d at 448–449 (describing Old CNC's routine discharge of acid and lead on the Site); and *Ross*, 910 F. Supp. 2d at 833 (stating that damage caused by leaching of lead and arsenic from pyrite placed into the ground "arises out of" the original intentional dumping and is thus excluded from coverage by the pollution exclusion). Accordingly, *Greenville* provides no support for PCS.

Moreover, this court can readily reject PCS's argument that "whether a discharge or release was unexpected and accidental is a fact issue left to the province of the factfinder and is not appropriate for summary judgment." PCS Opp. at 24. The Supreme Court of South Carolina, the U.S. District Court for the District of South Carolina, and the U.S. Court of Appeals for the Fourth Circuit have all upheld summary judgment in favor of insurers on the basis of the pollution exclusion. See *Helena Chem.*, 357 S.C. at 645; 594 S.E.2d at 462; *Ross*, 910 F. Supp. 2d at 844 (so finding with regard to the very Site now at issue); and *Ross*, 526 F. App'x at 304 (same).

III. PCS Improperly Attempts to Focus on Whether Old CNC Intended *Contamination*, When the Pollution Exclusion Applies Unless the *Discharge* Was Accidental.

Throughout its opposition, PCS urges the wrong standard, asking the court to focus on "[w]hether damage is expected (or unexpected) . . . from the standpoint of the insured." PCS Opp. at 19. For example, PCS argues that "demolition" resulted in "unexpected and accidental" contamination. PCS Opp. at 20. It argues that that "[c]hemicals released by a leak were treated with soda ash to neutralize the compound," as was "any acidic lead sludge deposited on the site." *Id.* Similarly, it argues that "Old CNC 'caus[ed] contaminated fill materials to be brought onto the Site and used [them] for grading, filling and site improvements,' yet there is no allegations that Old CNC knew that such fill was contaminated." *Id.* at 20-21.

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This argument merely attempts to circumvent the language of the pollution exclusion, and the holding in *Ross*, that the pollution exclusion does not apply only if the "*discharge, dispersal release or escape*" of the pollutants is "sudden and accidental," *not* whether the resulting *contamination* is sudden and accidental. As noted above, PCS made this exact argument in *Ross* and lost. *Ross*, 527 F. App'x 299, 304 (4th Cir. 2013) ("The exception's plain language requires that the discharge, not the pollution damages, be 'sudden and accidental'.... The contrary interpretation offered by [PCS] would render the qualified pollution exclusion clause completely superfluous."). Thus, PCS's argument here attempts, again, to shift the focus of the inquiry to whether the contamination was sudden and accidental, an argument that PCS already made and lost in *Ross*. Moreover, as noted in *Helena Chemical*, an insured's attempts to clean up spills occurring in the ordinary course of business does not alter the routine nature of such spills. *Helena Chem.*, 357 S.C. at 644; 594 S.E.2d at 461.

Indeed, all of the examples that PCS cites as being "unexpected and accidental" discharges in fact were unequivocally not "unexpected and accidental." PCS's deposit of fill material obviously was not accidental, and any contamination that resulted is excluded, just as Planters'/Ross's deposit of fill material was excluded in *Ross*. 527 F. App'x at 304–305. Lead sludge was repeatedly and routinely deposited on the ground. *Ashley II*, 791 F. Supp. at 488-49. Chemical leaks occurred routinely as part of the business operation. *See Helena Chem.*, 357 S.C. at 643-44; 594 S.E.2d at 461 (holding that release of liquid spills from rail cars, trucks and hoses were a "normal part of operations" and there can be "no other conclusion than that routine discharge of pollutants occurred"). And demolition clearly was intentional. Moreover, PCS acknowledges that "the court faulted Old CNC for 'leaving contaminants open to the elements,"

following demolition work. PCS Opp. at 6 (citing 791 F. Supp. 2d at 492). Thus, PCS's effort to find "sudden and accidental" discharges is cut from whole cloth.

IV. The *Ross* Decision Supports the Conclusion That Old CNC Did Not Cause Any "Sudden and Accidental" Discharges of Pollutants.

In attempting to distinguish *Ross*, PCS ignores the identity of the facts and issues that were litigated and decided there, and the facts and issues in this case. The *Ross* court applied South Carolina law to the identical pollution exclusion and contamination at the same Site. *Compare Ross*, 910 F. Supp. 2d at 832 *with* Exhibit B to Moving Insurers' Opening Brief, at US Fire/CFI 0005 (Exclusion (f)).[7] *Ross* is indeed persuasive, and binding on PCS, on the issue of whether the pollution exclusion applies to bar coverage as to the Site.

PCS contends, without citing any supporting evidence, that the release of contaminants was "a result of time and nature." PCS Opp. at 23. PCS unsuccessfully advanced this very same argument in *Ross*. *See Ross*, 910 F. Supp. 2d at 834. There, Judge Seymour rejected PCS's argument that the placement of lead and arsenic-containing materials onto the ground did not constitute a "discharge of pollutants" because the pollutants were contained. *Id.* The court found "no justification for such a distinction." *Id.* It noted that the material that Ross put into the ground "contained toxic metals and compounds that would, in the normal and natural course of events without any further human action, leach into the soil and ultimately into water sources. The fact that these pollutants may have escaped from their 'container' slowly rather than immediately has no bearing on whether Ross discharged pollutants into the environment." *Id.* Likewise, the lead and arsenic-containing materials discharged by Old CNC during the course of its routine business activities at the Site contained toxic materials, and pollution at the Site has

[7] The policies of the Joining Insurers contain the identical pollution exclusion, as noted in their separate pleadings and exhibits.

been found to have arisen out of those discharges.[8] *See Ashley II*, 791 F. Supp. 2d at 492. Accordingly, the Court should reject PCS's wholly unsupported contention that the discharge of hazardous substances at the Site by Old CNC was somehow "unexpected and unintended."

V. The 1971 Wind Storm Did Not Cause Property Damage.

The 1971 wind storm, which PCS claims involved a "sudden and accidental" discharge of pollutants, is not even mentioned in the complaints filed against PCS in *Ashley II* or in the UAO. *See* Exhibits C, D to Moving Insurers' Opening Brief. The *Ashley II* court noted that the wind storm "resulted in *air dispersion* of contaminated roof dust, the finished fertilizer product, and chemicals." *See Ashley II*, 791 F. Supp. 2d at 450 (emphasis added). In determining liability, however, Judge Seymour did not find that the wind storm caused any property damage at the time, or, for that matter, any property damage in later years. *See generally id.* at 490–503 (setting forth the contamination for which all parties to the *Ashley II* matter were found liable). Nothing that PCS argues now changes these undisputed facts.

PCS's passing reference in a footnote to the report of Ashley II's expert, Dr. Richard A. Brown, does not raise a genuine issue of material fact. Brown does not even mention the 1971 wind storm, nor does he conclude that any contamination at the Site was caused by the windstorm. *See generally*, PCS Opp. Ex. 7. At most, Brown's opinion is that there can be active transport of contaminants from the surface to the groundwater. *See* PCS Opp. Ex. 7, at 20. PCS also cites an August 8, 2011 EPA Revised Enforcement Action Memorandum, but it likewise does not mention the 1971 wind storm, nor does it conclude that any contamination at the Site was caused by the 1971 wind storm. *See* PCS Opp. Ex. 8. The EPA concludes only that

[8] While Old CNC's intentions are irrelevant in assessing the application of the pollution exclusion, the *Ashley II* court found that Old CNC knew it was contaminating the Site. *See Ashley II*, 791 F. Supp. 2d at 492.

elevated levels of arsenic and lead *in the subsurface soil* can lead to continued groundwater contamination. *Id.* at 6. Given the volumes of evidence generated during the *Ashley II* trial, it is telling that PCS refers to only these two inapposite documents in a desperate attempt to generate a fact question regarding the wind storm. In fact, the wind storm is of no consequence whatsoever. No party in *Ashley II* alleged that the wind storm caused any contamination, and the *Ashley II* court did not so find. *See generally Ashley II.* Notwithstanding Brown's opinions and the EPA memorandum, Judge Seymour did not attribute any liability to *any party*, much less PCS or Old CNC, as a result of the wind storm. *See generally Ashley II*, 791 F. Supp. 2d at 492. Had there been evidence of contamination due to the wind storm, Judge Seymour surely would have cited it as a basis for imposing liability. She did not do so, and PCS cannot now re-litigate that here. *See* Restatement (Second) of Judgments § 27 cmt c (1982). ("if the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact"); *see also Barna Conshipping, Inc. v. 2,000 Metric Tons of Abandoned Steel*, 410 F. App'x 716, 721 (4th Cir. 2011) (cited in Moving Insurers' Opening Brief).

PCS has advanced no proof that the wind storm resulted in contamination that caused property damage at any time, and certainly not in later (post-1971) years. On this point, Judge Seymour's analysis in *Ross* with respect to the 1963 fire is analogous. *See Ross*, 910 F. Supp. 2d at 837. There, Judge Seymour determined that there was no proof that the two localized hot spots contaminated with carcinogenic polyaromatic hydrocarbons (cPAH) caused by the fire

caused any third-party property damage during the policy periods between 1972 and 1992. As Judge Seymour said:

> The policies cover "sums that the insured becomes legally obligated to pay as damages *because of . . . property damage to which this insurance applies*. . . . Furthermore, each policy "applies" only to property damage that takes place during the policy period. *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589, 603 (S.C. 2011). For these reasons, the 1963 fire could trigger coverage only if it continued to cause new property damage during one or more of the policy periods between 1972 and 1992.
>
> * * *
>
> Ross and PCS have not produced any evidence showing that cPAH contamination or any other contamination caused by the 1963 fire **spread or migrated to third-party property** between 1972 and 1992. Additionally, nothing in this court's second amended findings of fact in *Ashley II* suggests that such migration occurred. *See Ashley II*, 2:05-2782 (D.S.C.) (ECF No. 627). The fact that the cPAH contamination caused by the fire remained localized in two "hot spots" on the Site decades after the fire suggests that this contamination did not spread throughout the Site. Even more importantly, no analysis of subsurface soil or groundwater revealed the presence of cPAHs.

Ross, 910 F. Supp. 2d at 837 (italics emphasis in original; boldface emphasis added).

This analysis applies even more strongly to the 1971 wind storm. There is *no* evidence that the wind storm caused *any* property damage—much less third party property damage—*at all*. But as with the 1963 fire, the 1971 wind storm certainly did not cause third-party property damage in later years—there is no allegation or evidence that any dust dispersed in the air contaminated anything, much less subsurface soil or groundwater, so there was no allegation or evidence that any (nonexistent) contamination spread or migrated. Also, like the 1963 fire, the 1971 wind storm resulted in *no clean-up liability*, so it has no relevance for PCS's coverage claim. *See Ross*, 910 F. Supp. 2d at 838. ("the cPAH contamination at the Site played no role in this court's analysis of the divisibility of harm or equitable allocation for remediation costs at the Site. There is no basis to conclude that Ross's liability is 'because of' any cPAH contamination at

the Site, including the hypothetical spreading of this contamination to third-party property between 1972 and 1992."). In other words, a discharge that results in no property damage and no liability is completely irrelevant to whether the property damage for which PCS *is* liable was caused by a sudden and accidental discharge. PCS cannot bootstrap coverage for contamination caused by years of intentional dumping and routine discharges by pointing to the 1971 wind storm.

VI. PCS Is Estopped From Now Arguing that Old CNC's Dispersal of Waste at the Site Was "Sudden and Accidental."

PCS is precluded from re-litigating the application of the pollution exclusion with respect to the discharges by Old CNC at the Site. Indeed, "[t]here is no legitimate reason to permit a [party] who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question, already once decided, simply because he now faces a different [party] who . . . could not be adversely bound by the prior judgment." *Beall v. Doe*, 281 S.C. 363, 370 315 S.E.2d 186, 190 (S.C. Ct. App. 1984). PCS's half-hearted attempt to distance itself from *Ross* is of no moment because, in *Ross*, (1) the court applied the same law applicable here—South Carolina law—to the same sudden and accidental pollution exclusion and contamination at the Site, and (2) PCS had a "full and fair" opportunity to litigate – and did litigate – the applicability of the exclusion. *Compare Ross*, 910 F. Supp. 2d at 831 *with* Moving Insurers' Opening Brief, Exhibit B, at Exclusion (f); *see also South Carolina Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213 403 S.E.2d 625, 627 (S.C. 1991) (setting forth the "full and fair opportunity" requirement). Moreover, "[c]ollateral estoppel . . . prevents a party from relitigating an issue that was decided in a previous action, *regardless of whether the claims in the first and subsequent lawsuits are the same*." *Carolina Renewal, Inc. v.*

S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (S.C. Ct. App. 2009) (emphasis added) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (S.C. Ct. App. 2009)); *see also Liberty Mut. Ins. Co. v. Employers Ins. of Wausau*, 284 S.C. 234, 273–38, 325 S.E.2d 566, 568–69 (S.C. Ct. App. 1985) (precluding the insured from re-litigating the issue of whether the Insurers' statute of limitations defense during a workers compensation proceeding was a "sham defense" when the validity of the defense was "actually and necessarily litigated and decided" in the prior workers compensation matter). PCS is not permitted to re-litigate the applicability of the pollution exclusion with respect to the discharge of pollutants at the Site simply because it now seeks coverage under additional policies that contain an identical exclusion.

Moreover, Moving Insurers and Joining Insurers have amply demonstrated the requirements necessary to apply collateral estoppel. The issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal*, 385 S.C. at 555, 684 S.E.2d at 783. The legal issue presented and actually litigated in *Ross* is whether the very same pollution exclusion contained in the policies subject to this motion precludes coverage for liability for discharges of contaminants at the Site. The applicability of the exclusion to discharges at the Site was directly determined in *Ross* and was necessary to support the judgment in *Ross*.

As an active litigant in *Ross*, PCS sought to establish coverage by asserting that the discharge of pollutants at the Site was "sudden and accidental." *Ross*, 910 F. Supp. 2d at 831–32. Relying upon the findings of fact in *Ashley II*, the district court directly determined, and the Fourth Circuit affirmed, that the discharge of pollutants at the Site was *not* "sudden and accidental." *Id.* at 833 (emphasis added); *see also Ross*, 526 F. App'x at 305. Because the

applicability of the pollution exclusion was thoroughly litigated by PCS, PCS is collaterally estopped from re-litigating that issue here.

PCS tries to evade this result by arguing that only Ross's conduct, and not Old CNC's conduct, was at issue. But this effort is unavailing. The pollution exclusion applies to exclude coverage for property damage arising out of pollutants discharged *by anyone*, not just pollutants discharged by the insured. *See, e.g., Powers Chemco, Inc. v. Federal Ins. Co.*, 74 N.Y.2d 910, 911, 548 N.E.2d 1301, 1302 (N.Y. 1989) ("Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured."); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 575, 584 (D.D.C. 1994) (same). As a result, PCS had every opportunity and incentive to argue and prove that sudden and accidental discharges occurred, no matter whose conduct was at issue, in order to try and obtain coverage under Ross's liability insurance policies, which covered virtually the same time period as the policies at issue here. It may not now assert that the bar of collateral estoppel does not apply.

The cases relied upon by PCS provide no support for its contrary arguments. In *Catawba Indian Nation v. South Carolina*, 407 S.C. 526, 756 S.E.2d 900 (S.C. 2014), the court held that collateral estoppel did not apply because the court in the prior matter did not address the discreet issue of the impact of South Carolina's recently-enacted "Gambling Cruise Act" on the Catawba Indian Nation's gaming rights. *See id.* at 538–39. *Catawba* is distinguishable because the application of the pollution exclusion to the discharge of pollutants at the Site *was actually litigated and decided* in the *Ross* litigation. *See Ross*, 910 F. Supp. 2d at 832–35.

PCS also relies upon the South Carolina Court of Appeals' decision in *Carman v. S.C. Alcoholic Bevs. Control Comm'n*, 315 S.C. 320, 433 S.E.2d 885 (S.C. Ct. App. 1993) for the unremarkable proposition that "estoppel does not extended to matters not expressly adjudicated." *See* PCS Opp. at 18. This reliance is misplaced. First and foremost, the Court of Appeals' opinion was reversed by the South Carolina Supreme Court in *Carman v. S.C. Alcoholic Bevs. Control Comm'n*, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994). Second, the Supreme Court held that the South Carolina Beverage Commission ("Commission") was precluded from re-litigating the issue of the plaintiff's moral character in 1990 when, despite having knowledge of a prior conviction of solicitation to commit murder, the Commission directly determined that the plaintiff had good moral character when it issued the plaintiff a beer and wine permit and sale and consumption liquor license in 1987. *See Carman*, 317 S.C. at 6–7, 451 S.E.2d at 386. Here, having litigated and lost the issue in *Ross*, PCS is precluded from arguing that the discharges of hazardous substances on the Site were "sudden and accidental." Furthermore, PCS does not challenge the fact that no exceptions to collateral estoppel apply. *See* Moving Insurers' Opening Brief at 30-31. Accordingly, having had a full and fair opportunity to litigate the applicability of the exclusion to the Site, and having lost with respect to that issue, PCS should not be permitted to re-litigate same against Moving Insurers and Joining Insurers.

CONCLUSION

PCS has failed to demonstrate the existence of any genuine issue of material fact regarding the applicability of the "sudden and accidental" pollution exclusion. Further, PCS is estopped from re-litigating the applicability of the exclusion. Accordingly, summary judgment should be granted in favor of Moving Insurers and Joining Insurers.

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CERTIFICATE OF SERVICE

The undersigned employee of the law offices of Collins & Lacy, P.C., does hereby certify that on the 13 day of November, 2015, the following named individual(s) were served with a copy of the within pleading via electronic mail and/or by mailing a copy of same to said person(s) via the United States Postal Service with sufficient postage affixed thereto and return address clearly marked.

PLEADING: REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE POLLUTION EXCLUSION

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: 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.

DEFENDANT CONTINENTAL CASUALTY COMPANY'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON CORPORATE SUCCESSION

FILED
2015 NOV 13 AM 10:16
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I. INTRODUCTION

Defendant Continental Casualty Company ("Continental") respectfully submits this Reply Brief in further support of its Motion for Summary Judgment Based on Corporate Succession ("Corporate Succession Motion" or "Motion").[1]

Plaintiff PCS Nitrogen, Inc. ("PCS Nitrogen") does not dispute the pertinent facts laid out in the Corporate Succession Motion and concedes much of the Motion's merit. PCS Nitrogen concedes that it is not the same corporation as Columbia Nitrogen Corporation ("Old CNC"), the insured under the defendants' policies, and that it is the successor-by-merger to a *different* corporation formed only after all of the defendants' policies expired ("New CNC"). Opp. at 3. PCS Nitrogen further concedes that the district court ruling upon which it relies in its Complaint as its only basis for claiming rights under policies issued to Old CNC was not affirmed by the Fourth Circuit and is "now non-binding." Opp. at 16.

Accordingly, PCS Nitrogen's argument for claiming entitlement to insurance policies

[1] The following defendants join in this Reply Brief: Admiral Insurance Company; United States Fire Insurance Company (with respect to Policy No. 5401893627); United States Fire Insurance Company (with respect to Policy Nos. GLA 284022 and GLA 540 079751 7); ACE Property & Casualty Insurance Company, formerly known as CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company; Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America; Certain London Market Insurance Companies (Dominion Insurance Company Ltd, Excess Insurance Company Ltd., River Thames Insurance Company, National Casualty Company of America, Ltd., Argonaut Northwest Insurance Company, London & Edinburgh General, Assicurazioni Generali SpA, Alba General Insurance Company Ltd., Harper Insurance Company Ltd. f/k/a Turegum Insurance Company, and Helvetia Accident Swiss Insurance Company Ltd.); Certain Underwriters at Lloyd's, London; Certain Aviva Companies; Certain Winterthur Companies; New London Reinsurance Company Limited; The Scottish Lion Insurance Company Limited; Starr Indemnity & Liability Company (formerly known as Republic Insurance Company); Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company); Providence Washington Insurance Company, as successor in interest by way of merger to Seaton Insurance Company, f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company; and First State Insurance Company.

issued to a completely separate corporation rests primarily on a theory not pleaded in its complaint: that New CNC received a valid assignment of those policies in 1986, shortly after New CNC was created. Opp. at 1 (stating that there was "a valid assignment of the Old CNC policies"). Yet the "Assignment of Insurance Benefits" upon which PCS Nitrogen relies ("Assignment") does not purport to assign the policies themselves and assigns rights and interests under the policies only "to the extent the same may be transferred and assigned." Opp. Exh. 1 at PCS-0000970. The Assignment assigns nothing to the extent such rights may *not* be assigned, and it is undisputed that each of the defendants' policies requires the insurer's consent for any assignment, which Old CNC did not obtain.

Even so, PCS Nitrogen persists in arguing the Assignment validly substituted New CNC as the insured. Although PCS Nitrogen admits that New CNC did not obtain consent for any such assignment, it seeks to nullify the consent requirement of the policies by claiming the Assignment is subject to a "post-loss" exception, which in PCS Nitrogen's formulation allows an insured to add or substitute a new party as the insured, without insurer consent, practically at any time. South Carolina law recognizes no such exception. Rather, as Continental laid out in its opening brief, South Carolina holds that insurance policies are personal to the insured, that they cannot be assigned to a new insured without consent of the insurer, and that only an accrued right to obtain the insurer's payment can be assigned without consent, because it is a chose in action—it is the insured's money held in the insurer's hands. Thus, South Carolina law does not permit what PCS Nitrogen seeks, and what South Carolina law does permit—assignment of a chose in action—did not occur because the defendants owed no payment obligation to Old CNC at the time of the purported assignment.

PCS Nitrogen seeks to evade South Carolina law by relying on out-of-state authority, but

its reliance is misplaced: The cases it cites, with few exceptions, in fact *do not* allow assignment of all policy rights to a new insured. Some merely allow assignment of an accrued right to a sum of money (*i.e.*, the "chose in action" rule), and therefore do not support PCS Nitrogen here. Others fail to follow controlling law of their jurisdiction that limits assignments to choses in action. One exception is the decision by the Supreme Court of California in *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 354 P.3d 302 (2015), but that decision was premised on the court's interpretation of an 1872 California statute, and there is no such statute here.

In sum, PCS Nitrogen fails to present any basis for the Court to ignore South Carolina law and to permit PCS Nitrogen to substitute itself as the "insured" under the defendants' policies. Accordingly, Continental's Motion (and the related motions and joinders of all other defendants) should be granted.

II. ARGUMENT

A. PCS Nitrogen Effectively Concedes Its "Corporate Successor" Allegation Has No Merit

Although PCS Nitrogen's Third Amended Complaint alleged that "the district court in the *Ashley II* litigation held that PCS Nitrogen is the successor to [Old] CNC," Third Am. Compl. ¶ 35, and although that was the sole basis of PCS Nitrogen's claim that it was entitled to seek coverage under the defendants' policies, PCS Nitrogen now concedes that that holding was not affirmed on appeal, is not subject to preclusive effect, and is "now non-binding." Opp. at 16.[2]

[2] PCS Nitrogen states that the "Fourth Circuit affirmed that New CNC (and, therefore, PCS) was the successor to Old CNC on other grounds." Opp. at 4. That is incorrect. The Fourth Circuit affirmed the district court's holding that New CNC *contractually assumed* Old CNC's liability with respect to clean-up of the Ashley II Site. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 173 (4th Cir. 2013) ("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

As a fallback position, PCS Nitrogen now seeks to assert, in this case, that it is the successor, by *de facto* merger, to Old CNC and argues that summary judgment must be denied because the question "is an issue of genuine material fact." *Id.* That this issue is not "genuine" is revealed by the fact that PCS Nitrogen took precisely the opposite position throughout the *Ashley II* litigation, vigorously denying at every turn that it was Old CNC's successor under any theory. Motion at 4-5. PCS Nitrogen's change of heart may suit it, now that the *Ashley II* litigation is final and it wishes to claim Old CNC's insurance rights, but at a minimum the Court should look askance at whether PCS Nitrogen's claim, diametrically opposed to what it argued to the federal courts, is "genuine."

Yet even if PCS Nitrogen could tell one court "It was night" and tell another court "It was day," it cannot avoid summary judgment here. Whether or not the *de facto* merger doctrine applies here is a *legal* issue, not a factual issue, based on facts that PCS Nitrogen does not dispute.[3] PCS Nitrogen offers no argument on the law to counter Continental's point that the *de facto* merger theory applies only when creditors are left with "no one to sue." Motion at 21. Nor does it even attempt to counter Continental's point that the theory does not apply here because New CNC contractually assumed Old CNC's liabilities, specifically providing "someone to sue." *Id.*[4] Thus, PCS Nitrogen disputes neither the law nor the facts, and its claim that there is an

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Acquisition Agreement."). That is not a conclusion that New CNC was the corporate "successor" to Old CNC as to all rights and obligations, which the Fourth Circuit did not address, as PCS Nitrogen admits. Opp. at 4.

[3] PCS Nitrogen cites a federal decision as saying, "Whether there has been a *de facto* merger, the court pointed out, was a question of fact." Opp. at 16 (citing *R.C. McIntire & Co. v. Eastern Foods, Inc.*, 702 F.2d 471, 474 (4th Cir. 1983)). The decision did not so hold, but merely recited what the trial court there had concluded, because there *were* disputed facts that had been tried to a jury in that case. *Id.* at 474. Where the facts are undisputed, of course, whether a transaction resulted in a *de facto* merger is an issue of law.

[4] As the Fourth Circuit observed in the *Ashley II* matter, a contractual assumption of liability is different and distinct from being a corporate successor, 714 F.3d at 173, and it is possible for one

"issue of fact" is baseless. As PCS Nitrogen does not present any legal argument under South Carolina law that it is the successor to Old CNC by *de facto* merger, the Court should treat the issue as conceded.

B. PCS Nitrogen Cannot Evade South Carolina Law Barring Policy Assignment

Having no argument that it is the corporate successor to Old CNC, PCS Nitrogen lays most stress on an argument it did not even plead: that it obtained an assignment from Old CNC, for which the insurers' consent was allegedly not needed. PCS Nitrogen's argument is unsupported both on the facts and on the law.

1. The Undisputed Facts Show that Old CNC Did Not Assign the Policies

As noted, the Assignment document to which PCS Nitrogen points purports to assign rights only "to the extent the same may be transferred and assigned." Opp. Exh. 1 at PCS-0000970. This language constitutes an acknowledgement that any transfer or assignment had to be authorized and/or in compliance with any applicable restrictions. Non-assignable rights were not even attempted to be assigned. Here, the policies expressly required the insurers' consent to an assignment of any interests under the policies. Motion at 2. And the Assignment attempts assignment only of rights "in the benefits and proceeds" of the policies, not of the policies themselves. *Id.* In other words, the Assignment sought to assign whatever could be assigned, which was any proceeds then-owing to Old CNC, and did not even attempt to do what PCS Nitrogen claims, which is to make New CNC an insured under the policies.[5]

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corporation to assume another corporation's liability without succeeding to all of the second's rights and obligations.

[5] PCS Nitrogen asserts that the defendants do not dispute that they insured the "activities of Old CNC" and "types of claims at issue in *Ashley II*." Opp. at 3. PCS Nitrogen's characterization of the defendants' position is incorrect. The defendants did not insure the "activities" of any entity; they contracted with Old CNC to pay sums that it became legally obligated to pay as damages for bodily injury and property damage to which their insurance policies applied. For this reason,

Moreover, other contemporary documents show that Old CNC and New CNC understood that assignment of insurance policies from one to the other was possible only with consent of the insurers. A checklist of tasks to accomplish to close the sale noted that, at the closing, Old CNC was to provide "Assignment of insurance policies with the consent of the insurance companies endorsed thereon." (Attached as Exhibit 1 hereto, at 26.) A December 6, 1986, letter, summarizing events surrounding the November 1, 1986, closing, notes that, in fact, most of Old CNC's then-current policies were cancelled, with new policies issued to New CNC ("the purchaser of Columbia Nitrogen Corporation"), rather than old policies assigned to it. (Attached as Exhibit 2 hereto.) Only those policies that could not be canceled for a premium refund were assigned:

> Most all of those policies were cancelled at closing, November 1, 1986, and pre-payments were refunded to Nipro, Inc. and distributed by Nipro, Inc. to the companies according to the original share of premium. In these cases, new separate policies were issued to Nipro, Inc., Synres and to the purchaser of CNC [New CNC]. In the cases indicated [below], the prepaid premium was not subject to refund by terms of the policy and so, *the benefits of such prepaid policies were assigned* to Nipro, Inc. and to the purchaser of Columbia Nitrogen Corporation [New CNC]."

Id. at 1 (emphasis added). The letter lists "Liability Insurance" policies that were assigned, *id.* at 2-3, and the list does not include any of the policies at issue here. Indeed, the only liability policy that was assigned instead of being canceled (a second level excess policy) was assigned with the consent of the insurer. *Id.* at 3 ("the underwriter did agree to assign coverage to Nipro, Synres and the purchaser of Columbia Nitrogen Corporation [New CNC]. Such endorsement was received 10/14/86. . . ."). This shows that New CNC understood it needed insurer consent for assignment of policies, and that it actually obtained such consent from one of the then-current

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they also did not insure the "types of claims at issue in *Ashley II*." Indeed, if anything, the insurers who separately seek summary judgment based on the pollution exclusion specifically excluded those "types of claims" from coverage, so PCS Nitrogen's characterization is doubly wrong.

insurers of old CNC. Each defendant-insurer in this action has asserted that it gave no consent to any assignment of its policies and/or rights thereunder, and PCS Nitrogen has not disputed this fact. Accordingly, PCS Nitrogen's assertion that the policies at issue here were assigned to New CNC is unsupported by the record.

2. In Any Event, Any Assignment Was Ineffective Absent Consent

a) South Carolina Prohibits Assignment of Policies Without Consent

Even assuming, however, that the 1986 corporate transaction sought to assign rights under the defendants' policies, PCS Nitrogen's assertion that it could obtain those rights without consent of the insurers is contrary to South Carolina law. Although PCS Nitrogen seeks to rely on *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (S.C. 2013), what the Supreme Court said about assignment of insurance was admittedly dicta, as the court stated that it "need not reach" the issue of whether the insurer's approval of the assignment was required. *Id.* at 344, 745 S.E.2d at 94. In any event, the court's discussion is actually contrary to PCS Nitrogen's proposition. *Narruhn* involved a tort claimant who sought to collect insurance proceeds *after obtaining a judgment* against the insured. *Id.* at 339, 745 S.E.2d at 91. That meant that, if the insurer covered the claimant's injury at all, its payment obligation had accrued, and the insured therefore had an assignable chose in action for that payment. In supplemental proceedings on the judgment, the referee granted the claimant "an assignment of any all rights, including any claims, that [the insured] might have against Insurer." *Id. Narruhn* did not involve an assignment of *policies*, meaning assignment to a new entity who sought to substitute itself as the insured for all purposes—which is what PCS Nitrogen seeks here. Opp. at 1. The Supreme Court's comment that "an assignment *after* a loss has already occurred does not require an insurer's consent," *id.* at 344, 745 S.E.2d at 94 (emphasis original), 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. Indeed, the Court explained its "note," leaving no doubt what it meant: " '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). 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 (made by PCS Nitrogen here) that a *contractual relationship* could be assigned without consent.

In this, *Narruhn* was only repeating what other South Carolina cases previously said, which PCS Nitrogen does not rebut. Personal contracts cannot be assigned without consent. *Green v. Camlin*, 229 S.C. 129, 133, 92 S.E.2d 125, 127 (S.C. 1956). Insurance policies are contracts personal to the insured and cannot be assigned without consent of the insurer. *Silverman v. Dew*, 182 S.C. 457, 460, 189 S.E. 756, 757 (S.C. 1937). A policyholder may assign only a money claim, for "insurance money then due," after it has accrued. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 155, 64 S.E.2d 258, 264 (S.C. 1951). Thus, South Carolina law, as recognized by *Narruhn*, does not permit assignment of insurance policies without insurer consent.

b) Cases from Other Jurisdictions Do Not Support PCS Nitrogen's Arguments Here

The cases from other jurisdictions on which PCS Nitrogen relies are not controlling here, but in any event 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." Opp. at 13. In fact, as discussed below, there is a consistent view throughout the decisions, with some errant 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, that is precisely South Carolina law as well.

Several of the cases cited by PCS Nitrogen in fact involved assignment merely of a chose in action for an accrued money claim, not assignment of policies to make a new person or entity an insured. In *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 328 Ill. 571, 572-73, 575, 160 N.E. 145, 145-46 (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 573, 160 N.E. 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 575, 160 N.E. at 146 (emphasis added). Instead, after the car was stolen the insured's claim "became a chose in action." *Id. See also Citicorp Indus. Credit, Inc. v. Federal Ins. Co.*, 672 F. Supp. 1105, 1105-07 (N.D. Ill. 1987) (thefts had occurred before assignment of assets to creditor; under Missouri law, "insureds had not assigned the policy at issue, but instead, had assigned a matured claim or debt, which, like any other chose in action, was assignable"); *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388-89 (D.C. 1996) (fire had occurred; "policies for fire insurance are normally considered 'personal' in nature;" but assignment of claim as "chose in action" permitted because after the fire "the relationship of insured and insurer is now

one of 'creditor and debtor' "); *Peck v. Public Serv. Mut. Ins. Co.*, 114 F. Supp. 2d 51, 56 (D. Conn. 2000) (permitting assignment to judgment creditor of bad faith claim against insurer "after the loss has occurred *and a judgment has been obtained* against the insured") (emphasis added); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) (windstorm damage had occurred; the "assignment followed the windstorm. After the loss was incurred the issue became not an assignment of the policy, but the assignment of a chose in action—the right to compel defendant's payment"); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001) (following *Kintzel*; after windstorm, "the insurer-insured relationship is more analogous to that of a debtor and creditor"); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 296, 903 A.2d 1219, 1224 (2006) (claimant had entered into settlement agreement with insured prior to verdict, and insured assigned to claimant its claim against insurer; assignment permitted based on Pennsylvania case law stating " 'it is against public policy so to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer an absolute right in the nature of a chose in action' ") (citations omitted). In all of these cases, then, the insurer's payment obligation had accrued, and all that 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, they conform to South Carolina law and do not support PCS Nitrogen here.

