STATE OF SOUTH CAROLINA
In the Court of Appeals

ON APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas

RECEIVED
Jun 22 2020
SC Court of Appeals

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-000845

Circuit Court Case Nos. 2015-CP-46-02155 (*Smith*), 2015-CP-46-03456 (*Howe*), 2019-CP-40-00076 (*Hopper*), 2018-CP-40-04680 (*Hill*), and 2018-CP-40-04940 (*Taylor*)

Ex Parte: United States Fidelity and Guaranty Company..... Appellant,

v.

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation..... Respondent,

In Re:

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith ..... Plaintiffs,

v.

CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union Carbide Corporation; United States Fidelity and Guaranty Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United Conveyor Corporation ..... Defendants,

and

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe ..... Plaintiffs,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora

Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries ..... Defendants,

and

Charles T. Hopper and Rebecca Hopper..... Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Flour Constructors International, Inc.; Fluor Daniel Services Corporation; Flour Enterprises, Inc.; FMC Corporation;

Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries ..... Defendants,

and

James Michael Hill, Jr., as Executor of the Estate of James Michael Hill ... Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., successor-in-interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as successor-in-interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as successor-in-interest to Byron Jackson Pumps; CB&I Group Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CNA Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as successor-in-interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individualy and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to

Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as successor-in-interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually, and as successor-in-interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as successor-by-merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and successor-in-interest to Bowater, Inc.; Reynolds American, Inc., individually, and as successor-by-merger to Brown & Williamson Tobacco Corporation, successor-by-merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and successor-in-interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as successor-in-interest to Zurn Industries, Inc. ..... Defendants,

and

Denver D. Taylor and Janice Taylor..... Plaintiffs,

v.

Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; Borgwarner Morse Tec, LLC; CBS Corporation; CNA Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito-Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life

Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC ..... Defendants.

APPENDIX ACCOMPANYING USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL

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STATE OF SOUTH CAROLINA COUNT□ OF □ORK TIMOTH□ W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SI□TH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456 **UNITED STATES FIDELITY AND GUARANTY COMPANY□S LIMITED OBJECTION TO JOINT MOTIONS TO □I□ESTABLISH AND APPROVE □UALIFIED SETTLEMENT FUND□ AND □II□APPROVE SETTLEMENT AGREEMENTS WITH HARTFORD, TIG AND SENTRY**

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 **UNITED STATES FIDELITY AND GUARANTY COMPANY'S LIMITED OBJECTION TO JOINT MOTIONS TO (I) ESTABLISH AND APPROVE QUALIFIED SETTLEMENT FUND AND (II) APPROVE SETTLEMENT AGREEMENTS WITH HARTFORD, TIG AND SENTRY**

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04940 **UNITED STATES FIDELITY AND GUARANTY COMPANY'S LIMITED OBJECTION TO JOINT MOTIONS TO (I) ESTABLISH AND APPROVE QUALIFIED SETTLEMENT FUND AND (II) APPROVE SETTLEMENT AGREEMENTS WITH HARTFORD, TIG AND SENTRY**

United States Fidelity and Guaranty Company ("USF&G") submits this limited objection (the "Objection") to the joint motions (the "Joint Motions") of Peter D. Protopapas, as Receiver (the "Receiver") for Covil Corporation ("Covil"), for entry of (i) an order to establish and approve a qualified settlement fund (the "QSF") over which this Court would retain jurisdiction (the "Proposed QSF Order"); and (ii) three orders (collectively, the "Proposed Settlement Orders") approving settlement agreements with, respectively, First State Insurance Company and Hartford Accident and Indemnity Company (the "Hartford Settlement") and TIG Insurance (the "TIG Settlement") and Sentry Insurance, a Mutual Company, formerly known as Hardware Mutual Casualty Company (the "Sentry Settlement") (collectively, the "Settling Insurers").

The Court should deny the Joint Motion that seeks entry of the Proposed QSF Order because, without clarification, it purports to relieve Covil of its obligations to abide by the terms of its insurance policies and South Carolina law on pro rata allocation; and the Court should deny the Joint Motions that seek entry of Proposed Settlement Orders because the Receiver lacks the

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authority to enter into any agreement that extinguishes or bars USF&G's rights under its contracts or at law. In the alternative, the Court should modify the Proposed SF Order and Proposed Settlement Orders as reflected in the revised proposed orders submitted as Exhibits A and B, respectively. Absent the foregoing relief, the Court should issue an order directing: (a) that the Receiver produce the documents requested in the subpoenas attached as Exhibit C (the Subpoena) on or before five (5) days after entry of such order or at such time as the Court may direct; and (b) that on or before seven (7) days after the Receiver's production, USF&G may be permitted to file a supplemental objection to the Joint Motions for the Court's consideration.

USF&G does not seek to prevent the Receiver or any Settling Insurer from entering into reasonable settlements. The relief requested by the Receiver and Settling Insurers, however, unlawfully attempts to impair the rights of non-settled parties that are not signatories to such settlement agreements or other agreements, in violation of USF&G's contractual and common law rights.

INTRODUCTION

The Proposed Settlement Orders cannot be entered as submitted. They would impermissibly bar or impair USF&G's (and other non-settling insurers) rights to contractual subrogation and/or equitable contribution under South Carolina law and the United States Constitution (collectively, the Insurer Contribution Claims). The Receiver proposes to terminate Insurer Contribution Claims against the Settling Insurers and force USF&G and other non-settling insurers to assert such claims solely against the SF. USF&G's contributions rights are legally cognizable property rights under South Carolina law. The Court cannot approve an agreement pursuant to which the Receiver extinguishes Insurer Contribution Claims without affording the insurers due process.

In addition, the Proposed □SF Order references an operating agreement submitted by the Receiver (the □□SF Operating Agreement□), which purports to make the □SF □excess□ to any insurance issued by non-settled insurers. While USF&G is not bound by the □SF Operating Agreement □the Receiver is its only signatory □to the extent the Proposed □SF Order could be construed as endorsing the terms of the □SF Operating Agreement, it must be clarified. The Receiver lacks authority to unilaterally alter its legal obligations to the extent doing so impacts other parties such as USF&G, and, thus, the Proposed □SF Order should specify that the Receiver remains bound by its insurance contracts and South Carolina law, including pro rata allocation among insurers that cover the same underlying liabilities.[1]

Finally, the Receiver has, to date, refused to provide information necessary to determine the extent to which the □SF and related orders would impact their rights. The Receiver has ignored USF&G□s multiple requests that he provide evidence to enable USF&G to: (a) confirm that the □SF will contribute pro rata to any judgment or settlement of an underlying asbestos claim that would implicate insurance policies issued by a Settling Insurer or (b) assess whether or not sufficient funds will be available to satisfy any Insurer Contribution Claims. To comply with the law, the Proposed □SF Order must clarify that it does not modify Covil□s obligation to abide by pro rata allocation, and the Proposed Settlement Orders must be revised to remove any limitation on the right of USF&G and other non-settling insurers to assert Insurer Contribution Claims, including to assert such claims directly against the Settling Insurers to the extent the □SF fails to satisfy such claims.

[1] The Proposed □SF Order also provides for this Court to retain jurisdiction over matters pertaining to the Proposed □SF Order and, as such, requires clarification that it does not deprive or limit other courts with jurisdiction over insurance coverage matters involving Covil, including the United States District Courts for the District of South Carolina and the Middle District of North Carolina.

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RELEVANT FACTS

For decades, USF&G has defended Covil, and is currently defending Covil, under a 1976 to 1978 policy (the "USF&G Policy") against claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos ("Covil Asbestos Suits"). USF&G has agreed to pay and *has paid* indemnity where coverage exists subject to an appropriate reservation of rights. As the Receiver acknowledges, past and future Covil Asbestos Suits trigger policies issued by the Settling Insurers. To confirm that the Proposed "SF Settlement will not operate to extinguish the Receiver's legal obligations, the Receiver must disclose information regarding the manner in which the "SF will resolve Covil Asbestos Suits that implicate both settled and non-settled insurance policies. To determine whether the Hartford Settlement, TIG Settlement, Sentry Settlement and the Proposed Settlement Orders would impermissibly impair USF&G's rights, the Receiver must disclose whether the Settling Insurers' payments to the "SF are sufficient to exhaust the Hartford, TIG and Sentry policies and whether there will be enough funds remaining in the "SF, after deducting unspecified fees and expenses, to satisfy Insurer Contribution Claims for perhaps decades to come. USF&G has requested this information both informally and by its Subpoena, but the Receiver has refused to respond to any of USF&G's requests.

In the Subpoena, USF&G has specifically requested that the Receiver provide documents reflecting: (1) funding of the "SF sufficient to show amount of funds available to satisfy any claim for contribution, indemnification or subrogation, including amounts needed to pay legal fees administrative and management costs, and other fees; (2) analysis or evidence to support the proposed finding of fact in the Proposed Settlement Orders that the consideration is fair and reasonable; (3) analysis or evidence to support the Proposed Settlement Orders' conclusion of law that the Settling Insurers expect the qualified settlement fund will protect them from contribution

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claims; and (4) the terms of the SF and any other document that purports to address, modify, impair, enjoin, or alter in any way any potential rights of contribution, indemnification or subrogation by USF&G or other insurer, including the Hartford Settlement, TIG Settlement and Sentry Settlement.

Given that the Receiver is a judicial officer of this Court, there is a pressing interest in transparency. *See Kirven v. Lawrence*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964). Nonetheless, the Receiver has refused to provide information critical to clarifying that the Proposed SF Order complies with the law and establishing that the Hartford Settlement, TIG Settlement and Sentry Settlement are reasonable and that USF&G s rights are protected. Accordingly, the Proposed SF Order must be clarified to confirm that it does not alter Covil s obligations under any contract or at law, and the Proposed Settlement Orders must be rejected or revised to provide USF&G and other non-settling insurers the right to assert Insurer Contribution Claims against the Settling Insurers to the extent the SF fails or refuses to satisfy such claims.

ARGUMENT

I. The Receiver, Acting As An Arm Of The Court, Lacks Authority To Modify Or Terminate The Insurer Contribution Rights Or Relieve Itself of Legal Obligations

This Court appointed the Receiver pursuant to Section 4 of S.C. Code § 15-65-10. Such appointment is not without limits. Under long-standing South Carolina precedent, the appointment of a receiver works ***no metamorphosis*** in the title or interest to or in the assets of the insolvent; the receiver takes possession of them as the arm of the court, subject to all existing liens and encumbrances, ***having due regard to the legal and equitable rights of the parties***. *Carwile v. Metropolitan Life Ins. Co.*, 136 S.C. 179, 134 S.E. 285 (1926) (emphasis added). Thus, the Receiver cannot change any existing contractual relation or create any new contractual relation or right of action thereon. *National Cash Register Co. v. Burns*, 217 S.C. 310, 60 S.E.2d 615

(1950). *See also Jeffcoat v. Morris*, 389 S.E.2d 159, 160, 300 S.C. 526, 528 (S.C. Ct. App. 1989) ("a receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver and becomes merely the assignee of the insolvent having exactly the same rights") (citing *Carwile*, 134 S.E. at 290).[2]

South Carolina has long recognized an insurer's right to assert subrogation claims where an insurance policy so provides. *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 438 (S.C. 1960). "When an insurer pays its insured for a loss resulting from the tortious conduct of a third party, the insurer is subrogated to the rights of its insured against the third party." *Frank B. Hall & Co. v. Vic Bailey Lincoln-Mercury, Inc.*, 298 S.C. 282, 284, 379 S.E.2d 892, 894 (1989). *See also Pringle v. Atlantic Coast Line Railroad Co.*, 212 S.C. 303, 310, 47 S.E.2d 722, 725 (1948) ("the Insurance Company is subrogated to the rights of the insured, to the extent of the indemnity paid."); *accord Allstate Insurance Company v. Electrolux Home Products, Inc.*, 2017 WL 2216298, at *5-6 (D.S.C. 2017) (same).

Similarly, under well-established South Carolina law, a non-settling insurer has a right to seek contribution from settling insurers where the insurers' policies cover the same interests of the insured. *See, e.g.*, *Midwest Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 258 S.C. 533, 539 (S.C. 1972) (recognizing and upholding insurers' equitable and contract rights to contribution under South Carolina law); *Cooper v. Georgia Casualty & Surety Co.*, 244 S.C. 286, 292 (S.C. 1964) ("each insurer is affected by the cause of action against the other under the rule of contribution"); *Lucas v. Garrett*, 41 S.E.2d 212, 214-16 (S.C. 1947) ("The rule of contribution is an equitable rule

[2] A receiver "has only such general powers, rights, and duties as may be conferred upon him" by the court or laws of the state. *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935). *See also* SCRCP 66, which provides that, in actions where a receiver has been appointed, "the administration of estates by receivers . . . shall be in accordance with the laws of this State. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules."