Other cases cited by PCS Nitrogen were federal or intermediate appellate cases that misapplied the state law they claimed to enforce. In *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. 2011)—a ruling that PCS Nitrogen incorrectly attributes to the Illinois Supreme Court (Opp. at 11)—the Illinois Appellate Court permitted the insured to assign its liability insurance policies to a purchaser of the insured's assets, even though, as noted above, the Supreme Court of Illinois had made clear in *Ginsburg* that an

assignment would be effective only as to a chose in action: that is, only when "nothing remains to be done except pay the money." *Ginsburg*, 328 Ill. at 573, 160 N.E. at 146. *Ginsburg* had also stated that consent *would* be required to assign the policy. *Id.* at 575, 160 N.E. at 146. *Illinois Tool Works* simply failed to adhere to this precedent. Indeed, the Appellate Court stated, "There is little distinction between assignment of an insurance policy and assignment of benefits under a policy." 962 N.E.2d at 1054 n.8. Yet, as *Ginsburg* held, there is a significant difference: A policy cannot be assigned without consent, because such an assignment seeks to transfer a contractual relationship; whereas the accrued right to a money payment can be assigned without consent because it is the property of the insured (money already owing) held in the insurer's hands. 328 Ill. at 575, 160 N.E. at 146.[6] That *Illinois Tool Works* failed to appreciate the distinction shows it is not an authoritative statement of Illinois law.[7] *See also Baird v. Baird*, 567 F.3d 1207, 1213-14 (10th Cir. 2009) (holding that insured's contingent right to recovery under liability insurance policies is part of bankruptcy estate and assignable to tort claimant prior to judgment, even though under Utah law (*Time Fin. Corp. v. Johnson Trucking Co.*, 23 Utah 2d 115, 118, 458 P.2d 873, 875 (1969)) insured could not assign "contractual relationship," but only "money claim"); *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 120 A.3d 959 (App. Div. 2015), *petition for cert. filed* (permitting assignment of liability insurance policies to corporate affiliate after environmental contamination occurred, contrary to holding of

[6] The Illinois Appellate Court also equated a "future claim" for "defense and indemnification" with a "chose in action." 962 N.E.2d at 1055. Yet a chose in action is not a future contingency, but a fixed debt payable to its holder. *Crum v. Sawyer*, 132 Ill. 443, 460, 24 N.E. 956, 960 (1890) (contrasting choses in action, which are "absolutely fixed and *in esse*," with "contingent interests and expectancies"). The fact that the court confused a future contingency with a chose in action makes its analysis all the more unpersuasive.

[7] *See also Water Applications & Sys. Corp. v. Bituminous Cas. Corp.*, 986 N.E.2d 124 ¶ 60 (Ill. App. 2013) (holding insurer consent required for assignment of liability insurance policy, under Maryland law).

Supreme Court of New Jersey (*Flint Frozen Foods, Inc. v. Firemen's Ins. Co.*, 8 N.J. 606, 611, 86 A.2d 673, 675 (1952)) that "After a loss has occurred a person may not adopt a policy to which he is a stranger and thereby increase the liability of the insurer.").

Of particular note for its failure to adhere to state law is the federal decision in *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939). *Ocean Accident* is premised on the assertion that a "claim" under a liability insurance policy is an assignable "chose in action" immediately upon the occurrence of a claimant's injury, because "the liability of the [liability insurer] arose immediately upon the happening of the accidents resulting in the injuries." *Id.* at 444-45. Yet that assertion is not supported by any of the cases the court cites. One such case held the opposite, holding that an insurer's obligation under an indemnity policy "did not become fixed . . . until plaintiff had paid the judgment." *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 133 S.W. 156, 159 (Mo. App. 1911). Another involved an automobile insurance policy that did not contain a "no action" clause, noting that if such a clause had been included (as it is here)[8] the insurer's liability would not attach until there was a judgment against the insured. *Wehrhahn v. Fort Dearborn Cas. Underwriters*, 1 S.W.2d 242, 244 (Mo. App. 1928). Another involved a specific Missouri statute that fixed the insurer's responsibility at the time of the accident,[9] *Schott v. Continental Auto. Ins. Underwriters*, 31 S.W.2d 7, 10 (Mo. 1930), but that case *still* recognized that the insurer had no payment obligation until judgment was entered against the insured, *id.* at 12 ("the obligation on the part of the insurer to pay accrues the moment judgment against the insured has been rendered"). There was therefore absolutely no basis for *Ocean Accident's* assertion that an insurer has a payment obligation, or that the insured has a chose in action it can assign, immediately upon the

[8] *See* Motion at 14.

[9] There is no such statute here.

happening of an accident. Rather, Missouri law held that the insured had no chose in action for the insurers' payment until a judgment had been entered against it. *Ocean Accident* simply contravened the state law it purported to apply.[10]

Finally, yet other cases upon which PCS Nitrogen relies are clearly distinguishable. *Fluor* 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.*, 29 Cal. 4th 934, 62 P.3d 69 (2003). *Fluor*, 61 Cal. 4th at 1219, 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. *Fluor*, 61 Cal. 4th at 1180 & 1224, 354 P.3d 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

[10] *Ocean Accident* also relied on *Ross v. American Empl. Liab. Ins. Co.*, 56 N.J. Eq. 41, 38 A. 22 (Ct. Ch. 1897), but that case addressed what priority, in equity, to give competing claims made by insureds against an insolvent insurer's remaining assets and did not involve assignability at all. *Id.* at 42, 38 A. at 22. In addition, the policy language interpreted in *Ross* was completely different from the policy language at issue here. In *Ross*, the insuring agreement covered damages "with which the insured may be *legally charged*." *Id.* (emphasis added). By contrast, Continental's (and other insurers') policies here apply to sums that the insured "shall become legally obligated to pay." Motion at 14. The distinction is critical, because the court in *Ross* interpreted the "legally charged" language as attaching the insurer's obligation at the time of the accident, since the insured could be "legally charged" with liability then, with a judgment being "a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured." 56 N.J. Eq. at 44, 38 A. at 23. Later New Jersey cases recognize, however, that the language in the policies at issue here—"sums the insured shall become legally obligated to pay"—*requires* that liability be fixed by a judgment or settlement before the insurer has a payment obligation. *Nakonieczny v. Commonwealth Cas. Co.*, 111 N.J.L. 137, 142-43, 167 A. 213, 215 (Sup. Ct. 1933) (policy promising "to pay all sums which the assured shall become liable to pay" "entitled the assured to sue the insurer after a final judgment had been recovered against him on a claim covered by the policy"); *Viddish v. Hartford Acc. and Indem. Co.*, 41 N.J. Super. 221, 225, 124 A.2d 607, 609 (App. Div. 1956) (same). Thus *Ross* and *Ocean Accident* provide no support for concluding that an insurer's payment obligation is fixed at the time of an underlying accident under the policy language at issue here, or that policy rights are assignable then.

P.3d at 73-74.[11] Moreover, another case cited by PCS Nitrogen similarly rejects the "by operation of law" theory. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 490-93, 861 N.E.2d 121, 129-30 (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 483, 861 N.E.2d at 123.[12] *Egger* 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. 588 Pa. at 298-99, 903 A.2d 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) (until injured party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured];" "Stated another way, 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

[11] PCS Nitrogen 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.

[12] The opinion in *Pilkington* demonstrated remarkable division among the justices, with no answer to the certified questions posed receiving more than four (out of seven) votes. The split in the opinion may be summarized as follows: Three justices would have followed *Henkel* and hold that insurance rights are contractual and cannot be transferred by operation of law, and that they cannot be assigned without consent of the insurers, either, as they are not a chose in action for money due. At the other end of the spectrum, two justices would have rejected *Henkel* and allowed liability insurance rights to "follow the liability" whether or not they have matured into a chose in action. And in the middle, two justices would have held that the right to indemnity, but not defense, is a chose in action that is assignable by the insured once the "covered loss" occurs; but if liability is assumed by contract, insurance does not convey by operation of law.

they interpreted, or are inconsistent with South Carolina law. They should not be followed here.

C. In Liability Insurance Policies, "Loss" Does Not Occur, and a Chose in Action Does Not Arise, Until the Insured's Liability Is Fixed in an Underlying Judgment

As the case law demonstrates, the real question in determining when an insured may assign rights under an insurance policy, which are otherwise non-assignable, is whether a right has matured into a present right to obtain the insurer's payment, as that right is a form of property (a chose in action), which the law of property declares may not be restrained from alienation. Yet many of the cases addressing assignment of such rights have arisen in the context of first-party insurance (for loss the insured itself suffers, as from fire, wind, theft, etc.), and the insurer's payment obligation arose with the insured-against contingency (the fire, the wind damage, the theft). These cases colloquially refer to the event permitting assignment as the "loss," even though in truth the event they are referring to is the insured contingency and the no-longer-contingent insurance payment obligation arising out of it. Thus, although their language may refer to a "post-loss" exception, they stand for a "chose in action" exception.

Nevertheless, those seeking coverage under liability policies, such as PCS Nitrogen here, seek to twist those cases' language to assert that the "loss" permitting assignment under a third-party liability policy is the injury or damage suffered by third-party claimants, even though the insured has no "loss" arising from that injury unless and until it is held liable in a judgment.[13] Through this linguistic sleight-of-hand, they argue that rights under a liability policy may be assigned as soon as underlying third-party injury allegedly occurred.

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[13] The insurer's payment obligation may also arise when the insured, the claimant and the insurer reach a settlement agreement, as that determines the insured's liability without a judgment. Further, the discussion above assumes that the insurance policy covers the liability at issue. Of course, if the insured is held liable in a judgment for injury not covered by a policy, the payment obligation never arises.

Since the real question is when the insurer's payment obligation arises, and there is no question under South Carolina law that a liability insurer has no such obligation until the insured is held liable in a judgment, this argument is nothing but an attempt to distract from the real issue. The question is not when "loss" occurs, but when a payment obligation arises. Yet even if when "loss" occurs were relevant, there is no doubt that "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 (insurer has no obligation to injured party "until and unless [the insured] becomes liable to pay"); 2 Allan D. Windt, *Insurance Claims & Disputes* § 6:6 at 6-159 (6th ed. 2013) ("Third-party liability policies require, as a condition precedent to the insurer's liability, that the insured be liable to a third person, by means of either a judgment or a settlement."). As Continental's policy states, Continental agrees to pay "sums which the insured *shall become legally obligated to pay* as damages because of bodily injury or property damage to which the insurance applies." Motion Exh. 1 at CCC000208 (emphasis added).[14] Although the third-party claimant's injury is *one* contingency to that obligation, the most salient contingency—that the insured have "become legally obligated to pay"—does not occur until the claimant obtains a judgment, and that contingency may never occur, if the claimant does not file suit, if he fails to do so timely, if the law of liability does not provide a remedy, if the claimant fails to satisfy his burden of proof on every element of his claim, or if the insured has valid defenses. In short, there are multiple contingencies beyond the happening of injury that must be fixed for the insured to be liable at all. For liability insurance, therefore, the proper analog to the first-party cases' use of "loss" (the

[14] The policies of the other defendants contain similar provisions, as noted in their respective motions/joinders.

insured contingency, *i.e.*, the fire, the wind damage, the theft) as the point when insurance rights may be assigned is a judgment against the insured. *That* is when the nature of the relationship changes from insured-insurer, with the insured risk being uncertain and contingent (and subject to increase by the insured's action or inaction), to debtor-creditor, with the insured risk transformed into actuality (and no longer subject to change).

Furthermore, any rule that permits assignment to a new insured of all policy rights as soon as an underlying injury occurs, even if that injury is unknown to the insured or even the claimant at the time (as may be the case with environmental contamination), necessarily increases the risk to the insurer. This is because the assignment, made prior to the determination of the insured's liability, results in a divorce of interests that the insurer counts on being aligned: the insured's and insurer's common interest in defeating liability. For example, the new entity may seek to cast blame on the insured for the injury, to avoid or diminish its own liability (as PCS Nitrogen did in the *Ashley II* case[15]), then seek to recover from the insurers *for the liability it helped to establish*. It may even claim (as PCS Nitrogen claims here[16]) that the costs of *prosecuting* claims against the insured should be recoverable from the insurers, even though the policies cover only costs of *defending* the insured. Indeed, an insured who assigns its policies to a corporation that assumes its liability has no interest in *defeating* its own liability, and the new

[15] For example, in the *Ashley II* litigation, PCS Nitrogen filed a third-party complaint against Old CNC's parent company, Koninkijke DSM, N.V., alleging that "[d]iscovery recently taken in this case has revealed that [Old CNC's] *activities at the Charleston Site substantially contributed to the contamination of the Charleston Site* property and thus rendered [Old CNC] a 'covered person' within the meaning of Section 107(a)(2) of CERCLA." Amended Answer, Counterclaim and Amended Third-Party Claims of Defendant PCS Nitrogen, *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, No. 2:05-2782 CWH, ¶ 37 at 22 (D.S.C. Jan. 19, 2007) (emphasis added) (attached as Exhibit 3 hereto).

[16] Third Am. Complt. ¶ 50(c) (listing, as a cost for which PCS seeks coverage, "[t]he costs to defend itself in the *Ashley II* litigation . . ."). As noted, part of that defense involved seeking to establish that Old CNC's "activities at the Charleston Site substantially contributed to the contamination of the Charleston Site." *See* note 15 above.

entity/assignee may have an interest in *demonstrating* the original insured's liability to reduce its own. This is a risk the insurers did not bargain for.

Accordingly, even if the exception allowing assignments notwithstanding the consent-to-assignment clause were called 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, even the "post-loss" exception PCS Nitrogen advocates does not apply.

III. CONCLUSION

PCS Nitrogen concedes that the ruling upon which it relies in claiming that it is Old CNC's successor is essentially null and void. Its fallback argument in attempting to claim Old CNC's insurance rights is to rely on the Assignment, but the Assignment did not purport to assign the defendants' policies, and other contemporaneous transaction documents show the parties understood that any such assignment would require the consent of the insurers, which they did not obtain. Further, even if an assignment of the policies had been attempted, it would be disallowed under South Carolina law, which recognizes that insurance policies cannot be assigned without the insurer's consent. Only a chose in action to obtain an already-accrued payment may be assigned, and it is undisputed that no such payment was ever owing to Old CNC, making that exception to the general prohibition on assignment inapplicable. Cases that PCS Nitrogen cites from other jurisdictions either reach the same conclusion, fail to follow the law they interpreted or are inconsistent with South Carolina law. Thus, the Court should conclude that PCS Nitrogen's new theory for obtaining Old CNC's insurance rights is untenable and grant Continental's (and other insurers') motion(s) for summary judgment.

Dated: November 13, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 13, 2015, a true and correct copy of Defendant Continental Casualty Company's Reply Brief in Further Support of its Motion for Summary Judgment Based on Corporate Succession was served by electronic mail on each party set forth below.

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Exhibit 1

Marked Copy

CHECKLIST

DSM NORTH AMERICA, INC.
COLUMBIA NITROGEN CORPORATION
SALE OF ASSETS & LIQUIDATION/DISSOLUTION

I. INTRODUCTION

A. General Purpose. This checklist has been prepared for the purpose of providing action guidelines and steps to be taken in achieving the complete liquidation (physical disposition of assets and liabilities from an accounting and tax point-of-view) and dissolution (formal termination of legal existence under applicable corporate law) of Columbia Nitrogen Corporation ("CNC") and DSM North America, Inc. by not later than December 31, 1986. In addition, this checklist focuses on the sale of assets and divestiture transactions which CNC will engage in prior to its final dissolution. As a general matter the sale of assets will involve many of the same business and legal actions whether such transaction is with a third-party buyer intending to operate CNC's former ammonia business on a "going concern" basis or with a liquidator intending to dispose of CNC's buildings, plant, equipment, inventories and the like of a "salvage" basis. To the extent distinctions can be drawn in such divestiture transactions at this stage, such distinctions will be pointed out.

One use of this checklist should be to assign tasks and responsibilities to the various participants. Also, in due course, completion dates should be assigned to the various tasks. Such assignments and timetable appear premature at this time but should emerge rather easily from the near-term meetings and other work expected to follow the circulation of this checklist.

Finally, it is suggested that this checklist be deemed a dynamic document or, if you like, a draft to be continuously updated and refined as the required actions and the business and legal steps necessary to achieve complete liquidation and dissolution come more clearly into focus.

B. Identification and Abbreviation of All Entities and Participants.

1. Entities. (a) Columbia Nitrogen Corporation ("CNC"), a Delaware corporation, direct wholly-owned subsidiary of Nipro, Inc.; qualified to do business in Georgia, Florida, North and South Carolina; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483(13), Augusta, Georgia 30913.

(b) DSM Energy, North America, Inc. ("Energy"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at Augusta, Georgia.

(c) DSM, North America, Inc. ("DSMNA"), a Delaware corporation; direct wholly-owned subsidiary of DSMNV; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483(13), Augusta, Georgia 30913.

(d) DSM, N.V. ("DSMNV"), a Netherlands corporation; the parent corporation principal place of business located at Heerlen, The Netherlands.

(e) Erta, Inc. ("Erta - N.Y."), a New York corporation; direct wholly-owned subsidiary of Silverlake; qualified to do business in Pennsylvania, principal place of business located at _____.

(f) Erta, Inc. ("Erta - Delaware"), a Delaware corporation; direct wholly-owned subsidiary of Silverlake; principal place of business located at Malvern, Pennsylvania.

(g) Nipro, Inc. ("Nipro"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; qualified to do business in Georgia; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483 (13), Augusta, Georgia 30913.

(h) Silverlake, Inc. ("Silverlake"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at _____.

(i) Synres Chemical Corporation ("Synres"), a New Jersey corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at Jersey City, New Jersey.

The above-listed corporations are hereinafter collectively referred to as the "Companies". CNC, Energy Erta, (N.Y.) and DSMNA are hereinafter sometimes collectively referred to as the "Liquidating Corporations".

2. Participants. [Add all persons and entities likely to be assigned responsibilities.]

NAME	ABBREVIATION
Martin Aertsen	Aertsen
Baird & Co.	Baird
William P. Bivins, Jr.	Bivins
James L. Clegg	Clegg
CNC Management	CNC
W. P. Copenhaver	Copenhaver
A.J.A.J. Eijsbouts	Eijsbouts
Marius M. Frank	Frank
Nipro Management	Nipro
Robert C. Koerselman	Koerselman
Shearman & Sterling	S&S
The First Boston Corporation	FBC
J. W. Price	Price
M. Jan Van Campen	van Campen

C. Assignment of Tasks and Responsibilities, Timetable and Deadlines.

As mentioned above it will be desirable to identify the entity(ies) or individual(s) responsible for a particular task by noting such participant's initials in the margin by the item in question and adding a numerical completion date.

II. PRELIMINARY CONSIDERATIONS AND DUE DILIGENCE/BACKGROUND INVESTIGATION

A. Introduction.

This section will identify numerous documents and facts that should be reviewed as an introduction and background to the (i) various stock transfers, (ii) the sale of assets by CNC and (iii) the subsequent liquidation/dissolution of CNC, DSMNA and possibly Energy (hereinafter collectively referred to as the "Contemplated Transactions"). If done correctly this preliminary investigation should uncover all the legal and many of the business "due diligence" issues which the potential purchaser(s) of CNC's assets, particularly those purchasing on a "going"

	Responsibility
concern basis", are likely to be concerned about. Moreover, this initial review should focus and in fact commence the work to be done to carry out the Contemplated Transactions.	
B. Corporate Organization Documents.	
1. Relevant Documents. Locate and determine current status of the following corporate organization documents for each of the Companies:	
a. Certificates of Incorporation	
b. By-Laws	
c. Minute Books; Stock Ledgers	
d. Stock Certificates	
e. Option, Warrant or similar agreements respecting rights in the securities of each of the Companies. Confirm that there are none.	
2. Actions.	
a. Review documents to identify any restrictions or problems which require special consideration in connection with the Contemplated Transactions.	Clegg/S&S
b. Determine shareholder and/or director authorization process necessary for each of the Companies to engage in their respective aspects of the Contemplated Transactions.	S&S
c. If any of the foregoing documents cannot be located or are not current, initiate action to replace and/or to update.	Clegg/Bivins
d. Verify that all issued shares for each of the Companies have been certificated and that the certificates can be located.	Clegg/Bivins

C. Financing Documents.

1. Relevant Documents. Locate and determine current status of the following financing documents for each of the Companies [possibly just Nipro and the Liquidating Corporations]:

a. Bank Loan and Other Debt Agreements

b. Bonds and Trust Identures

(i) Pollution Control Bonds
(ii) Industrial Revenue Bonds

c. Mortgages and Security Agreements

d. Uniform Commercial Code Financing Statements

2. Actions.

a.	Review documents to identify any restrictions or other problems which require special consideration in connection with the Contemplated Transactions.	Bivins
b.	Review particularly covenants and default provisions which might restrict stock or asset transfers or trigger early repayment of principal or redemption of bonds. Identify and pay close attention to any waiting or notice periods.	Bivins
c.	Determine which, if any, of the financing arrangements (e.g., industrial revenue bonds) will be proposed to the purchaser of CNC's assets as a liability to be assumed. Determine what restrictions would apply to or what consents would be required with respect to such assignment and assumption by the purchaser.	CNC/Clegg
d.	Where any of these situations exist, the bank or other creditor's consent or a refinancing will become necessary. Prepare to contact necessary creditors.	van Campen

e. In the case of mortgages, security interests or other liens, determine which corporation (as between Nipro and CNC) owns (i.e., has title to) the property subject thereto. Determine proposed ownership of properties subject to liens following the sale of assets by CNC. Will purchaser assume liabilities related to such liens and agree to take property subject thereto? — Clegg/Bivins

D. Financial Statements.

1. Relevant Documents. Locate and determine current status of the following financial statements (balance sheets and income statements, etc.):

a. Audited statements of Nipro for each of last 3 years.

b. CNC and Nipro internal statements for each of last 3 years.

c. DSMNA statements (audited or unaudited) for each of last 3 years.

d. Energy statements (audited or unaudited) for each of last 3 years.

2. Actions.

a. Review financial statements with inside and outside accountants (e.g., Baird). — van Campen

b. Determine whether there are any contingent liabilities not reflected in the statements. — van Campen

c. Consider the need to prepare audited statements for CNC reflecting its assets, liabilities and operations as separate from Nipro. Note, FBC Brochure uses internal unaudited financial statements. — FBC/CNC

d. Determine any problems relevant to the Contemplated Transactions as shown on the financial statements. — ?

e. Consider whether or to what extent any or all of the financial statements can be made available to prospective purchasers of CNC's assets. Consider whether the response depends on which Companies' statements are involved (e.g., Nipro as opposed to CNC) and the nature of the purchaser (e.g., competitor, customer or industry participant). CNC/FBC

E. Federal, State and Local Income Tax Returns.

1. Relevant Documents. Locate federal, state and local income tax returns for the last five years.

2. Action. Review by auditors and tax counsel to determine their relationship to the Contemplated Transactions. van Campen

F. Real Estate.

1. Relevant Documents. Locate the following documents relating to all Nipro and CNC (assuming DSMNA and Energy have none) real estate:

a. Site Plan

b. Deeds

c. Leases

d. Title Insurance Policies

e. Appraisals

f. Easements, Rights-of-Ways, Encumbrances

g. Guarantees of Leases Bivins/Price

2. Actions.

a. Review current Site Plan: prepare pro-forma Site Plan to reflect Contemplated Transactions. Consider any special problems with respect to the Terminals. ?

b. Consider problems in preparation of instruments of conveyance in sale of assets by CNC.

c. Check status of titles. Determine any problems and the resolution thereof in giving purchaser evidence of good and marketable title.

d. Determine status of real estate records.

e. Consider necessity for title insurance.

f. Consider problem of real estate transfer taxes, if any, applicable to transfers between CNC and Nipro and in connection with sale of assets by CNC.

g. Consider effect of Contemplated Transactions on long-term leases. Are leases transferable between CNC and Nipro and/or a third-party purchaser.

h. Consider liability on leases: Will CNC and/or Nipro want to be relieved of liability on any leases. Will Nipro have to remain liable on a guarantee of any lease.

i. Check whether any liens or other encumbrances against property have been recorded.

j. Current survey should be required. Check to see that structures are within property lines.

k. Consider survey and engineering study to identify property to be divided between Nipro and CNC (including plant, storage tanks, office space, etc.)

l. Obtain evidence that current use of property is permitted by zoning laws and that buildings comply with building codes and other applicable regulations.

m. Consider Nipro purchasing real estate from CNC and leasing to purchaser of CNC's

assets. Appraisal may be desirable and/or required for Dutch tax purposes.

n. Determine whether adequate insurance for casualty, fire, etc. exists. — van Campen

G. Personal Property.

1. Relevant Documents. Locate the following documents relating to the personal property of Nipro and CNC [check DSMNA and Energy].

a. Equipment Lists or other Schedules of Property

b. Leases

c. Purchase Contracts

d. Equipment Warranties

2. Actions.

a. Develop definitive list of all personal property, e.g. equipment and other similar CNC assets. Confirm that catalogue of 6000 cards may be in lieu of list. — CNC

b. Review purchase contracts and equipment warranties to determine whether or to what extent warranties can be passed to purchaser. — Bivins

c. Appraisal may be desirable and necessary for Dutch tax purposes with respect to any property to be transferred between Nipro and CNC. — van Campen

d. Consider whether purchaser of CNC's will take property subject to any liens. — Bivins

e. Determine status of personal property leases. Are such leases assignable between Nipro and CNC and/or third party purchaser? Consider termination arrangement for any CNC leases which are not assumed by third-party purchaser and not transferred to Nipro. — Bivins

Exhibit 1

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CHECKLIST

DSM NORTH AMERICA, INC.
COLUMBIA NITROGEN CORPORATION
SALE OF ASSETS & LIQUIDATION/DISSOLUTION

I. INTRODUCTION

A. General Purpose. This checklist has been prepared for the purpose of providing action guidelines and steps to be taken in achieving the complete liquidation (physical disposition of assets and liabilities from an accounting and tax point-of-view) and dissolution (formal termination of legal existence under applicable corporate law) of Columbia Nitrogen Corporation ("CNC") and DSM North America, Inc. by not later than December 31, 1986. In addition, this checklist focuses on the sale of assets and divestiture transactions which CNC will engage in prior to its final dissolution. As a general matter the sale of assets will involve many of the same business and legal actions whether such transaction is with a third-party buyer intending to operate CNC's former ammonia business on a "going concern" basis or with a liquidator intending to dispose of CNC's buildings, plant, equipment, inventories and the like of a "salvage" basis. To the extent distinctions can be drawn in such divestiture transactions at this stage, such distinctions will be pointed out.

One use of this checklist should be to assign tasks and responsibilities to the various participants. Also, in due course, completion dates should be assigned to the various tasks. Such assignments and timetable appear premature at this time but should emerge rather easily from the near-term meetings and other work expected to follow the circulation of this checklist.

Finally, it is suggested that this checklist be deemed a dynamic document or, if you like, a draft to be continuously updated and refined as the required actions and the business and legal steps necessary to achieve complete liquidation and dissolution come more clearly into focus.

B. Identification and Abbreviation of All Entities and Participants.

1. Entities. (a) Columbia Nitrogen Corporation ("CNC"), a Delaware corporation; direct wholly-owned subsidiary of Nipro, Inc.; qualified to do business in Georgia, Florida, North and South Carolina; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483(13), Augusta, Georgia 30913.

(b) DSM Energy, North America, Inc. ("Energy"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at Augusta, Georgia.

(c) DSM, North America, Inc. ("DSMNA"), a Delaware corporation; direct wholly-owned subsidiary of DSMNV; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483(13), Augusta, Georgia 30913.

(d) DSM, N.V. ("DSMNV"), a Netherlands corporation; the parent corporation principal place of business located at Heerlen, The Netherlands.

(e) Erta, Inc. ("Erta - N.Y."), a New York corporation; direct wholly-owned subsidiary of Silverlake; qualified to do business in Pennsylvania, principal place of business located at _____.

(f) Erta, Inc. ("Erta - Delaware"), a Delaware corporation; direct wholly-owned subsidiary of Silverlake; principal place of business located at Malvern, Pennsylvania.

(g) Nipro, Inc. ("Nipro"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; qualified to do business in Georgia; principal place of business located at No. 1 Columbia Nitrogen Road, P. O. Box 1483 (13), Augusta, Georgia 30913.

(h) Silverlake, Inc. ("Silverlake"), a Delaware corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at _____.

(i) Synres Chemical Corporation ("Synres"), a New Jersey corporation; direct wholly-owned subsidiary of DSMNA; principal place of business located at Jersey City, New Jersey.

The above-listed corporations are hereinafter collectively referred to as the "Companies". CNC, Energy Erta, (N.Y.) and DSMNA are hereinafter sometimes collectively referred to as the "Liquidating Corporations".

2. Participants. [Add all persons and entities likely to be assigned responsibilities.]

NAME	ABBREVIATION
Martin Aertsen	Aertsen
Baird & Co.	Baird
William P. Bivins, Jr.	Bivins
James L. Clegg	Clegg
CNC Management	CNC
W. P. Copenhaver	Copenhaver
A.J.A.J. Eijsbouts	Eijsbouts
Marius M. Frank	Frank
Nipro Management	Nipro
Robert C. Koerselman	Koerselman
Shearman & Sterling	S&S
The First Boston Corporation	FBC
J. W. Price	Price
M. Jan Van Campen	van Campen

C. Assignment of Tasks and Responsibilities; Timetable and Deadlines.

As mentioned above it will be desirable to identify the entity(ies) or individual(s) responsible for a particular task by noting such participant's initials in the margin by the item in question and adding a numerical completion date.

II. PRELIMINARY CONSIDERATIONS AND DUE DILIGENCE/BACKGROUND INVESTIGATION

A. Introduction.

This section will identify numerous documents and facts that should be reviewed as an introduction and background to the (i) various stock transfers, (ii) the sale of assets by CNC and (iii) the subsequent liquidation/dissolution of CNC, DSMNA and possibly Energy (hereinafter collectively referred to as the "Contemplated Transactions"). If done correctly this preliminary investigation should uncover all the legal and many of the business "due diligence" issues which the potential purchaser(s) of CNC's assets, particularly those purchasing on a "going"

Responsibility

concern basis", are likely to be concerned about. Moreover, this initial review should focus and in fact commence the work to be done to carry out the Contemplated Transactions.

B. Corporate Organization Documents.

1. Relevant Documents. Locate and determine current status of the following corporate organization documents for each of the Companies:

a. Certificates of Incorporation

b. By-Laws

c. Minute Books; Stock Ledgers

d. Stock Certificates

e. Option, Warrant or similar agreements respecting rights in the securities of each of the Companies. Confirm that there are none.

2. Actions.

a. Review documents to identify any restrictions or problems which require special consideration in connection with the Contemplated Transactions. — Clegg/S&S

b. Determine shareholder and/or director authorization process necessary for each of the Companies to engage in their respective aspects of the Contemplated Transactions. — S&S

c. If any of the foregoing documents cannot be located or are not current, initiate action to replace and/or to update. — Clegg/Bivins

d. Verify that all issued shares for each of the Companies have been certificated and that the certificates can be located. — Clegg/Bivins

C. Financing Documents.

1. Relevant Documents. Locate and determine current status of the following financing documents for each of the Companies (possibly just Nipro and the Liquidating Corporations):

a. Bank Loan and Other Debt Agreements

b. Bonds and Trust Identures

(i) Pollution Control Bonds
(ii) Industrial Revenue Bonds

c. Mortgages and Security Agreements

d. Uniform Commercial Code Financing Statements

2. Actions.

a.	Review documents to identify any restrictions or other problems which require special consideration in connection with the Contemplated Transactions.	Bivins
b.	Review particularly covenants and default provisions which might restrict stock or asset transfers or trigger early repayment of principal or redemption of bonds. Identify and pay close attention to any waiting or notice periods.	Bivins
c.	Determine which, if any, of the financing arrangements (e.g., industrial revenue bonds) will be proposed to the purchaser of CNC's assets as a liability to be assumed. Determine what restrictions would apply to or what consents would be required with respect to such assignment and assumption by the purchaser.	CNC/Clegg
d.	Where any of these situations exist, the bank or other creditor's consent or a refinancing will become necessary. Prepare to contact necessary creditors.	van Campen

e. In the case of mortgages, security interests or other liens, determine which corporation (as between Nipro and CNC) owns (i.e., has title to) the property subject thereto. Determine proposed ownership of properties subject to liens following the sale of assets by CNC. Will purchaser assume liabilities related to such liens and agree to take property subject thereto? — Clegg/Bivins

D. Financial Statements.

1. Relevant Documents. Locate and determine current status of the following financial statements (balance sheets and income statements, etc.):

a. Audited statements of Nipro for each of last 3 years.

b. CNC and Nipro internal statements for each of last 3 years.

c. DSMNA statements (audited or unaudited) for each of last 3 years.

d. Energy statements (audited or unaudited) for each of last 3 years.

2. Actions.

a. Review financial statements with inside and outside accountants (e.g., Baird). — van Campen

b. Determine whether there are any contingent liabilities not reflected in the statements. — van Campen

c. Consider the need to prepare audited statements for CNC reflecting its assets, liabilities and operations as separate from Nipro. Note, FBC Brochure uses internal unaudited financial statements. — FBC/CNC

d. Determine any problems relevant to the Contemplated Transactions as shown on the financial statements. — ?

e. Consider whether or to what extent any or all of the financial statements can be made available to prospective purchasers of CNC's assets. Consider whether the response depends on which Companies' statements are involved (e.g., Nipro as opposed to CNC) and the nature of the purchaser (e.g., competitor, customer or industry participant). CNC/FBC

E. Federal, State and Local Income Tax Returns.

1. Relevant Documents. Locate federal, state and local income tax returns for the last five years.

2. Action. Review by auditors and tax counsel to determine their relationship to the Contemplated Transactions. van Campen

F. Real Estate.

1. Relevant Documents. Locate the following documents relating to all Nipro and CNC [assuming DSMNA and Energy have none] real estate:

a. Site Plan

b. Deeds

c. Leases

d. Title Insurance Policies

e. Appraisals

f. Easements, Rights-of-Ways, Encumbrances

g. Guarantees of Leases Bivins/Price

2. Actions.

a. Review current Site Plan; prepare pro-forma Site Plan to reflect Contemplated Transactions. Consider any special problems with respect to the Terminals. 7

b. Consider problems in preparation of instruments of conveyance in sale of assets by CNC.

c. Check status of titles. Determine any problems and the resolution thereof in giving purchaser evidence of good and marketable title.

d. Determine status of real estate records.

e. Consider necessity for title insurance.

f. Consider problem of real estate transfer taxes, if any, applicable to transfers between CNC and Nipro and in connection with sale of assets by CNC.

g. Consider effect of Contemplated Transactions on long-term leases. Are leases transferable between CNC and Nipro and/or a third-party purchaser.

h. Consider liability on leases. Will CNC and/or Nipro want to be relieved of liability on any leases. Will Nipro have to remain liable on a guarantee of any lease.

i. Check whether any liens or other encumbrances against property have been recorded.

j. Current survey should be required. Check to see that structures are within property lines.

k. Consider survey and engineering study to identify property to be divided between Nipro and CNC (including plant, storage tanks, office space, etc.)

l. Obtain evidence that current use of property is permitted by zoning laws and that buildings comply with building codes and other applicable regulations.

m. Consider Nipro purchasing real estate from CNC and leasing to purchaser of CNC's

assets. Appraisal may be desirable and/or required for Dutch tax purposes.

n. Determine whether adequate insurance for casualty, fire, etc. exists. — van Campen

G. Personal Property.

1. Relevant Documents. Locate the following documents relating to the personal property of Nipro and CNC [check DSMNA and Energy].

a. Equipment Lists or other Schedules of Property

b. Leases

c. Purchase Contracts

d. Equipment Warranties

2. Actions.

a. Develop definitive list of all personal property, e.g. equipment and other similar CNC assets. Confirm that catalogue of 6000 cards may be in lieu of list. — CNC

b. Review purchase contracts and equipment warranties to determine whether or to what extent warranties can be passed to purchaser. — Bivins

c. Appraisal may be desirable and necessary for Dutch tax purposes with respect to any property to be transferred between Nipro and CNC. — van Campen

d. Consider whether purchaser of CNC's will take property subject to any liens. — Bivins

e. Determine status of personal property leases. Are such leases assignable between Nipro and CNC and/or third party purchaser? Consider termination arrangement for any CNC leases which are not assumed by third-party purchaser and not transferred to Nipro. — Bivins

f.	Determine whether there is adequate insurance (fire, casualty and other) on personal property.	?
H.	Inventory.	
1.	Actions.	
a.	Specify which inventory is to be sold to purchaser of CNC's assets. Segregate according to finished goods, semi-finished goods, work in progress, and raw materials.	van Campen
b.	Consider arrangements for disposition of inventory not purchased by purchaser of CNC's assets. Would such inventory be sold to a liquidator and/or Nipro?	van Campen
c.	Verify current and estimated quantities of inventory on an item by item basis at time of closing of sale transaction.	van Campen
d.	Is any inventory consigned or stored off-site?	van Campen
e.	Determine whether quantities of inventory should be considered excess, obsolete or not saleable.	van Campen
f.	Is inventory subject to any liens?	Clegg
g.	Consider whether detailed cost records will be made available. Does it depend on the identity of the purchaser?	van Campen
h.	Consider arrangements for purchaser (e.g., a liquidator) not buying CNC's assets to take physical possessin of inventory.	CNC
I.	Accounts Receivable.	
1.	Actions.	
a.	Determine whether accounts receivable will be sold. Does this depend on the purchaser's desires?	van Campen

b. Identify and review all CNC accounts receivable. — van Campen

c. Determine CNC's collection experience and delinquent accounts. — van Campen

d. Are CNC's accounts receivable subject to liens. — Clegg

e. Determine treatment, handling and collection of CNC's accounts receivable during liquidation and winding up of CNC assets to purchaser which does not take such receivables. — van Campen

J. Material Contracts.

1. Relevant Documents. Locate all contracts, agreements and arrangements which are material to the business or financial condition of the Liquidating Corporations, including the following:

a. Purchase Contracts relating to raw materials, utilities, services, (repair and maintenance) equipment, vehicles, etc.

b. Sales Contracts relating to finished goods, other items, etc.

c. Guarantees, Letters of Credit, etc.

d. Distribution or Dealer Agreements

e. Agency or Broker Agreements

f. Shipping Contracts

g. DSM Energy NA, Inc. Contracts

2. Actions.

a. Review and determine current status of all material contracts. — Bivins

b. Check status of gas supply agreements. — Clegg

c. Determine whether any oral contracts, gentlemen's agreements or course of dealings exist and how such arrangements should be handled in the sale of assets — Clegg

and in the liquidation/dissolution.

d. Determine any restrictions on the transfer and/or assignment of material contracts between Nipro and CNC or a third-party purchaser. Consider arrangements to obtain necessary consents. — Bivins

e. Consider what contracts may and should be assigned to the purchaser of CNC's assets. Consider modifying contracts, particularly those relating to Nipro and CNC jointly (e.g., utility contracts), before assignment. — Clegg

f. Commence preparation of assignment and transfer documentation. — Clegg

K. Patents, Trade Secrets and Other Confidential Information.

1. Relevant Documents. Locate the following documents relating to patents, trade secrets, trademarks and confidential information ("Proprietary Rights") of Nipro and the Liquidating Corporations.

a. Patents and Patent Applications

b. License Agreements

c. Copyrights and Trademarks

d. Product Brand Names

e. Confidentiality and Disclosure Agreements (relating to employees and third parties)

2. Actions.

a. Verify registration of all trademarks. Confirm that there are no patents and copywrights. — Bivins

b. Review and determine status of all license agreements. — Bivins

c. Consider what Proprietary Rights will be required by the purchaser of CNC's assets. Will CNC be selling any Proprietary Rights with respect to products? — Clegg

d. Determine whether DSM has any objection to disclosure and subsequent transfer of any Proprietary Rights to the purchaser. Consider alternative arrangements (assignment and transfer to Nipro with non-exclusive license to purchaser) for making available to the purchaser any Proprietary Rights which CNC now owns but are not desired to be lost by DSM. — Clegg

e. Will purchaser be given right to use CNC's corporate name, trademarks product brand, names, etc. Consider appropriate legal arrangements for preservation and transfers. — Clegg

f. Confirm that there are no pending or threatened, infringement, misappropriation, or other claims or suits relating to Proprietary Rights. — Clegg

L. Employment and Employees.

1. Relevant Documents. Locate the following documents relating to employment and employees of the Liquidating Corporations or to such persons who are likely to be employees of the purchaser of CNC's assets.

a. List of all employees (specify job, title, compensation)

b. Employment Contracts - Confirm none

c. Personnel Files

d. Union Contracts and/or related labor organization correspondence- Confirm none

e. Severance Arrangements and Policies

2. Actions.

a. Determine which employees (management, production service, other) wil be required or desirable to purchaser of CNC's assets. — Copenhaver/Paschal

b. Consider which employees purchaser should be committed or encourage to hire. Determine severance exposure in connection with sale of CNC's assets and/a liquidation and dissolution. Will "offer of employment" by Nipro and/or purchaser of CNC's assets eliminate or minimize severance exposure. — Copenhaver/Paschal

c. Consider employee reaction to the Contemplated Transactions. Consider whether transactions might cause labor disturbance, union action, etc. and appropriate response thereto. — Copenhaver/Paschal

d. Consider whether purchaser may want to execute employment contracts with key employees. — Copenhaver/Paschal

e. Consider arranging for resignation of non-essential executive employees. — Copenhaver/Paschal

f. Investigate employee turnover for potential problems. — Copenhaver/Paschal

g. Estimate cost of retaining key employees. — Copenhaver/Paschal

h. Determine if there are any pending or threatened discrimination suits. — Clegg/Paschal

M. Employee Benefit Plans.

1. Relevant Documents. Locate the following documents relating to employee benefit plans (including pension plans, profit-sharing retirement plans, insurance, medical or health benefits) relating to employees of the Liquidating Corporations or other personnel which are likely to be employees of the purchaser of CNC's assets.

a. Plan documents (current and prior)

b. Trust documents (current and prior)

c. Summary Plan Descriptions (current and prior)

d. Insurance contracts and any claims for employee benefit plans

e. Investment management contracts

f. Participant records

g. Actuarial reports

h. Annual financial statements

i. Records filed with the government

j. IRS determination letters

k. Audits by IRS or Department of Labor

l. Claims records

m. Litigation (past, pending, threatened)

n. Union contracts for employee benefit plans

2. Actions.

a. Review and determine legal and actuarial status of each employee benefit plan. Are plans in name of Nipro, CNC or any of the other Companies? — Paschal

b. Check for need of additional funding. — Paschal

c. Determine if there is a deficiency requiring payment of tax. — Paschal

d. Determine impact of Contemplated Transactions on each employee benefit plan. — Paschal

e. Determine Nipro's plan following completion of Contemplated Transaction. — Paschal

f. Determine treatment of plans with respect to purchaser of CNC's assets. — Paschal

Can any or all plans be transferred to such purchaser? Is this desirable? What actions are necessary to carry out such transfer?

g. Consider implications of whole or partial termination of plans. Review notification of IRS, Pension Benefit Guaranty Corporation and participating employees. Check notification requirements and time periods. — Paschal

h. Consider formulae for prior service credits, and splitting funding surpluses or necessary additional contributions between Nipro and CNC or third-party purchaser. — Paschal

i. Consider severance liabilities and arrangements for employees of CNC which will not be hired by the purchaser or cannot be relocated with Nipro or one of the other Companies. — Paschal

N. Legal and Regulatory Compliance.

1. Relevant Documents. Locate all documents which are relevant to the legal and regulatory compliance (federal, state and local) of Nipro and the Liquidating Corporations which may be affected by the Contemplated Transactions, including the following:

a. Licenses

b. Permits

c. Franchises

d. Product Approvals

e. Consent Decrees

f. Complaints (OSHA, EEOC, etc.)

2. Actions.

a. Review all legal and regulatory compliance documents to determine current status and possible impact by the Contemplated Transactions. — Clegg/S&S

b. Determine with inside and outside counsel as appropriate the legal and regulatory posture of each of the Companies. Identify any problems which might delay or adversely impact the Contemplated Transactions. — Clegg/S&S

c. Review all laws and regulations which might delay or adversely affect the Contemplated Transactions. — Clegg/S&S

(i) federal

(ii) state (Georgia and other)

(iii) local (Augusta and other)

O. Litigation and Investigations.

1. Actions.

a. Review with inside and outside counsel as appropriate all pending and threatened litigation and governmental investigations against any of the Companies. — Clegg/S&S

b. Consider with litigation counsel how litigation or any investigation might be affected by the Contemplated Transactions. — Clegg

c. Determine whether it might be appropriate for the purchaser of CNC's assets to assume defense of and/or liability for any of the litigation. Consider possible indemnification by DSM or Nipro in such event. [Nor Vipro] — Clegg

d. Consider whether settlement arrangements can be made with respect to any litigation involving the Liquidating Corporations. — Clegg

P. Environmental and Products Liability Matters.

1. Relevant Documents. Locate all documents which may be relevant to environmental

(air, water, soil, etc.) and products liability matters with respect to CNC and Nipro (possibly Energy), including the following:

a. Permits

b. Complaints

c. Consent Decrees

d. Studies, Risk Assessments or Audits

e. Compliance Records and Reports

f. Correspondence

g. Insurance Policies.

2. Actions.

a. Determine environmental history and current status from legal, regulatory and operating standpoint. Consider whether an environmental audit (sampling, testing, etc.) should be conducted. — Mullis

b. Determine products liability history and current status from legal, regulatory and operating standpoint. — Clegg

c. Consider possible environmental and product liability issues arising in connection with the sale of CNC's assets. Consider appropriate remedial action and/or indemnification. — Clegg/S&S

d. Should the purchaser assume any CNC product liabilities. — Clegg

e. Consider how CNC's environmental, product warranty and liability problems are to be handled, and which party (e.g., Nipro and DSM) bears responsibility therefor, following completion of the liquidation and dissolution. [Not Nipro] — Mullis/van Campen

III. SALE OF ASSETS TRANSACTION; CNC DIVESTITURE.

A. Introduction.

A sale of assets transaction is a very complicated form of corporate reorganization because individual assets have to be either specifically sold or retained, and individual liabilities have to be either specifically assumed or retained by the purchaser and CNC. Title to CNC's individual assets that would otherwise stay in corporate solution in a sale of CNC's stock must be identified and formally conveyed, and disclosed and undisclosed liabilities of CNC must be identified and the business risks associated therewith must be allocated between CNC and the purchaser.

In connection with preparing an asset sale agreement covering such detailed matters, any purchaser will require a period of time to complete a "due diligence" review, and this process will often affect the timing of the transaction. The purchaser will base the representations and warranties section of the asset sale agreement on the results of its review, and these sections form the basis for the indemnification provisions (if any) contained in such agreement.

Once a purchaser has been identified, the due diligence and negotiation phases of a sale of assets transaction become the most time consuming ones, often taking two to three months when assets of a non-public company such as CNC are being sold. This is especially true since audited separate financial statements for CNC and other public disclosure documents of CNC are (or may be) unavailable.

At our meeting on July 9, 1986 in New York City, certain time constraints were established with respect to a sale of assets transaction: A goal of identifying a purchaser by August 15, 1986 was established, as was a goal of negotiating and signing a definitive sale of assets agreement by September 10, 1986. If a definitive asset sale agreement was not signed by such date, it was contemplated that CNC would commence the sale of its assets to a liquidator on a "salvage basis".

1. Identification of Purchaser.

a. Confirm deadline of August 15, 1986. FBC

b. Review FBC Offering Book. S&S

c. Review FBC approach and timetable. CNC/S&S/FBC

2. Preliminary Investigation by Purchaser. Commences as soon as potential purchasers are identified. Once "real" purchasers are identified, commence visits to CNC plant and offices, review of books and records of CNC and detailed forecasts, etc.

3. Letter of Intent. In many sale of assets transactions it is customary for a purchaser and seller to negotiate and enter into a letter of intent (also known as agreement in principle) setting forth the understanding of the purchaser and seller with respect to the transaction. The letter of intent provides a guide through the negotiation of a definitive sale of assets agreement. Customarily, a letter of intent is viewed by both a purchaser and a seller as non-binding as a legal matter, except for exclusivity and confidentiality provisions. Because of its non-binding nature, many purchasers wanting to avoid today's "auction" environment insist on an approach in which they go straight to a definitive agreement, which agreement is based on an agreed summary of terms, referred to as a "term sheet".

Consider advantages in using letter or intent: S&S/FBC

a. Tests parties' seriousness.

b. Morally commits parties to sale.

c. Sets out in writing areas of agreement. Important since may be delay before sales agreement is executed.

d. Highlights differences and matters needing further negotiation.

e. Discourages seller from shopping around for better deal.

Consider disadvantages in using letter of intent: S&S/FBC

a. Delay.

b. Parties may be locked into undesirable provisions even if not legally bound.

c. Might trigger public announcements.

However, if a Hart-Scott-Rodino premerger notification and waiting period is required, it may be desirable to use a letter of intent approach, since there is a mandatory waiting period of 30 days imposed before the transaction can be consummated. The necessary filing and commencement of the waiting period can be based on a letter of intent. Clegg

As alternative to letter of intent, consider using the form of an Asset Sale Agreement as drafted by S&S in an effort to establish certain of the terms of the sale at the outset and attempt to limit the degree of negotiation with respect to such terms.

4. Use of a Term Sheet by CNC. Attached as Exhibit A hereto is a hypothetical term sheet for CNC's sale of assets transactions.

a. Review the Term Sheet in order to understand the issues that will arise in the negotiation of CNC's sale of assets.

b. Identify CNC's Assets and Liabilities. The term sheet is a useful way to organize the process of identifying the various assets and liabilities of CNC that must be identified, catalogued and eventually listed as schedules to the asset sale agreement.

B. Draft of Definitive Asset Sale Agreement.

1. Text. Typically drafted by a purchaser after a due diligence review has been conducted. The most important provisions to a

purchaser would be CNC's representations and warranties about the assets and liabilities, CNC's covenants regarding the operation of the business pending the closing, the purchaser's and CNC's conditions precedent to closing, and the provisions dealing with indemnification of the purchaser by Nipro and/or DSM for breach of a representation, warranty or covenant.

The number and scope of the representations and warranties made by CNC will depend on whether CNC sells its assets on an "AS IS" basis, which provides for no or only minimal representations and warranties and therefore few protections for a purchaser, or whether CNC sells its assets, in essence, on a "recourse basis", by making fuller representations and warranties backed up by indemnification provisions by Nipro and/or DSM. A Liquidator will likely agree to "AS IS" with no indemnification. The types of representations and warranties that a non-liquidator purchaser may reasonably ask CNC to make include the following matters:

a. Organization of CNC.
b. Authority of CNC Relative to the Agreement.
c. Assets and Capitalization.
d. Compliance with laws.
e. Trademarks and Patents.
f. Employee Plans and Contracts.

    1. Labor Union Contracts
    2. Employee Plans
    3. Prohibited Transactions
    4. ERISA
    5. Copies of Employee Plans, etc.
    6. Qualifications

g. Brokers
h. Subsidiaries
i. Financial Information
j. Undisclosed Liabilities
k. Books and Records; Tax Returns
l. Absence of Certain Changes, Events and Conditions
m. Material Changes since the Balance Sheet Date
n. Accounts Receivable
o. Insurance
p. Sufficiency of Certain Contracts, Leases, Licenses, etc.

q. Energy Supplies and Raw Materials
r. Inventory
s. Modification of Employee Plans and Salaries
t. Lockboxes, Safe Deposit Boxes and Powers of Attorney
u. Customers and Distributors
v. Substantial Suppliers
w. No Hazardous Wastes on Premises
x. Environmental Compliance
y. Real Property
z. Completeness of Schedules and Exhibits

2. Schedules. CNC to prepare. Schedule of Schedules. Clegg

a. List the various assets and liabilities of CNC's business (i.e., real property, plant and equipment, contracts, commitments, litigation, title matters and trademarks).

b. List exceptions to the detailed representations and warranties about such assets and liabilities. Price

3. Exhibits. CNC and purchaser negotiate and prepare. The form of such exhibits are agreed to by the signing of the definitive agreement, although they are often not executed and delivered or used until the closing. Typically an asset sale agreement contains various exhibits which include, among other things, the following.

a. Ancillary agreements.

b. Auditor's procedures.

c. Opinions of counsel.

C. Negotiation of a Definitive Agreement.

1. Selection of Team. Important to identify negotiating team and CNC/S&S principal spokesman for CNC. In order to make any real progress, it is necessary to have CNC's spokesman present at negotiations, although as a negotiating ploy it may be desirable to have him Copenhaver/Frank

absent from time to time so that the lawyers and/or other negotiators cannot concede any points.

2. Location of Negotiations. New York City?

3. Price and Terms. A sale of assets that yields CNC a high price may also leave it with a number of post-closing liabilities. There is a trade-off between price and terms, and gamesmanship by CNC is essential. — CNC/FBC

a. Consider possible delays.

b. Consider difficulties in handling any post-closing liabilities. (See III.F.2.) — Clegg/S&S Koerselman

4. Deadline. September 30, 1986 was set as a deadline to have a signed agreement.

D. Preparation for Closing.

1. Closing Memorandum. Consider time to start preparation. — S&S

2. Purchaser Arranges Financing. Raising the money for the purchase price may cause problems depending on the type of purchaser and the time frame. Consider ways CNC might be of assistance. — FBC

3. CNC and Purchaser Obtain Consents. — Clegg

a. lenders
b. contractual restraints
c. governmental
d. corporate

4. Regulatory Matters.

a. Hart-Scott-Rodino approval - approximately 30 days, subject to exceptions. Determine whether required in case of sale to liquidator. — S&S

b. Bulk Sales Laws - Purchaser gives 10 days notice of sale to CNC's creditors. List provided by CNC. — van Campen

5. Escrow Agreement (if any).	van Campen/Clegg
a. See III.F.2.(e) for possible use in connection with post-closing liability.	
6. Powers of Attorney. Determine who will sign closing documents for CNC?	Clegg
7. Certified CNC Certificates of Incorporation. Arrange to obtain from Secretary of State of Delaware.	S&S
8. CNC By-Laws Certified by Corporate Secretary.	Clegg
9. Good-Standing Certificates. Arrange to obtain from states where CNC is qualified to do business.	S&S
10. Tax Status and Lien Docket Certificates. Verify that taxes are paid and no liens on assets exist other than those disclosed to purchaser.	van Campen/ Auditors
11. Certified Corporate Resolutions. Authorize CNC's sale of assets and execution and delivery of sale of assets agreement and any other necessary agreements or actions by CNC's proper officers.	S&S/Clegg
12. Representation Certificates. Prepare CNC officer's certificate stating that representations and warranties are accurate.	Clegg/S&S
13. Resignations of Certain Directors and Officers. Prepare forms of resignation for execution and delivery at the closing. Which officers of CNC will become employees of the purchaser and will resign from CNC?	Paschal/Clegg
14. Assignments of Patents, Trademarks and Copyrights. Prepare documents.	Clegg/S&S
15. Assignment of Bank Accounts. Verify procedure.	van Campen/Banks
16. Legal Opinions.	
a. Prepare executed opinions.	S&S
b. Which counsel	?

c. Which give opinions — Clegg

- Transfer of Assets

- Enforceability of Asset Sale Agreement

17. Cross Receipts for Payments. Prepare. — S&S

E. Closing.

1. Time and Date.

a. Specify or agree on method to determine.

b. Set firm date.

2. Place of Closing. New York City?

3. Right of Parties to Defer Date of Closing. Determine absolute deadline of Closing.

4. Documents to be exchanged at Closing.

a. Deeds, bills of sale, and any other documents and instruments that purchaser deems sufficient to transfer title to CNC's assets. — Bivins/S&S

- Deeds to all real estate with proper revenue stamps affixed. — Bivins/S&S

- Bills of Sale on items of personal property. — Bivins/S&S

- Assignment of automobile certificates of ownership. — Bivins/S&S

- Certificates relating to transfer of railroad cars. — Bivins/S&S

- Assignment of insurance policies with the consent of the insurance companies endorsed thereon. — Bivins/S&S

- Assignments of any patents or licenses under patents. — Bivins/S&S

	- Assignments of any trademarks.	Bivins/S&S
	- Assignments of any copyrights.	Bivins/S&S
	- Assignments of all leases to real or personal property used in the business with consent from lessors affixed thereto.	Bivins/S&S
	- Assignments of all other contracts binding upon or of value to purchaser with any necessary consents.	Bivins/S&S
	- Assignments of bank accounts.	Bivins/S&S
	- Assignments of safe-deposit boxes.	Bivins/S&S
b.	Title insurance covering real estate.	Bivins
c.	Officer's certificates delivered.	Clegg/Paschal
d.	Secretary's certificates delivered.	Clegg
e.	Certified resolutions delivered.	S&S/Clegg
f.	Certified Charter and By-Laws delivered.	Clegg
g.	Incumbency Certificate regarding CNC officers delivered.	S&S/CNC
h.	Opinions of Counsel to purchaser and CNC.	S&S/Clegg
i.	Employment Agreements.	S&S/Clegg
j.	Releases of certain Claims.	
k.	Ancillary agreements such as supply contracts or contracts dealing with assets (i.e., facilities and services) shared by CNC and Nipro.	Mullis/Clegg/S&S
l.	Written resignations of certain officers and directors.	Copenhaver
m.	Accountant's letter re financial statements.	van Campen
n.	Good-standing certificates.	S&S

o. Estoppel certificates from creditors of CNC whose liabilities have been assumed by Purchaser. — van Campen/ Clegg/S&S

p. Copy of Bulk Sales Law notice. — S&S

5. Transfer of Purchase Price.
Immediately available funds by wire or bank check. — van Campen

6. Details re Delivery of Possession.
Purchaser should avoid taking over business prior to closing since such action may violate bulk transfer laws and deprive purchaser of certain protections under tax statutes.

7. Liability for Certain Expenses.
Liability for expenses connected with closing (including investment banker's or finder's fees) should be specified. — Clegg/S&S

F. Post Closing Matters - To be specified in Asset Sale Agreement.

1. Survival of Representations and Warranties.

a. Consider whether or to what extent they survive the closing? Note, draft of Asset Sale Agreement does not provide for survival or indemnification. Consider possible flexibility in this regard.

b. For what period of time?

c. All or some of the representations and warranties?

2. Indemnification.

a. Consider indemnifying parties (Nipro and/or DSM?)

b. Consider time limitation (as short as possible?)

c. Consider Dollar limitation?

d. Consider Basket amounts?

e. Consider use of escrow to cover liability with balance payble to DSMNV.

IV. LIQUIDATION AND DISSOLUTION.

A. Introduction. — Koerselman

Reference is made to Sections 3b.1 and 4.1 of Shearman & Sterling Preliminary Response to Legal Actions and Points of Attention in CNC Transaction as per M. Frank Fax of July 8 (previously provided) for a general discussion of legal and procedural matters relating to liquidation (basically a tax and accounting concept dealing with the physical disposition of corporate assets and liabilities) and dissolution (formal termination of corporate existence).

For purposes of this checklist it has been assumed that the Liquidating Corporations (CNC, DSMNA and possibly Energy and Erta - NY) which are to be dissolved are Delaware corporations.

B. Dissolution Procedures.

1. Compliance with applicable corporate law.

a.	Check applicable Delaware law with respect to the procedure.	S&S
b.	Check requirements of applicable law of states (e.g., Georgia) where Liquidating Corporations are qualified to do business.	S&S
c.	Prepare necessary documents as required by applicable state law.	S&S
d.	Arrange for required filing with the secretary of state of the state of Delaware and other states where the Liquidating Corporations are qualified to do business.	S&S
e.	Arrange for filings, where necessary, with local recorder's office.	Clegg/S&S

2. Qualification in foreign states.

a.	Consider action required in order to withdraw Liquidating Corporations from qualification to do business in foreign states.	S&S

b. Where action is required by shareholders or directors have appropriate resolutions adopted. — S&S

c. Prepare certified copies of resolutions of stockholders and directors for use in connection with filings in foreign jurisdictions. — S&S

3. Requirements of Regulatory and Governmental Agencies.

a. Consider requirements of regulatory and governmental agencies with respect to liquidation and dissolution. — S&S/Clegg

(i) federal

(ii) state

(iii) local

b. Where action is required by shareholders or directors, have appropriate resolutions adopted. — S&S/Clegg

c. Prepare certified copies of resolutions for use in connection with filings with governmental agencies. — S&S/Clegg

4. Directors' Meeting and Action.

Where action of board of directors of Liquidating Corporations is required, then arrange to:

a. Call meeting of board of directors with required notice or waiver or prepare unanimous written consents. — Clegg

b. Hold directors' meeting or use written consents in accordance with notice and waiver and applicable law and bylaws. — Clegg

c. Prepare in advance and have directors adopt appropriate resolutions to dissolve the corporations, to authorize the adoption of a plant of liquidation and to authorize the sale of assets. — S&S/Clegg

d.	Include authority desirable or necessary with respect to action to be taken by officers incident to dissolution.	Clegg
e.	Prepare certified copies of resolutions.	S&S/Clegg

5. Shareholders' Meeting and Action. Where action of shareholders of Liquidating Corporations is required, then arrange to:

a.	Call shareholders' meeting with required notice or waiver or prepare written consent.	Clegg
b.	Hold meeting or use written consents in accordance with notice and applicable law and bylaws.	Clegg
c.	Prepare in advance and have shareholders adopt appropriate resolutions to approve the plan of liquidation and formal disolution and to authorize the sale of corporate assets not already sold in transaction discussed in III above.	S&S/Clegg
d.	Include authority desirable or necessary with respect to other action to be taken prior to and subsequent to formal dissolution, e.g., distribution of assets in kind or sale of assets.	Clegg
e.	Prepare certified copies of resolutions.	S&S/Clegg

6. Disposition of Assets.

a.	Consider plan for disposition of any CNC assets not sold to purchaser in the transaction discussed in III above.	van Campen/ Koerselman
b.	Consider use of one or more liquidators for unsold CNC assets.	van Camen
c.	Determine any restrictions on or problems with the successive	van Campen

distribution of CNC's unsold assets to DSMNA and DSMNV.

(i) Accounts Receivable

(ii) Determine what role Nipro can play.

d. Make similar determinations with respect to DSMNA and Energy. — van Campen

7. Corporate name.

a. Consider disposition of corporate name of the Liquidating Corporations. — CNC

b. If the corporate name has value, perhaps it can be sold with other assets. Once the corporation is dissolved the name is lost. — CNC

c. Perhaps DSMNV will take names.

d. Consider problems of "reincorporation" and other tax implications. — Koerselman

8. Distribution to stockholders.

a. Make certain that no distribution is made until all debts are paid or provision is made for their payment. — van Campen/ Koerselman

b. If there are possible contingent liabilities (e.g., unsettled claims or litigation) then be certain to retain sufficient assets to pay such liabilities. Consider use of liquidating trust for remaining or retained assets. Check Dutch tax issues. — van Campen/ Koerselman

c. Ascertain liability for all federal taxes -- income and excise. Accelerate final tax audit. — van Campen

d. If contract rights remain n which income or other distributions will (or may) be available, consider appointment of agent (possible Nipro) to receive such payments and to make distributions to — Clegg: None should remain.

stock (only DSMNV) as received. Provide for procedure for distribution and payment of costs of agent in effecting distribution. In the distribution of assets with continuing income, such as patent rights, special tax and other legal problems may arise which require careful consideration.

e. If lawsuit is required for the collection realization of certain assets, provide for continuation of suit by successor (possibly Nipro) to dissolved corporation and payment of all costs of suit. — Clegg: Should not happen.

f. Secure certificates for shares before distribution. Cancel shares upon effectiveness of dissolution. — Clegg

9. Continuing rights in assets or potential assets.

a. Consider rights of Liquidating Corporations to continuing assets such as royalties on license agreements, reversionary rights to proceeds from life insurance or other insurance policies, damages which may be collected on infringement suits, and tax refund claims. — Clegg: Should not happen.

b. Establish program for preservation of such rights, naming successors (possibly Nipro) to act for stockholders of dissolved corporation. — Clegg

c. Procedure should be approved in dissolution agreement and approved by shareholders and directors. — S&S/Clegg

C. Tax Matters.

1. Consider with accountants responsible for tax affairs and tax return preparation for the Liquidating Corporations the appropriate form of tax liquidation. — van Campen/ S&S/AA

a. Section 331 -- van Campen/
b. Section 332 -- liquidation of corporate subsidiaries S&S/AA

c. Section 333 -- 3-month liquidation
d. Section 337 -- 12-month liquidation.

2. Consider with inside and outside accountants pitfalls (tax and other) in liquidation process -- generally. Identify applicable time periods, possible sources of delay. van Campen

D. Steps necessary to windup.

1. Prepare and file all final tax returns. van Campen/ Baird/AA

a. Federal. Conside- with accountants filing a request for prompt assessment of federal income tax. S&S/van Campen/ Baird/AA

b. State (Georgia and Other) van Campen/Baird

c. Local (Augusta and Other) van Campen/Baird

2. Pay all outstanding bills. Send notice to all creditors requesting final statements including appraisers, counsel and accountants involved in liquidation and dissolution. van Campen/Baird

3. Payment of taxes. Get certificates from the following showing that all taxes are paid in full: van Campen

a. Tax Commission --- franchise taxes. No corporation shall be dissolved until all franchise taxes due to or assessable by the state have been paid by the corporation. van Campen/Bivins

b. County treasurer -- personal property taxes van Campen/Bivins

c. Bureau of Unemployment Compensation -- unemployment taxes. van Campen/Bivins

d. Division of Sales & Excise Taxes -- sales taxes. van Campen/Bivins

e. State Industrial Commission -- workmen's compensation. van Campen/Bivins

4. Workmen's compensation:

a. Notify this department that Liquidating Corporations (only CNC?) are dissolving and file a final report. — Paschal/Bivins

b. Do not send in a check with final return. Check whether deposit is applied or refunded; pay balance. — Paschal/Bivins

5. Federal unemployment. Final form 940, Excise Tax Return, to be filed by the following January 31. — Paschal/Bivins

6. State unemployment. File Report of Employer (only CNC?) on Disposition of Business in Whole or in Part. — Paschal/Bivins

a. Check Georgia requirements. — Paschal/Bivins

b. Change account number listing. — Paschal/Bivins

7. Social Security

a. Indicate on Form 941, Employer's Quarterly Federal Tax Return, that this is a final return. — van Campen

b. Prepare Form W-3, Reconciliation of Income Tax Withheld From Wages. — van Campen

c. Prepare withholding tax statements, Form W-2. — van Campen

d. Check whether social security number (e.g., Nipro or CNC) requires a change. — van Campen

8. Sales tax.

a. Notify Sales Tax Commission that Liquidating Corporations are dissolving; file final sales tax report. — Bivins

b. Check the block indicating this is a final return; otherwise, there will be a penalty for failure to file. — van Campen

9. Refunds. Claim potential tax refunds: — van Campen/Bivins

a.	Sales tax deposit.	van Campen/Bivins
b.	State franchise tax.	van Campen/Bivins
10.	Publish notice. Prepare and publish notice that Liquidating Corporations are dissolving.	Clegg/S&S
11.	Storage of records. Arrange for storage of all records of the Liquidating Corporations.	Bivins
12.	Utilities. Notify utilities if services are to be discontinued.	?
13.	Insurance. Notify insurance agents to revise or cancel policies.	van Campen/ Gladden
14.	Outstanding stock. Call in and cancel outstanding stock certificates.	?
15.	Miscellaneous Actions.	
a.	Transfer property registration at appropriate recording and tax offices.	Bivins
b.	To extent desired, notify suppliers, customers, post office and credit agencies that the Liquidating Corporations are dissolving.	van Campen/Clegg

Financial Aspects

Assets

a. Listing of all fixed assets > $5,000 historic purchase price with following items: — R. Valentine/ B. Boatwright

- purchase price
- date of purchase (or age)
- acc. depreciation (books and fiscal)
- bookvalue (books and fiscal)
- tag number

(Status 12/31/85 - Ready end of August)

b. Listing of spare parts (non capitalized) per sector (check what is available and where) — B. Boatwright

Purpose: Listing as annex of sale contract.

c. Precious metals

- CNC
- Common

Listing inventory — B. Boatwright

d. Listing leased railcars/cars — B. Boatwright/ B. Bivins

Finance Department (Organization)

- Future organization accounting CNC/Nipro as separate units.	B. Boatwright
- Future organization MIS department CNC/Nipro as separate units. Soft/ hardware requirements.	D. Wall
- Manning of above mentioned organizations.	B. Boatwright/ D. Wall
- Info for FBC's presentation review of financial part.	B. Boatwright J. van Campen
- Prepare discussion paper transition period.	D. Wall

Financial Info CNC

- auditing of 1985 P&L/Balance Sheet by Baird.	
- recalculation of interest charges as of 1976 for CNC and Nipro.	B. Boatwright
- correction of 1985 and 1986 figures CNC/Nipro fiscal and books.	B. Boatwright/ Baird/(S&S?)
- a correct tax return CNC and Nipro for previous years correction before taking CNC out of Nipro.	Baird/(S&S?)
- make P&L statements and balance sheets of CNC as of 1970 (books).	B. Boatwright/ Baird
- Listing of major fixed assets to be transferred from CNC to Nipro.	R. Valentine

Exhibit 2

December 6, 1986

Mr. M. J. van Campen
President
Augusta Liquidating Corp.
P.O. Box 1483
Augusta, Georgia 30913

Re: Cancellation of all DSM NA and Columbia Nitrogen Corporation Insurances

Dear Mr. van Campen:

DSM NA and Columbia Nitrogen Corporation had insurance coverages as listed on the attached insurance policy schedule as of October 31, 1986. Most all of those policies were cancelled at closing, November 1, 1986, and pre-payments were refunded to Nipro, Inc. and distributed by Nipro, Inc. to the companies according to the original share of premium. In these cases, new separate policies were issued to Nipro, Inc., Synres and to the purchaser of CNC. In the cases indicated, the prepaid premium was not subject to refund by terms of the policy and so, the benefits of such prepaid policies were assigned to Nipro, Inc. and to the purchaser of Columbia Nitrogen Corporation. Details on each policy are as follows:

Property Insurance

1. A. Industrial Risk Insurer's Policy #31-3-39538 and American International Group Policy #943-38-28 had provided four types of coverage, namely fire and extended perils, difference in conditions, boiler and machinery, business interruption, coverages to Columbia Nitrogen Corporation, Nipro, Inc. and Synres Chemical Corporation. These two policies were cancelled effective 11/1/86. The insurer's returned a check for the prepaid premium insurance balance of $459,029 which allocated among the covered companies according to the premium originally paid by each company as follows:

Nipro, Inc.	$304,106.71
Columbia Nitrogen Corporation	142,298.99
Synres	12,623.30

New policies were written effective November 1, 1986, under the following numbers:

	Policy No.
Nipro, Inc.	31-3-42448
Columbia Nitrogen Corporation	31-3-42339
Synres	31-3-42449

DSM NA was an additional insured under the cancelled policies but is not an insured under the new policies.