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and is based on the fact that those who insure the same interest would be equitably apportion the same liability); *accord Michelin North Am. v. Fed. Ins. Co.*, No. CV 6:17-1599-HMH, 2017 WL 11458023 (D.S.C. Nov. 7, 2017), at *3.

In view of this law, the Receiver cannot properly enter into agreements that purport to alter or impair USF&G s contractual, equitable and common law rights as set forth in the Proposed Settlement Orders. The USF&G Policy, for example, contains a clear and unambiguous subrogation clause. *See* USF&G Policy (Section 14. In the event of any payment under this endorsement the Company shall be subrogated to all the Insured s rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatsoever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.). South Carolina courts routinely enforce insurers rights to subrogate. By barring Insurer Contribution Claims, the Receiver would impermissibly change Covil s existing contract with USF&G by purporting to modify or delete the subrogation clause in the USF&G Policy.[3]

In short, the Receiver lacks authority to enter into an agreement that modifies or terminates a contractual subrogation provision or unilaterally purports to relieve Covil of its contractual obligations. Accordingly, the Receiver s request for approval of the Hartford Settlement, TIG Settlement, and Sentry Settlement, which alter USF&G s contractual rights, must be denied.

Likewise, the Receiver cannot purport to relieve Covil of its legal obligations to USF&G and other non-settled insurers, including its obligation to comply with rules of pro rata allocation

[3] By order dated February 27, 2020, the court in the pending federal coverage action enjoin[ed] the Receiver from further pursuing judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers. *Covil Corp. v. Zurich American Ins. Co.*, No 7:18-3291 (D.S.C. Feb. 27, 2020), at 25. Thus, the Receiver is enjoined from seeking any ruling on USF&G s rights and obligations under any policy issued to Covil, and USF&G does not waive any right to enforce the injunction or contend that the Receiver s positions violate the injunction.

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under South Carolina law. *See Crossmann Comm. N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 62-63, 717 S.E. 2d 589, 601 (2011 (there is no logic to support the notion that one single insurance policy among 20 or 30 years[] worth of policies could be expected to be held liable for the entire time period). Thus, the Proposed SF Order must be rejected unless it clarifies that the Receiver remains obligated to apply pro rata allocation where any Covil Asbestos Suit implicates policies issued by USF&G (or other non-settled insurers) and policies issued by the Settling Insurers.

II. The Proposed Settlement Orders Violate Due Process By Barring Complete Relief On Insurer Contribution Claims Without Compensation To Non-Settling Insurers

This Court cannot enter the Proposed Settlement Orders for the additional reason that they would improperly alter or terminate USF&G's (and other non-settling insurers') equitable rights of contribution under South Carolina law ***with no corresponding credit or other compensation***. Under Both Article I, Section 3 of the South Carolina Constitution and the fourteenth amendment to the United States Constitution, a person cannot be deprived of property "without due process of law." *South Carolina Nat. Bank v. Central Carolina Livestock Market, Inc.*, 345 S.E.2d 485, 487, 289 S.C. 309, 312 (S.C. 1986). This prohibition includes contractual rights and "reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Insurer Contribution Claims are cognizable property interests protected under South Carolina law. By barring USF&G from asserting such claims against the Settling Insurers and channeling them to the SF whose funding and administration are not fully disclosed, the Proposed Settlement Orders impairs USF&G's property interest in Insurer Contribution Claims. Importantly, the Receiver offers ***no consideration*** for taking away USF&G's property interest.

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The Proposed Settlement Orders provide no setoff or other form of compensation to account for the deprivation of Insurer Contribution Claims. Instead, the Receiver proposes to alter USF&G's right to assert Insurer Contribution Claims while unilaterally declaring that USF&G's only recourse will be to a "SF whose funding and administration is deliberately obscured.

Case law in the federal bankruptcy context illustrates the due process issues raised by the Receiver's Proposed Settlement Orders and refusal to provide USF&G with the information it has requested concerning the terms. Under federal bankruptcy law, courts may issue channeling injunctions to bar contribution claims by one insurer against another; in the asbestos context, this authority is specifically provided by 11 U.S.C.A. § 524(g). *See In re Maremont Corp.*, 601 B.R. 1, 31"32 (Bkrtcy. D. Del. 2019) (explaining that insurers" release of claims and contributions to asbestos personal injury trust supported the imposition of channeling injunction pursuant to § 524(g)(4)(A)(ii)(III)). But such bar orders are entered pursuant to specific statutory authority and in accordance with the due process protections afforded by the United States Bankruptcy Code.

The Receiver here lacks the authority of the Bankruptcy Code, and the Proposed Settlement Orders do not purport to provide the non-settling insurers with any of the protections that are required in the bankruptcy context for a court to extinguish property rights in a manner that comports with due process. *See Martin v. Wilks*, 109 S.Ct. 2180, 2184, 490 U.S. 755, 762 (1989), *superseded by statute* as stated in *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 511 U.S. 244 (1994) ("[W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights ***if the scheme is otherwise consistent with due process***.") (citations omitted) (emphasis added); *In re Johns-Manville Corporation*, 551 B.R. 104, 114-115 (S.D.N." 2016) (noting that section 524 is the only provision of the Bankruptcy Court that explicitly authorizes a bankruptcy

court to enter an order releasing a nondebtor from liability and that its requirements are specifically tailored to protect the due process rights of future claimants.) For example, the bankruptcy court must conclude, based on a sufficient evidentiary record, that an injunction in favor of a settling insurer is "fair and equitable" to those who might assert demands subject to the injunction, in light of the third party's contributions to the trust. *See* 11 U.S.C. § 524(g)(4).

Further, to comport with due process, bankruptcy courts must provide insurers whose contribution claims are enjoined as a result of a court order certain protections, including consideration in exchange for extinguishing state-law granted property rights. *See Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996) ("When determining whether to enter a bar order against nonsettling defendants, the [bankruptcy] court must make a reasoned determination that the bar order is fair and equitable."). As noted above, the Bankruptcy Code further requires courts to make specific findings, based on an evidentiary record, that the contributions made by settling parties are fair and reasonable. Not only is there no comparable state or federal statute applicable here that would authorize the relief requested by the Receiver, the protections afforded in the bankruptcy context are entirely absent from the Proposed Settlement Orders.

Other analogues are found in lawsuits brought under the Private Securities Litigation Reform Act ("PSLRA"). Under the PSLRA, courts considering whether to approve settlement agreements that bar contribution claims against settling parties must assess whether the agreement is fair and reasonable. *See In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1032 (2d. Cir. 1992) ("[a] settlement bar should not be approved unless it is narrowly tailored and preceded by a judicial determination that the settlement has been entered into in good faith and that no one has been set apart for unfair treatment"). Notably, in situations where a settlement agreement deprives or terminates a non-settling defendant's property or contractual rights, the

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court must determine whether due process was afforded and, if not, refuse to approve the bar order. *See AAL High Yield Bond Fund v. Ruttenberg*, 2005 WL 5926936, at *2 (N.D. Ala. 2005) (the "approval of a bar order broader than the bar order in the PSLRA would risk affecting the rights of the non-settling defendants, and the Court is not aware of any authority holding that such rights may be abridged without compensation"); *see also In re Granada Partnership Sec. Litig.*, 803 F.Supp. 1236, 1236 (S.D. Tex. 1992) (the touchstone for determining whether a bar order should be approved is whether it is "fundamentally fair and equitable to the non-settling defendants"). [4]

Here, the Proposed Settlement Orders are not narrowly tailored and do not reflect a "fundamentally fair and equitable" process. Indeed, they offer no credit at all to non-settling insurers to account for payments that the Settling Insurers would otherwise owe on account of settlements or judgments of Covil Asbestos Claims. The Proposed Settlement Orders provide no protections whatsoever for USF&G or any other non-settling insurers with respect to their rights to assert Insurer Contribution Claims against the Settling Insurers to the extent the "SF fails or refuses to satisfy them. Rather, they purport to extinguish "without compensation or credit "the rights of USF&G and other non-settling insurers to assert Insurer Contribution Claims for decades to come.

III. In the Alternative, the Court Should Enter USF&G's Proposed Orders or Defer the Motion Until the Receiver Has Provided the Re"uested Information

The proposed order attached as Exhibit A would clarify that the Receiver remains obligated to abide by South Carolina law on allocation with respect to resolved Covil Asbestos Claims. The proposed order attached as Exhibit B would permit the Receiver to enter into reasonable

[4] Case law in the federal class action context illustrates this point as well. *See In re Orthopedic Bone Screw Products Liability Lit.*, 1997 WL 164237, at *4"5 (E.D. Pa. 1997) (quoting *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995). (recognizing exception to the rule "that a non-settling defendant generally lacks standing to object to a partial settlement"where non-settling defendant insurers whose contribution claims were at issue "can demonstrate that they will suffer some formal legal prejudice as a result of the partial settlement.").

settlements with settled insurers and limit the liability or obligations of the □SF, while at the same time protecting USF&G□s rights of contribution by permitting USF&G to recover on its contribution directly from any settled insurer in the event necessary.

If this proposal is not acceptable to the Receiver, the Settling Insurers, or the Court, then USF&G is entitled to information sufficient to enable it to (a) confirm that the Receiver will contribute properly to any resolved Covil Asbestos Claims that implicate insurance policies issued by the Settling Insurers and (b) determine the extent to which the Hartford Settlement, TIG Settlement and Sentry Settlement are fair and reasonable and the extent to which the Proposed Settlement Order in fact may impair its rights. USF&G does not seek to prevent the Receiver or any Settling Insurer from entering into settlements, and has repeatedly requested information necessary to respond to the Joint Motions. Unfortunately, neither the Receiver nor any Settling Insurer has responded to USF&G□s multiple requests for such information, either formally or informally.

Accordingly, absent modification of the Proposed □SF Order and Proposed Settlement Orders as set forth in Exhibits A and B, the Court should issue an order directing: (a) that the Receiver must produce the documents requested in the Subpoena on or before five (5) days after entry of such order or such time as the Court may direct; and (b) that on or before seven (7) days after the Receiver□s production, USF&G may file a supplemental objection to the Joint Motions for the Court□s consideration.

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CONCLUSION

For the reasons set forth herein, the Court should deny the Joint Motions or provide the alternative relief requested above.

Dated: March 20, 2020

Respectfully submitted:

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EXHIBIT 28

STATE OF SOUTH CAROLINA COUNTY OF YORK ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH, Plaintiffs, vs. CBS Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-02155 **THE RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTIONS TO APPROVE SETTLEMENTS WITH HARTFORD, TIG, AND SENTRY**
STATE OF SOUTH CAROLINA COUNTY OF YORK TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456 **THE RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTIONS TO APPROVE SETTLEMENTS WITH HARTFORD, TIG, AND SENTRY**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 **THE RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTIONS TO APPROVE SETTLEMENTS WITH HARTFORD, TIG, AND SENTRY**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680 **THE RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTIONS TO APPROVE SETTLEMENTS WITH HARTFORD, TIG, AND SENTRY**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04940 **THE RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTIONS TO APPROVE SETTLEMENTS WITH HARTFORD, TIG, AND SENTRY**

Peter D. Protopapas, as Receiver for Covil Corporation ("Receiver"), files this memorandum in further support of the joint motions with Hartford, TIG, and Sentry to approve the settlements with those insurers (the "Settling Insurers").[1]

I. The Receivership Court Has Authority to Approve Covil's Settlements.

This Court has the power to approve the Receiver's settlements with the Settling Insurers. South Carolina law empowers this Court to control, liquidate, and dispose of the assets of this Receivership. Furthermore, South Carolina has long held that the equitable powers of the Circuit

[1] The Court has been provided with the relevant settlement agreements for its in camera review and is aware of the monetary amounts of these settlements. USF&G and Zurich have been provided with the aggregate settlement amount by way of an absolutely privileged mediation communication from Timothy Gallagher, the mediator who facilitated these settlements and who remains actively engaged in mediating Covil's remaining, unresolved disputes with its insurers (including Zurich and USF&G). Given that public policy strongly favors settlements and the fact that these arms' length, good faith settlements leave the Covil QSF with ample funding for its future responsibilities as to USF&G and Zurich, if any, these settlements should be approved.

Court extends to appointing a Receiver to assist this Court with the identification, control, liquidation and disposal of the assets of the entity in receivership. *See In re State ex rel Hutchinson*, 182 S.C. 369, 375, 189 S.E. 475, 477-78 (1937) (holding the power to appoint a receiver is vested in every circuit court of the State, and nowhere in the body of the law is there any limitation upon this authority); *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 345 (1928) (holding the effect of the appointment of the receiver is to take property and place it in the hands of a third party pending litigation); S.C. Code Ann. § 15-65-10. The Receiver has determined that these settlements are in the best interest of the Receivership.