2. Transit Insurance Policy P-0016 covering Columbia Nitrogen Corporation and Nipro, Inc. was cancelled effective 11/1/86 which generated a return of prepaid premium in the amount of $1,107.55 which was received by Nipro, Inc. and credited in the allocation between old Columbia Nitrogen Corporation and Nipro, Inc. New policies numbered P-0217 were issued to Nipro, Inc. and policy P-0218 was issued to CNC effective November 1, 1987. DSM NA was never a named insured on these policies.

3. The Blanket Crime Bond #8114-77-58 covering DSM NA, Nipro, Inc., CNC and Synres was cancelled effective 11/1/86 generating a return of prepaid premium of $10,643.00 which was allocated to Nipro, Inc. in the closing amongst the companies. New policies were issued effective 11/1/86 for Columbia Nitrogen (and ASCI), #81147830 and for Nipro, Inc. and Synres, #81147758A. DSM NA was an insured under the old policies but not under the new policies.

LIABILITY INSURANCE

4. Auto Liability Insurance is provided on the vehicles of Columbia Nitrogen and Nipro, Inc. under policy BA4465717 issued by South Carolina Insurance Company. By endorsement #3, effective 11/7/86, DSM NA was deleted as an insured. The policy was assigned to Columbia Nitrogen Corporation and Nipro, Inc. There was no returned premium since the policy was continuous and the two corporations will obtain separate insurance upon normal cancellation date 3/31/87. Synres vehicles are covered under policy #002227-01 issued by the Kemper Insurance Company directly to Custom Chemical Company and Daniel Products Company. No changes were necessary on that policy.

5. General Liability Insurance is self-insured up to $1 million. No insurance policies are involved. DSM NA had provided Synres with a financial guarantee for losses above $100,000 to $1,000,000. Such guarantee was cancelled effective 9/30/86.

6. A Primary Excess Liability policy providing coverage for claims exceeding $1,000,000 up to $15,000,000 covering DSM NA companies was cancelled effective 11/1/86. The return prepaid premium of $383,333 was received by Nipro, Inc. and allocated amongst the companies. The stock shares in Primex owned by DSM NA were returned. The purchaser of CNC applied for coverage and purchased the required stock as did Nipro, Inc. Two policies were issued effective 11/1/87. DSM NA is not an insured in either of the two policies. Synres is an insured on Nipro's policy.

7. The Second Excess Liability policy underwriter would not rewrite new policies if the prior policy was cancelled. However, the underwriter did agree to assign coverage to Nipro, Synres and the purchaser of Columbia Nitrogen Corporation. Such endorsement was received 10/14/86 with effective date of 10/30/86. DSM NA will remain a named insured to policy expiration 3/31/87 at which time Nipro, Inc. and CNC will each purchase separate policies.

8. A Fiduciary Liability policy covering CNC, Nipro and Synres was cancelled effective 11/1/86. This generated a refund of prepaid premium of$4,227.00 which was allocated amongst the companies. Two new replacement polices have been written, one for Columbia Nitrogen Corporation and ASCI and a second for Nipro, Inc. and Synres. DSM NA no longer required to be named as an insured.

WORKERS COMPENSATION INSURANCE

9. On 9/3/87, the excess Workers Compensation policy covering losses within our Georgia self-insurance program exceeding $500,000 was not renewed but instead a new policy covering all claims without deductible was purchased covering both Columbia Nitrogen Corporation and Nipro, Inc. in anticipation of divestiture problems. Such policy continues on a month-to-month basis until Columbia Nitrogen Corporation can effectuate a license to self-insure as under the old system. After 12/31/86, Nipro, Inc. alone will be covered under this policy. CNC will begin self-insuring and obtain an excess Workers Compensation policy as before. There was no prepaid premium nor claims to be settled from 9/3/86 through 11/1/86. Claims prior to 9/3/86 were assumed by Nipro, Inc. and the purchaser of CNC as part of the closing agreement and reserves were established for payment of those claims.

10. Various other Georgia Workers Compensation expenses were non-refundable and non-assignable and were expensed.

11. A policy to cover all CNC and Nipro employees residing in states other than Georgia was cancelled and rewritten effective 11/1/87 with a small return premium yet to be received by Nipro, Inc. A new policy was written by Nipro for one employee in Pennsylvania and by Columbia Nitrogen for employees in North Carolina, South Carolina.

EMPLOYEE BENEFIT INSURANCE

12. - 16. These policies are paid on a month to month basis so that upon cancellation on 11/1/86, no prepaid premium existed. The respective insurers provided letters binding new coverage on individual contracts to be finalized with each company (New CNC, ASCI, Nipro) based upon employee demographics within each company.

The Blue Cross contract was not yet fully paid up on cancellation because of incurred, but not reported, liability for claims occurring before 10/31/86 but to be paid after 11/1/86. The new companies assumed these short term liabilities and established appropriate reserves upon the guidance of Blue Cross: $118,820 - Nipro; $158,430 - CNC and ASCI. Because DSM NA had no employees, DSM NA was never an insured on any Employee Benefit Insurance Policy.

17. The Business Travel Accident insurance policy 6TF8031601 covering a 3 year period from 5/31/86 to 5/31/89 was cancelled providing a return check for prepaid premium of $5204.52 payable to Nipro and credited between old Columbia Nitrogen Corporation and Nipro according to the closing allocation.

18. The Special Travel Bond was written on a guaranteed minimum premium basis not allowing for a return of prepaid premium. The underwriter endorsed the policy effective 12/1/86 to delete DSM NA and have Nipro, Inc. and Columbia Nitrogen Corporation as the named insured's for the remainder of the policy period.

19. The Volunteer Fire Fighters insurance policy. Because of the small minimum premium involved, no return premium is allowed so the policy was assigned to New CNC and Nipro for the balance of the period 11/1/86 to 2/1/87.

PENSION INSURANCE & TRUST

20. As of 9/30/86, the CNC Pension Plan was split into a new CNC plan and a new Nipro plan. Immediately thereafter, CNC cancelled its new plan. An actuarial statement of valuation evidencing compliance with appropriate regulations was filed with the Federal Government. Assets were distributed to terminated CNC employees and surplus assets were returned to the plan sponsors according to Government rule. Trustees were elected to supervise the ongoing Nipro plan.

A DSM North America Master Trust, which had served as a joint funding vehicle, was terminated also as of 9/30/86.

21. As of 9/30/86, the CNC Savings Plan was split into two plans with the CNC portion being terminated and with the Nipro portion being continued by Nipro. Terminated CNC employees received the distribution of their individual account balances on 11/21/86. The insurance company's administration contract was assumed by Nipro effective 9/30/86.

22. The Retired Life Insurance portion of Prudential Insurance Co. policy 55601 was allocated between New CNC and Nipro according to employee demographics. The funds in this insurance trust are not returnable to the participating employers but are vested to employees 55 years of age and older. New Life Insurance policies on the same basis are being prepared by the Prudential for Nipro, New CNC and ASCI.

W. J. Gladden

WJG/gc
cc: M. A. Aertsen

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Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ASHLEY II OF CHARLESTON, L.L.C., Plaintiff, v. PCS NITROGEN, INC., Defendant/Third-Party Plaintiff, v. ROSS DEVELOPMENT CORPORATION, KONINKLIJKE DSM N.V., DSM CHEMICALS OF NORTH AMERICA, INC., JAMES H. HOLCOMBE, AND J. HOLCOMBE ENTERPRISES, L.P. AND J. HENRY FAIR, JR., Third-Party Defendants.	Case No. 2:05-2782-CWH **AMENDED ANSWER, COUNTER-CLAIM AND AMENDED THIRD-PARTY CLAIMS OF DEFENDANT PCS NITROGEN, INC.**

Defendant PCS Nitrogen, Inc. ("PCS"), answers the Complaint of Plaintiff Ashley II of Charleston, L.L.C. ("Plaintiff" or "Ashley") as follows:

NATURE OF ACTION

1. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint and, therefore, denies the same. PCS denies the legal conclusions contained in paragraph 1 of the Complaint.

JURISDICTION AND VENUE

2. In response to Paragraph 2 of the Complaint, PCS admits that this Court has subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §9613(b) and that venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

3. In response to Paragraph 3 of the Complaint, PCS admits that Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and 28 U.S.C. §§ 2201 and 2202 empower the Court to issue a declaratory judgment. If Paragraph 3 alleges that a declaratory judgment should be entered finding PCS liable to Ashley for any response costs, PCS denies that allegation.

4. In response to Paragraph 4 of the Complaint, PCS admits that that venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

PLAINTIFF

5. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint and, therefore, denies the same.

6. PCS denies that Plaintiff is a bona fide prospective purchaser ("BFPP"), as that term is defined under Section 101(40) of CERCLA, 42 U.S.C. § 9601 (40), and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 6 of the Complaint and, therefore, denies the same.

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DEFENDANT

7. PCS admits that it is a corporation duly organized under the laws of the State of Delaware. The remaining allegations of paragraph 7 are denied.

8. PCS admits the allegations in paragraph 8 of the Complaint.

9. PCS admits the allegations in paragraph 9 of the Complaint.

10. PCS admits the allegations in paragraph 10 of the Complaint.

11. PCS responds to the attempted incorporation of the allegations contained in paragraphs 24 to 27 of the complaint in the correspondingly numbered answers below. PCS admits the allegations contained in paragraph 11 of the Complaint to the extent that it alleges that on or about October 31, 1986, CNC Corp., also known as New Columbia Nitrogen, received a transfer of certain assets and assumed certain liabilities of Columbia Nitrogen Corporation ("Old Columbia Nitrogen"). PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of the Complaint and, therefore, denies the same.

12. PCS denies the allegations contained in paragraph 12 of the Complaint to the extent that it implies that the transfer of certain assets, liabilities and obligations from Old Columbia Nitrogen to New Columbia Nitrogen was a transfer of all assets, liabilities and obligations of Old Columbia Nitrogen. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 12 concerning the date of incorporation of Old Columbia Nitrogen and, therefore, denies the same. PCS admits the remaining allegations in paragraph 12 of the Complaint.

13. PCS is without knowledge of the allegations contained in paragraph 13 of the Complaint and, therefore, denies the same.

THE COLUMBIA NITROGEN SITE

14. PCS admits the allegation in paragraph 14 of the Complaint that a site referred to as the Columbia Nitrogen Site is located in Charleston, Charleston County, South Carolina ("Charleston Site") and that the site was used in the past for phosphate fertilizer production. PCS further admits that the site in question borders the Ashley River. PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 14 and, therefore, denies the same.

15. PCS admits the allegation in paragraph 15 of the Complaint that Old Columbia Nitrogen purchased the site at some time in the past and operated the site to produce phosphate fertilizers there for some period of time. PCS further admits that Old Columbia Nitrogen no longer owned the site as of October 31, 1986. PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 15 of the Complaint and, therefore, denies the same.

16. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint and, therefore, denies the same.

17. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint and, therefore, denies the same.

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18. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint and, therefore, denies the same.

19. PCS admits that EPA has engaged in activities it has termed a remedial investigation/feasibility study ("RI/FS"). PCS further admits that EPA's regulations describe a RI/FS at 40 C.F.R. § 300.430(a)(2). PCS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 19 and, therefore, denies the same.

NATURE AND EXTENT OF CONTAMINATION

20. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint and, therefore, denies the same.

21. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint and, therefore, denies the same.

22. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Complaint and, therefore, denies the same.

23. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint and, therefore, denies the same.

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(NEW) COLUMBIA NITROGEN'S LIABILITY

24. PCS admits the allegations contained in the first sentence of paragraph 24 of the Complaint. It further admits that Exhibit 1 to the Complaint is a copy of certain portions of the Acquisition Agreement. PCS denies that Exhibit 1 is a copy of the Acquisition Agreement in its entirety. The terms of the Acquisition Agreement speak for themselves. PCS denies any allegation in paragraph 24 contrary to those terms.

25. PCS admits the allegations contained in paragraph 25 of the Complaint to the extent that it quotes from the Acquisition Agreement. PCS further admits that the Acquisition Agreement is governed by New York law according to its express terms. The terms of the Acquisition Agreement speak for themselves.

26. PCS admits the allegations contained in paragraph 26 of the Complaint to the extent that it accurately quotes parts of the Acquisition Agreement. The terms of the Acquisition Agreement speak for themselves. PCS denies any allegation in paragraph 26 to the effect that the Acquisition Agreement contemplated or transferred any liability for the Site in dispute.

27. PCS admits that the recitals to the Acquisition Agreement include the quoted language. PCS denies the portions of the allegations in paragraph 27 of the Complaint that seeks to paraphrase the Acquisition Agreement. The terms of the Acquisition Agreement speak for themselves.

FIRST CLAIM FOR RELIEF

28. In response to the allegations contained in paragraph 28 of the Complaint, PCS repeats and incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 28 of the Complaint.

29. In response to the allegations contained in paragraph 29 of the Complaint, PCS states that the statutory language speaks for itself and that no response is required.

30. PCS denies the allegations contained in paragraph 30 of the Complaint.

31. PCS denies the allegations contained in paragraph 31 of the Complaint and denies that Plaintiff is entitled to the relief sought in paragraph 31 of the Complaint.

SECOND CLAIM FOR RELIEF

32. In response to the allegations contained in paragraph 32 of the Complaint, PCS repeats and incorporates by reference, as if fully set forth herein, its responses to Paragraphs 1 through 31 of the Complaint.

33. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint and, therefore, denies the same.

34. PCS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of the Complaint and, therefore, denies the same.

35. PCS denies the factual allegations and legal conclusions contained in paragraph 35 of the Complaint.

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36. PCS denies the factual allegations and legal conclusions contained in paragraph 36 of the Complaint.

37. PCS denies each allegation and conclusion asserted in the Complaint not otherwise admitted, controverted or denied in paragraphs 1 through 36 above.

ADDITIONAL AND AFFIRMATIVE DEFENSES

FIRST DEFENSE

38. Plaintiff's Complaint is barred because Plaintiff lacks standing to bring this lawsuit.

SECOND DEFENSE

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

THIRD DEFENSE

40. Plaintiff's Complaint is barred because Plaintiff is a covered person under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

FOURTH DEFENSE

41. Plaintiff's Complaint is barred because Plaintiff is not an innocent purchaser under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b).

FIFTH DEFENSE

42. Plaintiff's Complaint is barred because Plaintiff is not a bona fide prospective purchaser as defined under Section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

SIXTH DEFENSE

43. Plaintiff's Complaint against PCS is barred because Plaintiff has assumed the liabilities of the former owners and operators of the Charleston Site.

SEVENTH DEFENSE

44. Plaintiff's Complaint against PCS is barred because PCS is not a liable or responsible party within the meaning of CERCLA.

EIGHTH DEFENSE

45. If the predecessor of PCS assumed liability for the site from Old Columbia Nitrogen, which PCS denies, Plaintiff is not entitled to the relief against PCS because any disposal of hazardous substances within the meaning of CERCLA, as alleged in the Complaint, occurred during a period of ownership or operation of the Charleston Site when Old Columbia Nitrogen, whose liabilities PCS's predecessor allegedly assumed, did not own or operate the site.

NINTH DEFENSE

46. Since Plaintiff or its predecessor corporation(s), to whose liabilities Plaintiff has succeeded, bear substantial responsibility for any environmental contamination that might exist, any costs associated therewith must be allocated accordingly, and Plaintiff should recover nothing from PCS.

TENTH DEFENSE

47. Plaintiff is not entitled to the relief sought in the Complaint insofar as Plaintiff has failed to mitigate its damages.

ELEVENTH DEFENSE

48. Plaintiff is not entitled to the relief sought in the Complaint insofar as any damages sustained or response costs incurred by Plaintiff or its predecessor corporation(s) are the result of their own actions or omissions.

TWELFTH DEFENSE

49. Plaintiff's Complaint against PCS is barred insofar as it seeks to recover any costs, expenses or other damages other than response costs as defined by CERCLA.

THIRTEENTH DEFENSE

50. The conditions complained of in Plaintiff's Complaint were caused and/or contributed to by a person or persons other than PCS and for whose actions PCS is not legally responsible.

FOURTEENTH DEFENSE

51. Plaintiff's Complaint against PCS is barred because any damages or costs were caused by the intervening or superseding acts or omissions of third parties other than an employee or agent of PCS or any predecessor to whose liabilities it has succeeded and because the circumstances and requirements of Section 107(b)(3) of CERCLA, 42 U.S.C. §9607(b)(3), are met.

FIFTEENTH DEFENSE

52. Plaintiff is not entitled to the relief it seeks since it failed to exercise due care with respect to, or take reasonable steps to respond to, the alleged release or threat of release of hazardous substances at the Charleston Site.

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SIXTEENTH DEFENSE

53. Plaintiff's Complaint against PCS for contribution is barred to the extent its alleged response costs were (i) incurred in a manner inconsistent with the National Contingency Plan (ii) were not necessary and/or (iii) are not recoverable under CERCLA or the National Contingency Plan.

SEVENTEENTH DEFENSE

54. Plaintiff's Complaint against PCS is barred because any harm alleged to be caused by PCS or any of its predecessors is divisible from any harm or any release or threat of release of hazardous substances which caused or allegedly caused Plaintiff to incur response costs.

EIGHTEENTH DEFENSE

55. Plaintiff's claims are barred because Plaintiff or its predecessor corporation(s), to whose liabilities Plaintiff has succeeded, has, in whole or in part, caused, contributed to or exacerbated the conditions complained of in Plaintiff's Complaint.

NINETEENTH DEFENSE

56. Plaintiff is liable for some or all of the amounts alleged in Plaintiff's Complaint under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.

TWENTIETH DEFENSE

57. To the extent that PCS is liable for costs or damages, if any, associated with alleged environmental contamination at the Charleston Site, which PCS denies, such liability is limited to PCS's allocable fair share of such costs pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613.

TWENTY-FIRST DEFENSE

58. PCS intends to rely upon all other applicable affirmative defenses as may become apparent during the course of this action and reserves the right to amend its Answer accordingly.

COUNTERCLAIM

1. Ashley is the owner of the property which comprises the Charleston Site and is the subject of Ashley's Complaint.

2. Ashley alleges in its Complaint that the Charleston Site is a "facility" under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), at which "hazardous substances" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), have been released into the environment. If so, as the owner of the Charleston Site, Ashley is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

3. If the site is a facility, and if releases of hazardous substances have occurred there, then, as the owner and operator of the Charleston Site property, Ashley is jointly and severally liable for costs of response pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

4. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section

107(a) of CERCLA, 42 U.S.C. § 9607(a). If PCS is liable for response costs at the site under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), which PCS denies, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Ashley for any costs of response incurred by PCS at the Charleston Site or for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

5. To the extent PCS is found to have any liability for response costs at the Charleston Site, Ashley is liable to PCS for contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

WHEREFORE, PCS requests that this Court deny all relief sought by Ashley against PCS, enter judgment in favor of PCS and against Ashley, dismiss Ashley's Complaint with prejudice, award PCS its costs, attorney's fees and expenses, and grant such other and further relief as this Court deems just and proper. In the event that PCS is determined to have any liability with respect to the Charleston Site, PCS requests that this Court enter an order determining Ashley's liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f) determining that Ashley is liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Ashley's share of any amounts for which PCS is found to be liable; and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Ashley is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

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THIRD-PARTY COMPLAINT AGAINST ROSS DEVELOPMENT CORPORATION (CERCLA 107(a)(2) Past Owner and Operator)

6. Planters' Fertilizer and Phosphate Company ("Planters") was incorporated in South Carolina in 1906. From approximately that time until 1966, Planters owned and operated the Charleston Site. Planters produced phosphate fertilizer at the site. In 1966, Planters changed its name to Ross Industrial Products, Inc. Thereafter, in 1970, Ross Industrial Products, Inc. changed its name to Ross Development Corporation ("Ross").

7. In December, 1983, Ross filed a declaration of its intent to dissolve with the Secretary of State of South Carolina. However, the company was not dissolved.

8. On September 11, 2006, on information and belief with the intent to evade the liabilities associated with the operations described above, Ross filed its Articles of Dissolution with the Secretary of State.

9. This Court has jurisdiction of the subject matter of the claims against Ross because the claims arise under federal law pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).

10. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

11. Planters' production of phosphate fertilizers at the Charleston Site involved reacting phosphate ores with sulfuric acid to produce phosphoric acid, the building block of nitrogen-phosphate potassium (N-P-K) agricultural fertilizers. The production process included two components: the production of sulfuric acid using the lead acid chambers process, and the granulation, bagging and storage of the fertilizer. During the early years of

the phosphate fertilizer industry, pyrite ore was used as the source of sulfur. The pyrite ore was crushed and roasted, creating sulfur dioxide gas. The sulfur dioxide gas was reacted with oxygen to create sulfur trioxide gas. Sulfuric acid was produced as water flowing downward through a Glover Tower came into contact with rising sulfur trioxide gas. The sulfuric acid was stored on-site in large chambers insulated with sheet lead. Environmental impacts EPA found associated with the phosphate fertilizer manufacturing facilities at the Charleston Site included elevated levels of metals, particularly lead and arsenic in soil, groundwater, and sediment, as well as acidic pH conditions.

12. CERCLA authorizes contribution claims for cost recovery to be filed against any person, such as Ross, who owned or operated a site at the time that hazardous substances were disposed of and/or released into the environment. 42 U.S.C. 9607(a)(2). PCS's claims against Ross are brought pursuant to that section since, as described below, hazardous substances were disposed of and/or released at the site at the time Ross owned and operated it.

13. From on or around 1906 until 1966, Ross was the "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

14. During the period of Ross' ownership and operation of the Charleston Site, as described above there was a "disposal" of "hazardous substances" as those terms are defined under Section 101(14) and Section 101(29) of CERCLA, 42 U.S.C. §§ 9601(14) and (29).

15. Ross is a "person" as defined in Section 101(21), CERCLA, 42 U.S.C. § 9601(21).

16. Pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of is liable for, among other things, all costs of removal or remedial action incurred by the United States not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

17. As the owners and operators of the Charleston Site property at a time of a disposal of hazardous substances, Ross is liable pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

18. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

19. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Ross for any necessary costs of response incurred by PCS at the Charleston Site.

20. PCS is entitled to contribution from Ross for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

WHEREFORE, PCS requests that this Court enter an order determining Ross' liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section

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113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that Ross is liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Ross' share of any amounts for which PCS is found to be liable and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Ross is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

THIRD-PARTY COMPLAINT AGAINST KONINKLIJKE DSM N.V.

21. Koninklijke DSM N.V. ("DSM N.V.") is a corporation existing under the laws of the Kingdom of the Netherlands. Prior to 2002, DSM N.V. was known as Naamloze Vennootschapp DSM. In 2002, its name was changed to Koninklijke DSM N.V.

22. DSM N.V. is the sole shareholder of DSM Chemicals North America, Inc. ("DCNA").

23. This Court has jurisdiction over the subject matter of the claims against DSM N.V. pursuant to 42 U.S.C. § 9613(b). To the extent the derivative CERCLA claims are either grounded on or arise under state as opposed to federal law, jurisdiction is proper under 27 U.S.C. § 1367.

24. This Court has personal jurisdiction over DSM N.V. As described below, DSM N.V. has purposely availed itself of the benefits of transacting business in the State of South Carolina, regularly and systematically transacted business in the State of South Carolina, and has tortiously committed acts that have caused injury in South Carolina.

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25. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST KONINKLIJKE DSM N.V.
(Derivative CERCLA Liability: Alter Ego Doctrine)

26. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Under the alter ego doctrine, parent corporations can be derivatively liable if they controlled the actions of their subsidiary. Recent discovery in this case indicates that DSM N.V. and DCNA have exercised dominion and control over Old Columbia Nitrogen and related assets and privileges for decades and, as a result, are responsible for the contamination Old Columbia Nitrogen caused at the Charleston Site. According to documents recently produced and depositions newly taken, DSM N.V. and DCNA controlled the operation of Old Columbia Nitrogen; dissolved Old Columbia Nitrogen for the purpose of achieving favorable tax treatment for DSM N.V.; transferred to DSM N.V. and DCNA, for little to no consideration, all assets of Old Columbia Nitrogen not sold to New Columbia Nitrogen; and, to the present day, assert control over documents, assets, and privileges belonging to Old Columbia Nitrogen. In light of this conduct, DSM N.V. and DCNA should be held liable for any and all costs associated with the release of hazardous substances caused by Old Columbia Nitrogen and PCS should be permitted to seek contribution from them.

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27. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 21 through 25 of the Third-Party Complaint Against Koninklijke DSM N.V. as if restated herein.

28. From 1962 through 1972, DSM N.V. owned Old Columbia Nitrogen as a joint venture. In February 1972, DSM N.V. purchased all stock in Old Columbia Nitrogen. Later the same month DSM N.V. transferred all stock in Old Columbia Nitrogen to DCNA. In September 1986, DCNA transferred all stock in Old Columbia Nitrogen to DSM North America, Inc. ("DSMNA"), a wholly owned subsidiary of DSM N.V.

29. For decades, DSM N.V. and DCNA acted to control the operations of Old Columbia Nitrogen, including without limitation as follows:

a. During much of the existence of Old Columbia Nitrogen most or all of the directors and officers of Old Columbia Nitrogen were the same as the directors and officers of DCNA. Those directors and officers made decisions related to Old Columbia Nitrogen generally, and the Charleston Site in particular, while considering the best interests of DSM N.A. and DCNA. Among other things, those directors and officers directed the ongoing operation of the Charleston Site and determined when such operations should be discontinued.

b. In the mid 1980s, DSM N.V. and DCNA decided that Old Columbia Nitrogen and its parent DSMNA should be dissolved to obtain favorable tax treatment for DSM N.V.

c. As noted below in paragraph 41 of the Third-Party Complaint Against DSM N.V. and by reference incorporated herein, in 1986, DSM N.V. and DCNA transferred to themselves all assets not sold to New Columbia Nitrogen.

d. DSM N.V. and DCNA have exercised dominion and control over insurance policies covering the Charleston Site despite repeated requests for access.

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30. Further evidence of the control DSM N.V. and DCNA exerted over Old Columbia Nitrogen, and continues to assert over its assets, is apparent from the fact that all assets in the possession of Old Columbia Nitrogen at the time of its 1986 dissolution came under the control of DSM N.V. and DCNA, including those related to Charleston Site. Recent discovery has shown that books and records related to the Charleston Site were kept by DCNA rather than sent to New Columbia Nitrogen and that, *to this day*, DCNA asserts attorney client privilege over Old Columbia Nitrogen documents related to the Charleston Site, and will not provide them because, according to the former general counsel for Old Columbia Nitrogen and DCNA, they could impact the company's position.

31. As a result, DSM N.V. and DCNA are derivatively liable, pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

32. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

33. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from DSM N.V. and DCNA for any necessary costs of response incurred by PCS at the Charleston Site.

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34. PCS is entitled to contribution from DSM N.V. and DCNA for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

SECOND CLAIM FOR RELIEF AGAINST KONINKLIJKE DSM N.V.
(Derivative CERCLA Liability: Trust Fund Doctrine)

35. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Under the trust fund doctrine an entity who knows or should know of the potential liability of a subsidiary can not take the assets and benefits of that subsidiary, and leave it with no assets to cover the liability. Discovery recently taken in this case reveals that Old Columbia Nitrogen knew of contamination at the Charleston Site. According to witness statements recently filed with this Court, by the time the Charleston Site was dismantled there was a significant concern regarding environmental liabilities. In light of the control DSM N.V. and DCNA exercised and still exercise over Old Columbia Nitrogen they knew or should have known of these environmental liabilities at the Charleston Site. Notwithstanding, DSM N.V. and DCNA failed to provide for these liabilities at the time of Old Columbia Nitrogen's dissolution. Instead, DSM N.V. and DCNA had all Old Columbia Nitrogen assets transferred to their benefit. As such, this Court is permitted to -- and should -- impose a constructive trust upon the assets improperly transferred to DSM N.V. and DCNA.

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36. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 21 through 25 and 28 through 30 of the Third-Party Complaint Against Koninklijke DSM N.V. as if restated herein.

37. Discovery recently taken in this case has revealed that Old Columbia Nitrogen's activities at the Charleston Site substantially contributed to the contamination of the Charleston Site property and thus rendered Old Columbia Nitrogen a "covered person" within the meaning of Section 107(a)(2) of CERCLA.

38. That discovery includes, but is not limited to, the following:

a. The witness statement of John Hardwick was filed with the Court on November 2, 2006. That statement asserts that Mr. Hardwick will testify that by the time Old Columbia Nitrogen dismantled the facility at the Charleston Site, there were significant concerns about environmental liabilities at the Charleston Site.

b. The deposition of Wallace Benson was taken on November 15, 2006. Mr. Benson testified that during the time he worked at the Charleston Site from the late 1960s to the early 1970s, there was lead strewn about as a result of hapless disposal, leaking lead-lined acid chambers, and lead soldering. Mr. Benson further testified that the Old Columbia Nitrogen plant supervisor and Old Columbia Nitrogen employees from Augusta visited the site, including the areas where the lead was located.

c. As indicated above, DSM N.V. and DNCA exercised control over Old Columbia Nitrogen and therefore would have had the same access to the information about environmental liabilities at the Charleston Site as did Old Columbia Nitrogen.

39. Old Columbia Nitrogen, DSM N.V., and DCNA also knew they must account for any unknown environmental liabilities. This understanding is clear from recently taken depositions and documents drafted at the time of the acquisition.

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a. William Bivins, in-house counsel for Old Columbia Nitrogen from 1980 to 1986 and in-house counsel for DCNA from 1980 to 2002, testified on November 13, 2006, that he was familiar with CERCLA at the time of the Acquisition Agreement, knew that unknown environmental liabilities must be accounted for and remembered that they had contemplated if DSM N.V. or DCNA should be responsible. Mr. Bivins further testified that DSM decided to transfer all Old Columbia Nitrogen assets and dissolve it and DSMNA to obtain a $100,000,000.00 tax credit for DSM N.V. Finally, to retain that tax credit DSM had to assure that no assets or liabilities could come back to Old Columbia Nitrogen.

b. A checklist drafted by Shearman & Sterling, counsel for Old Columbia Nitrogen notes hat as part of the sale of specified assets to New Columbia Nitrogen any unknown environmental obligations would go to DSM N.V.

c. Another memorandum drafted during the period of the acquisition by an officer of Old Columbia Nitrogen and DCNA noted that unknown liabilities would not be assumed by the buyer and contemplated whether DSM N.V. could avoid jeopardizing the favorable tax treatment for DSM N.V. that instigated the decision to sell Old Columbia Nitrogen.

40. Old Columbia Nitrogen, DSM N.V., and DCNA did not disclose those concerns to New Columbia Nitrogen when it purchased specified assets and assumed certain liabilities of Old Columbia Nitrogen by means of the Acquisition Agreement – an agreement with an effective date of October 31, 1986. Stephen Magida, a member of the team that negotiated the Acquisition Agreement on behalf of New Columbia Nitrogen testified that CERCLA liability with respect to the assets they were acquiring was a concern for New Columbia Nitrogen. Mr. Magida further testified that because New Columbia Nitrogen did not acquire assets or assume liabilities related to the Charleston Site, those assets and liabilities remained with Old Columbia Nitrogen.

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41. DSM N.V. and DCNA had all assets not purchased by New Columbia Nitrogen transferred to themselves for little or no consideration through the following transactions:

a. On October 31, 1986, Old Columbia Nitrogen transferred real property located in Augusta, Georgia to DCNA for $10.00.

b. On November 3, 1986, Old Columbia Nitrogen transferred all "Retained Assets" to DCNA, including equipment, 50% ownership of Augusta Service Company, and other specified property.

c. On November 3, 1986, Old Columbia Nitrogen also assigned specified contracts and leases to DCNA and Augusta Service Company, then 50% owned by DCNA.

d. On November 19, 1986, Old Columbia Nitrogen assigned DSMNA promissory notes totaling $27,500,000.00.

e. On November 21 and 24, 1986, Old Columbia Nitrogen distributed to DSMNA a total of $14,450,759.58 in cash representing final distribution of all Old Columbia Nitrogen assets.

f. On November 26, 1986, DSMNA transferred the $27,500,000.00 promissory notes received from Old Columbia Nitrogen to DSM N.V.

g. On November 26, 2986 DSMNA also turned over to DSM N.V. all remaining assets, including a term loan to New Columbia Nitrogen worth $15,122,876.71 and cash transfers totaling $17,483,234.85.

42. At the same time, DSM N.V. and DCNA dissolved Old Columbia Nitrogen and its sole shareholder, DSMNA:

a. On September 25, 1986, the board of directors of Old Columbia Nitrogen adopted a plan of liquidation providing, among other things, for the dissolution of Old Columbia Nitrogen.

b. On September 25, 1986, the board of directors of DSMNA, a wholly-owned subsidiary of DSM N.V., also adopted a plan of liquidation providing, among other things, for the dissolution of DSMNA.

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43. On November 19, 1986, Certificates of Dissolution for Old Columbia Nitrogen (then operating as Augusta Liquidating Company) and DSMNA were filed with the office of the Delaware Secretary of State, hereby affecting the dissolution of both those corporations pursuant to Delaware law.

44. Under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" is a "covered person" who has liability for response costs and other damages attributable to environmental contamination stemming from the disposal and/or release of hazardous substances.

45. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

46. Accordingly, if New Columbia Nitrogen is determined to be the successor to Old Columbia Nitrogen, then PCS, as the successor to the rights and liabilities of New Columbia Nitrogen, would have the right to seek contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), from Old Columbia Nitrogen, had Old Columbia Nitrogen not been dissolved.

47. Under the trust fund doctrine, when a dissolving corporation knows or has reason to know it has creditors, and dissolves without sufficient reserves, those creditors have an equitable right to follow the assets of the dissolved corporation and to impress a constructive trust upon them.

48. DSM N.V. was effectively the sole shareholder of Old Columbia Nitrogen at the time that Old Columbia Nitrogen dissolved on November 19, 1986, because on that date, DSM N.V. was the sole shareholder of DSMNA, and DSMNA, the sole shareholder of Old Columbia Nitrogen, itself dissolved on November 19, 1986.

49. Consequently, PCS, pursuant to its right to seek contribution from Old Columbia Nitrogen under Section 113(f) of CERCLA, 42 U.S.C. § 9613, had Old Columbia Nitrogen not been dissolved, has the right to seek satisfaction of that claim from the assets of Old Columbia Nitrogen that were transferred to DSM N.V. and DCNA in October and November 1986. Pursuant to the trust fund doctrine, this Court should, in order to satisfy PCS's CERCLA contribution claim with respect to the Charleston Site, impress a constructive trust upon the assets of Old Columbia Nitrogen that were transferred to DSM N.V. and DCNA in October and November 1986.

WHEREFORE, PCS requests the following:

First, that this Court enter an order determining that DSM N.V. is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that DSM N.V. is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of what would be DSM N.V.'s share of any amounts for which PCS is found to be liable; enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), determining

that DSM N.V. is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Second, that this Court impress a constructive trust, in favor of PCS, upon the assets distributed by Old Columbia Nitrogen to DSM N.V. (via DSMNA), for the purpose of satisfying any rights to contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), that PCS would have had against Old Columbia Nitrogen, were Old Columbia Nitrogen still in existence, in connection with PCS's liabilities, under Section 107 of CERCLA, 42 U.S.C. § 9607, relating to the Charleston Site.

THIRD-PARTY COMPLAINT AGAINST DSM CHEMICALS NORTH AMERICA, INC.

50. DCNA is a Delaware corporation. DCNA was originally incorporated in Delaware on November 5, 1963 as Columbia Nipro Corporation, which changed its name to Nipro, Inc. effective March 22, 1971. Nipro, Inc. changed its name to DSM Chemicals Augusta, Inc., effective August 3, 1987. DSM Chemicals Augusta, Inc., changed its name to DSM Chemicals North America, Inc., effective October 19, 1989.

51. This Court has jurisdiction over the subject matter of the claims against DSM N.V. pursuant to 42 U.S.C. § 9613(b). To the extent the derivative CERCLA claims are either grounded on or arise under state as opposed to federal law, jurisdiction is proper under 27 U.S.C. § 1367.

52. This Court has personal jurisdiction over DCNA. As described below, DCNA has purposely availed itself of the benefits of transacting business in the State of South

Carolina, regularly and systematically transacted business in the State of South Carolina, and has tortiously committed acts that have caused injury in South Carolina.

53. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST DSM CHEMICALS NORTH AMERICA, INC. (Derivative CERCLA Liability: Alter Ego Doctrine)

54. PCS re-alleges and incorporates by reference the allegations contained in paragraphs 22, 26, and 28 through 42 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc. as if restated herein.

55. For the reasons stated therein, DCNA should be held responsible for any and all contamination caused by their alter ego Old Columbia Nitrogen.

SECOND CLAIM FOR RELIEF AGAINST DSM CHEMICALS NORTH AMERICA, INC. (Derivative CERCLA Liability: Trust Fund Doctrine)

56. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 22, 28 through 30, and 35 through 49 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc as if restated herein.

57. For the reasons stated therein, this Court is permitted to – and should – impose a constructive trust upon the funds improperly transferred to DCNA.

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THIRD CLAIM FOR RELIEF AGAINST DSM CHEMICALS NORTH AMERICA, INC. (Derivative CERCLA Liability: Mere Continuation)

58. Under CERCLA, all owners or operators who contribute to environmental hazards are liable for remediation costs, even if they no longer own or operate the property, if at the time they owned or operated it hazardous substances were disposed of and/or released into the environment. Recent discovery in this case indicates that DCNA purchased specified assets from Old Columbia Nitrogen for little to no consideration and operated as a mere continuation of the Old Columbia Nitrogen business entity. DCNA is, therefore, liable for the contamination Old Columbia Nitrogen caused to the Charleston Site and should be required to contribute to its remediation.

59. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 22, 28 through 30, and 35 through 42 of the Third-Party Complaint Against Koninklijke DSM N.V. and paragraphs 50 through 53 of the Third-Party Complaint Against DSM Chemicals North America, Inc. as if restated herein.

60. DCNA and Old Columbia Nitrogen had the same ultimate shareholder, DSM N.V.

61. DCNA and Old Columbia Nitrogen had nearly identical officers and directors.

62. DCNA purchased assets from Old Columbia Nitrogen, including real and personal property, for less than fair market value.

63. The assets were purchased at the time Old Columbia Nitrogen, DSM N.V., and DCNA knew about the potential environmental liabilities of Old Columbia Nitrogen.

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Old Columbia Nitrogen, DSM N.V., and DCNA intended that DCNA not assume those environmental liabilities and, thus, Old Columbia Nitrogen and DSM N.V. intentionally, if not fraudulently, transferred the assets to DCNA so that they would not be available as assets from which Old Columbia Nitrogen could make provision for environmental liabilities as part of its dissolution.

64. Consequently, DCNA is liable in contribution and responsible for the remediation costs associated with the Charleston Site.

WHEREFORE, PCS requests the following:

First, that this Court enter an order determining that DCNA is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that DCNA is liable for any Charleston Site liability that Old Columbia Nitrogen, if still in existence, would have to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of what would be DCNA's share of any amounts for which PCS is found to be liable; enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), determining that DCNA is liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Second, that this Court impress a constructive trust, in favor of PCS, upon the assets distributed by Old Columbia Nitrogen to DCNA, for the purpose of satisfying any rights to contribution, under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), that PCS would have had against Old Columbia Nitrogen, were Old Columbia Nitrogen still in existence, in

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connection with PCS's liabilities under Section 107 of CERCLA, 42 U.S.C. § 9607 relating to the Charleston Site.

Third, that this Court enter an order that DCNA acted as a mere continuation of Old Columbia Nitrogen and, as a result, is liable in contribution and responsible for the remediation costs associated with the Charleston Site.

THIRD-PARTY COMPLAINT AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.

65. James H. Holcombe is an individual residing in Charleston County, South Carolina.

66. J. Henry Fair, Jr. is an individual residing in Charleston County, South Carolina.

67. Holcombe Enterprises, L.P. is a limited liability partnership formed by Mr. Holcombe on December 31, 1997.

68. This Court has jurisdiction over the subject matter of the claims because the claims arise under federal law pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).

69. Venue is proper in this district pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

FIRST CLAIM FOR RELIEF AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.
(CERCLA § 107(a)(2) – Past Owner and Operator)

70. CERCLA authorizes contribution claims against persons that were past owners and operators of sites from which hazardous substances were disposed of and/or released into the environment at the time such hazardous substances were disposed of and/or

released into the environment. 42 U.S.C. 9607(a)(2). As discussed below, Mr. Holcombe, Mr. Fair, and Holcombe Enterprises owned and operated the Charleston Site at the time of the release of hazardous substances and, as such, are liable in contribution for the costs of any remediation.

71. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 63 through 69 as if stated herein.

72. On, or about May 3, 1985, Mr. Holcombe and Mr. Fair purchased the Charleston Site from Old Columbia Nitrogen. When the property was sold to Mr. Holcombe and Mr. Fair, who then were long-time realtors in the area, they agreed to accept the property in its then current condition. Mr. Holcombe and Mr. Fair knew the property had been previously used to process fertilizer products. On or about December 31, 1997, Mr. Holcombe conveyed his interest in the property to his partnership, Holcombe Enterprises.

73. Holcombe Enterprises and Mr. Fair sold the Charleston Site property to Ashley in or about August, 2003. Pursuant to a Fourth Amendment to contract of sale, Holcombe Enterprises and Mr. Fair acknowledged their potential liability at the site, having sought and received from Ashley an indemnification for past response cost claims in an amount not to exceed $2,700,000 with, among other things, Holcombe Enterprises and Mr. Fair retaining liability for 50% of the first $400,000 past cost claims.

74. Mr. Holcombe, Holcombe Enterprises and Mr. Fair are each "persons" as defined in Section 101(21) CERCLA, 42 U.S.C. § 9601(21).

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75. From on or around May 3, 1985 until August, 2003, Mr. Fair was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

76. From on or around May 3, 1985 until August, 2003, Mr. Holcombe was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

77. From on or around December 31, 1997 to August 2003, Holcombe Enterprises, L.P. was an "owner" and "operator" of the Charleston Site as defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

78. During this time period, Mr. Holcombe, Holcombe Enterprises, and Mr. Fair exacerbated rather than abated the conditions of the Charleston Site by affirmatively causing various hazardous substances to be disposed of and/or released into the environment. For example, at their direction, a number of pits were dug into the earth to a depth of approximately seven to ten feet below the surface and the water table was encountered. As a result of the construction of these pits, corresponding road cuts and other associated activities, the groundwater and surface were materially disturbed thereby causing hazardous substances to be disposed of and/or released into the environment. None of these on-site activities was done with the consent much less the approval of EPA or the State of South Carolina. Subsequent analysis of representative samples taken of subsurface soils and the waste materials described in the preceding sentence indicated that some of the materials would be considered to be "characteristically hazardous wastes," as those terms are defined

under 42 U.S.C. §6903(5) and interpreted by EPA and the South Carolina Department of Health and Environmental Control.

79. Mr. Holcombe and Mr. Fair were informed that the presence of the leaching and/or leaking materials described in the preceding paragraph could constitute an ongoing release of hazardous substances under CERCLA. But neither Mr. Holcombe nor Mr. Fair took any affirmative steps to mitigate the harm, including releases of hazardous substances caused by these actions. Nor did Mr. Holcombe or Mr. Fair report the results of the findings to EPA or the State of South Carolina pursuant to any applicable release reporting requirement set forth in CERCLA 42 U.S.C. § 9603 or other applicable federal or state law, so that any state or federal agency could investigate to determine what remedial action should then be undertaken to address the releases at the site.

80. The environmental actions described in the preceding paragraph by Mr. Holcombe and Mr. Fair were not isolated instances of conduct that each knew or was reasonably likely to cause releases, leaching, leaking, and/or the disposal of site-related contaminants into the environment. By a letter dated November 5, 1998, EPA informed Mr. Holcombe and Mr. Fair that, due to site conditions, including the ongoing releases of contaminants into the environment, EPA believed future remedial action at the site would be necessary to more adequately protect human health and the environment from exposure to site-related constituents that were regularly being released at the site. EPA specifically noted its "greatest concern" was the "quality of surface water which is transported to the tidal marsh adjacent to the Ashley River during rainfall events." According to sampling data

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obtained by EPA at the time, the surface water had, among other things, a pH level of 2.8, lead level of 3.6 mg/l, and arsenic level of 2.2 mg/l.

81. On November 12, 1998, EPA informed Mr. Holcombe and Mr. Fair that due to the quality of uncontrolled storm water runoff at and from the site, EPA was considering commencing an emergency removal action at the site unless Mr. Holcombe and Mr. Fair, among other things, implemented a comprehensive surface water management plan that would be subject to the review and approval of EPA and the State of South Carolina. Neither Mr. Holcombe nor Mr. Fair, however, ever adopted such a plan, thereby allowing and/or causing releases, leaching and/or the disposal of site-related contaminants to continue largely unabated at the Charleston Site.

82. In fact, the actions taken by Mr. Holcombe and Mr. Fair were not only plainly inadequate but actually served to materially exacerbate site conditions. For example, in December, 1998, in response to Mr. Holcombe and Mr. Fair's submission of information to EPA regarding the proposed locations for a storm water drainage basis, EPA expressed its concern that the purported protocol for land disturbance activities near "coastal/critical areas was not followed." Subsequently, it was learned by EPA and the State of South Carolina that Mr. Holcombe and Mr. Fair had actually constructed one or more ponds at the site and filled another pond in with fill material – all without approval by EPA and the State of South Carolina and in a manner that caused environmental harm. Based on these actions, which caused contaminated material at the site to be exposed to environmental conditions (i.e., the air, wind, and water) and disposed of and/or released into the environment, Mr. Holcombe and Mr. Fair were assessed fines by the State of South Carolina.

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83. In the Spring of 1999, in light of Mr. Holcombe's and Mr. Fair's chronic indifference to the increasingly worsening of environmental conditions caused by their own actions, EPA informed Mr. Holcombe and Mr. Fair that EPA was proceeding with proposing that the site be added to the NPL.

84. EPA further informed Mr. Holcombe and Mr. Fair that EPA considered them to be responsible parties under CERCLA.

85. Aerial photographs taken of the site show that large portions of the Charleston Site were cleared and filled during the period of time that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair owned and operated it. These observations confirm the suspicions expressed by EPA personnel that Mr. Holcombe and Mr. Fair engaged in a wide-range of actions at the site that they not only concealed from the agency and the public, but also that contributed to the worsening conditions at the site.

86. During the period of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's ownership and operation of the Charleston Site, there was a "disposal" of "hazardous substances" as those terms are defined under Section 101(14) and Section 101(29) of CERCLA, 42 U.S.C. §§ 9601(14) and (29).

87. During the period of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's ownership and operation of Charleston Site, EPA incurred costs of "removal or remedial" action in connection with the site, as these terms are defined in Sections 101(23), (24) and (25) of CERCLA, 42 U.S.C. § 9601(23), (24) and (25) and 42 U.S.C. § 9607(a).

88. Pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

89. As the owners and operators of the Charleston Site property at a time of a disposal of hazardous substances, Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are each jointly and severally liable pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

90. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

91. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any necessary costs of response incurred by PCS at the Charleston Site.

92. PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

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SECOND CLAIM FOR RELIEF AGAINST JAMES HOLCOMBE, HENRY FAIR AND HOLCOMBE ENTERPRISES, L.P.
(CERCLA 107(a)(1) – Owners and Operator At Time Costs Incurred)

93. CERCLA authorizes contribution claims against persons that own or operate a site at which hazardous substances have been disposed of and/or released into the environment if such a release or threatened release results in response costs being incurred by the United States. 42 U.S.C. 9607(a)(1). Mr. Holcombe, Mr. Fair, and Holcombe Enterprises were owners and operators of the Charleston Site, including when EPA incurred response costs related to the site. As a result, PCS's second contribution claim against Mr. Holcombe, Holcombe Enterprises, and Mr. Fair arises under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

94. PCS re-alleges and incorporates by incorporates by reference the allegations contained in paragraphs 65 through 92 as if stated herein.

95. Because the EPA incurred response costs at the Charleston Site when Mr. Holcombe, Holcombe Enterprises, and Mr. Fair were "owners" and "operators," each is jointly and severally liable pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1).

96. Pursuant to Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), any person who, at the time response costs were incurred by the United States, owned or operated any facility at which such hazardous substances were disposed of and/or or released is liable for, among other things, all costs of removal or remedial action incurred by the United States Government not inconsistent with the National Contingency Plan and any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.

97. Pursuant to Section 113(f) CERCLA, 42 U.S.C. § 9613(f), any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

98. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any necessary costs of response incurred by PCS at the Charleston Site.

99. PCS is entitled to contribution from Mr. Holcombe, Holcombe Enterprises, and Mr. Fair for any costs of response at the Charleston Site for which PCS is found liable to the United States Government or any other person under Sections 107(a), 113(f) or 113(g) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(f) or (g).

WHEREFORE, PCS requests that this Court enter an order determining Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); enter an order under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), determining that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are each liable to PCS for an equitable share of any amounts for which PCS is determined liable; determine the amount of Mr. Holcombe's, Holcombe Enterprises, and Mr. Fair's share of any amounts for which PCS is found to be liable; and enter a declaratory judgment under Section 113(g) of CERCLA, 42 U.S.C. § 9613(g) determining that Mr. Holcombe, Holcombe Enterprises, and Mr. Fair are liable for further response costs and damages at the Charleston Site; and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
PCS NITROGEN INC.

CHARLESTON, SC

January 19, 2007

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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.

OPINION AND ORDER ON 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 (the "Charleston Site"). On July 24, 2015, Defendant Continental Casualty Company ("Continental") filed a motion for summary judgment (the "Motion") asserting that PCS Nitrogen is not the "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

The defendants are alleged to have issued primary and/or umbrella general liability insurance policies to a corporation called "Columbia Nitrogen Corporation" (the "Policies"). Third Amended Complaint ("TAC") ¶¶ 17-32 (Mar. 24, 2015) . 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 (with immaterial variation) 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." *E.g.*, Continental Policy CCP 968 21 95 (attached as Exh. 1 to the Motion) at CCC000208 (emphasis added). The Policies also stated (with immaterial variation), "Assignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon." *E.g., id.* at CCC000214.

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 (Sept. 28, 2007) ("2007 *Ashley II* Findings"). Old CNC sold the Charleston Site to a third party in 1985.

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

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 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 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 was dissolved in 1986. New CNC similarly 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. Complaint, *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, No. 2:05-2782 (D.S.C. Sept. 26, 2005). 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. *Id.* at 9. 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. Brief of Appellant PCS Nitrogen, Inc., *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, No. 11-1662(L), at 17-39 (4th Cir. Apr. 2, 2012) ("PCS Fourth Circuit Brief") ("PCS Is Not a Successor to CNC").

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 before the court (C. Weston Houck, J.) without a jury, and the court entered Findings of Fact and Conclusions of Law on September 28, 2007. 2007 *Ashley II* Findings. 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." *Id.* 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 also 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 factors used in that test, 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 after the trial judge recused himself. The district court (Margaret Seymour, J.) denied reconsideration in an order entered June 2, 2009. Second Amended Order and Opinion, *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, No. 2:05-2782-MBS, at 3 n.2 (D.S.C. May 27, 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. PCS Fourth Circuit Brief at 17-39. The Fourth Circuit affirmed the district court's ruling that New CNC had contractually

assumed Old CNC's environmental liability. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 174-76 (4th Cir. 2013). As the court said, "[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." *Id.* at 176. The Fourth Circuit explicitly did not address the other corporate succession theories used by the district court (the "substantial continuity" test or "consolidation or merger" under South Carolina law). *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." Plaintiff PCS Nitrogen, Inc.'s Omnibus Memorandum of Law in Opposition to Defendants' Summary Judgment Motions (filed Oct. 9, 2015) ("Opp."), at 16.

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." Opp. at 8. 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. Rather, 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—it 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 PCS Nitrogen asserts 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." TAC ¶ 35. But, Continental argues, PCS Nitrogen appealed that holding, and the Fourth Circuit did not affirm on that ground, holding instead 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 indeed PCS Nitrogen is not the corporate successor to Old CNC: 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," which was one of the documents executed as part of the 1986 corporate transaction. Opp. Exh. 1 ("Assignment"). That 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." *Id.* at PCS-INS 0040194. 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 it argues that the Assignment was a "post-loss" assignment, and that under South Carolina law "the no-assignment clauses are unenforceable." Opp. at 8. 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 is 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." Opp. at 16. However, PCS Nitrogen asserts that it may contend it is the corporate successor to Old CNC from a "blank slate," *id.*, and that there is a genuine issue of material fact as to whether it is.

C. The Insurers' Arguments in Reply

Continental (joined by all other insurers) 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 a 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." Defendant Continental Casualty Company's Reply Brief in Further Support of its Motion for Summary Judgment Based on Corporate Succession (filed Nov. 13, 2015), Exh. 1 at 26. 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. *Id.* Exh. 2. 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, but instead supports only assignment of an accrued chose in action. And 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 score (and by failing to respond to Continental's) 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 have 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."

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.

1. 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. There is no dispute 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, so the insurers could have had no obligation to pay "benefits and proceeds" to Old CNC then. Thus, 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.

2. 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; rights under personal contracts cannot be assigned by that party to third persons, even where the contract does not specifically bar such assignment. *Green v. Camlin*, 229 S.C. 129, 133, 92 S.E.2d 125, 127 (S.C. 1956) ("Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relationship of personal credit and confidence."); *see also Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 37, 775 S.E.2d 37, 38-39 (S.C. 2015) (disallowing assignment of malpractice claim against lawyer in part because "The relationship between an attorney and a client . . . 'is founded on the trust and confidence reposed by one person in the integrity and fidelity of another.' ") (citation omitted). *See generally* 29 Richard A. Lord, Williston on Contracts § 74.37 (2003) (discussing non-assignability of rights under contract where confidence in the assignor "is a vital element of the contract").

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. For example, in *Silverman v. Dew*, 182 S.C. 457, 189 S.E. 756 (S.C. 1937), the plaintiff in a car accident case obtained judgment against the defendant and executed judgment by attaching and selling the defendant's car, obtaining only $100. He then sought to sue the defendant's

automobile insurer for collision coverage for damage to the *car* (not for the insured's liability), saying that the insurance coverage transferred to him when he attached it. The Supreme Court rejected the plaintiff's claim, holding that the insurance policy was "the purely personal contract of insurance between the indemnity company and the defendants," and stating, "The insurance policy being a personal contract, did not run with or attach to the thing insured." *Id.* at 460, 189 S.E. at 757. The court rejected that claim even though the damage had occurred prior to the attachment, and the plaintiff was therefore attempting to transfer the policy "post-loss." The court's rejection of the plaintiff's argument makes clear that it rejected allowing a new party to step into a contractual relationship with someone else's insurer, even after "loss." 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 (the Court said, "we need not reach the issue here," *id.* at 344, 745 S.E.2d at 93-94), 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] "Chose" is Law French for "thing." It means "an article of personal property. A chose is a chattel personal, and is either in action [*i.e.*, not in one's possession, but recoverable by an action at law] or in possession." Black's Law Dictionary at 219 (5th ed. 1979). "A 'chose in action' has been variously defined as (1) 'A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort'; (2) 'The right to bring an action to recover a debt, money, or thing' and (3) 'Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.' " *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)).

In *Narruhn*, the plaintiff had obtained a judgment against the insured nightclub for damages for personal injuries and sought to collect insurance proceeds under the nightclub's liability insurance policy. *Id.* at 339, 745 S.E.2d at 91. The issue was whether the insurer, as a non-party to the supplemental proceedings, could move to set aside the order assigning insurance proceeds. *Id.* The Supreme Court held it could not, but that the insurer could assert all defenses in a separate action to recover the proceeds. *Id.* at 343, 745 S.E.2d at 93. Thus, the insured had already suffered a judgment by the time the assignment was made, and, if the judgment was covered, the insurer already had a payment obligation to indemnify the insured, which the Court stated was a chose in action that could be assigned.

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*, meaning assignment to a new entity who sought to substitute itself as the insured for all purposes—which is what PCS Nitrogen seeks here. Opp. at 1. The Supreme Court's comment that "an assignment *after* a loss has already occurred does not require an insurer's consent," *id.* at 344, 745 S.E.2d at 94 (emphasis original), 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. Indeed, the Court explained its "note," leaving no doubt what it meant: " '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 (made by PCS Nitrogen here) that a *contractual relationship* could be assigned without consent. *Narruhn* therefore does not support PCS Nitrogen's argument here.

In its comments, *Narruhn* was only repeating what other South Carolina cases previously said, 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) (insured bank sold, at foreclosure sale, house damaged by fire but had not made a claim against its insurer for the damage and was made whole by selling the house; *held*, purchaser of house could not claim against bank's insurer; "An assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment."); *Rawls v. American Central Ins. Co.*, 97 S.C. 189, 81 S.E. 505 (S.C. 1914) (mortgagee assigned mortgage to third party after fire had destroyed building; new mortgagee had obtained assignment of a chose in action to recover insurance proceeds; "the assignment was sufficient in form to transfer the insurance claim"); *see also Silverman*, 182 S.C. 457, 189 S.E. 756 (personal injury plaintiff who attached and sold car to execute on judgment could not have attached insured defendant's right to payment for amounts due under a collision policy as the insurer had already paid its insured for the damage).

(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.*

Motion Exh. 1 at CCC000213 Condition 5 (emphasis added). In addition, Continental and the other insurers 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." *Id.* at CCC000208. The insured is so "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) (until injured party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured];" "Stated another way, no right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay."). The duty to indemnify and a chose in action to recover an indemnity payment therefore 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 (stating, in dictum, that right to payment of liability insurance proceeds could be assigned after insured was held liable in a judgment).[3]

[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; it 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) (duty to defend is "an obligation to provide personal services [and] is not capable of

Under the policies' language and South Carolina law, therefore, 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.

PCS Nitrogen's effort to argue that South Carolina and other states recognize a "post-loss" exception to the general rule enforcing consent-to-assignment clauses is ineffective. As the case law demonstrates, the real question in determining when an insured may assign rights under an insurance policy, which are otherwise non-assignable, is whether a right has matured into a present right to obtain the insurer's payment, as that right is a form of property (a chose in action), which the law of property declares may not be restrained from alienation. Yet many of the cases addressing assignment of such rights have arisen in the context of first-party insurance (for loss the insured itself suffers, as from fire, wind, theft, etc.), and the insurer's payment obligation arose with the insured-against contingency (the fire, the wind damage, the theft). These cases colloquially refer to the event permitting assignment as the "loss," even though in truth the event they are referring to is the insured contingency and the no-longer-contingent insurance payment obligation arising out of it. Thus, although their language may refer to a "post-loss" exception, they stand for a "chose in action" exception.

Nevertheless, those seeking coverage under liability policies, such as PCS Nitrogen here, seek to use those cases' language to assert that the "loss" permitting assignment under a third-party liability policy is the injury or damage suffered by third-party claimants, even though the

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transfer. . . ;" " 'the insurance carrier could not be obligated to defend a stranger to the contract. . . .;' 'whatever value inheres in the contractual duty of the insurer is personal to the insured.' ") (citation omitted).

insured has no "loss" arising from that injury unless and until it is held liable in a judgment.[4] Through this linguistic focus, they argue that rights under a liability policy may be assigned as soon as underlying third-party injury allegedly occurred.

Since the real question is when the insurer's payment obligation arises, and there is no question under South Carolina law that a liability insurer has no such obligation until the insured is held liable in a judgment, this argument merely distracts from the real issue. The question is not when "loss" occurs, but when a payment obligation arises. Yet even if when "loss" occurs were 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 (insurer has no obligation to injured party "until and unless [the insured] becomes liable to pay"); 2 Allan D. Windt, *Insurance Claims & Disputes* § 6:6 at 6-159 (6th ed. 2013) ("Third-party liability policies require, as a condition precedent to the insurer's liability, that the insured be liable to a third person, by means of either a judgment or a settlement."). As Continental's policy states, Continental agrees to pay "sums which the insured *shall become legally obligated to pay* as damages because of bodily injury or property damage to which the insurance applies." Motion Exh. 1. at CCC000208 (emphasis added).[5] Although the third-party claimant's injury is *one* contingency to that obligation, the most salient contingency—that the insured have "become legally obligated to pay"—does not occur until the

[4] The insurer's payment obligation may also arise when the insured, the claimant and the insurer reach a settlement agreement, as that determines the insured's liability without a judgment. Further, the discussion above assumes that the insurance policy covers the liability at issue. Of course, if the insured is held liable in a judgment for injury not covered by a policy, the payment obligation never arises.

[5] The policies of the other defendants contain similar provisions, as noted in their respective motions/joinders.

claimant obtains a judgment, and that contingency may never occur, if the claimant does not file suit, if he fails to do so timely, if the law of liability does not provide a remedy, if the claimant fails to satisfy his burden of proof on every element of his claim, or if the insured has valid defenses (among other contingencies). In short, there are multiple contingencies beyond the happening of injury that must be fixed for the insured to be liable at all. For liability insurance, therefore, the proper analog to the first-party cases' use of "loss" (the insured contingency, *i.e.*, the fire, the wind damage, the theft) as the point when insurance rights may be assigned is a tort judgment against the insured. *That* is when the nature of the relationship changes from insured-insurer, with the insured risk being uncertain and contingent (and subject to increase by the insured's action or inaction), to debtor-creditor, with the insured risk transformed into actuality (and no longer subject to change).

Furthermore, any rule that permits assignment to a new insured of all policy rights as soon as an underlying injury occurs, even if that injury is unknown to the insured or even the claimant at the time (as may be the case with environmental contamination), necessarily increases the risk to the insurer. This is because the assignment, made prior to the determination of the insured's liability, results in a divorce of interests that the insurer counts on being aligned: the insured's and insurer's common interest in defeating liability. For example, the new entity may seek to cast blame on the insured for the injury, to avoid or diminish its own liability (as PCS Nitrogen did in the *Ashley II* case. For example, in the *Ashley II* litigation, PCS Nitrogen filed a third-party complaint against Old CNC's parent company, Koninkijke DSM, N.V., alleging that "[d]iscovery recently taken in this case has revealed that [Old CNC's] *activities at the Charleston Site substantially contributed to the contamination of the Charleston Site* property and thus rendered [Old CNC] a 'covered person' within the meaning of Section 107(a)(2) of

CERCLA." Amended Answer, Counterclaim and Amended Third-Party Claims of Defendant PCS Nitrogen, *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, No. 2:05-2782 CWH, ¶ 37 at 22 (D.S.C. Jan. 19, 2007) (emphasis added) (Motion Exh. 6). It also alleged that Old CNC had engaged in "hapless disposal" of lead, had "significant concerns about environmental liabilities," and "knew of contamination at the Charleston Site." *Id.* at 21-22. Having thus *helped to establish* Old CNC's liability for the environmental conditions at the Charleston Site, PCS Nitrogen now seeks to recover from the insurers *for that liability.* Further, PCS Nitrogen seeks to recover its attorneys fees for helping to *establish* the insured's liability. It does so even though the Policies cover only costs of *defending* the insured.

Thus, the facts here demonstrate the way an insurer's risk can be dramatically increased when a new entity, not the insured, is alleged to have assumed the insured's liability and seeks to obtain the insured's policy rights without consent. The new entity may have a very strong interest in demonstrating or maximizing the insured's liability, in order to minimize or defeat its own. That interest is directly adverse to the insurer's interest in defeating the insured's liability. This adverse interest is a risk the insurers did not bargain for.

Accordingly, even if the exception allowing assignments notwithstanding the consent-to-assignment clause were called 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, even 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. The cases from other jurisdictions on which PCS Nitrogen relies are not controlling here, but in any event 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." Opp. at 13. 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, that is precisely South Carolina law as well.

Several of the cases cited by PCS Nitrogen in fact involved assignment merely of a chose in action for an accrued money claim, not assignment of policies to make a new person or entity an insured. In *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 328 Ill. 571, 572-73, 575, 160 N.E. 145, 145-46 (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 573, 160 N.E. 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 575, 160 N.E. at 146 (emphasis added). Instead, after the car was stolen the insured's claim "became a chose in action." *Id. See also Citicorp Indus. Credit, Inc. v. Federal Ins. Co.*, 672 F. Supp. 1105, 1105-07 (N.D. Ill. 1987) (thefts had occurred before assignment of assets to creditor; under Missouri

law, "insureds had not assigned the policy at issue, but instead, had assigned a matured claim or debt, which, like any other chose in action, was assignable"); *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388-89 (D.C. 1996) (fire had occurred; "policies for fire insurance are normally considered 'personal' in nature;" but assignment of claim as "chose in action" permitted because after the fire "the relationship of insured and insurer is now one of 'creditor and debtor' "); *Peck v. Public Serv. Mut. Ins. Co.*, 114 F. Supp. 2d 51, 56 (D. Conn. 2000) (permitting assignment to judgment creditor of bad faith claim against insurer "after the loss has occurred *and a judgment has been obtained* against the insured") (emphasis added); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) (windstorm damage had occurred; the "assignment followed the windstorm. After the loss was incurred the issue became not an assignment of the policy, but the assignment of a chose in action—the right to compel defendant's payment"); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001) (following *Kintzel*; after windstorm, "the insurer-insured relationship is more analogous to that of a debtor and creditor"); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 296, 903 A.2d 1219, 1224 (2006) (claimant had entered into settlement agreement with insured prior to verdict, and insured assigned to claimant its claim against insurer; assignment permitted based on Pennsylvania case law stating " 'it is against public policy so to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer an absolute right in the nature of a chose in action' ") (citations omitted). In all of these cases, then, the insurer's payment obligation had accrued, and all that 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, they conform to South Carolina law and do not support PCS Nitrogen here.