The Receiver's authority rests upon the Orders appointing the Receiver. The Order in the instant case empowers the Receiver "with the power and authority to fully administer all assets of Covil Corporation ("Covil"). This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." *See* November 2, 2018 Order Appointing Receiver.

Pursuant to the Order appointing the Receiver, the Receiver has engaged in extensive fact-finding discovery and litigation over the insurance policies with the Settling Insurers prior to entering into the proposed settlements. The Receiver and the Settling Insurers have conducted multiple mediations under the auspices of a court-ordered mediator. The Receiver requests this Court approve the liquidation of the insurance policies issued to Covil by the Settling Insurers. Upon liquidation, the Receiver requests this Court order the transfer of the assets into a Qualified Settlement Fund under the supervision and continuing jurisdiction of the Receivership Court.

This Court clearly has the authority to liquidate assets of the Receivership and direct where those assets should go. Pursuant to South Carolina law, once the appointment of the Receivership took effect, no attachment could be levied on the property in the Receiver's possession for it is

then in the custody of this Court. *Regenstein v. Pearlstein*, 30 S.C. 192, 205, 8 S.E. 850, 854 (1889); Property in custodia legis, 10 Cyc. of Federal Proc. § 36:23 (3d ed.). The Receivership Court determines the rights of creditors to Receivership property and funds according to the creditors' respective priorities. *Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S.C. 464, 490, 176 S.E. 589, 599 (1934). This Court controls these assets through its Receiver who administers the assets of the estate under the direction of the Court. *In re Fifty-Four First Mortgage Bonds*, 15 S.C. 304, 315 (1881); *Kirven v. Lawrence*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964). For example, this Court can (1) utilize a Receiver instead of a master to dispose of assets of the bankrupt; *Buist v. Merchant's & Planter's Bank* 65 S.C. 487, 489, 43 S.E. 958, 959 (S.C. 1903); (2) order Receivers to sell the assets of the receivership; *Clyburn v. Reynolds*, 31 S.C. 91, 105, 9 S.E. 973, 975 (1889); (3) liquidate the rights of creditors pursuant to their priorities; *Montgomery & Crawford v Arcadia Mills*, 173 S.C. at 490, 176 S.E. at 599*; Stevens v. Carolina Scenic Stages*, 208F.2d 332, 333 (4th Cir. 1953); and (4) manage real property including the collection of rents and payment of taxes and maintenance charges. *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 104, 311 S.E.2d 95, 96 (Ct. App. 1984).

On November 2, 2018, this Court took possession of the property of Covil through its duly appointed Receiver. From that moment forward, this Court has been imbued with the authority to liquidate the asset on terms it finds favorable. Attempts at any lien or encumbrance on the Receivership property after the appointment of the Receiver are not recognized by South Carolina law. Furthermore, the placement of the liquidated asset into a Qualified Settlement Fund for the processing of future asbestos claims is appropriate, as those are the only liabilities that have been brought against Covil in the last thirty years. The Court's continuing jurisdiction over the

Qualified Settlement Fund means that these assets will remain under this Court's continuing authority.

II. As Non-Parties, USF&G and Zurich Lack Standing to Oppose these Settlements.

As they have frequently reminded this Court for many months, neither USF&G nor Zurich is a party to the *Smith*, *Howe*, *Hill*, *Hopper*, or *Taylor* cases. As a result, they do not have standing to seek any relief in these cases, including relief related to the Qualified Settlement Fund, or "QSF."

USF&G has repeatedly taken the position that this Court lacks jurisdiction over it, in filings made in this Court and in other courts, while somehow also seeking relief from this Court. In the cases captioned above, for example, counsel for USF&G entered an "appearance for the limited purpose of electronically filing a notice of removal with this Court." *See* Exhibit 1, Notice of Appearance dated July 11, 2019. In that notice of appearance, USF&G specifically stated, "By filing this appearance for this limited purposed [sic] of electronically filing a paper in aid of federal jurisdiction, USF&G does not waive any of its jurisdictional objections, as set forth in the notice of removal." *Id.* Counsel for USF&G has not filed any other notices of appearance in the above-captioned cases.

USF&G has taken this same position in its filings with the South Carolina federal district court. On the eve of this Court's first status conference regarding the Covil receivership, USF&G inexplicably attempted to remove this Court's Notice of Status Conference to federal court. *See* Exhibit 2, Notice of Removal (filed without exhibits). In its removal pleadings, USF&G cited this Court's lack of jurisdiction over it in its attempted removal to federal court of the Notice of Status Conference. *Id.* at 6.

Zurich likewise asserts its non-party status to the receivership proceedings. In its Joinder to USF&G's Limited Objection, Zurich specifically identifies itself as a non-party: "Non-Party Zurich American Insurance Company ("Zurich"), specifically reserving and not waiving its previously filed objection to this Court's exercise of personal jurisdiction over it." *See* Zurich's Joinder at 1.

Even though they are non-parties, and have continuing objection to this Court's exercise of personal jurisdiction over them, USF&G and Zurich now insist that they are, at the same time, entitled to extraordinary relief from this Court. USF&G filed a "limited objection" to the motions at issue here, and Zurich joined the briefing. *See* USF&G's Opposition at 1; Zurich's Joinder at 1. While doing everything it can to avoid or challenge this Court's jurisdiction, USF&G now attempts to invoke this Court's jurisdiction – improperly requesting relief in the form of denial of the Receiver's routine motions.[2] USF&G and Zurich cannot have it both ways.

As non-parties to both the above-captioned cases and the motions to approve the settlements between Covil and the settling insurers, USF&G and Zurich lack standing to oppose the Joint Motions. In *Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013), the South Carolina Supreme Court held that a non-party insurer did not have standing to set aside a special referee's assignment of rights between a nightclub and a patron of the club. *Id.* at 341. The Court reasoned, "Since Insurer has not established that it was a party or the legal representative of a party, it was not entitled to seek relief under the provisions of Rule 60(b)." *Id.* at 342. While

[2] USF&G also requests that this Court make specific insurance coverage rulings. It argues: "The Proposed QSF Order must be rejected unless it clarifies that the Receiver remains obligated to apply pro rata allocation where any Covil Asbestos Suit implicates policies issued by USF&G (or other non-settled insurers) and policies issued by the Settling Insurers." *See* USF&G's Opposition at 10. As this Court is aware, USF&G previously moved in federal court to enjoin the Receiver from seeking similar insurance coverage rulings from this Court in the future.

USF&G and Zurich request that this Court reject the settlements rather than set aside the order after its entry, the principle remains: only parties, not non-parties USF&G and Zurich, have standing to challenge the Joint Motions. *Accord*, *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016) ("***A party*** seeking to establish standing must prove the 'irreducible constitutional minimum of standing,' which consists of three elements . . ." (emphasis added)).[3]

III. Contribution and Subrogation are not Contract Rights

USF&G and Zurich assert that this Court cannot enter the proposed settlement orders because the orders would terminate their valuable contract rights of contribution and subrogation without "corresponding credit or compensation." Brief, p. 10. This assertion by USF&G and Zurich is patently false. The Receiver and the Settling Insurers have preserved all policy rights and objections. They have stipulated to their respective policy terms and conditions and the QSF has "stepped into the shoes" of the Settling Insurers in all respects, as provided for by governing federal law set forth in 28 U.S.C. § 468B. This assertion by USF&G and Zurich is also legally erroneous. Liability insurance policies contain no right to contribution or to subrogation against other insurance companies. An insurer contracts with its insured for defense and indemnification against the insured's potential liability to pay damages for, among other things, bodily injury and property damage during the policy period. A liability insurer does not contract with other insurers

[3] Zurich's and USF&G's failure to seek intervention in these matters and become a party to them is fatal to any attempt to object. *See, e.g., In re Horry Cty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) ("Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action.")

to obtain contribution or subrogation recoveries to offset the payments it makes on behalf of its insured. Contribution and subrogation are *not* contract rights.

"The rule of contribution is an *equitable rule* and is based on the fact that those who insure or become sureties for the same duty ought [] share the results of the default." *Cooper v. Ga. Cas. & Sur. Co.,* 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) (emphasis added); *Aerojet-General Corp. v. Transp. Indem. Co*., 948 P.2d 909, 929-30 (1997) ("contribution" gives insurers an equitable right of contribution because they do not have contracts with each other).

Subrogation is also based in equity. It permits an insurer to seek recovery against third-party tortfeasors that are responsible for at least a portion of its insured's liability. There is no equitable right of subrogation between or among insurers:

> Legal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties.

Calvert Fire Ins. Co. v. James, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960). The general rule is that when an insurer pays the insured's loss resulting from the tortious conduct of a third party, the insurer is subrogated equitably to the rights of its insured *against the third party*. *Frank B. Hall & Co. v. Bailey Lincoln–Mercury, Inc*., 298 S.C. 282, 284, 379 S.E.2d 892, 894 (1989).

IV. The Proposed Orders Raise No Constitutional Concerns

USF&G and Zurich assert that the settlement orders would effectuate a "taking" of their property without due process of law in violation of the federal and South Carolina constitution. USF&G has made the argument unsuccessfully in other cases, and it fares no better here.

For example, in the Plant Insulation Company asbestos bankruptcy, USF&G and other non-settling insurers argued that the bankruptcy court's order eliminating their contribution rights

against settling insurers was a compensable taking in violation of the constitution. The Federal district court "easily" dismissed this argument:

> The threshold question, therefore, is whether the Non–Settling Insurers' contract rights and claims for equitable contributions from Settling Insurers qualify as "property interests" under the Takings Clause. The answer is easily ascertained: they do not. The Ninth Circuit has explained that claims do not vest, and hence do not rise to the level of a constitutionally-protected property interest, "until a final reviewable judgment is obtained."

In re Plant Insulation Co., 485 B.R. 203, 217 (N.D. Cal. 2012). "The reason an accrued cause of action is not a vested property interest for Takings Clause purposes until it results in a 'final unreviewable judgment' is that it is inchoate and does not provide a certain expectation in that property interest." *Bowers v. Whitman*, 671 F.3d 905, 914 (9th Cir. 2012). Indeed, the United States Supreme Court remarked more than a century ago that "a person has no property, no vested interest, in any rule of the common law." *Mondou v. New Haven & Hartford R.R. Co*., 223 U.S. 1, 50, 32 S.Ct. 169, 56 L.Ed. 327 (1912); *see also Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) ("Although the Supreme Court has suggested that a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained"(citations and internal quotation marks omitted)).

The "right" of USF&G, and of Zurich, to equitable contribution here is equally "inchoate" for this very reason. There has been no judgment establishing a right of USF&G or Zurich to contribution from Sentry, TIG or Hartford. USF&G and Zurich merely possess a common law expectation of a *potential right* to contribution sometime in the future that, at present, is not reduced to a final unreviewable judgment. As the *Plant Insulation* court noted, "their claims remain unrealized, and contingent upon a whole host of outcomes in future litigation." *In re Plant*

Insulation, 485 B.R. at 217.[4] Consequently, no constitutional issues are raised by the proposed settlement orders, and not compensation would be owed if they are entered. Moreover, as outlined below, the QSF is "stepping into the shoes" of the Settling Insurers, including as respects these claims.

V. USF&G's and Zurich's "Rights" to Contribution Will Be Directed to the QSF

In the Plant Insulation bankruptcy, USF&G and the other non-settling insurers lost their inchoate contribution rights *entirely*. Here, however, the proposed settlement orders *maintain* those inchoate contribution rights, but "direct" them *away* from Sentry, TIG and Hartford and *to* the QSF. Proposed Order at __. USF&G's assertion that the proposed settlement orders "provide no protection whatsoever for USF&G or any other non-settling insurer . . . Rather they purport to extinguish – without compensation or credit – the rights of USF&G and other non-settling insurers to assert Insurer Contribution Claims for decades to come" is wrong. Brief, p. 13.

USF&G nevertheless brazenly urges this Court to reject the QSF order "unless it clarifies that the Receiver remains obligated to apply pro rata allocation where any Covil Asbestos Suit implicates policies issued by USF&G (or other non-settled insurers) and policies issued by the Settling Insurers." Brief, at 10. USF&G relies on *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co*., 395 S.C. 40, 717 S.E.2d 589 (2011).

This Court, however, has already addressed the application of *Crossman* to the relationship between the Receiver and Covil's insurers:

> The Court is mindful of the South Carolina Supreme Court's decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co*., 395 S.C. 40, 717 S.E.2d

[44] On appeal, the Ninth Circuit affirmed the lower court's holding that the non-settling insurers were not entitled to compensation for the "loss" of their contribution rights, but reversed the lower court's confirmation of the debtor's plan of reorganization on a question of federal bankruptcy law that is not at issue in this state court proceeding. *In re Plant Insulation Co*., 734 F.3d 900, 917 (9th Cir. 2013)

> 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not address the particular circumstances presented by this Receivership, *i.e.,* the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court will apply the rule of *Crossman Communities of N.C., Inc*. except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an "all sums" basis. The Court also interprets *Crossman* such that allocation of loss will not be made to policy years when Covil does not have any available or responsive coverage.

January 8, 2020 Order at 18-19 (the Order).

Under the Order, USF&G and Zurich are entitled to seek contribution from other insurers – and also the QSF upon entry of the QSF order – for *indemnity* paid on "products" or "completed operations" claims. There is, however, no "right" to contribution in South Carolina as respects an insurer's defense obligation:

> We hold where two companies insure the identical risk and both policies provide for furnishing the insured with a defense, neither company, absent a contractual relationship, can require contribution from the other for the expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty. "Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services."

Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha, 269 S.C. 183, 187, 236 S.E.2d 818, 820 (1977) (internal citations omitted).

There is nothing inequitable about this result. South Carolina permits the imposition of the type of substantive sanctions this Court issued against USF&G and Zurich "in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield Cnty*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008). "[S]anctions for discovery abuse are left to the sound discretion of the trial court." *Id*.

The evidence of "bad faith," "willful disobedience" and "gross indifference" on the part of both USF&G and Zurich is abundant:

> Over time, this Court entered a series of escalating orders designed to require the Insurers to produce relevant insurance information to Covil's Receiver and to participate in asbestos mediations as scheduled in the South Carolina docket. Although several asbestos cases have been resolved under this system, except as noted above in note 5, the Insurers have yet to comply with this Court's Orders regarding the full production of the relevant insurance information to Covil's Receiver. These Insurers' defiance of this Court's lawful orders has impeded Covil's Receiver in his work under this Court's mandate, has interrupted this Court's ability to manage the numerous asbestos cases pending on its docket, and has required this Court unnecessarily to expend valuable time and resources in numerous hearings designed to encourage these Insurers to conduct themselves in accordance with the basic tenets of well-established South Carolina law. The Court has experienced problems with these Insurers when they were animating an otherwise defunct Covil and controlling its behavior in asbestos litigation before the appointment of the Receiver. See Order Granting Plaintiff's Motion for New Trial in *Crawford v. Celanese Corp*., C/A No. 2017-CP-42-04429 (where this Court found that Covil's insurers had been improperly operating, controlling, and abusing Covil for many years).
>
> Unfortunately, this Court's persistence and patience have been unsuccessful in causing these Insurers to produce the insurance information to the Receiver for their insured, Covil. After numerous attempts to achieve compliance, this Court scheduled a show cause hearing on November 12, 2019, where the Insurers were directed to appear to discuss by policy and annual period (or portion thereof) the original and remaining limits of Covil's insurance policies under all applicable coverage parts, including separately as to the product liability/completed operations coverage part and the operations/premises coverage part and to provide an accounting of the amounts paid in settlement for each claim paid or settled, who authorized payment, under what coverage parts of the policies settlements or judgments were paid, documentation or other evidence supporting the analysis and characterization of claims as products/completed operations or operations/premises claims, method of allocation of settlements or judgments paid among Insurers, policies and policy years and if no payment was made because of a denial of coverage, the stated basis at the time of settlement for such denial. With the exceptions note above in note 5, the Insurers failed and refused to comply with this order.

Order, at 4-5.

This Court also found that USF&G spoliated Covil's policy documentation in anticipation of litigation:

> the evidence shows that USF&G plainly undertook its purge of policy-related materials in anticipation of litigation. Having destroyed its policy records, USF&G

> then could require its policyholders to provide copies of their policies to USF&G in order for USF&G to provide coverage.

Order, at 10. This Court further found that USF&G had a "culpable state of mind" in systematically destroying historical policy documentation in the mid-1980s:

> By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, USF&G had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil's Receiver's ability to reconstruct its insurance program and other information relevant to pending and future asbestos personal injury and insurance litigation.

Order, at 12.

USF&G's objections to the proposed settlement order are "equitable" in nature. It asserts that its equitable contribution "rights" will be undermined by the settlement orders. It almost goes without saying, however, that:

> He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. The decision to grant equitable relief is in the discretion of the trial judge.

Straight v. Goss, 383 S.C. 180, 207m 678 S>E.2d 443, 457-58 (Ct. App. 2009) (internal citations and punctuation omitted).

Neither USF&G nor Zurich has acted equitably here. The course of their bad faith refusal to comply with this Court's lawful orders is well-documented. In fact, in a January 2020 deposition of a Travelers employee sitting as USF&G's "person most knowledgeable," the Receiver discovered that even today Travelers continues to defy this Court's orders regarding the production of documents related to USF&G's historic relationship with Covil. *See* Exhibit 3, Deposition Transcript of Mark Esposito at 12-13. Even to this date, the full extent of the microfilmed Covil claims registers have not been produced to the Receiver. The evidence of USF&G's willful

flouting of this Court's order and its spoliation of policy documentation in anticipation of litigation is abundant.

Despite the non-settling insurers' egregiously inequitable misconduct, the Receiver's proposed settlement orders nevertheless *preserve* the equitable contribution rights of USF&G and Zurich. The proposed settlement orders simply direct the exercise of those rights to the QSF for handling in the event that they become ripe in the future. There is nothing inequitable about this result. It can, in fact, be argued that the proposed settlement orders give USF&G and Zurich far more than they equitably deserve in light of their misconduct in this Court.

The settlement approval orders should be entered without delay.

CONCLUSION

For the foregoing reasons, the Receiver and the Settling Insurers respectfully request that this Court enter orders approving the settlements with Hartford, TIG, and Sentry.

Respectfully Submitted,

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This 30th March, 2020

EXHIBIT 1

ELECTRONICALLY FILED - 2019 Jul 11 10:21 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4000076

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
AND	)	AND
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT

ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH, Plaintiffs, Vs. CBS Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C.A. No. 2015-CP-46-02155 **NOTICE OF APPEARANCE**
TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, Vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C.A. No. 2015-CP-46-03456
CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, Vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C.A. No. 2019-CP-40-00076
JAMES MICHAEL HILL, Plaintiff, Vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C.A. No. 2018-CP-40-04680

ELECTRONICALLY FILED - 2019 Jul 11 10:21 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4000076

DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, Vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C.A. No. 2018-CP-40-04940

TO: THE HONORABLE JEANETTE MCBRIDE, CLERK OF COURT, RICHLAND COUNTY AND THE HONORABLE DAVID HAMILTON, CLERK OF COURT, YORK COUNTY:

The undersigned hereby enters his appearance for the limited purpose of electronically filing a notice of removal with this Court to effect removal of these actions to federal court pursuant to 28 U.S.C. sect. 1446(d), because the Court's procedures require an entry of appearance before a party can file any paper electronically, including a sect. 1446(d) notice. By filing this appearance for this limited purposed of electronically filing a paper in aid of federal jurisdiction, USF&G does not waive any of its jurisdictional objections, as set forth in the notice of removal.

s/William P. Davis
William P. Davis SC Bar No.: 1585
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Attorneys for USF&G

July 11, 2019

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH,

Plaintiffs,

Vs.

CBS Corporation, et al.,

Defendants.

In Re:

Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas

---

TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe,

Plaintiffs,

Vs.

Air & Liquid Systems Corporation, et al.,

Defendants.

In Re:

Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas

---

CHARLES T. HOPPER and REBECCA HOPPER,

Plaintiffs,

Vs.

Air & Liquid Systems Corporation, et al.,

Defendants.

In Re:

Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas

Civil No. _____

NOTICE OF REMOVAL

JAMES MICHAEL HILL, Plaintiff, Vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas
DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, Vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas

Pursuant to 28 U.S.C. § 1446, United States Fidelity and Guaranty Company ("USF&G"), hereby removes this action from the South Carolina Court of Common Pleas to the United States District Court for the District of South Carolina, and states as follows:

I.
Civil Action Subject to Removal

1. It is firmly established that an insurance coverage dispute—although filed in a tort action under the tort action's caption and not styled as an original case-initiating pleading—is a distinct civil action for purposes of federal removal jurisdiction. *Labertew v. Langemeier*, 846 F.3d 1028, 1031–32 (9th Cir. 2017); *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1139 (11th Cir. 2013); *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 725 (7th Cir. 2012); *Butler*

v. Polk, 592 F.2d 1293, 1295–96 (5th Cir. 1979); *Adriaenssens v. Allstate Ins. Co.*, 258 F.2d 888, 890 (10th Cir. 1958).

2. Peter D. Protopapas as Receiver for Covil Corporation ("Covil"), has commenced proceedings, under the caption *In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas* ("*In re Receivership*") that are, in substance, a civil action seeking declaratory and coercive relief against USF&G, Zurich American Insurance Company ("Zurich"), Sentry Insurance a Mutual Company ("Sentry"), TIG Insurance Company ("TIG"); and Hartford Accident and Indemnity Company ("Hartford").

3. The case-initiating document is captioned "Receiver's Notice of Motion and Motion for Status Conference" (**Exhibit 1**) which the Receiver filed in five asbestos tort actions, adding the *In re Receivership* caption, on June 18, 2019. The following filings are part of the *In re Receivership* civil action being removed through this notice of removal, and, to the extent necessary to demonstrate federal jurisdiction, are subsequent papers permitting removal under 28 U.S.C. § 1446(b)(3):

a. Certificate of Service for Receiver's Notice of Motion and Motion for Status Conference" (filed June 18, 2019) (**Exhibit 2**);

b. Notice of Hearing (Exh. A) on July 11, 2019 Before the Honorable Chief Justice (Ret.) Jean H. Toal at Richland County Courthouse, 1701 Main Street, Columbia, SC in Courtroom 3-B (filed June 24, 2019) (**Exhibit 3**);

c. Receiver's Notice of Motion and Motion for a Rule to Show Cause (filed June 25, 2019) (**Exhibit 4**);

d. Receiver's Memorandum in Support of Motion for a Rule to Show Cause (filed June 27, 2019) (**Exhibit 5**);

e. Affidavit in Support of the Receiver's Motion to Show Cause and the Receiver's Declaration (filed June 28, 2019) (**Exhibit 6**);

f. Certificate of Service (filed June 28, 2019) (**Exhibit 7**); and

g. Memorandum of Law on the Jurisdiction of This Court (filed July 1, 2019) (**Exhibit 8**).

4. In the alternative, the Receiver's Notice of Motion and Motion for a Rule to Show Cause and related papers (Exhibit 4, 5, 6, and 7) constitute a civil action for purposes of removal jurisdiction.

5. This civil action is the Receiver's third attack on the federal courts' jurisdiction, following the filing of *Zurich American Insurance Co. et al. v. Covil Corp. et al.*, No. 18-cv-932 (M.D.N.C.) ("*Zurich v. Covil*"). The prior two attacks were the Receiver's complaints in *Covil Corp. v. Zurich American Insurance Company, et al.*, No. 18-cv-3291-BHH (D.S.C) ("*Covil v. Zurich*"),[1] in which the Court denied the Receiver's motion to remand on June 14, 2019, and *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, No. 3:19-cv-01635-BHH (D.S.C.) (*"Covil v. Wall Templeton"*), in which the Receiver's motion for remand is pending. Now, through this *In re Receivership* proceeding, the Receiver seeks the following relief from the state court:

a. a judicial declaration that the state court has exclusive jurisdiction over all disputes relating to Covil's insurance, in an effort to divest federal jurisdiction in the prior pending actions;

[1] To fully preserve its rights, USF&G moved to join in Hartford's motion to enjoin the Receiver in *Covil v. Zurich.*

b. sanctions against USF&G, Zurich, and Sentry for filing, under seal, an April 18, 2019 email agreement ("Cooperation Agreement") in this Court in *Covil v. Wall Templeton*; and

c. discovery, including contention discovery, from the insurers regarding the subject matter of pending federal litigation, circumventing the procedures and protections of Title V of the Federal Rules of Civil Procedure.

6. The Receiver's tactical decision to seek relief by way of a "motion for status conference," rather than a formal complaint, does not affect that he seeks, in substance, to force the insurers into a hearing where the Receiver will seek entry of declaratory and other relief against them.

7. As in *Covil v. Wall Templeton*, the Receiver has sought to thwart federal jurisdiction through ginned-up claims against Wall, Templeton & Haldrup, P.A. ("Wall Templeton"), a South Carolina citizen. The relevant state court filings are:

a. Receiver's Notice of Motion and Motion to Compel/Rule To Show Cause (filed June 25, 2019) (**Exhibit 9**);

b. Receiver's Memorandum in Support Of Motion to Compel/Rule to Show Cause (filed June 27, 2019) (**Exhibit 10**);

c. Affidavit in Support of the Receiver's Motion to Compel/Rule to Show Cause and the Receiver's Declaration (filed June 28, 2019) (**Exhibit 11**); and

d. Certificate of Service [on Wall Templeton] (filed June 28, 2019) (**Exhibit 12**).