Other cases cited by PCS Nitrogen were federal or intermediate appellate cases that misapplied the state law they claimed to enforce. In *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. 2011), the Illinois Appellate Court permitted the insured to assign its liability insurance policies to a purchaser of the insured's assets, even though, as noted above, the Supreme Court of Illinois had made clear in *Ginsburg* that an assignment would be effective only as to a chose in action: that is, only when "nothing remains to be done except pay the money." *Ginsburg*, 328 Ill. at 573, 160 N.E. at 146. *Ginsburg* had also stated that consent *would* be required to assign the policy. *Id.* at 575, 160 N.E. at 146. *Illinois Tool Works* simply failed to adhere to this precedent. Indeed, the Appellate Court stated, "There is little distinction between assignment of an insurance policy and assignment of benefits under a policy." 962 N.E.2d at 1054 n.8. Yet, as *Ginsburg* held, there is a significant difference: A policy cannot be assigned without consent, because such an assignment seeks to transfer a contractual relationship; whereas the accrued right to a money payment can be assigned without consent because it is the property of the insured (money already owing) held in the insurer's hands. 328 Ill. at 575, 160 N.E. at 146.[6] That *Illinois Tool Works* failed to appreciate the distinction shows it is not an authoritative statement of Illinois law. *See also Baird v. Baird*, 567 F.3d 1207, 1213-14 (10th Cir. 2009) (holding that insured's contingent right to recovery under liability insurance policies is part of bankruptcy estate and assignable to tort claimant prior to judgment, even though under Utah law (*Time Fin. Corp. v. Johnson Trucking Co.*, 23 Utah 2d

[6] The Illinois Appellate Court also equated a "future claim" for "defense and indemnification" with a "chose in action." 962 N.E.2d at 1055. Yet a chose in action is not a future contingency—which may or may not occur—but a fixed debt payable to its holder. *Crum v. Sawyer*, 132 Ill. 443, 460, 24 N.E. 956, 960 (1890) (contrasting choses in action, which are "absolutely fixed and *in esse*," with "contingent interests and expectancies"). The fact that the court confused a future contingency with a chose in action makes its analysis all the more unpersuasive.

115, 118, 458 P.2d 873, 875 (1969)) insured could not assign "contractual relationship," but only "money claim"); *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 120 A.3d 959 (App. Div. 2015) (permitting assignment of liability insurance policies to corporate affiliate after environmental contamination occurred, contrary to holding of Supreme Court of New Jersey (*Flint Frozen Foods, Inc. v. Firemen's Ins. Co.*, 8 N.J. 606, 611, 86 A.2d 673, 675 (1952)) that "After a loss has occurred a person may not adopt a policy to which he is a stranger and thereby increase the liability of the insurer."), *cert. granted*, 223 N.J. 404, 125 A.3d 392 (2015).

Of particular note for its failure to adhere to state law is the federal decision in *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939). *Ocean Accident* is premised on the assertion that a "claim" under a liability insurance policy is an assignable "chose in action" immediately upon the occurrence of a claimant's injury, because "the liability of the [liability insurer] arose immediately upon the happening of the accidents resulting in the injuries." *Id.* at 444-45. Yet that assertion is not supported by any of the cases the court cites. One such case held the opposite, holding that an insurer's obligation under an indemnity policy "did not become fixed . . . until plaintiff had paid the judgment." *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 133 S.W. 156, 159 (Mo. App. 1911). Another involved an automobile insurance policy that did not contain a "no action" clause, noting that if such a clause had been included (as it is here)[7] the insurer's liability would not attach until there was a judgment against the insured. *Wehrhahn v. Fort Dearborn Cas. Underwriters*, 1 S.W.2d 242, 244 (Mo. App. 1928). Another involved a specific Missouri statute that fixed the insurer's

[7] *See supra* p.17.

responsibility at the time of the accident,[8] *Schott v. Continental Auto. Ins. Underwriters*, 31 S.W.2d 7, 10 (Mo. 1930), but that case *still* recognized that the insurer had no payment obligation until judgment was entered against the insured, *id.* at 12 ("the obligation on the part of the insurer to pay accrues the moment judgment against the insured has been rendered"). There was therefore no basis for *Ocean Accident's* assertion that an insurer has a payment obligation, or that the insured has a chose in action it can assign, immediately upon the happening of an accident. Rather, Missouri law held that the insured had no chose in action for the insurers' payment until a judgment had been entered against it. *Ocean Accident* contravened the state law it purported to apply.

Finally, yet other cases upon which PCS Nitrogen relies are clearly distinguishable. *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 354 P.3d 302 (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.*, 29 Cal. 4th 934, 62 P.3d 69 (2003). *Fluor*, 61 Cal. 4th at 1219, 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. *Fluor*, 61 Cal. 4th at 1180 & 1224, 354 P.3d 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.[9] Another

[8] There is no such statute here.

[9] PCS Nitrogen 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.

case cited by PCS Nitrogen similarly rejects the "by operation of law" theory. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 490-93, 861 N.E.2d 121, 129-30 (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 483, 861 N.E.2d at 123. *Egger* 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. 588 Pa. at 298-99, 903 A.2d 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) (until injured party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured];" "Stated another way, 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. 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.

The Court disagrees. The insurers have not walked away from their insured, Old CNC. As counsel stated at 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. (Motion Exh. 6 at 17-31)), but 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. And holding it 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 transaction, 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 an assignment in the 1986 transaction, 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.[10] Accordingly, there is no basis for PCS Nitrogen's theory that it obtained Old CNC's insurance rights by assignment.

B. 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.[11] PCS Nitrogen nevertheless argues that it is Old CNC's corporate successor, but in opposition to the Motion asserts only that there is an issue of fact as to that issue: It presents no argument based on the facts of the corporate transaction to support its claim. Moreover, it identifies no issue of fact not resolved in the *Ashley II* case regarding the corporate transaction that would require trial here. Having failed to meet its burden as the non-moving party to show there is an issue of fact, PCS Nitrogen may not simply assert that one exists. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994) (non-moving party "must set forth or point to specific facts showing that there is a genuine issue of material fact"). Indeed, the facts

[10] Attempting to assume the *duties*, as well as obtain the rights, of one party to a contract is not "assignment" at all, 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.

[11] Specifically, the Fourth Circuit affirmed the district court's ruling that PCS Nitrogen contractually assumed Old CNC's environmental liabilities, and it explicitly declined to consider the district court's alternative holdings that New CNC was successor to Old CNC under the "substantial continuity" test and "consolidation or merger" under South Carolina law. *PCS Nitrogen*, 714 F.3d at 173. In this respect, the law is clear that when a judgment is based on alternative holdings, only one of which is upheld on appeal, the non-affirmed alternative holdings have no effect, including *res judicata* effect against the parties. *In re Peters*, 642 F.3d 381, 386 (2d Cir. 2011) (alternative issues not considered in prior appellate proceeding were not "affirmed" and had no *res judicata* effect); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996) ("It is a well-established principle of federal law that if an appellate court considers only one of a lower court's alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation.").

of that transaction 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 score.

Even so, 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

First, 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 a few federal courts, applied federal labor law precedents to cases under 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) (enunciating and applying the "continuity of enterprise" or "substantial continuity" test in CERCLA case to require purchaser of corporate assets to pay clean-up costs for contamination caused by seller, based on "evolving principles of federal common law"). The district court relied on *Carolina Transformer* as its sole authority for using the "substantial continuity" test.

The premise of that 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) (surveying numerous cases and concluding "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. PCS Nitrogen does not argue otherwise.

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

Second, the district court's reliance on South Carolina law regarding when a court may find a "consolidation or merger" to have 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 broadly-worded and unclear 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) (treated as dispositive by *Simmons*, 366 S.C. at 312, 622 S.E.2d at 215); *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 (discussing the "surrounding circumstances" test of *Brown*); *see also Brown*, 128 S.C. at 432, 123 S.E. at 99 (noting exception involves " 'the complete absorption of the old company and its assets, including its franchise' " into the new company) (citation omitted). 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 (which, as shown above, was erroneous because New CNC *did* assume Old CNC's liabilities).

The district court's alternative "corporate succession" rulings therefore have no effect not just 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 the Motion (and the motions and joinders of other defendants) and will enter judgment in favor of the defendants that PCS Nitrogen have and take nothing from them and dismissing all of PCS Nitrogen's claims with prejudice.

DATE: _____

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

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February 18, 2016

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
1701 Main Street, Room 320
Columbia, South Carolina 29202-0192

Re: *PCS Nitrogen, Inc. v. Continental Casualty Company, et al*
Civil Action No.: 2011-CP-10-387
Claim No.: DE000010

Dear Judge Cooper:

This firm represents Defendant Continental Casualty Company ("Continental") in the above-referenced case. With the concurrence of all Defendants, we respectfully submit this Objection to the proposed Order ("Proposed Order") submitted by Plaintiff PCS Nitrogen, Inc. ("PCS Nitrogen") on February 12, 2016. (PCS also submitted a "revised" Proposed Order later that day, making changes to its proposed footnote 1. This Objection applies to both submissions.)

The Proposed Order submitted by PCS would have the Court deny Continental's Motion for Summary Judgment Based on Corporate Succession ("Corporate Succession Motion") (in which all Defendants joined) "but hold[], sua sponte, that the rights and benefits of the insurance policies issued by defendants to Old CNC were assigned to 'New' Columbia Nitrogen Corporation ('New CNC') and that these same rights and benefits were transferred by merger from New CNC to PCS." Proposed Order at 2. PCS Nitrogen did not move for summary judgment on any issue, and it is, of course, not permitted to seek summary judgment in the guise of submitting a proposed order that would grant it an unmade motion, after all briefing and oral argument on the Defendants' motions have been concluded. PCS Nitrogen's effort to seek summary judgment without motion, by having the Court enter summary judgment "*sua sponte*" is plainly inappropriate.

PCS Nitrogen attempts to justify its effort in footnote 2 of the Proposed Order, relying on a 1946 decision of the South Carolina Supreme Court addressing motions for judgment on the pleadings. Proposed Order at 3 n.2. More recent decisions reject the suggestion that South Carolina courts may grant summary judgment to a non-moving party sua sponte. In *South Carolina ex rel. McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (S.C. 1982), the trial court had granted summary judgment to one defendant and then dismissed all remaining defendants *sua sponte*. The Court reversed, saying, "We believe that an order substantially affecting a party's rights should not be made in a case without notice to the party prejudiced by it and an opportunity to be heard." 278 S.C. at 284, 294 S.E.2d at 782. Thus, the Court disapproved of granting motions for summary judgment *sua sponte*.

Similarly, in *Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 407 S.C. 407, 756 S.E.2d 148 (S.C. 2014), the Court reversed the Court of Appeals' decision *sua sponte* granting a non-moving party summary judgment on appeal. It stated that it "need not decide" whether to adopt a rule from other jurisdictions permitting an appellate court to grant summary judgment to a non-moving party "because the limited circumstances wherein an appellate court may grant summary judgment are not present here." *Id.* at 420-21, 756 S.E.2d at 155. One of the "limited circumstances" cited by the Court, not present there, was where the adverse party "had an opportunity to address the issue before the trial court." Id. (citing *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 132 P.3d 825, 830-31 (2006)).

These cases clearly show that the Supreme Court does not permit summary judgment to be granted to a non-moving party without giving the adverse party notice and an opportunity to be heard. PCS Nitrogen's effort should therefore be rejected.

Even so, PCS Nitrogen's request that the Court should enter summary judgment in its favor, because the Corporate Succession Motion presents only a "purely legal question," with "[n]o material facts being in dispute," Proposed Order at 3, demonstrates without question that the Corporate Succession Motion does *not* involve an issue of fact. Thus, the Corporate Succession Motion should be decided on the law, and it cannot be denied on the ground that PCS Nitrogen has identified a genuine issue of material fact. Indeed, the Corporate Succession Motion should be granted on the law, because, as Continental fully explains in its briefs, liability insurance policies may not be assigned to make a new entity the "insured."

PCS Nitrogen makes a similarly flawed request with respect to Continental's and United States Fire Insurance Company's separate Motion for Summary Judgment based on the pollution exclusion ("Pollution Exclusion Motion") (in which multiple defendants joined). In seeking to have the Court *deny* that motion, PCS Nitrogen would have the Court go on to "specifically find[] that PCS is not collaterally estopped . . . from arguing that the pollution exclusion in defendants' policies does not bar its claims for coverage." Proposed Order at 2-3. Even if the Court were to deny the Pollution Exclusion Motion, the Court should decline to grant this, or any, affirmative relief to PCS Nitrogen. PCS Nitrogen did not move or cross-move seeking any relief.

Accordingly, the Defendants respectfully request that the Court reject the Proposed Order.

Sincerely,

WADE TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton

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

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO: 11-CP-10-387
PCS Nitrogen, Inc., Plaintiff, v. Continental Casualty Company, *et al.*, Defendants.	)	**PLAINTIFF PCS NITROGEN, INC.'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

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I. INTRODUCTION

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff PCS Nitrogen, Inc. ("PCS") moves the Court to reconsider its March 23, 2016 order granting summary judgment in favor of Defendant Continental Casualty Company ("Continental") on the issue of whether Columbia Nitrogen Corporation ("Old CNC") validly transferred its insurance coverage rights to CNC Corporation ("New CNC"). In adopting Continental's argument that assignment of coverage rights from Old CNC to New CNC was invalid the Court committed clear legal error. Reconsideration is, therefore, warranted on at least four grounds.

First, the Court held that insurance policies are personal and cannot be assigned without the insurer's consent. But the cases on which it relied stand for the proposition that liability policies can be assigned after the injury that gives rise to liability. Second, the Court relied on the South Carolina Supreme Court's decision in *Narruhn v. Alea London Ltd.* for the proposition that only assignments of "accrued money due" are valid. In fact, *Narruhn* supports the rule advocated by PCS and permits the assignment of an occurrence-based liability insurance policy after the end of the policy term. Lest there be any doubt, the authority on which *Narruhn* is premised explicitly rejects the position advanced by Continental (and adopted by the Court) and

explicitly follows the rule advocated by PCS. Third, the Court, relying on Continental, held that, even if the duty to indemnify could be assigned, the duty to defend cannot. The authority provided by Continental and on which the Court relies, however, says nothing about the validity of the assignment of the duty to defend. In fact, cases that consider whether the duty to defend is assignable have consistently upheld such assignments. Finally, Continental's position that Old CNC did not assign coverage rights to New CNC, which was adopted by the Court, cannot be reconciled with the clear assignment of "all of [Old CNC's] rights, proceeds and other benefits to and under all of Seller's insurance policies."

Continental asked the Court to grant it a significant windfall: the absolution of liability for claims it agreed to cover and for which it accepted premium payments. Legal support for this request, however, is almost entirely lacking. As a result, Continental advanced arguments that are contrary to South Carolina Supreme Court precedent, the decisions of the overwhelming majority of states that have considered the issue, and the most prominent insurance-law commentators. In adopting Continental's arguments, the Court incorporated Continental's errors into its order. To correct these manifest errors of law, PCS respectfully requests that the Court reconsider its prior order, vacate that judgment, and enter partial summary judgment in favor of PCS on the issue of whether Old CNC validly assigned its coverage rights to New CNC.

II. STANDARD OF REVIEW

The purpose of a Rule 59(e) motion is "to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 420 S.E.2d 834, 842 (S.C. 1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988)). A request for reconsideration is appropriate where the court has "misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue." *Elam v. S.C. Dep't of Transp.*, 602 S.E.2d 772, 780 (S.C. 2004). A Rule 59(e) motion may encompass arguments previously raised. *See id.* at

779 (stating that it would be "inherently unfair" to disallow "a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument."). Reconsideration should be "freely allow[ed]" to give trial courts an "'opportunity promptly to correct their own alleged errors.'" *Id.* (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999)).

III. DISCUSSION

The Court committed manifest error of law by granting summary judgment to Continental on the issue of whether Old CNC validly assigned coverage rights to New CNC. Continental's position, adopted by the Court, errs in at least four respects. First, it erroneously concludes that insurance contracts are personal and not assignable. Second, it contradicts the South Carolina Supreme Court in holding that even post-loss assignments of coverage rights are barred. Third, it concludes that the duty to defend is never assignable, relying solely on a case that does not address the issue at all, and contrary to the many cases that reach the opposite conclusion. Finally, it holds that Old CNC did not assign its coverage rights, notwithstanding the unambiguous assignment of "all of Seller's rights, proceeds, and other benefits to and under all of Seller's insurance policies." Each of these errors are grounds for reconsideration.

A. Insurance Contracts Are Freely Assignable After Loss.

Relying on Continental's misstatements regarding the governing law, the Court began its analysis on the premise that "insurance contracts are personal to the insured and cannot be assigned without insurer consent." Order at 12. This is incorrect. In fact, although the Court relies on *Ligon v. Metropolitan Life* for this proposition, in that decision the South Carolina Supreme Court refused to enforce a restriction on the assignment of an insurance policy. *Ligon v. Metro. Life Ins. Co.*, 64 S.E.2d 258, 264 (S.C. 1951) (refusing to enforce an anti-assignment

clause and holding that "such a restriction in the insurance policy is not intended to cover a case where the loss has already occurred").

As a result, Continental's analysis and this Court's order are founded on a fundamental error. Critically missing from the analysis is that even though insurance policies are ***generally*** treated as personal to the insured, after a loss an ***assignment of a policy is treated as the assignment of an indisputably assignable chose in action***. *See Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013) (citing *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) for the proposition that "[a]fter the loss was incurred, the issue became not an assignment of the policy, but the assignment of a chose in action"). "While the general rule regards liability and indemnity policies as nonassignable personal contracts, assignment is valid following occurrence of the loss insured against and is then regarded as chose in action rather than transfer of actual policy." 2 Couch on Ins. § 34:25 (2015).

As PCS explained in its prior briefing, and as it will explain further below, the policies in question are occurrence-based policies. They provide defense and indemnity coverage for claims arising from bodily injury or property damage that occurs during the policy period. Upon the expiration of the last policy period (indisputably well before the assignment at issue), all occurrences that could ever possibly give rise to coverage had already happened. Any assignment taking place thereafter necessarily took place after the loss. Thus, in this case, the general rule that insurance policies could not be assigned gives way to the rule that assignments of policies after the loss takes place are treated as a valid assignment of a chose in action.[1]

[1] The occurrence of an injury in an occurrence-based policy is treated as creating a chose in action, even if a claim or lawsuit comes many years later. In *Illinois Tool Works*, relied upon by the Supreme Court in *Narruhn*, the court held that an "assignment after loss is not the assignment of the policy, but the assignment of a claim or debt – a chose in action." *Illinois Tool Works v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042, 1054 (Ill. App. 2011).

B. The Court's Order is Internally Inconsistent and Contrary to Clearly Established South Carolina Law in that it Fails to Follow the South Carolina Supreme Court's Decision in *Narruhn v. Alea.*

The central question in determining whether an assignment is a valid post-loss assignment is when the loss occurs, and more specifically, what constitutes a "loss" in the context of the assignment of insurance coverage rights. PCS, relying on *Narruhn* and decisions from at least fourteen other jurisdictions, contends that in the context of third-party liability policies the relevant "loss" is the happening of the injury or occurrence that gives rise to liability. Continental, on the other hand, interprets "loss" as "when the third party obtains a judgment against the insured." The Court adopted Continental's view. Order at 16. This was clear error.

In adopting Continental's view that "loss" is not relevant to when a post-loss assignment occurs and that only assignments of "accrued money due" are valid, the Court's order was both in conflict with prior orders of the South Carolina Supreme Court and was also internally inconsistent. That is, the Court purported to follow the South Carolina Supreme Court's decision in *Narruhn v. Alea London Ltd.*, yet adopted a position expressly rejected by the authority on which the *Narruhn* decision was premised.

The *Narruhn* Court premised its statement that "an assignment after a loss has already occurred does not require an insurer's consent" on *Illinois Tool Works. See* 745 S.E.2d at 94. Importantly, this decision, which the Court did not address in its order, expressly supports PCS's position and expressly rejects the view advanced by Continental and adopted by the Court.

Illinois Tool Works presents nearly identical facts as this action. In connection with a 1998 asset sale, Binks R&D assigned "the benefits, including all rights to defense and indemnity coverage, under any and all policies of liability insurance" to Illinois Tool Works. *Id.* at 1049. Five years later, Illinois Tool Works was sued as the successor to Binks for pollution caused by Binks, at least in part, between 1976 and 1984. Illinois Tool Works, sought coverage for the

defense of that pollution action from the insurers that covered Binks between 1976 and 1984. The insurers denied coverage. The trial court granted judgment in favor of the insurers. The court of appeals, however, reversed.

The appellate court held that "notwithstanding the existence of an anti-assignment or consent provision, a policy may be assigned after a loss without notice to or consent of the insurer" *Id.* at 1054 (citations omitted). Such post-loss assignments are valid, according to the court, because "***assignment after loss is not the assignment of the policy but the assignment of a claim or debt – a chose in action.***" *Id.* (citations omitted, emphasis added). The court of appeals held that the loss was the happening of the covered occurrence and not "when the third party obtains a judgment against the insured":

> [T]he 'loss' here was not the [underlying] suit, which was filed in 2003 and a defense to which could, therefore, not have been assigned in 1998 since the suit did not yet exist. Rather, the loss was Binks' contamination of the [underlying plaintiff's] property, an occurrence for which Binks had bought defense and indemnification coverage. ***Once an injury or loss occurs, the chose in action is established and assignable without the consent of the insurer.***

Id. at 1055 (emphasis added).

Further, the secondary authority on which the Supreme Court in *Narruhn* relied is expressly premised on *Illinois Tool Works*. *See* 3 Couch on Insurance 3d § 35:8 (2011 Rev. ed.) (citing *Ill. Tool Wks.*, 962 N.E.2d 1042); 44 Am. Jur. 2d Insurance § 776 (citing *Ill. Tool Wks.*, 962 N.E.2d 1042)[2]; 17 Williston on Contracts § 49:126 (4th ed. 2000) (citing *Ill. Tool Wks.*, 962 N.E.2d 1042). Indeed, Couch explains that, as argued by PCS, "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and after ***events giving rise to the***

[2] The text of *Narruhn* references Section 786, instead of Section 776, quoted above. This appears to be a scrivener's error as the quotation identified in the *Narruhn* opinion is in Section 776.

insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." 3 Couch on Insurance 3d § 35:8 (3d ed. 2012) (emphasis added). "The fact that the loss does not 'mature' until final judgment against the insured is entered is not material, 'for an assured is not protected against loss if he has to pay a judgment before he can recover against the insurer.'" *Ocean Accident v. Sw Bell*, 100 F.2d 441, 446 (8th Cir. 1939).

As PCS explained in its prior briefing, this conclusion is supported by South Carolina law and the overwhelming majority of courts that have considered this issue. *See* Omnibus Opp. Br. at 9-10; *see also Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 1224 (Cal. 2015) ("***[A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment*** of the right to invoke defense or indemnification coverage regarding that loss. This result obtains even without consent by the insurer – and even though the dollar amount of the loss remains unknown or undetermined until established later by a judgment or approved settlement." (emphasis added)); *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 39 (App. Div. 2015) ("[T]he fact that some claims may not have been asserted by those allegedly harmed by the Givaudan Corporation's actions during a policy period of one of the subject policies does not affect the validity of the assignment. Defendants' obligation to provide coverage to the party deemed to be an insured under the policies arose at the time of the loss. Although the precise amount of defendants' liability may not be known, defendants' obligation to insure the risk in accordance with their respective policies was not altered by the assignment."); *In re Ambassador Ins. Co.*, 965 A.2d 486, 490 (Vt. 2008) (holding that under an occurrence-based policy, the insurer's potential liability to indemnify the insured "***arose when parties were injured by [the insured's] products***" (emphasis added)); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588

N.W.2d 756, 763 (Minn. Ct. App. 1999) (holding that "***loss occurs at the time of contamination***," observing that "[t]he great majority of courts follow this distinction between risk and loss and allow an insured to assign a loss" despite a standard consent-to-assignment clause, and explaining that doing otherwise would provide "an insurer . . . the windfall of not having to insure an occurrence that it received premiums for covering" (emphasis added)); *Cent. Tablet Mfg. Co. v. United States*, 417 U.S. 673, 685 (1974) ("With a fire loss, the obligation to pay arises upon the fire. Unlike an executory contract to sell, the casualty cannot be rescinded. Details, including even the basic question of liability, may be contested, but ***the fundamental contractual obligation that precipitates the transformation from tangible property into a chose in action consisting of a claim for insurance proceeds is fixed by the fire.*** Although the parties remain free to arrive at an acceptable settlement, the obligation itself has come into being." (emphasis added)); *Ocean Accident*, 100 F.2d at 445 (holding "under a liability policy such as the one under consideration, ***the liability, the loss and the cause of action arise simultaneously with the happening of the accidental injury***" (emphasis added)).

Had the South Carolina Supreme Court agreed with the small minority of decisions supporting Continental's position, it could have cited them in its opinion. If the Supreme Court disagreed with *Illinois Tool Works*, Couch, Williston, or American Jurisprudence, it would not have relied on them. Instead, in the sole decision of the South Carolina Supreme Court addressing this issue, the Supreme Court cited with approval the rule advanced by PCS and the reasoning and authority on which PCS relies and which directly rejects Continental's position. Pursuant to the reasoning relied on by the South Carolina Supreme Court, the relevant "loss" in this matter is the occurrence of pollution during the relevant policy periods. At the time of the assignment in 1986, all policy periods had lapsed. Because the policies only cover occurrences

during the policy periods, all assignments necessarily occurred after the loss in question and were not subject to the anti-assignment clause.

Continental's theory, adopted by the Court, is contrary to the South Carolina Supreme Court's decision in *Narruhn* as well as the overwhelming majority of courts across the United States. It is recognized as a distinct minority view by all relevant commentators. And it is contrary to reason and the policies underlying anti-assignment clauses. It was error for the Court to adopt Continental's mistaken position.

C. The Duty to Defend Is Freely Assignable.

The Court also adopted Continental's argument that even if an obligation to indemnify may be assigned, the duty to defend may not be. There is no support for this conclusion. The sole authority on which the Court relies concerns whether quasi in rem jurisdiction could attach to the duty to defend. *See* Order at 15 n.13 (citing *Javorek v. Superior Court*, 17 Cal. 3d 629 (1976)). The decision says nothing about whether the duty to defend can be assigned.

Cases that allow the assignment of the duty to defend, on the other hand, are legion. *See, e.g.*, *Fluor*, 61 Cal. 4th at 1224 ("[A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke defense or indemnification coverage regarding that loss."); *Givaudan*, 442 N.J. Super. at 39 (reversing the trial court and upholding the assignment of the duty to defend and indemnify); *Ocean Accident*, 100 F.2d at 444-46 (holding that the insurer owed the post-loss assignee of a liability policy a duty to defend a claim under the policy); *Ill. Tool Works*, 962 N.E.2d 1042 (reversing the trial court and holding that an insurer had a duty to defend and indemnify the assignee of a liability insurance policy in a CERCLA action, notwithstanding that the rights were assigned prior to the initiation of that action, because the policy rights were assigned after the pollution occurred); *Gopher Oil*, 588 N.W.2d at 763

(collecting cases and holding that the corporation that purchased the insured was entitled to a defense and indemnification of CERCLA claims based on the insured's polluting activity, explaining that "[c]ourts in other jurisdictions have refused to enforce [a no-assignment] clause when a successor corporation's acquisition of a predecessor's assets transfers the predecessor's losses").

Given the absence of support for Continental's position and the great weight of authority favoring PCS's position, the Court erred in holding that the duty to defend is not assignable. At a minimum it was clear error for the Court to rely on a California decision that did not address the assignability of the duty to defend in support of its conclusion, especially given that the California Supreme Court held just last year that the duty to defend was, in fact, assignable.

D. Old CNC Unambiguously Assigned These Rights to New CNC.

Finally, the Court adopted Continental's factual finding that the document titled "Assignment of Insurance Benefits" did not assign any insurance rights or benefits to New CNC. Continental contends, and the Court agreed, that because "no benefits and proceeds were [,at the time of the assignment,] owing to Old CNC" that the assignment could not have transferred anything to New CNC. Order at 11-12. This conclusion cannot be reconciled with the assignment or governing law.

The assignment is explicit. Old CNC agreed to transfer to New CNC all of its "rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies." Opp. Br. Ex. 1. Yet, Continental argued, and the Court agreed, that the parties only intended to transfer "then-owing proceeds." Order at 11-12. Because no then-owing proceeds existed, the Court concluded, nothing was assigned. *Id.* This conclusion is belied by the plain text of the agreement, which expressly assigns "all of [Old CNC's] rights" including proceeds. If proceeds were the only "rights" being transferred, there would be no need to separately identify "rights" or

"other benefits" as being transferred. Continental's interpretation thus improperly renders part of the contract superfluous and must be rejected. *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 756 S.E.2d 148, 153 (S.C. 2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.").

In addition to being contrary to the rules of construction, Continental's interpretation is further belied by reason: corporations do not enter assignment agreements to assign nothing..

In fact, nothing in the agreement limits the transfer to then-owing proceeds. The agreement transfers "all of Seller's rights and benefits, including proceeds, in and under its insurance policies." Opp. Br. Ex. 1. The transfer of "all of Seller's rights and benefits" necessarily included Old CNC's contingent future rights, such as the contingent right to assert claims for defense and indemnity for liabilities arising from past losses. Contrary to Continental's unsupported assertion, which was adopted by the Court's order, a "conditional right may be subject to assignment," including the contingent right to "future performance," even before the condition occurs. *Moore v. Weinberg*, 644 S.E.2d 740, 746 (S.C. Ct. App. 2007) (citing Restatement § 320; 4 A. Corbin, Corbin on Contracts § 874 (1951)). *Illinois Tool Works*, on which the Supreme Court in *Narruhn* relied, directly addressed this issue in the context of the assignment of coverage rights, holding that the right to defense and indemnification "should a third-party suit based on that loss arise" was freely assignable in equity:

> What Binks assigned plaintiff was Binks' then-present conditional right to the insurance proceeds, to its right to defense and indemnification should a third-party suit based on that loss arise. A valid assignment of a conditional right is enforceable in equity. Binks' conditional right to defense and indemnification against third-party suit for covered occurrences existed as soon as it paid its premium. This right was not dependent on whether or when the insurers' duty to defend a particular suit was triggered, i.e., dependent on whether a third party actually filed suit against Binks for a covered occurrence. Filing of a third-party suit impacted

> whether Binks would need to assert its right to defense and indemnification, not whether that right existed.

Ill. Tool Works, 962 N.E.2d at 1055-56 (citations omitted). The contrary position advanced by Continental and adopted by the Court is unsupported.

E. The Court Erred in Adopting Continental's Argument that an Assumption of Liabilities Weighs Against a Finding of *De Facto* Merger.

As PCS argued at the summary judgment hearing, the Court need not reach the issue of *de facto* merger because, for the reasons outlined above, Old CNC's coverage rights transferred to New CNC via a valid post-loss assignment. Importantly, however, PCS notes that the Court's order also commits a manifest error of law in adopting Continental's argument that an express assumption of liability precludes a finding of de facto merger. Order at 22-23. In fact, the cases cited by Continental and the Court stand for the proposition that an express assumption of liability weighs in favor of a finding of *de facto* merger. *See Brown v. Am. Ry. Exp. Co.*, 123 S.E. 97, 99 (S.C. 1924); *Huggins v. Commercial & Sav. Bank*, 140 S.E. 177, 186 (S.C. 1927); *United States v. Davis Mem'l Hosp.*, 956 F.2d 1163 (Table) (4th Cir. 1992)).[3]

IV. CONCLUSION

Continental's arguments are little more than an invention of the insurance industry designed to avoid paying claims that insurers agreed to pay (and for which insurers accepted premiums). Recognizing the lack of merit in these arguments, courts have routinely and nearly universally rejected them. By adopting Continental's arguments, the Court incorporated Continental's internal inconsistencies and clear legal and factual errors into its order. To correct these errors, PCS respectfully requests that the Court reconsider its prior order, vacate that

[3] Because a finding of *de facto* merger is not necessary for PCS to prevail, PCS does not address all points of error it may ultimately raise on appeal regarding this issue nor does it reargue all issues raised at summary judgment. PCS specifically reserves its right to raise additional points of error on appeal as it relates to this issue, as well as other issues.

judgment, and enter summary judgment in favor of PCS on the issue of whether Old CNC validly assigned its coverage rights to New CNC.

Dated: April 7, 2016

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 11-CP-10-387
PCS Nitrogen, Inc., Plaintiff, v. Continental Casualty Company, *et al.*, Defendants.	)	**CERTIFICATE OF SERVICE**

2016 APR -7 AM 9:32

The undersigned certifies that on April 7, 2016, a copy of the foregoing document was served on each party or counsel of record set forth below by email in the manner prescribed by the South Carolina Rules of Civil Procedure.

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

PCS NITROGEN, INC.

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY, *et al.*

Defendants.

DEFENDANT CONTINENTAL CASUALTY COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

FILED
2016 APR 18 PM 1:18
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I. INTRODUCTION

Defendant Continental Casualty Company ("Continental") respectfully submits this opposition to Plaintiff PCS Nitrogen, Inc.'s Brief in Support of Motion for Reconsideration, filed April 7, 2016 ("Motion").[1]

Plaintiff PCS Nitrogen, Inc. ("PCS Nitrogen") offers the Court no reason to reconsider its Order Granting Defendants' Motions for Summary Judgment with respect to Corporate Succession, filed March 23, 2016 ("Order"). The Motion simply rehashes arguments that (1) PCS Nitrogen previously made, (2) Continental and other insurers refuted, and (3) the Court necessarily rejected in granting the defendants' motions. A motion for reconsideration is not an opportunity merely to repeat arguments, and on that basis alone the Motion should be denied.