8. *In re Receivership* is not procedurally proper, and the state court has not obtained jurisdiction over the defendants. The Receiver is treating his appointment as creating some sort of special proceeding, subject to no rules other than whatever ad hoc procedures he may request from the state court. To the contrary:

a. The South Carolina Rules of Civil Procedure ("SCRCP") govern actions brought by a receiver. Rule 66(a), SCRCP ("The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the laws of this State. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.").

b. Under the SCRCP, there "shall be one form of action to be known as 'civil action.'" Rule 2, SCRCP. That rule "abolishes the mostly cosmetic differences between 'actions' and 'special proceedings.' A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc." Note, Rule 2, SCRCP. Thus, by seeking special remedies against the insurers, the Receiver is pursuing a civil action.

c. "A civil action is commenced when the summons and complaint are filed with the clerk of court" and upon the timely and proper service of the summons. Rule 3(a), SCRCP. Moreover, "the proper procedure to determine whether a party should be held in contempt" of a Court order "is

to bring a *summons* and a rule to show cause." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 121 (2008) (emphasis added).

d. The South Carolina Code governs service on an insurance company: "The summons and any other legal process in any action or proceeding against it must be served on an insurance company ... by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance." S.C. Code § 15-9-270.

e. In an effort to evade federal jurisdiction, the Receiver is instead filing a "motion for status conference" in lieu of a complaint, and delivering the papers to the insurers' counsel in the federal actions (by mail or even by process server) in lieu of the filing and service of summonses upon the Director of the Department of Insurance.

9. Notwithstanding the Receiver's intentional disregard of the procedures for a court to secure jurisdiction over the insurers, who are not (and cannot be) parties to the underlying tort actions against Covil,[2] the state court granted the motion for status conference, which is scheduled for July 11, 2019. *See* Order Granting The Receiver's Motion for Status Conference (entered July 5, 2019) (**Exhibit 13**). That order—which adopts the new *In re Receivership* caption and thus further confirms that this is a distinct civil action for purposes of removal—did not incorporate assurances the state court unofficially provided in an email two days before. Email of July 3, 2019 (**Exhibit 14**) ("By attending this status conference, no counsel or party will

[2] Pursuant to the insurers' "no action" clauses and the rule against direct actions, it is improper to join the insurers in the tort actions against Covil. To the extent that the filing of these papers under the case numbers for the tort actions might otherwise be an obstacle to removal, notwithstanding the authorities cited in ¶ 1 of this notice, the doctrine of fraudulent misjoinder would permit removal. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, 2016 WL 7339811, at *2 (D.S.C. Oct. 24, 2016)

waive their right to insist that South Carolina does not have jurisdiction to hear any or all of the cases filed in its Circuit Courts regarding Covil. As the Administrative Circuit Judge for Asbestos Litigation Matters, I simply want to get a handle on these cases. All rights will be preserved."). Even if the order had incorporated those assurances, the state court has provided no assurances that the insurers will not be waiving *in personam* jurisdiction. USF&G still risks, moreover, that the state court will hold: that is has jurisdiction over any or all matters raised in the Receiver's filings; rule on the merits of those issues; hold that the state court has obtained in personam jurisdiction over USF&G and effectively force it thereafter to argue the merits of those issues; and/or hold that attendance by the USF&G would waive the right to insist on proper process and service of process.

10. Further confirming the risks that USF&G faces with respect to the July 11 hearing, counsel for the plaintiff in *Finch* sent a July 9, 2019 email to the state court proposing an agenda—identifying particular lawyers for the Receiver who will be addressing the state court on each issue—signaling an intent by the Receiver to present argument on the merits of the show-cause motion made against USF&G. *See* Email of July 9, 2019 (**Exhibit 16**).

11. A defendant in USF&G's position need not allow a state court proceeding to go forward in its absence, without proper jurisdiction over it, and thereby embroil itself in subsequent litigation over whether a determination made in its absence is valid. To the contrary, a defendant may remove an action before any defendant has been properly served. *Novak v. Bank of N.Y. Mellon Tr. Co., NA.*, 783 F.3d 910, 914 (1st Cir. 2015); *Fisher v. Pelstring*, No. CV 4:09-252-TLW-TER, 2009 WL 10664813, at *4 (D.S.C. Sept. 29, 2009). Nor must a defendant raise objections to process and service of process in the state court if federal removal jurisdiction exists. Upon removal to federal court, the defendant can move to dismiss based on insufficient

process and insufficient service of process under Fed. R. Civ. P. 12(b)(4) and (5). *Hunter v. Afro-Am. Co. of Baltimore City*, 133 F. Supp. 812, 813 (E.D.S.C. 1955); Fed. R. Civ. P. 81(c); Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1353 (3d ed.).

12. USF&G specifically denies proper process or service of process and, in accordance with Fed. R. Civ. P. 81(c), will move to dismiss under Fed. R. Civ. P. 12(b)(4) and (5) within seven days of filing this notice.

II.
Federal Question Jurisdiction Under 28 U.S.C. §§ 1331 and 1441

13. Removal of this lawsuit is authorized by 28 U.S.C. § 1441 because this Court has original jurisdiction over this civil action arising under federal law under 28 U.S.C. § 1331.

14. The Receiver filed this civil action twelve days after the insurers removed *Covil v. Wall Templeton* to this Court, and just four days after this Court denied the Receiver's motion to remand in *Covil v. Zurich*. The Receiver seeks to interfere with the insurers' right to invoke the Court's diversity jurisdiction in *Covil v. Wall Templeton*, effectively to block the insurers from submitting, or this Court from considering, a document that is material to their claim of removal.

15. Federal question jurisdiction exists where a state court action would interfere with the defendant's ability to vindicate a claimed federal right (here, the right to invoke removal jurisdiction) in a pending action or the federal court's ongoing consideration of that right. *Hodges v. Demchuk*, 866 F. Supp. 730, 733 (S.D.N.Y. 1994) (Sotomayor, J.) (finding federal question removal jurisdiction over state complaint challenging defendant's alleged violation of state law privilege during discovery in ongoing federal proceedings); *Fouad v. Milton Hershey Sch.*, Civil No. 18-5674, 2019 WL 457567, at *1–2 (S.D.N.Y. Feb. 6, 2019) ("Plaintiff's grievances stem out of federal lawsuits in Pennsylvania. Plaintiff's claims require "determination of the meaning and application of federal law and related rules," because they involve assessing

subpoenas and discovery orders issued by federal courts in ongoing actions, and counsel's representation of the [defendant] in those federal actions .... Even the state law claims that do not involve abuse of process rest in large part on Defendants' actions in the federal lawsuits.").

16. In a July 9, 2019 filing with this Court in *Covil v. Zurich*, the Receiver, contrary to his characterization of the July 11 hearing as informational, expressed his intent to seek sanctions at the hearing against USF&G for disclosing the Cooperation Agreement to this Court in *Covil v. Wall Templeton*. Receiver's Opposition to Hartford's Motion to Enjoin (**Exhibit 15**), at 17 ("The Receiver is asking the Receivership Court to find that the Controlling Insurers and WTH have violated certain specific orders of the Receivership Court. The Receivership Court is certainly entitled to enforce its own orders, especially when the orders were not even issued in the coverage action that the Controlling Insurers removed to this Court.").

17. Additionally, Plaintiff seeks to interfere with USF&G's invocation, and the Court's adjudication, of USF&G's removal rights by asking the state court to assert exclusive in rem jurisdiction over these insurance coverage disputes. *See* Memorandum of Law on the Jurisdiction of This Court (July 1, 2019) (**Exhibit 8**). These arguments fundamentally misapprehend the distinction between in rem jurisdiction over property and in personam jurisdiction over disputes regarding rights arising out that property. *See generally Marshall v. Marshall*, 547 U.S. 293, 312 (2006) (Ginsburg, J.); *Executive Risk Indem., Inc. v. Pac. Educ. Services, Inc.*, 451 F. Supp. 2d 1147, 1155 (D. Haw. 2006) ("Even if this court concludes that the [insurer] has no duty to defend or indemnify Defendants, this court will not deprive the state court of its jurisdiction and control over the receivership."); *Nat'l Specialty Ins. Co. v. Advanced Cargo Transp., Inc.*, No. 3:14-CV-01417, 2014 WL 6473975, at *4 (M.D. Pa. Nov. 19, 2014) ("Rather than seeking to resolve a dispute as to title to the policy or its proceeds, National Specialty seeks a declaration that it has fully satisfied its contractual obligations to defend and

indemnify its insureds, having paid out the policy's entire limits of liability with respect to the accident at issue in the underlying tort litigation. As such, this action is clearly brought in personam, rather than in rem or quasi in rem.").[3] Moreover, the assertion of in rem jurisdiction in a receivership proceeding does not eliminate the need to secure personal jurisdiction over the targets of in personam relief. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 958 (4th Cir. 1999).

18. The Receiver appears to have deliberately avoided raising these objections in the federal courts in *Zurich v. Covil*, *Covil v. Wall Templeton*, and *Covil v. Zurich*, in the belief that he is more likely to receive the ruling he desires from the state court. To be clear, such a state court ruling would not bind this Court. *See Marshall*, 547 U.S. at 312-14. Nevertheless, the Receiver is attempting through this civil action to convince the state court that it can somehow declare exclusive jurisdiction to interfere with the Court's adjudication of the insurers' right to invoke federal jurisdiction.

19. Finally, the Receiver seeks, through this action, for the state court to exercise a general supervisory power over the conduct of the federal litigation, including by requiring the insurers to provide contention discovery and an accounting outside the protective framework of Title V of the Federal Rules of Civil Procedure and the accompanying Local Rules.

20. For these reasons, federal question jurisdiction exists.

III.
Diversity Jurisdiction Under 28 U.S.C. §§ 1332 and 1441

21. Additionally and in the alternative, removal of this lawsuit is authorized by 28 U.S.C. §1441 because this Court has original jurisdiction over this civil action based on diversity of citizenship under 28 U.S.C. § 1332.

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[3] USF&G addresses the Receiver's contentions, for present purposes, merely to aid in showing the existence of federal questions for purposes of removal. USF&G's response to the complaint will be a Rule 12(b)(4)-(5) motion to dismiss made pursuant to Rule 81(c).

22. Plaintiff is a South Carolina citizen suing as the receiver for Covil, which, when active, was a South Carolina corporation with its principal place of business in South Carolina. Plaintiff is therefore a citizen of South Carolina.

23. USF&G is a Connecticut corporation with its principal place of business in Connecticut. It is therefore a citizen of Connecticut.

24. Sentry is a Wisconsin corporation with its principal place of business in Wisconsin. It is therefore a citizen of Wisconsin.

25. Zurich is a New York corporation with its principal place of business in Illinois. It is therefore a citizen of New York and Illinois.

26. Hartford is a Connecticut corporation with its principal place of business in Connecticut. It is therefore a citizen of Connecticut.

27. TIG is a California corporation with its principal place of business in New Hampshire. It is therefore a citizen of California and New Hampshire.