In any case the repeated arguments PCS Nitrogen offers have no merit. PCS Nitrogen mischaracterizes opinions of the Supreme Court of South Carolina, which in fact directly support the Court's Order and the propositions for which they were cited. PCS Nitrogen lays heavy

[1] The following defendants join in this Opposition: Admiral Insurance Company; United States Fire Insurance Company (with respect to Policy No. 5401893627); United States Fire Insurance Company (with respect to Policy Nos. GLA 284022 and GLA 540 079751 7); ACE Property & Casualty Insurance Company, formerly known as CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company; Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America; Certain London Market Insurance Companies (Dominion Insurance Company Ltd, Excess Insurance Company Ltd., River Thames Insurance Company, National Casualty Company of America, Ltd., Argonaut Northwest Insurance Company, London & Edinburgh General, Assicurazioni Generali SpA, Alba General Insurance Company Ltd., Harper Insurance Company Ltd. f/k/a Turegum Insurance Company, and Helvetia Accident Swiss Insurance Company Ltd.); Certain Underwriters at Lloyd's, London; Certain Aviva Companies; Certain Winterthur Companies; New London Reinsurance Company Limited; The Scottish Lion Insurance Company Limited; Starr Indemnity & Liability Company (formerly known as Republic Insurance Company); Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company); Providence Washington Insurance Company, as successor in interest by way of merger to Seaton Insurance Company, f/k/a Unigard Security Insurance Company, f/k/a Unigard Mutual Insurance Company; Lexington Insurance Company; and First State Insurance Company.

stress on four out-of-state cases, but the Order already rejected all of them, either specifically or implicitly, noting that all the cases on which PCS Nitrogen had relied (including the same ones on which it relies again now) either failed to apply their own state's law or were inconsistent with South Carolina law. PCS Nitrogen gives the Court no basis to reach a different conclusion.[2]

Accordingly, the Motion should be denied.

II. ARGUMENT

A. PCS Nitrogen Fails to Justify Reconsideration

A motion for reconsideration is not a chance to repeat facts or law already presented. "Motions under Rule 59 are limited in scope and are not to be used to ' "rehash" the same arguments and facts previously presented.' Furthermore, '[a] motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court ha[s] already thought through – rightly or wrongly.' " *Dockins v. Benchmark Communications*, 180 F.R.D. 294, 295 (D.S.C. 1998) (citations omitted). Only if an issue "could not have been raised" in prior pleading may a litigant seek to raise it through Rule 59(e). *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842-43 (S.C. 1992) (relying on federal court interpretation of Fed. R. Civ. P. 59(e)).[3]

PCS Nitrogen's Motion does nothing more than rehash its prior arguments. It identifies nothing new—and certainly nothing that it could not have raised earlier. Nor does the Motion

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[2] PCS Nitrogen continues to concede there is no issue of fact, seeking summary judgment in its favor. Motion at 2.

[3] *Elam v. South Carolina Dept. of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (S.C. 2009), cited by PCS Nitrogen, is not to the contrary. There the Supreme Court held that a Rule 59(e) motion for "reconsideration" was effective to toll the time to notice an appeal, even if it merely repeated arguments made in prior motions for a new trial and for judgment notwithstanding the verdict. *Id.* at 21-22, 602 S.E.2d at 778-79. The court did not endorse submitting rehashed arguments under Rule 59(e) or hold that such rehashed arguments would require a court to reconsider its decision.

establish that the Court overlooked a fact or a key legal proposition. Rather, PCS Nitrogen merely disagrees with the Court's conclusions. That is an insufficient reason to seek reconsideration.

B. PCS Nitrogen's Arguments Still Have No Merit

Even if the Court were to consider PCS Nitrogen's recycled arguments, they still have no merit.

1. PCS Nitrogen Mischaracterizes South Carolina Law

PCS Nitrogen claims that the Court misapplies *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 64 S.E.2d 258 (S.C. 1951). According to PCS Nitrogen, the *Ligon* court "refused to enforce a restriction on the assignment of an insurance policy." Motion at 3. But in *Ligon*, the insured under a life insurance policy had already disappeared by the time the beneficiary assigned her interest in the policy. *Id.* at 154, 64 S.E.2d at 264. Contrary to PCS Nitrogen's characterization, the decision did not permit assignment of the "policy" through substitution of the insured—which the court says would *not* be allowed—but permitted assignment of an accrued right to payment:

> The [no-assignment] provision . . . obviously refers to a situation where the insured undertakes *to assign his policy* of insurance during his lifetime. In our opinion, such a restriction in the insurance policy is not intended to cover a case where the loss has already occurred *and where the thing which is being assigned is a claim for a loss.*

Id. (emphasis added). The court quoted American Jurisprudence to emphasize that what can be assigned is a claim for money due: No-assignment provisions do not " 'prevent an assignment after loss or death, or the maturity of the policy, *of the claim or interest in the insurance money then due.*' " *Id.* at 155, 64 S.E.2d at 264 (quoting 29 Am. Jur. 2d Insurance § 506) (emphasis added). *Ligon* therefore does not support substitution of the insured without insurer consent, which is what PCS Nitrogen seeks here, but only assignment of a claim for money due.

PCS Nitrogen then asserts that *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (S.C. 2013) stands for the proposition that "after a loss an ***assignment of a policy is treated as the assignment of an indisputably assignable chose in action***." Motion at 4. In fact, *Narruhn* did not involve assignment of a policy to a new insured at all, but assignment "of any and all rights, including any claims, that [the insured] might have against Insurer" to a tort claimant, *who had already obtained a judgment against the insured. Id.* at 339, 745 S.E.2d at 91. Thus, *Narruhn* did not purport to treat all "policy assignments" as assignments of a "chose in action," as PCS Nitrogen suggests, but did involve assignment of an *actual* chose in action—the insured's right to receive insurance money, which had accrued because the insured had been held liable in a tort judgment already entered. As before, PCS Nitrogen simply seeks to confuse and conflate "policy assignment" with "assignment of a chose in action," because it knows Old CNC did not have a chose in action—an accrued right to receive insurance money.

PCS Nitrogen then spends pages theorizing what the Supreme Court must have meant in *Narruhn*, based on authorities it cited and omitted. Indeed, PCS Nitrogen divines much from what the Supreme Court did *not* cite, saying, "Had the South Carolina Supreme Court agreed with the small minority of decisions supporting Continental's position, it could have cited them in its opinion." Motion at 8. Yet PCS Nitrogen ignores the fact that the portion of *Narruhn* that it cites was, as the Supreme Court itself recognized, dictum. 404 S.C. at 344, 745 S.E.2d at 93-94 ("we need not reach the issue here"). Thus, as it was not necessary for the Supreme Court to discuss the assignment issue in *Narruhn* to reach its opinion, no conclusion can be drawn regarding how extensively or minimally the Supreme Court discussed various authorities—it simply did not have to discuss any of them. Dictum is not holding, precisely because a court may not be as careful with dictum:

> If [general expressions] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases *is seldom completely investigated.*

Cohens v. Virginia, 19 U.S. 264, 399 (1821) (emphasis added).

Yet even the dictum in *Narruhn* plainly rejects the proposition PCS Nitrogen advocates. Repeatedly, the Supreme Court notes that a "chose in action" may be assigned, that a chose in action is "Personal property that one person owns but another person possesses," and "After a loss has been incurred, the claim to recover insurance proceeds may be effectively assigned by the insured." 404 S.C. at 344, 745 S.E.2d at 93-94 (citations and quotations omitted). Thus, even to the extent the dictum of *Narruhn* predicts the jurisprudence of the Supreme Court (as if its prior caselaw were not enough[4]), it predicts rejection of PCS Nitrogen's claims and adoption of the Court's ruling.

2. The Court Has Already Rejected PCS Nitrogen's Out-of-State Authority

Beyond mischaracterizing the Supreme Court's decisions, PCS Nitrogen again turns to out-of-state opinions. All of them were argued and refuted before.

PCS Nitrogen places significant emphasis on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. 2011), completely ignoring the fact that that case failed to adhere to Illinois precedent, *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 328 Ill. 571, 572-73, 575, 160 N.E. 145, 145-46 (1928), which made clear an insured may not assign a policy to a new insured. *Illinois Tool Works* is not an authoritative statement of Illinois law; *Ginsburg*

[4] *Silverman v. Dew*, 182 S.C. 457, 189 S.E. 756 (S.C. 1937) (rejecting allowing a new party to step into a contractual relationship with someone else's insurer, even after "loss"); *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").

is. The Court expressly cited and followed *Ginsburg* in its Order.

PCS Nitrogen also relies on *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 120 A.3d 959 (App. Div. 2015), without noting that that intermediate appellate decision has been accepted for review by the New Jersey Supreme Court. 223 N.J. 404, 125 A.3d 392 (2015). Nor does it address the fact that *Givaudan Fragrances* also is contrary to authority of its state high court, authority which the decision did not discuss. *Flint Frozen Foods, Inc. v. Firemen's Ins. Co.*, 8 N.J. 606, 611, 86 A.2d 673, 675 (1952) ("After a loss has occurred a person may not adopt a policy to which he is a stranger and thereby increase the liability of the insurer."). Thus, *Givaudan Fragrances* is also not authoritative.

PCS Nitrogen again seeks to rely on *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 354 P.3d 302 (2015), but, as before, fails to explain how that decision's reliance on an 1872 California statute, which has no counterpart here, should be at all persuasive. And it again urges *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939). *Ocean Accident* is premised on the assertion that a "claim" under a liability insurance policy is an assignable "chose in action" immediately upon the occurrence of a claimant's injury, because "the liability of the [liability insurer] arose immediately upon the happening of the accidents resulting in the injuries." *Id.* at 444-45. Yet that assertion is not supported by any of the cases the court cites. It is also contrary to South Carolina law, which holds that a liability insurer's payment obligation does not arise until a tort judgment has been entered against the insured. *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (S.C. 1968) (until injured party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured];" "Stated another way, no right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay.").

Accordingly, PCS Nitrogen offers no reason why the Court should deviate from its correct conclusion that the out-of-state cases PCS Nitrogen cites "failed to adhere to the state law they interpreted, or are inconsistent with South Carolina law." Order at 18.

3. The Duty to Defend Is Not Assignable

Given the consistent holding of South Carolina courts, and of courts elsewhere, that an insured can assign only a right to insurance money already due and owing, as a chose in action, *a fortiori* an insured cannot assign its right to have the insurer defend it in a tort action, because the insurer's duty cannot be reduced to a sum of money. *Javorek v. Superior Court (Larson)*, 17 Cal. 3d 629, 644-45, 552 P.2d 728, 740 (1976) (duty to defend is "an obligation to provide personal services [and] is not capable of transfer. . . ;" " 'the insurance carrier could not be obligated to defend a stranger to the contract. . . .;' 'whatever value inheres in the contractual duty of the insurer is personal to the insured.' ") (citation omitted); *Robinson v. Shearer & Sons, Inc.*, 429 F.2d 83, 86 (3d Cir. 1970) (same); *Hart v. Cote*, 145 N.J. Super. 420, 425-26, 367 A.2d 1219, 1222 (Law Div. 1976) (following *Javorek*; declining to permit attachment of insurer's potential defense obligation as a "debt" because "the obligation would not arise in law until a judgment has been entered against the insured"). PCS Nitrogen's effort to argue to the contrary relies exclusively on the out-of-state decisions refuted above.

4. The Court Correctly Held that Old CNC Did Not Assign Policies

PCS Nitrogen simply ignores language in the Assignment document it cites that Old CNC attempted to assign "benefits and proceeds" "to the extent same may be transferred and assigned." And it ignores other contemporaneous documents showing that the parties *sought consent* from insurers when they intended to assign policies, but did not seek consent from the insurers here. Again, PCS Nitrogen cites and argues nothing new.

5. The Court Correctly Held that No *De Facto* Merger Occurred

PCS Nitrogen attempts to claim that *de facto* mergers may be found where the new corporation assumes the old corporation's liability. Motion at 12. To the contrary, if the new corporation had assumed the *tort liability* of the old corporation (as New CNC did here), there would be no need for law or equity to step in and re-cast the corporate transaction to make the new corporation responsible for that liability as a matter of law—the new corporation had agreed to assume it. *De facto* merger theories may be bolstered if the new corporation assumed the *business liabilities* of the old corporation, such as accounts payable, because that helps show the new and old corporations were really the same (*if*, as well, the two corporations have the same owners and same management, etc.). *Simmons v. Mark Lift Indus., Inc.* 366 S.C. 308, 312 n.1, 622 S.E.2d 213, 215 n.1 (S.C. 2005). What PCS Nitrogen points to as supporting its claim that "assumption of liabilities" supports a finding of "*de facto* merger" are actually *alternative*, and mutually exclusive, reasons to hold the new corporation liable: (1) express assumption; (2) mere continuation (or *de facto* merger); and (3) fraud. *See Brown v. American R. Express Co.*, 128 S.C. 428, 431, 123 S.E. 97, 98-99 (S.C. 1924). Thus, because New CNC expressly assumed Old CNC's liabilities, there was and is no basis to hold that it was the *de facto* merger successor to Old CNC.

Ashley II held that there was no *de facto* merger based on the facts of the Old CNC-New CNC transaction, including because their owners were different. PCS Nitrogen agreed with that conclusion. It offers no reason to disagree with it now.

III. CONCLUSION

Having no facts and no law to support its position, PCS Nitrogen unfortunately resorts to attacking its opponents to attempt to sway the Court. Motion at 12. The holdings of the cases that Continental presents to the Court are not Continental's "invention." PCS Nitrogen's

contrary accusation should be dismissed, and its Motion should be denied.

Dated: April 18, 2016

Respectfully submitted,

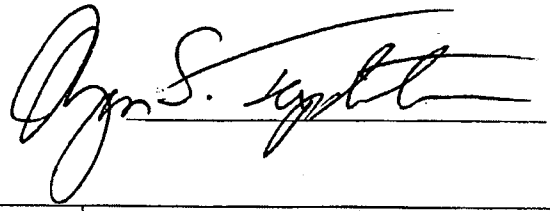
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I certify that on April 18, 2016, a true and correct copy of Defendant Continental Casualty Company's Opposition to Plaintiff's Motion for Reconsideration was served by electronic mail on each party set forth below.



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The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 18th day of April, 2016, she served a copy of **DEFENDANT CONTINENTAL CASUALTY COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION** by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known address, in Charleston, South Carolina:

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Sarah Jane Schrodetzki

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO: 11-CP-10-387
PCS Nitrogen, Inc., Plaintiff, v. Continental Casualty Company, *et al.*, Defendants.	)	**PLAINTIFF PCS NITROGEN, INC.'S REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

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I. INTRODUCTION

Plaintiff PCS Nitrogen, Inc. ("PCS") hereby submits this reply brief in support of its motion for reconsideration of the Court's March 23, 2016 order granting summary judgment in favor of Defendant Continental Casualty Company ("Continental") and the other insurers (collectively with Continental, "the Insurers") on the issue of whether Columbia Nitrogen Corporation ("Old CNC") validly transferred its insurance coverage rights to CNC Corporation ("New CNC"), and thus to PCS. PCS is now being held liable for operations by Old CNC—the very activities that the Insurers agreed to insure—yet the Insurers seek to avoid their obligations by pursuing an argument that has been rejected by nearly every court to have considered the issue and all major commentators. By adopting the Insurers' argument in its order on the motion for summary judgment, this Court erred, and reconsideration is warranted.

II. DISCUSSION

A. Reconsideration is the Proper Vehicle to Correct the Errors in the Court's March 23, 2016 Order.

Continental begins its opposition by erroneously asserting that this matter is not appropriate for reconsideration because PCS is "rehashing" its prior arguments. Although this

characterization of PCS's argument is incorrect, even if it were true Continental's position is directly contradicted by the South Carolina Supreme Court. "A party usually is allowed to ask the court to reconsider its decision ***even if it means rehashing all or part of an argument previously presented.***" *Elam v. S.C. Dep't of Transp.*, 602 S.E.2d 772, 778-79 (S.C. 2004) (emphasis added). Moreover, the Supreme Court recognizes that "'[t]he wisdom of giving [trial] courts the opportunity promptly to correct their own alleged errors is all the justification needed' for the practice of freely allowing a motion for reconsideration." *Id.* at 779 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999)).

Contrary to Continental's representation to this Court, *Arnold v. State* does not say that motions for reconsideration are only permitted where the moving party raises arguments that "could not have been raised" in a prior pleading. Opp. Br. at 2 (quoting *Arnold v. State*, 420 S.E.2d 834, 842-43 (S.C. 1992)). Reviewing the full sentence instead of simply the phrase excerpted by Continental reveals that the quotation does not refer to Rule 59 at all, but to South Carolina's Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 *et seq.*, which limits successive applications for relief to issues "that could not have been raised" in a prior application. *See Arnold*, 420 S.E.2d at 843 ("Under Section 8 of the Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application.").

Continental employed the same method of argumentation—misstating and mischaracterizing the law—at summary judgment to lead the Court to adopt a position directly at odds with explicit guidance from the Supreme Court and the national consensus on the issue of post-loss assignment. In adopting Continental's arguments on summary judgment, the Court

incorporated Continental's clear errors into its order. As explained by the Supreme Court, reconsideration is warranted to give this Court a final opportunity to correct these errors now, rather than waiting for appellate reversal. *See Elam*, 602 S.E.2d at 778-79.

B. Continental Fundamentally Misstates the Chose in Action Doctrine.

The gravamen of Continental's (and, therefore, the Court's) error on the issue of post-loss assignment is a misunderstanding of the concept of a "chose in action." The Insurers contend that only a "chose in action" is assignable and, to constitute a chose in action, a claim must have been reduced to judgment against the insured. *See* Opp. Br. at 4. As nearly every court to consider the issue has concluded, "[t]here is no merit to this argument." *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 38 (App. Div. 2015).

The Supreme Court in *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013), recognized that all relevant commentators and nearly every court to consider the question agree that, in the context of a liability insurance policy, a "chose in action" arises upon the happening of the covered accident, *not* upon a claim being reduced to a sum certain. *See id.* at 94 (citing *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) for the proposition that "[a]fter the loss was incurred, the issue became not an assignment of the policy, but the assignment of a chose in action"). This is not only the law, but makes sense; after all, "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and ***after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.***" 3 Couch on Insurance 3d § 35:8 (3d ed. 2012) (emphasis added). While the Supreme Court did not have occasion to formally rule upon this issue in *Narruhn*, its citation to sources adopting this majority position is the best evidence of what the Supreme Court believes is the correct statement of the law. *See State v. Reid*, 679

S.E.2d 194, 199 (S.C. Ct. App. 2009) (relying on Supreme Court dicta), *aff'd*, 713 S.E.2d 274 (S.C. 2011) (adopting position previously articulated in dicta); *cf. Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("The Town Council's only response to Allegheny's extended discussion of *Marsh* is to dismiss it as dicta. But as we and our sister circuits have frequently noted, with inferior courts, like ourselves, that argument carries no weight since carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (internal quotation marks and alterations omitted)).

As it did at summary judgment, Continental blithely declares that the Court should ignore all of the persuasive authority cited by *Narruhn* and PCS as either distinguishable or wrongly decided, and then launches unfounded criticism against a small subset of those authorities. Again, as at summary judgment, Continental's attempt to distinguish three of the dozens of relevant cases falls short.

1. *Fluor Corp. v. Superior Court*

Continental contends that the Court should ignore *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015), because it concerns a statute. But PCS did not cite *Fluor* because of the manner in which that court interpreted a statute. Rather, PCS cites *Fluor* because in the process of interpreting the statute, the California Supreme Court conducted a nationwide survey of over a century's worth of common law jurisprudence regarding the validity of post-loss assignments of liability insurance coverage rights—the precise issue before this Court—including the progeny of *Ocean Accident & Guarantee Corp. v. Sw. Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939) (from which much of the relevant precedent stems). *See Fluor*, 354 P.3d at 321-27. Thus, *Fluor* is an invaluable and neutral summary of the national state of the law on the issue of the validity of assignments of insurance coverage rights, the chose in action doctrine, and post-loss assignments. The California Supreme Court concluded at the end of its exhaustive survey that Continental's

interpretation of the law has only been followed by the Indiana Supreme Court, while PCS's interpretation has been followed by every other jurisdiction.[1] *Id.* at 327 & n.46.

2. *Illinois Tool Works v. Commerce & Industry Insurance*

Continental dismisses *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042, 1054 (Ill. App. 1st Dist. 2011), cited with approval in *Narruhn*, as contrary to Illinois law as stated in the 1928 case of *Ginsburg v. Bull Dog Auto Fire Insurance*, 160 N.E. 145 (Ill. 1928). Continental is incorrect. In *Ginsburg*, the Illinois Supreme Court ***upheld*** an insurance assignment despite an anti-assignment clause because the assignment occurred after the loss insured against—the theft of an automobile—and therefore, the assignment did not increase the insurer's risk. It explained:

> ***An assignment after loss is not the assignment of the policy but the assignment of a claim or debt—a chose in action.*** An assignment after loss does not violate the clause in the policy forbidding a transfer even if the clause reads before or after loss. The reason of the restriction is, that the company might be willing to write a risk for one person of known habits and character and not for another person of less integrity and prudence, but after loss this reason no longer exists.

Id. at 146. At the heart of this decision is the recognition that anti-assignment clauses should only be enforced to ensure that policyholders do not unilaterally change the risk assumed by the insurer. *Id. Illinois Tool Works* merely applies this principle to the context of third-party liability insurance. In that context (as here), if an assignment of all rights under a policy takes place after the policy period ends, the insurer's risk has not changed at all; the insurer is still only responsible for insuring against liabilities caused by the original insured during the coverage

[1] The California Supreme Court also noted that a small minority of states bar post-loss assignments entirely. Even the Insurers, however, recognize that this view is contrary to South Carolina law.

period. Thus, *Illinois Tool Works* is entirely consistent with *Ginsburg*'s holding that assignments of coverage rights after a loss are valid notwithstanding an anti-assignment clause.

3. *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co.*

Finally, Continental contends that the New Jersey Appellate Division's decision in *Givaudan* was in error because it failed to discuss the New Jersey Supreme Court's decision in *Flint Frozen Foods v. Firemen's Ins. Co. of Newark*, 86 A.2d 673 (N.J. 1952). In fact, *Givaudan* does cite *Flint Frozen Foods*, noting that the *Flint* decision did not reach the issue of post-loss assignments. *Givaudan*, 120 A.3d at 964-65. A review of the Supreme Court's decision in *Flint* makes clear that decision is wholly irrelevant.[2] In that case, there was no loss at all; the policy capped recovery at "the interest of the insured" in certain goods held as collateral on a debt, which was extinguished when the debt was repaid in full. *Flint Frozen Foods*, 86 A.2d at 674. As such, *Flint* stands for the uncontroversial proposition that "[i]f the insured has suffered no loss with respect to the property covered by the policy, there is, of course, no liability on the policy, for there is nothing for the insurer to indemnify." *Id.* at 674-75. Further, *Flint* concerned an indemnity contract, not a liability policy. *See id.* "Although indemnity policies require proof of payment by the insured as a condition precedent to recovering from an insurer, liability policies do not." *Givaudan*, 120 A.3d at 966 (citations omitted).[3]

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[2] To the extent the Supreme Court's decision in *Flint* is relevant, it is entirely consistent with PCS's position. Continental relies on the statement of *Flint* that "a person may not adopt a policy to which he is a stranger ***and thereby increase the liability of the insurer.***" 86 A.2d at 675 (emphasis added). Here, the assignment of coverage rights to New CNC (and PCS) *after the expiration of the policies* could not and did not increase the insurers' risk one iota.

[3] Continental also argues that *Givaudan* should be ignored because the New Jersey Supreme Court has agreed to review it. Of course, by this logic, *Illinois Tool Works* must be followed because the Illinois Supreme Court refused to review it. The fact that *Givaudan* has been accepted for review proves nothing other than that it remains the law in New Jersey and the New Jersey Supreme Court will at some later date either confirm its holding or change New Jersey law.

C. The Duty to Defend is Assignable.

Incredibly, even after PCS demonstrated that Continental erroneously relied on cases that say nothing about whether the duty to defend is assignable, Continental continues to press this flawed argument. It makes no attempt to distinguish the many cases cited by PCS, instead casually dismissing them as decisions of foreign jurisdictions (even though Continental exclusively relies on decisions of foreign jurisdictions that happen to have nothing to do with the issue of the assignment of the duty to defend).

The three cases relied upon by Continental do not address the issue of whether the duty to defend is assignable. Rather, all three concern whether the duty to defend can be attached to create *quasi in rem* jurisdiction. *See Robinson v. O. F. Shearer & Sons, Inc.*, 429 F.2d 83, 86-97 (3d Cir. 1970); *Hart v. Cote*, 67 A.2d 1219, 1222 (N.J. Super. Ct. Law Div. 1976); *Javorek v. Superior Court*, 552 P.2d 728, 739-40 (Cal. 1976). Furthermore, both *Hart* and *Javorak* come from jurisdictions in which courts have explicitly found the duty to defend to be freely assignable after the covered loss has occurred. *See, e.g., Fluor*, 354 P.3d at 334 (California) ("[A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke defense or indemnification coverage regarding that loss."); *Givaudan*, 120 A.3d at 966-67 (New Jersey) (reversing trial court and upholding assignment of duty to defend and indemnify, reasoning: "Once a covered loss has occurred, the insured's assignment of its right to liability coverage or a defense relating to those losses does not require consent from the insurer" (internal quotation marks omitted)).

D. Fact Issues Remain as to Whether PCS is Entitled to Old CNC's Insurance Rights as a Successor By Merger.

If the Court reconsiders its decision on the validity of the post-loss assignments and enters summary judgment in favor of PCS on that basis, there is no need to reach the issue of whether PCS is a successor by merger to Old CNC. Otherwise, reconsideration is warranted because this question is fact-bound and not suited for summary resolution. As explained by PCS in its opposition brief, determination of this very question in the *Ashley II* litigation required several days of trial on hotly disputed facts regarding the nature, terms, and practical impact of the transaction. The factual findings of that court are not binding on this one, and those facts are no less disputed today than they were then.

Moreover, the Court adopted Continental's mistake of law when it concluded that the fact that PCS assumed Old CNC's liabilities categorically foreclosed a finding of *de facto* merger under South Carolina law. *See* Order Granting Summary Judgment With Respect to Corporate Succession at 22-24 (Mar. 23, 2016). In its opposition to the motion for reconsideration, Continental backtracks on its position, drawing a meaningless distinction between tort liabilities and business liabilities, and suggesting that an assumption of tort liabilities and a finding of *de facto* merger are "mutually exclusive." Neither of these assertions is supported by the cases it cites, or any other case. *See Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 215 (S.C. 2005) (citing *Brown* as setting forth appropriate test for successor liability); *Brown v. Am. Ry. Exp. Co.*, 123 S.E. 97, 98-99 (S.C. 1924) (setting forth four bases for a finding of successor liability). The Supreme Court in *Brown* could not have been more clear when it observed that the circumstances of a transaction may warrant a finding of consolidation or merger where the evidence shows, among other things, that "***liability for the payment of claims outstanding***

against [the seller] *had been expressly or impliedly assumed* by the [purchaser]." *See id.* at 99 (emphasis added).

As such, reconsideration is warranted both because disputed issues of fact remain as to this issue, and because the Court's decision was predicated on a view of the law that is contrary to controlling precedent.

III. CONCLUSION

For the reasons stated above and in its opening brief, PCS respectfully requests that the Court reconsider its prior order, vacate the judgment against PCS, and enter summary judgment in favor of PCS on the issue of whether Old CNC validly assigned its coverage rights to New CNC.

Dated: April 25, 2016

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO: 11-CP-10-387
PCS Nitrogen, Inc., Plaintiff, v. Continental Casualty Company, *et al.*, Defendants.	)	**CERTIFICATE OF SERVICE**

FILED
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CLERK OF COURT

The undersigned certifies that on April 25, 2016, a copy of the foregoing document was served on each party or counsel of record set forth below by email in the manner prescribed by the South Carolina Rules of Civil Procedure.

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STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF CHARLESTON) CASE NO: 2011-CP-10-00387

B E F O R E: The Honorable Thomas Cooper
February 2, 2016

PCS NITROGEN, INC.,

Plaintiff,



vs.

CONTINENTAL CASUALTY COMPANY, et al.,

Defendants.

APPEARANCES:

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Court Reporter:
Natalie Dahl, RPR

P-R-O-C-E-E-D-I-N-G-S

THE COURT: We were taking a poll of the colors of ties and blue suits. It is not a Republican debate where everyone has a red tie. That's enough politics.

All right. We've been over most of your papers, and I'm assuming that those parties that are moving -- moving parties should proceed. How do you wish to proceed, Mr. -- for the court reporter's benefit, whenever you speak, when you first speak, identify yourself for the court reporter, so she can attribute what you say to the right name.

MR. HOFER: Patrick Hofer for Continental Casualty Company. What we would propose in terms of organization for today, I will be presenting argument on motion for summary judgment dealing with the corporate succession issue. Mr. Favate, my colleague, will be presenting argument on the pollution exclusion motion. We will both be arguing on behalf of all of the defendants on those issues, all adjoining defendants. So there will not be multiple presentations unless someone has something specific for their client or their policy, they can stand up and say something, but other than that, we will --

THE COURT: That's fine. And, I'm sorry, you are, sir?

MR. FAVATE: John Favate representing United States Fire Insurance Company.

THE COURT: Okay. Okay. I see. I have a list here and I just didn't see your name. Mr. Hofer, you may proceed.

MR. HOFER: Thank you. If the Court please, I'll proceed with the corporate succession motion first because that is dispositive of the whole case if granted. I'm here with Mr. McCleod from Charleston as our South Carolina counsel.

THE COURT: Is he admitted in South Carolina?

MR. HOFER: Mr. McCleod? He is. I am not, unfortunately, but I beg the Court's indulgence.

THE COURT: I'm very familiar with Mr. McCleod.

MR. HOFER: Your Honor, on the corporate succession motion, there are two theories that PCS Nitrogen advances in order to claim insurance policies that were issued to its separate corporation. That separate corporation was called Columbia Nitrogen Corporation. It existed from 1962 to 1986, and we insurers issued policies to it from the mid-60s to roughly when it dissolved in 1986. PCS Nitrogen is not the insured, and so it relies on two theories. One is a theory that it has been held to be liable -- held to be the corporate successor to Columbia

Nitrogen, and the other theory is that it was assigned those policies contractually.

I want to first address the question of whether there is an issue of fact, because obviously we have to overcome that hurdle under Turner versus Milliman before the Court can rule on the law. On the corporate successor theory, which I might call the de facto merger theory, they argue that Judge Houck, federal court in Charleston, held that they were the de facto merger successor to old Columbia Nitrogen, old CNC, as we might call it.

THE COURT: His ruling was fairly simple, wasn't it?

MR. HOFER: That's correct. However, it was appealed and another part of the ruling was affirmed, that is that PCS Nitrogen contractually assumed the liability, and his alternative holding that they were the corporate successor under South Carolina law was not affirmed, was not reviewed on appeal. What that means is that holding of the district court is no longer binding. PCS Nitrogen admits this in their opposition paper. They say that is no longer binding. It's binding on them, and certainly not binding on us. So that is no longer a holding.

Their alternative argument is to say, well, we

want to argue that issue now. We want to make that argument now. We want to argue that we're the de facto merger successor. And they claim there is a fact issue on that, but they never identify what the fact issue is. Judge Houck, in fact, tried this before the bench, made a decision about that, and PC Nitrogen never identifies why fact issue remains after that trial. The fact is, there is no fact issue. The facts are undisputed.

The new Columbia Nitrogen, which is now PCS Nitrogen, bought certain assets, assumed certain liabilities, but the main point is under South Carolina law you don't have a de facto merger situation if there is someone available to be sued after the corporate transition is done. De facto merger is an equitable theory which allows equity to step in and say you are going to be held liable for this other corporation's liabilities even though you didn't agree to it. But if you did agree to it, of course equity doesn't step down.

So they were held to have contractually assumed that liability. That was Judge Houck's first holding, that was affirmed by the Fourth Circuit, the de facto merger theory doesn't apply. And they don't really even argue the law on that, they just say there is an

issue of fact. They don't say what the issue of fact is, they don't discuss the law. Our view of that is that issue should be treated as conceded because they do not raise any argument about it.

Of course the Court doesn't have to accept our argument on that point. PCS argued, very strenuously, to Judge Houck and to the Fourth Circuit that it was not the de facto merger successor. We think it was right. So if the Court doesn't believe us, it should believe PCS Nitrogen. It was not the de facto merger successor, and that should end the issue.

So that leaves us with the alternative argument, the assignment argument and is there an issue of fact on that. Now, PCS concedes in its brief -- this is at Page 8 of its opposition brief -- I'm quoting: The only matter at issue is whether old CNC's assignment to new CNC is enforceable.

Now, whether that contract provision is enforceable or not is a legal issue. They say that is the only issue; we agree with that. There is no fact issue. So we are talking about legal issues, and we are -- this case is appropriate for summary judgment. So turning to the merits of the assignment theory, what PCS claims created an assignment of all of these insurance policies from the original insured to new

Columbia Nitrogen to PCS is a document called Assignment of Insurance Policies, but what is in that document says it is assigning benefits and proceeds to the extent they may be assigned.

So the parties acknowledge by that document that they couldn't assign policies. They could not make a new party an insured. They could transfer the benefits and proceeds that had already accrued, and that is all they attempted to do. The fact that they understood that isn't just revealed by that document, but what they also did when they did want to assign a whole policy, make new CNC an insured, they went to the insurance company and said we want you to assign -- approve an assignment, and the insurance company issued an endorsement. That is how it is supposed to be done. PCS understood that, and it did it when it wanted it to happen.

So no such attempt was made with respect to any of our policies, and PCS cannot claim that new Columbia Nitrogen received any assignment at all. Let's assume, for sake of argument, that one were attempted. If that were true, even if it were true, it wouldn't be valid under South Carolina law. Our first indication of why we are right on that is the supreme court decision in Nahruun. Both parties cite

that case. We acknowledge that what the supreme court said about the issue was dictum, but the Court drew a clear distinction between assigning insurance policies, which can never be done because it is an assignment of a contractual relationship, and that is really a novation. You cannot make a new party -- new entity a party to the contract without consent of the other party; that is just black letter law.

An assignment of an accrued right to insurance payment. Payment obligation that is already owing, that is permitted as it shows an action. All of this is clear under predecessor South Carolina law, not just Nahruun. We laid out that law, and PCS really doesn't rebut it. I think most damaging to PCS Nitrogen's argument is the Silverman case. This is the case where the tort plaintiff wanted to get the insurance due for the damage to the car that hit him. He sued the defendant, attached the car and wanted the insurance on the car because he only got a hundred dollars for selling the car.