28. Wall Templeton is a South Carolina citizen. Nevertheless, Wall Templeton's citizenship does not defeat diversity jurisdiction. Wall Templeton has been fraudulently joined. There has never been a genuine controversy between Wall Templeton and the Receiver regarding the matters asserted in this civil action:

a. On June 17, 2019, Wall Templeton's counsel, Warren Powell, Esquire, emailed the Receiver and certain insurers, noting that he had agreed to produce Wall Templeton's documents relating to the *Taylor* and *Hill* underlying actions to the Receiver by that day, as a condition of the Receiver's consent to extend the deadline for Wall Templeton to respond to the *Covil v. Wall Templeton* complaint. **Exhibit 1**, exhibit D thereto,

p.2. Although Mr. Powell understood "that now we are in federal court any discovery is premature until after the Rule 26(f) conference is held," he expressed that "I feel obligated to abide by my commitment as it was part of an agreement to receive an extension." *Id.*

b. In that email, Mr. Powell noted two problems that had arisen in his efforts to produce the documents by June 17. **Exhibit 1**, exhibit D thereto, p. 2. First, he had "discovered that the amount [of] documents involved and the technicalities involved in producing a universe of documents appropriately Bates labeled is daunting." *Id.* Second, Mr. Powell had found a December 2018 letter from Sentry asserting the common interest doctrine, and he noted: "While I have my own idea as to the efficacy of asserting this privilege in the context of this case I cannot make that call for the carriers." *Id.*

c. That day, USF&G noted that the discovery requests served with the *Covil v. Wall Templeton* complaint were indeed a nullity upon removal, *Steen v. Garrett*, No. 12-1662-DCN, 2013 WL 1826451, at *3 (D.S.C. Apr. 30, 2013), and objected to production until USF&G could analyze whether the common interest doctrine applied. **Exhibit 1**, exhibit D thereto, pp.1-2.

d. Before the Receiver objected to this pre-production review, Mr. Powell indicated that he would begin making the documents available for inspection for the carriers because he "would like to get this accomplished as soon as absolutely possible" and "would expect the first 1500-2000

pages to be ready for your review tomorrow." **Exhibit 1**, exhibit D thereto, p.1.

e. Thereafter, on the afternoon of June 17, 2019, the Receiver objected to pre-production review: "The client of the firm is Covil, not the insurance companies. It is Covil's file. The shared interest privilege would apply to Third parties not Covil. In no way should the insurance companies be allowed to review the files before production." **Exhibit 1**, exhibit D thereto, p.1. The Receiver did ***not*** take any issue with any other portion of the June 17 email exchanges. He did not contest that the June 17 production date was part of a pre-removal discovery agreement in *Covil v. Wall Templeton*. Nor did the Receiver express any concern at all regarding minor delays from the that the logistical difficulties Mr. Powell had communicated.

f. Also, between June 17 and June 21, 2019, Mr. Powell and the Receiver attempted to work through the Receiver's June 17 proposal for a search protocol, which differed from how Mr. Powell had been searching Wall Templeton's electronic files. **Exhibit 10**, exhibit E thereto, pp.2-5.

g. Less than 24 hours after the Receiver's June 17 objection to pre-production review by the insurers—and before Wall Templeton responded to the Receiver's objection—the Receiver instituted this civil action. His motion for status conference sought judicial intervention regarding the alleged impropriety of asserting a common-interest privilege. **Exhibit 1**, ¶¶ 8, 9, 11.f. The Receiver continued to take no issue with the logistics-related

delays, which were the subject of ongoing discussions between the Receiver and Wall Templeton's counsel.

h. Mr. Powell emailed the Receiver on Friday, June 21, 2019, to state that "absent some TRO secured by one of the carriers to go ahead and commence production on Monday of the documents I have. (The Hill and Taylor related documents.)" **Exhibit 10**, exhibit E thereto, p.2. He asked whether the Receiver had "any preference as to whether to receive these documents via sharefile, hard copy or flash drive." *Id.* Mr. Powell expressed his belief "that you will find the production complete, probably more than you and [your counsel] ever wanted to receive, and after review of the entire set I think you will see that the production is thorough." *Id.*

i. The Receiver responding that same afternoon, without answering Mr. Powell's question regarding the method of production. **Exhibit 10**, exhibit E thereto, pp.1-2. The Receiver demanded that by the next business day, Monday, June 24, 2019, Mr. Powell provide five categories of documents in their entirety (not merely commence the production), and that Mr. Powell separate out those documents from publicly filed documents: "Please do not do a document dump where you provide the publicly filed documents." *Id.* at 2.

j. On June 24, 2019, Wall Templeton commenced its production of documents to the Receiver. **Exhibit 10, p.5**.

k. The next day, June 25, 2019, the Receiver filed the "Receiver's Notice of Motion and Motion to Compel/Rule to Show Cause," **Exhibit 9**. The

Receiver sought "an Order of the Court compelling Wall Templeton to produce the entire file related to its representation of Covil." *Id.* at 3. This request was contrary to the Receiver's June 21 email requesting that Wall Templeton *not* produce its entire file but instead to remove publicly filed documents from the production. **Exhibit 10**, exhibit E thereto, p.2. This motion, filed at the same the Receiver filed his show-cause motion regarding the Cooperation Agreement, was a transparent attempt to continue the charade that the Receiver has genuine claims against Wall Templeton that might defeat diversity jurisdiction.

l. The Receiver's memorandum in support of his motion to compel against Wall Templeton, filed on June 27, proved the absence of any genuine dispute with Wall Templeton. The memorandum acknowledged that Wall Templeton was not withholding documents based on the common-interest privilege but falsely asserted that "the Receiver has been unable to receive the entire case file due to Wall Templeton's refusal to cooperate despite its obligations under this Court's Order." **Exhibit 10**, p.6. To the contrary, the documents attached to the memorandum documented Mr. Powell's efforts (discussed in the proceeding sub-paragraphs) to accommodate the Receiver's changing demands regarding the production.

m. Intent on manufacturing a dispute with Wall Templeton, the Receiver's June 27 memorandum to the state court stated that there "are no documents or communications in the June 24 production from before October 2018," but then dropped the following footnote:

> Wall Templeton produced a large volume of documents after the Receiver filed the instant Motion on June 25, 2019 which appear to be related only to the *Hill* and *Taylor* cases which are the subject of the legal malpractice claim. The Receiver has not been able to review all of the documents in the June 25 production to determine if this production satisfies Wall Templeton's obligation under the March 4 Order. However, the Receiver files this Memorandum in Support of its June 25 Motion to preserve and explain its arguments to the Court. This conduct further shows Wall Templeton has continuously attempted to delay production of these documents to the Receiver despite the clear language in this Court's March 4 Order.

Exhibit 10, p.6

n. In other words, the Receiver was running to the state court, before reviewing what Wall Templeton actually produced, and misrepresenting that Wall Templeton was delaying production. As recently as June 20, the Receiver informed Mr. Powell that the draft search protocol he was requesting "is in no way complete—we may very likely add to and/or subtract from it." **Exhibit 10**, exhibit E thereto, p.3.

o. Consequently, Wall Templeton was fraudulently joined as of the commencement of this civil action on June 18, 2019.

29. Alternatively, the factual admissions contained in the Receiver's June 27 memorandum, coupled with the exhibits attached to that memorandum, rendered this civil action removable under 28 U.S.C. § 1446(b)(3).

30. Diversity of citizenship exists between Plaintiff, who is a South Carolina citizen, and the insurers, who are citizens of Connecticut, Wisconsin, New York, Illinois, California, and New Hampshire.

31. The amount in controversy exceeds $75,000, exclusive of interest and costs, because Plaintiff is seeking a declaratory and other relief with respect to multiple federal lawsuits with millions of dollars in controversy.

32. This Court has original jurisdiction over the subject matter of this action under 28 U.S.C. §1332(a)(1) because this action is between citizens of different states, and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

IV.
Requirements of 28 U.S.C. § 1446

33. Because there are no "defendants who have been properly joined and served" under 28 U.S.C. § 1446(b)(2)(A), USF&G need not obtain the consent of the other defendants to this removal. *See* S.C. Code § 15-9-270 (specifying method of serving insurers with process). To the extent that an argument may be made that proper service has been made as to Wall Templeton, to which S.C. Code § 15-9-270 does not apply, USF&G states, pursuant to *Mayo v. Bd. of Educ. of Prince George's Cty.*, 713 F.3d 735, 742 (4th Cir. 2013), that Wall Templeton has consented to this notice of removal, to the extent its consent may be considered necessary.[4]

34. No process, pleadings, documents or orders have been actually served on USF&G, for purposes of attaching such documents pursuant to 28 U.S.C. § 1446(a). Nevertheless, USF&G is attaching copies of the *In re Receivership* filings, as are available on the state court's public docket.

[4] USF&G did not attempt to secure the consent of Wall Templeton in *Covil v. Wall Templeton* because the sole basis for removal was diversity, with Wall Templeton having been fraudulently joined to defeat diversity. Here, federal question jurisdiction exists without regard to Wall Templeton's citizenship, and USF&G has secured Wall Templeton's consent out of an abundance of caution.

35. Pursuant to 28 U.S.C. § 1446(d) USF&G is giving written notice to Plaintiff and to the Clerk of the Court of Common Pleas, which notice is being filed with the Clerk of the Court of Common Pleas.

s/William P. Davis
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(Pro Hac Vice Admission Applications Forthcoming)

July 10, 2019

EXHIBIT 29

STATE OF SOUTH CAROLINA COUNTY OF YORK ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH, Plaintiffs, vs. CBS Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-02155 **(PROPOSED) ORDER ON OBJECTIONS TO SETTLEMENT**
STATE OF SOUTH CAROLINA COUNTY OF YORK TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456 **(PROPOSED) ORDER ON OBJECTIONS TO SETTLEMENT**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 **(PROPOSED) ORDER ON OBJECTIONS TO SETTLEMENT**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680 **(PROPOSED) ORDER ON OBJECTIONS TO SETTLEMENT**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE TAYLOR,	)	
	)	
Plaintiffs,	)	**(PROPOSED) ORDER ON OBJECTIONS TO SETTLEMENT**
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

This matter comes before the Court by way of United States Fidelity and Guaranty Corporation's ("USF&G") and Zurich American Insurance Company's ("Zurich") Objection to Motions to Approve Settlement and Approve a Qualified Settlement Fund filed by Peter D. Protopapas as Receiver for Covil Corporation, Covil QSF LLC, Sentry Insurance a Mutual Company ("Sentry"), Harford Accident and Indemnity Company, and First State Insurance Company ("Hartford"), TIG Insurance Company, successor-in-interest to Ranger Insurance Company ("TIG"). (Sentry, Hartford and TIG are collectively referred to as "Settling Insurers").

The Receiver and the Settling Insurers are seeking approval for the Receiver to sell the Receivership's property. Specifically, the Receiver is selling the insurance policies issued by the Settling Insurers to Covil back to the respective Settling Insurers to establish and fund a qualified settlement fund. This Court has jurisdiction over the assets of Covil through its unappealed and

unchallenged Order appointing Receiver dated November 2, 2018. Furthermore, South Carolina law vests this Court with discretion to dispose of the Receivership's assets and direct disposition of those assets. [1]

USF&G and Zurich (collectively referred to as "Objecting Insurers") filed objections to the proposed settlements.[2] Objecting Insurers assert they are not parties to the case but still seek to object to the sale of a Receivership asset. Objecting Insurers do not address what standing they have to object to the settlement as non-parties -- both to the case and to the proposed settlement agreements. In South Carolina, an insurer does not have standing to challenge a Court order issued in a case where the insurer is a non-party. *See Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013)(holding that a non-party insurer did not have standing to challenge an Order). As a result, the Objecting Insurers assertion that they are non-parties is fatal to their objections as they do not have standing to challenge the Motions under their own theory. To the extent the objecting Insurers believe that they have standing to challenge the liquidation of the Receiver's assets because of this Court's prior Orders Sanctioning Objecting Insurers, they are mistaken. The Court's prior Orders addressed the Objecting Insurers violations of our mediation rules and the

[1] It is clear that this Court's jurisdiction extends over Covil's assets which includes its insurance policies. *See Buist v. Merchant's & Planter's Bank* 65 S.C. 487, 489, 43 S.E. 958, 959 (S.C. 1903) (Receiver can liquidate property under Court supervision); *Clyburn v. Reynolds,* 31 S.C. 91, 105, 9 S.E. 973, 975 (1889) (Court can empower receivers to sell the assets of the receivership); *Montgomery & Crawford v Arcadia Mills*, 173 S.C. 464, 490, 176 S.E. 589, 599 (1934) (Receivership Court has the power to liquidate the rights of creditors pursuant to their priorities) *In re State ex rel Hutchinson*, 182 S.C. 369, 375, 189 S.E. 475, 477-78 (1937) (holding the power to appoint a receiver is vested in every circuit court of the State, and nowhere in the body of the law is there any limitation upon this authority); *Truesdell v. Johnson,* 144 S.C. 188, 142 S.E. 343, 345 (1928) (holding the effect of the appointment of the receiver is to take property and place it in the hands of a third party pending litigation); S.C. Code Ann. § 15-65-10. It is clear that this Court's jurisdiction extends over Covil's assets including its insurance policies.

[2] Covil's other known and solvent insurer, Pennsylvania National Mutual Casualty Insurance Company, chose not to object to these settlements.

Objecting Insurers' failure to provide information required by this Court to manage its asbestos docket. Those Orders do not form a basis for the Objecting Insurers to challenge the routine disposal of a Receivership asset.

In reviewing the Objecting Insurers actual objections, they are without merit. Objecting Insurers assert two arguments: (1) if the court approves the settlement agreements, Objecting Insurers would be deprived of purported contractual and equitable rights and (2) issuing an order to prevent suits against the Settling Insurers violates the due process clause. Each is addressed in turn below.

Objecting Insurers argue that they will be deprived of rights of subrogation and contribution. Such an objection is without merit as the Receiver and the Settling Insurers propose to preserve all policy rights and objections. The Settling Insurers and the Receiver have stipulated to their respective policy terms and conditions, and it is proposed that the QSF stand in the shoes of the Settling Insurers in all respects, as provided for by federal law as set forth in 28 U.S.C. § 468B. These insurance policies will remain in place and the QSF will perform the Settling Insurers' obligations under these policies. Furthermore, Objecting Insurers fail to set forth a contractual relationship with the Settling Insurers. USF&G contracted with Covil for defense and indemnification against Covil's potential liability to pay damages for, among other things, bodily injury during the policy period. USF&G did not contract with any of the Settling Insurers to obtain contribution or subrogation recoveries to offset the payments USF&G makes on behalf of Covil.

Rather than point to a contract right with the Settling Insurers, USF&G points to a policy that USF&G alleges it issued to Covil which states: "Section 14. In the event of any payment under this endorsement the Company shall be subrogated to all the Insured's right of recovery therefor against any person or organization and the Insured shall execute and deliver instruments

and papers and do whatsoever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights." Assuming arguendo that the quoted language comes from a USF&G policy issued to Covil, such policy language does not provide a contractual remedy against the Settling Insurers as they are not parties to the contract. To the extent that the Insurers believe that subrogation or contribution are contractual rights, they are incorrect as subrogation and contribution are equitable rights.[3]

The Objecting Insurers assert that they will lose equitable claims of subrogation and contribution. Subrogation is an equitable claim against a tortious third party. *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960). Specifically, "Where the tortious conduct of a third person is the cause of a loss covered by an insurance policy, the insurer, upon payment of the loss, becomes subrogated pro tanto by operation of law to whatever rights the insured may have against the wrongdoer." *Globe & Rutgers Fire Ins. Co. v. Foil*, 189 S.C. 91, 200 S.E. 97, 100; *Lucas v. Garrett*, 209 S.C. 521, 41 S.E.2d 212; *Pringle v. Atlantic Coast Line R. Co.*, 212 S.C. 303, 47 S.E.2d 722. Here, the Objecting Insurers have failed to point to any third party tortious conduct for which they seek relief that they are now barred from seeking. For example, if USF&G believes that the supplier of the asbestos product which Covil resold or installed should be responsible for bodily injury payments USF&G makes under its liability policies, USF&G is free to sue such manufacturer or supplier of asbestos through Covil.

[3] *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) ("Legal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties."); *Cooper v. Ga. Cas. & Sur. Co.*, 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) ("The rule of contribution is an *equitable rule* and is based on the fact that those who insure or become sureties for the same duty ought [] share the results of the default.").

As it pertains to the equitable remedy of contribution, Settling Insurers point to *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 64, 717 S.E.2d 589, 601 (2011). Nothing in *Crossman* authorizes a claim by one insurer against another. Rather, *Crossman* speaks generally to allocation of loss in a continuous injury situation but does not address the specific circumstances presented by this Receivership. And, it has been held in other leading authority that no contribution claim arises in the case of the defense obligation, which is a joint and several obligation of both USF&G and Zurich. *Sloan Const. Co., Inc. v. Central Nat. Ins. Co. of Omaha*, 269 S.C. 183, 187, 236 S.E.2d 818, 820 (1977). Even assuming that the Objecting Insurers may have an *equitable* contribution claim for past indemnity payments, they have failed to provide the Court with any documentation or information about the potential value of those claims to justify that the settlement impacts their claim. Furthermore, if this Court approves the proposed settlements, any contribution claims against the Settling Insurers would not exist for future settlements because the proposed settlements liquidate the policies. In addition, Objecting Insurers have a well documented history of inequitable conduct including their bad faith refusal to comply with this Court's prior orders. Finally, the settlement agreements provide Objecting Insurers a mechanism to make claims and demands for contribution directly against the Qualified Settlement Fund, which will be responsible for such claims.

USF&G and Zurich insinuate that this Court is issuing a channeling injunction that will deprive the Objecting Insurers of a property right. Channeling injunctions enjoin entities from taking action against a Debtor. See 11 U.S.C. §524. To the contrary, the settling parties request that as part of the sale of a receivership asset, anyone that seeks to sue a Settling Insurers sue the Qualified Settlement Fund instead because the Fund is assuming all of the responsibilities of the Settling Insurers. Further, the Fund is within the exclusive jurisdiction of the Receivership and

the Receivership Court. To the extent that the Objecting Insurers bring a contribution claim against the QSF before this Court, this Court can determine all such claims.

As to the Objecting Insurers assertion that a property right of theirs is being taken without compensation, Objecting Insurers fail to point to any ascertainable right or provide any evidence as to the nature and amount of the property right. There has been no judgment establishing a right of USF&G or Zurich to contribution from Sentry, TIG or Hartford. USF&G and Zurich merely possess a common law expectation of a *potential right* to contribution sometime in the future that, at present, is not reduced to a final unreviewable judgment. As the *Plant Insulation* court noted, "their claims remain unrealized, and contingent upon a whole host of outcomes in future litigation." *In re Plant Insulation Co.,* 485 B.R. 203, 217 (N.D. Cal. 2012) (reversed on other grounds *In re Plant Insulation Co.,* 734 F.3d 900, 917 (9th Cir. 2013)). Indeed, the United States Supreme Court remarked more than a century ago that "a person has no property, no vested interest, in any rule of the common law." *Mondou v. New Haven & Hartford R.R. Co.,* 223 U.S. 1, 50, 32 S.Ct. 169, 56 L.Ed. 327 (1912); *see also Grimesy v. Huff,* 876 F.2d 738, 743-44 (9th Cir. 1989) ("Although the Supreme Court has suggested that a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained"(citations and internal quotation marks omitted)).

Finally, to the extent that the Objecting Insurers believe that they are creditors of the Receivership they should make such application through this Court under well settled legal principles: "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, **in order to distribute the proceeds among creditors**, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent

person or corporation." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935) (emphasis added).

For the foregoing reasons, this Court finds that the Objections raised by Zurich and USF&G are without merit and denied.

IT IS SO ORDERED.

_____

Chief Justice Jean H. Toal (Ret.)

This ___ Day of April, 2020

EXHIBIT 30

ELECTRONICALLY FILED - 2020 Apr 10 4:40 PM - YORK - COMMON PLEAS - CASE#2015CP4602155

STATE OF SOUTH CAROLINA COUNTY OF YORK ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH, Plaintiffs, vs. CBS Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-02155 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND
STATE OF SOUTH CAROLINA COUNTY OF YORK TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

ELECTRONICALLY FILED - 2020 Apr 10 4:40 PM - YORK - COMMON PLEAS - CASE#2015CP4602155

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

ELECTRONICALLY FILED - 2020 Apr 10 4:40 PM - YORK - COMMON PLEAS - CASE#2015CP4602155

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04940 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

This matter came before the Court on the joint motions of Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation (the "Receiver"), Hartford Accident and Indemnity Company and First State Insurance Company (collectively "Hartford"), and TIG Insurance Company, as successor to Ranger Insurance Company ("TIG"); and Sentry Insurance, a Mutual Company ("Sentry") to establish a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of 1986, as amended ("I.R.C.") to Approve the Settlements between the Receiver and each of Hartford, TIG, and Sentry, and to keep continuing jurisdiction over the Qualified Settlement Fund. Having considered the joint motions, together with the exhibits submitted with these motions, the Court hereby decides the matter on the filings and rules as follows:

FINDING RELATED TO CORONAVIRUS EMERGENCY PROCEDURES

On April 3, 2020, the South Carolina Supreme Court issued an Order providing guidance to the courts of South Carolina to help ensure the continued operation of the courts during the

Coronavirus emergency. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. The Supreme Court indicated South Carolina trial judges, after allowing all parties the opportunity to file responses to a motion, "may elect to not hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." *See* April 3, 2020 Order of the South Carolina Supreme Court. This Court advised all parties and non-parties by email of the opportunity to file briefs on or before March 30, 2020. The Court finds these motions have been fully and exhaustively briefed, and, after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and may readily be decided without further input from the lawyers. Ruling on these motions is also in the best interest of the Receivership as delay in these perilous times threatens the assets of the Receivership and the proposed liquidation of those assets into a qualified settlement fund.

FINDINGS REGARDING PARALLEL PROCEEDINGS

In the case of *Covil Corporation By Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich, USF&G et al*. in the United States District Court for the District of South Carolina, Spartanburg Division, CA No. 7:18-3291-BHH, United States District Judge Bruce Howe Hendricks issued an Opinion and Order dated February 27, 2020 in which she reviewed comprehensively the procedural complexities of the insurance coverage case before her involving claims and cross-claims regarding the question of coverage of policies issued or allegedly issued by various insurance companies to Covil at various times between the l950s and 1993.

Judge Hendricks also detailed the responsibilities assigned to this Court regarding the trial of asbestos cases in South Carolina and the supervision of the Receivership of Covil. In her order, Judge Hendricks declined to issue a broad moratorium on further proceedings before this Court as

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the Receivership Court. Judge Hendricks found: "It is abundantly clear that Justice Toal, for whom the undersigned has the highest respect, has done and is doing her best to keep the underlying state tort suits moving forward appropriately without interfering with the coverage issues pending here."

In this order, this Court intends to faithfully adhere to Judge Hendricks' rulings and stay out of ruling on coverage matters that are before Judge Hendricks' Court.[1]

With regard to these proposed settlements, these three settling insurers were parties to the case pending before Judge Hendricks, but each settling insurer has now been dismissed without prejudice from that proceeding. In each case, the settling parties indicated to Judge Hendricks that the requested dismissals were to be without prejudice because each settlement still required the approval of this Court. In addition, the Receiver filed with Judge Hendricks the proposed approval Orders submitted to this Court. The settling parties also advised Judge Hendricks that, upon the Receivership Court's approval, the parties would return to Judge Hendricks' Court in order to convert the dismissals without prejudice into final dismissals *with* prejudice. The non-settling insurers did not object to any of these motions even though the motions were predicated on this Court's considering the proposed Orders approving settlement to which they now object.

As to each settling insurer, Judge Hendricks signed the dismissals without prejudice on this basis, and as a result the settling insurers have all been dismissed from the above-referenced case

[1] Although the Objecting Insurers have taken the position that the Receiver and the Settling Insurers are seeking insurance rulings from this Court in requesting the approvals for these settlements, the Court notes that USF&G is the one that has sought substantive insurance rulings from this Court during this settlement approval process. The Court takes Judge Hendricks' order very seriously. It is disingenuous for non-party USF&G to assert such strident objections to this Court's adjudication of these joint settlement motions while, at the same time, USF&G has sought the exact types of rulings from this Court that are prohibited by Judge Hendricks' order. This Court rejects USF&G's blatant attempts to circumvent the spirit and substance of Judge Hendricks' directives.

in Judge Hendricks' court. Therefore, it is not possible for this Court to rule on the coverage matters pending before Judge Hendricks as this Court evaluates whether to approve the proposed settlements from the settling insurers, each of which has now been dismissed from Judge Hendricks' case.

ASBESTOS DOCKET MANAGEMENT

The establishment of the Covil QSF, and the approval of the settlements made the basis of these motions and the Court's continuing jurisdiction over the Covil QSF, as provided for by I.R.C. Section 468B, all directly relate to this Court's responsibility to manage South Carolina's statewide asbestos litigation docket. Asbestos litigation is often repetitive, serial litigation, and many similar issues present themselves repeatedly for routine adjudication by this Court. To the extent any claims are made that are addressed in this order, this Court can use its experience in managing the South Carolina asbestos litigation to establish efficient procedures to address, at the outset, a variety of these recurring, housekeeping issues. The Court intends to do so as a way to streamline future asbestos proceedings and to minimize the burden on this Court and the litigants of these prospective filings if ever made. Throughout this order, in establishing the mechanism for treatment of future claims related to asbestos issues, the Court will exercise its inherent authority to manage its docket so as to maximize the efficiency of the procedures being established by way of this order.

PROCEDURAL HISTORY

Covil Corporation was a business organized under the laws of the State of South Carolina and was previously incorporated in the State of South Carolina. Covil Corporation is alleged to have made, manufactured, sold, distributed, installed, removed and disturbed thermal insulation

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materials that, at certain times, contained asbestos. As a result, Covil Corporation has been named as a defendant in numerous asbestos-related bodily injury actions (hereinafter "Asbestos Bodily Injury Suits"). Sentry's predecessor Hardware Mutual Casualty Company issued certain policies of liability insurance to Covil Corporation or its predecessors that were in effect from April 21, 1964 through March 31, 1970. Hartford issued certain policies of liability insurance to Covil Corporation or its predecessors that were in effect from 1977 to 1986. TIG's predecessor Ranger Insurance Company issued or allegedly issued certain policies of excess liability insurance to Covil Corporation or its predecessors that were in effect from 1976-1979.

As part of the Settlement Agreements at issue with these joint motions, Covil Corporation, through its Receiver, and each of Sentry, Hartford, and TIG, have entered into stipulations identifying the year, limits, and basic terms of these insurance policies, and of certain claims made policies issued by Evanston Insurance Company, now managed by an affiliate of TIG.