The argument the plaintiff made there is essentially the same argument that PCS makes here, which is: If I buy an asset, I get the insurance on that asset. Except here PCS argues if I get a liability, I get the insurance from the seller for

that liability, as if the insurance is somehow attached to the asset for the liability involved. The supreme court said in Silverman that that is just not true. The insurance contract was personal to the insured. It does not attach to and flow with the asset or the liability. Buying an asset doesn't put you into a contractual relationship with the insurer, and so the supreme court rejected the fundamental argument raised there. The fact that it did so after the accident in that case, I think is important, because it rejects in principle the PCS argument that you can assign an insurance policy or any right under a policy any time after loss or any time after the jury. Obviously there, the accident had happened, but the tort plaintiff still couldn't step into a contractual relationship with the insurer afterward. It wasn't transferable. It was personal to the insured and it remained with the insured.

Now, Silverman involved an attachment, but the same applies to an assignment. Attachment to the assignment are two side of the same coin. Assignment is a voluntary transfer, assignment is involuntary transfer -- attachment is an involuntary transfer. In both cases, the thing transferred has to be transferable at law. You can't attach or assign

something that is not transferable. You can attach or assign money due. You can't attach or assign something like contract writing.

It might be different if the insurance money is due, because that is -- shows an action. It is the insured's money in the insured's hands, and the question is whose name do you put on the check. You can assign that. That is what all the cases say; South Carolina cases say that, cases from other jurisdictions. That is not the same as putting a different name on the policy. They are arguing these cases that say you can change the name on the check means you can change the name on the policy. That is not true. That is changing contractual relationship. That is a novation. The case -- well, the majority of the cases reject that proposition.

What is permitted is an assignment of a showing of an action, it's an assignment of a piece of property. Law of property forbids restriction on alienation and, therefore, can be assigned. PCS here doesn't argue that it received assignment and assignment of it shows an action. It argues it received an assignment of policies, including the duty to defend. So it is the new insured for all the purposes, and that outcome is just prohibited under

the contract language in South Carolina law.

So PCS relies extensively on out-of-state authorities for its position, and we've shown that all of those cases either just involve -- shows an action, so they are no different than what South Carolina law already provides, or they applied the law they are supposed to apply, they're federal or intermediate appellant decisions which ignored the state supreme court cases which upheld the other way, or they annunciate a rule which is inconsistent with State of South Carolina law and, therefore, not binding on the court --

THE COURT: What effect does payment of premium have on your argument?

MR. HOFER: I mean -- who paid the premium?

THE COURT: Yeah.

MR. HOFER: The fact that is our insured paid the premium and, therefore, our contract flows to the insured. So if our insured were sued for this liability, and we're covered, we have a payment obligation to the insured. So we -- our contracts are there and our insured -- if it were sueable -- would have insurance under those contracts. That is not something we're walking away from. The fact is it dissolved as part of this corporate transaction in

1986, and it was sueable for sometime after that, but was never sued.

From our perspective, the problem here isn't insurance, it is liability, the way of the law of liability with respect to resolved corporation functions. They are no stranger to that problem. They sued Ross Development, even though I believe it dissolved too, went up and tried to get the assets from the shareholders and the directors, tried to get their insurance, lost on that. That's what Mr. Favate will talk about because of the pollution exclusion applied. So it is familiar with the problem of suing a dissolved company, but that is what the law provides. That is not something that is part of the insurance contract. So there is no extreme minority. We're not talking about extreme minority. We're talking about the vast majority of cases which agree with us on our position. There are a few cases that disagree with us and allow a policy holder to assign the policies wholesale. That is not South Carolina law, and it shouldn't be. Here is why.

The cases they are relying on reveal fundamental confusion about what shows an action is. The fact is under a general liability insurance policy, the payment obligation from the insured to the insurer

doesn't arise until the tort case against the insured results in a judgment. That is when the liability is fixed, and that is when our contracts say we have a duty to indemnify.

THE COURT: What about a duty to defend?

MR. HOFER: It is never transferable, doesn't become a payment obligation. It is a duty owed personally to the insured. It is an obligation to provide services of an attorney. It can't be reduced to sum of monies. It can't be assigned, can't be attached. It is a personal obligation to the insured and, therefore, can never be transferred.

So what some cases say is that the loss occurs, when the loss occurs, the insurance obligation is assignable. What they are talking about by and large is first party property damage insurance, meaning insurance for loss that you suffer from a fire, from a windstorm, from theft, your own loss. They use the term "loss" colloquially because the payment obligation of the insurer arises at the same time as the property damage. But what they are really talking about shows an action exception. They are not talking about a loss exception. So the question isn't liability insurance contracts, when does the insurance have payment obligation. That can be assigned, but

the policy cannot. The injury that a third party may suffer as a result of an accident is not the time the insurer has a payment obligation. That injury is one contingency to the insurer's payment, but there is no obligation until the insured is liable, and that won't happen unless the claimants files suit, and here she does so on a timely basis, and has a cause of action recognized by law and proves every element of the claim and does so with admissible evidence beyond a preponderance of the evidence -- by a preponderance of the evidence, and the defendant has no defenses.

All of those contingencies has to be satisfied before there is a judgment, and it is only then that the insured would have a payment obligation, and that is assuming that what is at issue is covered. Only then does the risk of liability become set and determined and the risk can be dramatically affected by what the insurer does or does not do in the meantime. So we count on the insured having an alignment of interest with us in defending, minimizing and defeating liability all the way up to judgment.

This case shows the problem that could occur when a new entity comes on the scene, assumes liability and claims to be entitled to the original insurer's insurance policies, and that it is a division of

interest between our interest and the punitive insured's interest. PCS Nitrogen here alleged in the underlying case that our insured was at fault and substantially contributed to the contamination at this site in Charleston. It said that our insured committed hapless disposal of lead and permitted lead acid chambers to leak and knew of contamination at the site. They did discovery on all of this. So what they are asking the Court to do is to permit them to make these allegations against our insured proving our insured liable, seeking to do that anyway, and then pay them to do it, pay their cost of pursuing our insured. That is because -- excuse my characterization -- that is crazy. We did not sign up for that. That is not our contract. We defend our insured. We don't pay a third party to make allegations of liability against our insured and expect to be covered for that. They sought to increase our insurance liability. It is contrary to our interest. It is not something we bargained for, but it is the kind of adversity that results when the insurance is split from liability.

If you permit an assignment only judgment, that can't happen. The judgment fixes the liability, we rely on the insured to defend up until then, the risk

ends, the actuality of liability incepts, and we have a payment obligation the insured can assign, that is all the law permits.

Cases holding otherwise incorrectly assume that the risk ends when injury occurs. That is the wrong question to ask. The right question is, when does the payment obligation arise. But, in fact, the risk, which is whether the insured is liable, continues to be uncertain and contingent until judgment is entered. For that reason, the only rule that makes sense is the only rule we advocate and the cases recognize, which is that the insured may assign an accrued payment obligation that shows an action after judgment, and the underlying case may not assign policy rights before that.

All of PCS' claims depend on argument that old Columbia Nitrogen assigned its policies, full rights under the policies, without insured consent, but that was in violation of the contracts in South Carolina law, claims have no merits and summary judgment should be granted.

THE COURT: Thank you very much.

MR. GINSBERG: Mike Ginsberg on behalf of PCS Nitrogen with Mr. Morrison.

Let me go back a step, Your Honor, just to make

sure we are all on the same page as to what happened in 1986. 1986 a company known as Columbia Nitrogen Corporation decides to go out of business and it sells itself, all of itself, and it dissolves. It sells itself to a company called New Columbia Nitrogen, so we have an old CNC and a new CNC. We're talking about the old CNC policies here.

In subsequent years, my client buys the new CNC, new Columbia Nitrogen Corporation. There is no question that is a merger. We acquired all of the assets and liabilities of that new Columbia as a result of that merger. So the issue is only what happened in 1986 with respect to the sale of old -- from old Columbia Nitrogen to new Columbia Nitrogen. Judge Houck, looking at all of these facts, finds the de facto merger. We fought that issue, there is no question. PCS Nitrogen contended that that was not a de facto merger. We lost in front of Judge Houck. The issue went up on appeal to Fourth Circuit, and the Fourth Circuit did not address it. It is not affirmed. It is not reversed, just not addressed by the opinion of the Fourth Circuit.

That issue still remains out there at this point. We tried to argue that we weren't the successor, we lost that issue. They all want to say you lost,

therefore we win, because we're held by Judge Houck to be the successor, but that wasn't affirmed by the Fourth Circuit. I think Mr. Hofer said because there is no fact questions, we should win on that issue. I'm confused by that argument, but I don't have to go there. We don't have to make that decision, because we have a clear assignment of the insurance policies. Exhibit 1 to our brief is an assignment of the rights and benefits. It says all of seller'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. Right. Absolutely clear assignment of the rights and benefits and proceeds of the insurance policies that were owned by Columbia Nitrogen Corporation.

So Mr. Hofer spends his time now contesting whether that assignment is valid. I find that argument interesting because the -- South Carolina Supreme Court says, quoting Couch on insurance, and this is in the Nahruun decision. The great majority of courts adhere to the rule that general stipulations and policies prohibiting assignments of the policy, except with the consent of the insured, apply only to assignments before loss and do not prevent an assignment after loss for the obvious reason that the

clause by its own terms ordinarily prohibits merely the assignment of the policy as distinguished from a claim arising out of the policy.

It is the Supreme Court of South Carolina clearly articulating exactly the position that we advanced, and the vast majority of cases in this country advanced, that the assignment of rights to a policy after the policy is expired, after the events that can give rise to a loss under the policy have occurred, it is perfectly legitimate and appropriate. We cite a number of cases, and I apologize for that, in our brief. Those cases are not as Mr. Hofer suggests talking about a fixed loss, they are talking about -- I'm sorry, a judgment. Mr. Hofer would like the law -- the case we cite on Page 9, it is exactly this case talking about the rights for defense and indemnity of a liability insurance policy notwithstanding if the rights were assigned prior to the initiation of the action. So there was no judgment in Illinois Toolworks.

In Tokington, it talks again about a chosen action arises out of an occurrence based insurance policy at the time of the covered loss. Well, you know, these are policies which cover occurrences, damages that arise from occurrences during a policy

period. Once the policy period is over, their liability is fixed. Claims do come -- and always do come -- later. That is why they call them incurred, but not reported claims, IBNR. They have all sorts of claims under occurrence policies because they live forever for things that happen in those policy periods.

The courts have recognized that the anti-assignment language in the insurance policies is designed to prevent me from buying car insurance policy and assigning it to you while it is still valid. If I assign to you rights to coverage under my car insurance policy, after the term of the policy has expired, I haven't expanded their liability. They insured only me. That is exactly what we have here. Old Columbia Nitrogen was insured by these insurers only for old Columbia Nitrogen's activities. No one is expanding anyone's liability. All we're doing is saying the rights to pursue coverage under those policies has been transferred, and that is what all of these cases acknowledge. In fact, there are only now I think two cases, a case in Hawaii and I think Indiana, that go the other way. New Jersey, California now has gone this way, Iowa, Ohio, South Carolina in the Nahruun decision acknowledges that

that is the vast majority of law. They don't say we're going to follow it, but there is no indication by the South Carolina Supreme Court that they are looking to go somewhere else. In fact, they endorse, in that case, the referee's decision.

So we have a clear assignment and we have clear case law that says assignment post-loss is valid. I don't know where in these cases where Mr. Hofer gets to the position that rights and benefits don't include the duty to defend, because that is not what the cases are saying. They are saying that the rights and benefits of the policy may be assigned post-loss because it is not an increase in the liability of the insured.

The concern we have in a case like this one is if the liabilities have been assigned and assumed, then the insurers, essentially, for all the premiums they've collected, gets a free pass. They want to say that old Columbia Nitrogen doesn't exist anymore so it can't have any liability. The reason there is no de facto merger is because someone else assumed the liability, and I'll come back to that in a second, but we don't have any insurance for this new entity. So if the liabilities had matched what we insured -- the company we insured, they have no more liability

because they are gone, but our insurance doesn't apply to this new entity that assumed those liabilities, so we walk, the insurers. That is just not what the cases allow.

Judge Houck in his de facto merger -- I think he focused on both, de facto merger under federal law and what he called consolidation under South Carolina law -- looked at the issue of whether there is someone available to be sued. Mr. Hofer turns that on its head, and I want to be very clear about this. The law of de facto merger and the consolidation derives from product liability cases where there was a concern where if you transfer assets without the liabilities, that there may not be anyone there to sue who made the product. So they say, well, if you have all the assets and you are a continuation of this business, then the liability is going to follow with you. The exception to that is if the predecessor still exists.

Mr. Hofer says, well, we don't have to worry about a predecessor still existing because we have the successor that they assumed the liabilities. So if there is an explicit assignment of liabilities he says there no de facto. If there is no explicit assumption of liabilities, then there is nobody who has the liability, then we have a de facto merger. Your

Honor, I suggest that it turns the concept on its head. Here we have a clear -- based on Judge Houck's decision -- a clear assumption of liabilities, which is one of the elements of the determination of de facto merger or consolidation under South Carolina law.

So, yes, we argued vigorously that that was wrong. We lost. We turned to the insurance companies of the predecessor, that Judge Houck said we were the successor to, and they say you are wrong, you are not the successor. So we lose in front of Judge Houck and found we're the successor, and then they say you argued you weren't so we're not going to insure you. There is something fundamentally unfair about that. Something fundamentally unfair about these insurers who took premiums to insure the operations of old Columbia Nitrogen saying they no longer have to pay, they have no obligation because old Columbia Nitrogen is gone, and by the way, there is a new Columbia Nitrogen that has the responsibilities for that. Thank you, Your Honor.

THE COURT: Mr. Hofer.

MR. HOFER: Brief rebuttal, Your Honor, if I may?

THE COURT: Sure.

MR. HOFER: I think Mr. Ginsberg's prime

objection to our argument is his mischaracterization that we're going to walk if we're correct. That is just not true. The problem here from Mr. Ginsberg's client's perspective is that they did not sue our insured. They did not sue old Columbia Nitrogen. If they had sued old Columbia Nitrogen and obtained a judgment, our obligations, if that liability is covered, would be triggered. We would have to pay, if it was covered. But they did not sue old Columbia Nitrogen.

They are trying to -- I don't know why, maybe there was legal reasons they couldn't do that, maybe contractually, I don't know why. They sued Ross and Ross' shareholders and Ross' directors. They sued old Columbia Nitrogen's parent corporations, and they alleged old Columbia Nitrogen's parent corporations were liable. They didn't sue old Columbia Nitrogen. Now because they didn't do that, they are trying to get the Court to accept an argument that would up end South Carolina law and allow them to do something the law doesn't permit, which is to step into a contractual relationship as a stranger. Their situation should not create that law.

Now, Nahruun supports us, and we said in the brief. That involved a tort claimant who sued the

bar, got a judgment and then special proceedings on the judgment, the referee assigned whatever the insurance company owed the bar owner. That is a classic example of an assignment of an accrued payment obligation. It shows an action. The tort claimant didn't become the insured on the bar policy. She had a right to payment. She had a judgment against the insured, and the insurance company owed a payment obligation, that you can assign. That is all the supreme court proved, and that is all the law proves.

Mr. Ginsberg gave an example. He owns a car, has an insurance policy on it. He can't assign to you -- he can't sell the car to you and assign his insurance policy while the policy is still in effect. Certainly he can't do that; we understand that. But he asserted that once the policy is expired and then he sells you the car, he can assign you the policies then. Silverman says no. Silverman said after the loss, which was a car accident in that case, you still cannot transfer the contractual relationship to a stranger. That holding rejects Mr. Ginsberg's example.

Under the de facto merger point, the South Carolina cases are clear. The theory applies only when the new company does not assume liability. There

is no reason to have this theory if they do assume liability. The fact pattern, the problematic fact pattern, is the new corporation makes the same product, has the same business, same owners, same managers, same name, just different corporate shell. But it gets all of that, assets and all of the ongoing business, and doesn't assume liability, and the old company has nothing but the liability. The courts say, no, you can't do that. We're going to hold you to be the de facto merger successor to the old corporation, because you really are still the same corporation, but there is no assumption of liability. That is the reason the theory is necessary. Where liability is assumed, there is no need for a theory, there is someone to be sued. That is what the law says. That is not my characterization, that is what the cases say. They assumed the liability, therefore, they cannot be the de facto merger successor. Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. GINSBERG: Your Honor, only because I think Mr. Hofer misstated my example on the car insurance, I want to be -- don't want to have him suggesting I was transferring the car. I would say Silverman versus Drew, that case isn't what Mr. Hofer describes. In

that case, the person trying to get the insurance had already received payment from another source. That is the distinction the Court addresses there. So we have to be very careful there. On the de facto merger issue, United States versus Carolina Transfer, Fourth Circuit citing South Carolina law, lists the eight factors that Judge Houck referred to. It does not say but if there is an assumption of liability, none of these apply. No. I think Mr. Hofer added that to the analysis.

THE COURT: All right. Thank you very much. Mr. Favate.

MR. FAVATE: John Favate for United States Fire. Your Honor, before the Court is the moving insurer's emotion for summary judgment on the pollution exclusion. We submit, as we have outlined in the papers, that the pollution exclusion contained in the policies, which are the subject of this motion, precludes any duty to defend or indemnify PCS for the liabilities that it has arising from contamination at the site.

Your Honor, our motion is focused on the liabilities that PCS has as a result of the precluding activities at the site by old CNC, old Columbia Nitrogen Corporation. In addition, Your Honor, we

contend that PCS is now collaterally estopped from attempting to relitigate here the applicability of the pollution exclusion to contamination at this site. In the motion, Your Honor, we believe that we've demonstrated that there are no genuine issues of material fact, and that we're entitled to judgment as a matter of law. We submit that in its opposition, PCS has failed to demonstrate the existence of a genuine issue of fact. It has not even presented a scintilla of evidence sufficient to raise a genuine issue of material fact on the pollution exclusion issue.

Your Honor, the exclusion provides that the insurance provided by the policies does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkaloids, toxic chemicals, liquids or gases, waste materials or other irritants, contaminates or pollutants into, upon land, the atmosphere or any water course or body of water.

I think, Your Honor, if you review Judge Seymour's findings in the Ashley 2 case, you will see that is what precisely took place during old CNC's six years of operation at this site. The exclusion contains an exception, an exception that PCS bears the

burden of proving applies here, and I submit that they have failed to do that. That exception says this exclusion does not apply -- and these are important words and I want to be very clear about this -- if the discharge dispersal, release or escape is sudden and accidental. The plain language of that exclusion says nothing at all, and has no bearing upon, what old CNC intended. Mr. Ginsberg, PCS opposition, argues that you need to focus on the fact that -- according to Mr. Ginsberg -- old CNC did not intend to cause contamination. It didn't intend to pollute, but that analysis is wrong. It is irrelevant to the analysis before the Court here today. As the Supreme Court of South Carolina said in Helena, and as the Fourth Circuit said in the Ross case, a case in which PCS was an active litigant, it is the discharge that has to be sudden and accidental; it is not the contamination.

So in its opposition, PCS urges the Court to apply an incorrect standard, and we submit that when the Court applies the correct standard to the facts as they have been determined already by Judge Seymour in the Ashley 2 case, the only conclusion that the Court can reach is that the exclusion precludes coverage.

Now, in Ashley 2, following an extensive trial,

Judge Seymour rendered detailed findings of fact with regard to how the contamination is associated with when old CNC's activities took place. What those facts show, we submit beyond any dispute whatsoever, is that PCS has been deemed liable for pollution arising from ordinary business operations of old CNC at the site, routine discharges from day-to-day activities engaged in the course of manufacturing phosphate fertilizer. What Judge Seymour's decision talks about are the annual cleaning of the acid chambers. This involved cutting a hole in the acid chambers, rinsing out the sludge that was in there resulting in what Judge Seymour called a pyramid of sludge approximately 2 feet wide, 2 to 3 feet tall. That sludge contained lead, it contained arsenic, other acids. It was simply washed out to the surface of the ground into unlined ditches flowing towards the Ashley River. Nothing sudden and accidental about that, Your Honor. The same holds true with regard to the annual maintenance of the acid chambers when lead plates would be carved out of those acid chambers and thrown on the ground and left there. Again, Your Honor, nothing accidental -- sudden or accidental about that.

Old CNC conducted phosphate fertilizer

manufacturing activities from 1966 to 1972. In 1972 it wound down those operations and began the process of dismantling the site. That process continued into the 1980s. Again, Your Honor, as Judge Seymour found, that process also caused and contributed to the contamination of the site, and there is nothing sudden and accidental in those activities.

Now, although this site was the location of a phosphate fertilizing manufacturing operation for some 72 years, PCS would have all of that contamination bootstrapped into a windstorm that happened in April of 1971. Your Honor, that windstorm does nothing to alter the outcome of this motion. Judge Seymour found that that windstorm damaged buildings that were present on the site, and as a result of the damage to those buildings by the windstorm, dust was dispersed on the property. Judge Seymour made no finding, whatsoever, in the underlying case that that windstorm resulted in any property damage. Judge Seymour made no finding in the underlying case that that windstorm resulted in any liability being imposed upon PCS. Judge Seymour included a reference to the windstorm, I submit, simply to provide a complete history of the site. What we know for purposes of this motion, Judge, is there is no evidence whatsoever, nothing

presented a PCS' opposition, nothing found in Judge Seymour's decision showing that that windstorm caused any property damage when the windstorm happened, or any time after the windstorm. The windstorm has no bearing on this motion, and it simply should be disregarded.

Now, Your Honor, we submit that the undisputed facts, as they have been determined by Judge Seymour, can't be relitigated here, as well as controlling South Carolina law compels the conclusion that the pollution exclusion precludes any duty to defend or indemnify here. I would like to reserve a few moments to respond to what Mr. Ginsberg has to say.

THE COURT: Sure. Yes.

MR. GINSBERG: I have a couple of slides I would like to share with you, if I may approach?

THE COURT: Sure.

MR. GINSBERG: I made copies. The first slide -- and I apologize now for this. When I read the briefs, both of them that were filed by the defendants, they spent a lot of time talking about issue preclusion, collateral estoppel. I kept puzzling over that because, as the first line says, PCS is not Ross. In the coverage case that Ross had, that PCS joined into, never dealt with PCS' activities or old CNC's

activities, only that was Ross' activities. I can't even count how many times they -- count about how many times they talked about Ross' conduct in their briefs, talking about what Ross did. Ross operated the facility from 1906 to 1966, its predecessor. There is no question that their operation left a lot of stuff on the ground that caused contamination. That is what Judge Seymour finds. That was discussed at length in front of Judge Seymour in connection with Ross' insurance coverage action, and that was an action by Ross against Ross' insurers for Ross' conduct. They criticize PCS for not talking about the windstorm in that case. Well, Ross was gone by the time of the windstorm, so there is no reason to talk about Ross' conduct because its insurers didn't cover the property or Ross' operations when the windstorm happened. So I didn't hear Mr. Favate talk about Ross, so maybe they dropped that issue and no longer seeking to say PCS is bound by Ross' coverage determination. That is incorrect, and so I applaud them for withdrawing it, but that is what their briefs talk about. That is what I was prepared to talk about, which explains the first couple of slides focusing on that.

I would say it is kind of shocking when you think about it. PCS involved itself in the Ross case

because it is a judgment creditor of Ross. In the underlying cert actions, Judge Seymour found not only Ross responsible for 45 percent of the contamination, but they are liable to indemnify PCS because they agreed to indemnify CNC for damage at the property before CNC owned it. So PCS has a claim against Ross. That is what the Ross litigation, the shareholder action, is all about trying to get from Ross the indemnification and Ross' share of the cleanup.

What was interesting about this is PCS pursued Ross' coverage supporting Ross for the benefit of these insurers because PCS is trying to reduce its liability by collecting the millions -- I'm not sure, a little over 10 at this point -- millions of dollars that PCS has incurred cleaning up this site and defending itself. Then they say, well, you lost that so, therefore, you have no coverage under your policy. I didn't understand that, and they seemed to have walked away from it, so I'll stop there.

If I could talk about, though, the findings that Judge Seymour had made. Again, we start with Slide 5, the South Carolina standard, and that is what Judge Seymour was applying. Greenville County case, a landfill case, a case where someone was sending material to a landfill, and the Court found that the

sudden and accidental pollution did not bar coverage for liabilities arising out of sending material to a landfill. That is what the South Carolina supreme court said. It is said, Contains no temporal element, it means only unexpected. It was an unexpected release, that is what the South Carolina Supreme Court said. Then in Atlanta Chemical, which Counsel talked about, it talked about is there coverage under the sudden and accidental pollution exclusion for liabilities arising from ordinary business operations. I want to talk about ordinary business operations. That is the standard we have to focus on.

When you read Judge Seymour's very, very, very specific findings with respect to old CNC's activities, what you find is that most of the things she talks about has nothing to do with ordinary business operations. What she criticizes old CNC for, and therefore PCS, are things like -- let me back up. Criticize is really the wrong word. It is strict liability. All she has to do is find that there was movement of contaminants or release at the site. It is not a negligent standard, it's a strict liability standard. Did your operation contribute to the contamination at the site? It is not a judgment of fault, it is a judgment of strict liability. But she

says here are the things that I find happened while old CNC was on the property. On Page 6 of my Slide, 1971 windstorm. She says, This damage resulted in air dispersion of contaminated roof dust, the finished fertilizer product and chemicals. Air dispersion, so the Ashley experts on Footnote 4, Page 20, of our brief, and Counsel said we didn't address it, but we say, To the extent the insurers are asserting there is no evidence that contaminates distributed as a result of the 1971 windstorm, or any other activity, caused damage throughout the relevant policy period. We cite Ashley's own expert, the plaintiff's expert in that case, who argued that these contaminants reached the soil and migrated in the soil. So the windstorm is directly related to that.

We haven't had any discovery in this case between these parties. Everyone is relying on what Judge Seymour found, so I think we have to look at everything she found. Page 7, she talks a lot about construction activities, and that is true. PCS did construction activities. These were reconfiguring the plant, putting in a new granulation plant, running 4500 feet of underground piping, including 500 feet of piping from the acid plant. So there is no disposal there. There is no sudden and accidental -- there is

no intentional release of contaminants. What is happening they are moving dirt around as part of the construction activities, and she finds that the moving of dirt contributed to site contamination. There is no disposal of a pollutant. The pollution exclusion talks about the discharge dispersal release or escape of chemicals. That is not what is happening here. These are not ordinary business activities. This is not disposals. This is not what Ross was doing when it was putting in pyrite ore on the ground; these are construction activities.

Page 8, she talks about -- Paragraph 66 of her decision -- the granulation plant was converted to storage, construction of concrete ramps, removal of old equipment. She talked about CNC brought fill into the site in order to make you do this construction, and that some of the fill material had contaminants in it. Nothing in her report suggests that PCS was disposing of fill material on the site. They were bringing fill material, it wasn't disposal, but she says it was placed in and requires remediation. It is not a false standard, it is a strict liability standard.

She talks about the demolition activity on Slide 10. Demolition involved dismantling and washing

out the acid chambers and acid towers, excavating the acid take and associated piping, the heavy equipment that came in, Paragraph 71.

Paragraph 74 she talks about the demolition that required the use of large hydraulic excavators, a crane and grading that was required. Then she says in Paragraph 74, These processes disturbed the soil. She says, The removal of three separate railroad tracks required the use of these heavy excavation -- those are disturbing the soil.

Slide 13. She said -- this is really her conclusion. Paragraph 77, the CNC demolition and site preparation activities that incurred in 1971 to 1981 time period impacted an area a little less than 80 percent of the area where contaminated soils and sediments must be excavated. Demolition and regrading the site by CNC significantly disturbed the soil. She doesn't say "disposal" or "release." She says demolition and regrading of the site. That is what she's finding caused the contamination for which she finds PCS to be responsible, these site activities.

Now, there is some other evidence that she talks about with respect to releases during operations, and there is no question that some of that happened. It is much smaller if you look at her opinion than these

kinds of things she talks about that we put here. One of the things she talks about is pipe breaks. Pipes got chemicals running through it. It breaks, that happens. It is a sudden and accidental event. It is unintended release of whatever is in that pipe.

We know during Ross' operations, and in Helena Chemical they have testimony of witnesses that say they just let it go. She finds during CNC's operations, if a pipe broke, they shut the plant down until they could get a guy named Mr. Carter in to repair the pipe. She finds specific releases of chemicals related to pipe breaks. It is not a fault question, it is a strict liability question. Were there releases during the operations, and she says, Over time, periodic releases of acids from leaks and tank leaks mobilized both lead and arsenic through the soil. When pipes leak, Carter was called to address the problem immediately, and if he was not available, the plant was shut down.

So if there is a question of fact as to whether all of the contamination which CNC is responsible, or PCS is held to be responsible by the district court, was a result of sudden and accidental or non-sudden and accidental, the pollution exclusion bars any coverage. I think we have at least more than

sufficient evidence to defeat a motion for summary judgment. We may have to get into a situation where we have to figure out what part of the releases were -- might be governed by the pollution exclusion and what parts would not be. But her decision, if that is the Bible that we're living with, if that is our record, she has a plethora of information where she suggests in findings after trial that suggests that old CNC, which PCS is liable, was not intentionally disposing of contaminates or pollutants or acids or anything else.

THE COURT: Did the Fourth Circuit address those issues, or just the --

MR. GINSBERG: Just really the apportionate issues. She's the finder of fact, and so at that point, she's the finder of facts. They don't really go into a determination. Again, it is strict liability, so the question is, was there a release of contaminants during your operations, and she finds here is the things that I find that happened while you were there that either contributed or exasperated in which she finds PCS liable. Thank you, Your Honor.

MR. FAVATE: If I may?

THE COURT: Yes, sir.

MR. FAVATE: A couple of points. What you just

heard Mr. Ginsberg say is he wants to relitigate in this case how the contamination caused by old CNC took place. He simply can't do that. PCS litigated and lost in Ashley 2 the issues concerning how the contamination took place.

Your Honor, the slides that we look at have an interesting title on them, and once again, this is part of PCS' attempt to have the Court focus on the wrong standard. The slides talk about contamination during CNC's operations. In fact, the exclusion doesn't talk about contamination during CNC's operations. It talks about discharges. The fact of the matter is, as the slides even show, as the quotes from Judge Seymour's decision show, the demolition activities took place over many years. There is no question Judge Seymour says twice in her decision that old CNC knew that hazardous materials were present on this site, and notwithstanding that, they engaged in the demolition. They engaged in the grading of the site, all for the purpose -- all for furthering into business purposes preparing the site for sale, which is what happened in 1985.

Your Honor, I think it is important to know the specific reasons why Judge Seymour determined that PCS was liable in this circumstance. That appears

commencing at Page 491 of her decision, and she goes through a couple of things. First she says that old CNC conducted manufacturing operations on the site for 6 out of 66 years that the fertilizer plant was in operation. She says that all of the lead and arsenic on the site that was introduced after Ross left the site, was introduced by old CNC.

When old CNC ceased operations, it demolished all of the structures. This demolition was highly disruptive to the site and took place over several years leaving contaminants open to the elements. She goes on to say that prior to selling the property, CNC graded the site, and more specifically, she says CNC knew that its operations, manufacturing operations, contaminated that site. Your Honor, there is not a shred of evidence presented to the Court on this motion which establishes a sudden and accidental discharge, as South Carolina courts have interpreted that term, that resulted in property damage for which PCS is liable and for which it seeks coverage here. For that reason, we submit that the motion should be granted.

Your Honor, one other point relates to the Ross case. The Ross case -- PCS was an active participant in that case. It is the same site, same policy

exclusion, it is policies that were in effect at the same time. PCS had every opportunity and every incentive in that case to argue that there were sudden and accidental events that took place which triggered the coverage at issue there. That would be sudden and accidental events that took place in policies that were in effect from 1972 to 1992. That is what was at issue at Ross. That is what at issue in this case. PCS is barred from now attempting for relitigate whether or not the pollution exclusion in the policies applies to this site. It litigated that in Ross and lost.

More importantly, Your Honor, if you look at the facts of Ross, and you look at the facts of old CNC's activities at this site, they are strikingly similar. So there really is no factual distinction. At the very least, Ross is a very persuasive decision that this Court should give serious consideration to.

Another case that the facts of this case are strikingly similar to is Helena Chemical. That involved an insured who engaged in the manufacture of pesticides. Here we have one engaged in the manufacturing of fertilizers.

While Helena Chemical had testimony from folks who worked at the different facilities, I submit that

you have a far better and more robust record which to decide this motion. That is the extensive findings of fact and conclusions of law rendered by the Court in the Ashley 2 case, as well as the guidance provided by the Court in the Ross case. For those reasons, I submit that the motion for summary judgment should be granted, Your Honor.

THE COURT: All right. Mr. Ginsberg.

MR. GINSBERG: Your Honor, the reason the slides say, Contamination during CNC's operation was not ordinary. That is the Helena Chemical standard. That is precisely Helena Chemical standard. I urge the Court to do this, compare the factual testimony of Helena Chemical to what Judge Seymour talks about here. They talked about pipes leaking that no one tried to fix. She finds the opposite here. They are filing a motion for summary judgment with all sorts of inferences, and all we have is the record of Judge Seymour and her findings. Judge Seymour says over and over again these are not ordinary operations. That is what she's finding. She is saying these are activities that contributed to the contamination, but she finds specifically that PCS was a good steward, they were taking care to fix the pipes and not operating when they were leaking.

On the Ross issue, I don't need to go back through it again, but Ross' insurers didn't insure Ross' operations in 1972 at this site, because Ross didn't have any operations in 1917 or '72. Talking about the windstorm with respect to Ross would have made no sense, whatsoever.

THE COURT: Thank you, Counsel. Anything further? All right. I will -- I have read most of your briefs and most of the case law. I would assume that you can provide me with proposed orders within 10 days?

MR. HOFER: Ten days, Your Honor.

THE COURT: The plaintiff has submitted a proposed order, but if you care to make it any more comprehensive than that, I'll be glad to review it; otherwise, I'll take that as your position.

MR. GINSBERG: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, the proceedings concluded.)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the matter of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina, on the 2nd day of February, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 7, 2016

Natalie Dahl, RPR

Natalie Dahl, RPR
Court Reporter