Beginning in or about 1976, Covil began being named as a defendant in Asbestos Bodily Injury Suits. Shortly thereafter, Sentry began participating in the defense of Covil. At that time, Covil was still a functioning business entity with its own corporate counsel.

In 1991, Covil ceased business operations. In 1993, the Secretary of State revoked Covil's corporate charter. However, Covil continued to be named as a defendant in Asbestos Bodily Injury Suits. Sentry, along with Zurich American Insurance Company and United States Fidelity & Guaranty Company, continued defending Covil after Covil ceased operations. Covil Corporation was aware that it had pending asbestos bodily injury suits when it ceased operations.

ANALYSIS AND TREATMENT OF CONFIDENTIAL SETTLEMENT AGREEMENTS

The Receiver for Covil Corporation and Covil QSF LLC have entered into proposed Settlement Agreements with each of the settling insurers, Hartford, TIG, and Sentry. Sentry,

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Hartford and TIG, jointly with Covil Corporation, have moved this Court to authorize the establishment of Covil QSF LLC as the Covil Qualified Settlement Fund ("QSF") for the defense and payment of Covil's Asbestos Bodily Injury Suits. The proposed Settlement Agreements provide that funds paid by Hartford, TIG, and Sentry as part of the Settlement Agreement will all be deposited into the Covil QSF. The Court has thoroughly reviewed each of the proposed Settlement Agreements. Covil and the settling insurers have asked that the settlement agreements remain sealed.

In weighing the factors outlined in Rule 41.1(c) of the South Carolina Rules of Civil Procedure, the Court finds there is no compelling reason to seal the aggregate amount of the settlements which is $44,500,000. However, the Court, while mindful of our state's public policy favoring the transparency of court proceedings, has reviewed the comprehensive settlement agreements in detail *in camera* and all submissions related to this Motion and finds Receiver has met his burden to show sealing the settlement agreements is proper and necessary under Rule 41.1(c) of the South Carolina Rules of Civil Procedure. Specifically, the Court finds that, although the litigation of asbestos suits is of great public importance, the specific terms of the liquidation of Receiver assets arising from a settlement between the Receiver and the settling insurance companies does not have great public significance.

The Court agrees with Receiver that the settlement agreements do not attempt to hide important or damaging information from the public and are only related to liquidating Receiver assets from three insurers who, in each instance, have voluntarily agreed to the liquidation for amounts in excess of their stated applicable policy limits. The Court holds that sealing the settlement agreements is necessary and beneficial to the public to ensure the longevity of the Qualified Settlement Fund and allow for the fair and just compensation of injured parties who may

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have legitimate future claims against Covil due to asbestos-related injuries. This Court will retain continuing jurisdiction over the Qualified Settlement Fund and will be able to adjudicate any matter brought before the Court concerning these settlements and their transfer of funds to Covil QSF.

Although these settlement agreements fully resolve the disputes the Receiver has with TIG, Sentry, and Hartford, the Receiver is still deeply involved in disputes over other Receiver assets and is working towards a resolution with other Covil insurers in other forums.

The premature disclosure of the specific details of these settlement agreements could be misappropriated and could chill the Receiver's ability to equitably liquidate other Receivership assets. Furthermore, the underlying asbestos litigation is still ongoing, and sealing these settlement agreements will allow these asbestos cases to continue forward in the same manner in which other cases move forward. The Court further finds sealing the settlement agreements is the best way to balance the potential harm to the settling parties with the public interest, and there are no other alternatives in this case to protect the private interests of the settling parties.

LIQUIDATION OF RECEIVERSHIP ASSSETS AND APPROVAL OF SETTLEMENTS

"A sale of receivership property by the receiver, under an order of court, is a judicial sale." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935). "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, in order to distribute the proceeds among creditors, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent person or corporation." *Id.* at 876. Moreover, "it is often of great importance that such assets should be disposed of by a receiver, duly appointed, because of his special knowledge of such assets and

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because the receiver takes manual possession and custody of the property for the purpose of disposing of it and distributing the proceeds." *Id.* Thus, when the Court deems it appropriate, it "may make an order to the receivers to sell at private sale, or the court may accept an offer made directly to the court, or it may ratify a sale already made." *Id.*

The Court has previously held that the insurance policies are in the possession of the Court under the receivership. Like any contractual right, the insurance contracts constitute property of Covil Corporation that may be liquidated by way of a sale. As part of the Settlement Agreements, Hartford, TIG, and Sentry have offered to buy back any policies that it or its predecessors may have sold to Covil Corporation or Covil Corporation's predecessors. Doing so will allow the insurance assets to be liquidated for use in the administration of the Receivership, and by the QSF for the defense of asbestos bodily injury suits and payment of asbestos bodily injury claims.

The Receiver and the Settling Insurers are seeking approval for the Receiver to sell the Receivership's property. Specifically, the Receiver is selling the insurance policies issued by the Settling Insurers to Covil back to the respective Settling Insurers to establish and fund a qualified settlement fund. This Court has jurisdiction over the assets of Covil through its un-appealed and unchallenged Order appointing Receiver dated November 2, 2018. Furthermore, South Carolina law vests this Court with discretion to dispose of the Receivership's assets and direct disposition of those assets.[2] The Court is further keeping continuing jurisdiction over the QSF and all of its assets.

[2] It is clear that this Court's jurisdiction extends over Covil's assets which include its insurance policies. *See Buist v. Merchant's & Planter's Bank* 65 S.C. 487, 489, 43 S.E. 958, 959 (S.C. 1903) (Receiver can liquidate property under Court supervision); *Clyburn v. Reynolds*, 31 S.C. 91, 105, 9 S.E. 973, 975 (1889) (Court can empower receivers to sell the assets of the receivership); *Montgomery & Crawford v Arcadia Mills*, 173 S.C. 464, 490, 176 S.E. 589, 599 (1934) (Receivership Court has the power to liquidate the rights of creditors pursuant to their priorities) *In re State ex rel Hutchinson*, 182 S.C. 369, 375, 189 S.E. 475, 477-78 (1937) (holding the power

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OBJECTIONS BY NON-PARTY INSURERS

USF&G and Zurich (collectively referred to as "Objecting Insurers") filed objections to the establishment of the qualified settlement fund and to this Court's approval of the proposed settlements.[3] The Objecting Insurers vigorously assert they are not parties to the case but still seek to object to establishment of the Covil QSF and the sale of Receivership assets. Although the existence of these settlements have been known to the Objecting Insurers for months, the Objecting Insurers have not intervened in any of these matters. If the Objecting Insurers wished to object to the establishment of the Covil QSF or to the approval of these settlements then they were required to seek leave to intervene in these cases. They chose not to do so.

In South Carolina, an insurer does not have standing to challenge a Court order issued in a case where the insurer is not a party. *See Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013)(holding that a non-party insurer did not have standing to challenge an Order). As a result, the Objecting Insurers repeated assertion that they are non-parties to the case (and their decision not to intervene) is fatal to their objections because they do not have standing to challenge the Motions under their own theory.

To the extent the Objecting Insurers believe that they have standing to challenge the establishment of the Covil QSF or the liquidation of the Receiver's assets because of this Court's prior Orders Sanctioning Objecting Insurers for their misconduct, they are mistaken. The Court's

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to appoint a receiver is vested in every circuit court of the State, and nowhere in the body of the law is there any limitation upon this authority); *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 345 (1928) (holding the effect of the appointment of the receiver is to take property and place it in the hands of a third party pending litigation); S.C. Code Ann. § 15-65-10.

[3] Covil's other known and solvent insurer, Pennsylvania National Mutual Casualty Insurance Company, chose not to object to the establishment of the qualified settlement fund or to any of these settlements. Furthermore, none of the asbestos Plaintiffs have objected to these settlements or the propriety of a Qualified Settlement Fund for future asbestos Plaintiffs.

prior Orders addressed an Objecting Insurer's violation of South Carolina's mediation rules and the Objecting Insurers' refusal to provide information required by this Court to manage its asbestos docket. Those orders do not form a basis for the Objecting Insurers to challenge the establishment of the Covil QSF or the routine disposal of Receivership assets.

If this Court were to reach the Objecting Insurers' objections, the Court has evaluated them and finds that they are without merit. The Objecting Insurers assert two arguments: (1) if the Court approves the settlement agreements, the Objecting Insurers contend that they would be deprived of purported contractual and equitable rights and (2) issuing an order to prevent suits against the Settling Insurers violates due process.

First, the Objecting Insurers argue that they will be deprived of rights of subrogation and contribution. Such an objection is without merit because the Receiver and the Settling Insurers proposed that the QSF stand in the shoes of the Settling Insurers in all respects, as provided for by federal law as set forth in 26 U.S.C. § 468B. Additionally, the Court finds that the Objecting Insurers are in no way harmed by these settlements because Settling Insurers have agreed to pay more in its settlement than the policy limits applicable to the Settling Insurers' responsive policies. And, this Court has kept continuing jurisdiction over the QSF and stands ready to address any claim properly brought to or against the QSF.

Furthermore, the Objecting Insurers failed to establish any contractual relationship with the Settling Insurers. USF&G contracted with Covil for defense and indemnification against Covil's potential liability to pay damages for, among other things, bodily injury during the policy period. USF&G did not contract with any of the Settling Insurers. To the extent that the Objecting

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Insurers contend that subrogation or contribution are contractual rights, they are incorrect because subrogation and contribution are equitable rights.[4]

Subrogation is an equitable claim against a tortious third party. *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960). Specifically, "Where the tortious conduct of a third person is the cause of a loss covered by an insurance policy, the insurer, upon payment of the loss, becomes subrogated *pro tanto* by operation of law to whatever rights the insured may have against the wrongdoer." *Globe & Rutgers Fire Ins. Co. v. Foil*, 189 S.C. 91, 200 S.E. 97, 100; *Lucas v. Garrett*, 209 S.C. 521, 41 S.E.2d 212; *Pringle v. Atlantic Coast Line R. Co.*, 212 S.C. 303, 47 S.E.2d 722. Those types of rights are not implicated here.

As it pertains to the equitable remedy of contribution, the Objecting Insurers have failed to provide the Court with any documentation or information about the existence, let alone the potential value, of any such claims sufficient even to argue that these settlements (in excess of policy limits) impact the Objecting Insurers' theoretical, future claims. The Court believes that these sophisticated settlement agreements provide the Objecting Insurers with a mechanism to make claims and demands for contribution directly against the Covil Qualified Settlement Fund, which will be responsible for such claims, under this Court's careful and continuing supervision.

Second, the Objecting Insurers insinuate that this Court is issuing a "channeling injunction" that will deprive the Objecting Insurers of a property right in violation of their due process

[4] *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) ("Legal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties."); *Cooper v. Ga. Cas. & Sur. Co.*, 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) ("The rule of contribution is an *equitable rule* and is based on the fact that those who insure or become sureties for the same duty ought [] share the results of the default.").

rights. To the contrary, the settling parties request that as part of the sale of a receivership asset, anyone that seeks to sue or make a Covil-related claim against a Settling Insurer should simply sue the Qualified Settlement Fund instead because the Qualified Settlement Fund is assuming all of the responsibilities of the Settling Insurers. The Court notes that this is no different than Zurich as the successor to Maryland Casualty Company's responsibilities to Covil or TIG as the successor in interest to Fairmont Specialty Insurance Company's responsibilities to Covil. Here, the Fund is within the exclusive jurisdiction of the Receivership and the Receivership Court, and as mentioned above, the Court intends to exercise its inherent authority to manage its asbestos docket to fashion a streamlined process for the Court and future litigants.

To the extent that the Objecting Insurers bring a contribution claim against the QSF before this Court, this Court can adjudicate all such claims: "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, in order to distribute the proceeds among creditors, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent person or corporation." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935) (emphasis added).

For the foregoing reasons, this Court finds that, if it were to reach the Objections raised by non-parties Zurich and USF&G, those objections are without merit and are overruled. As such, the Court enters the following Findings of Fact and Conclusions of Law as to the Joint Motions to Approve Settlement Agreements and to Approve the QSF Formation.

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FINDINGS OF FACT

A. Hartford-Covil Settlement Agreement

1.1 The Receiver and Hartford have entered into a final comprehensive settlement agreement titled, "Confidential Settlement Agreement and Release" ("Hartford-Covil Settlement Agreement"). The Hartford-Covil Settlement Agreement resolves all disputes between Hartford and Covil under the policies Hartford issued to Covil.

1.2 The Hartford-Covil Settlement Agreement provides that Hartford shall transfer funds and claims to a Qualified Settlement Fund ("Covil QSF"), as defined by Section 468B of the I.R.C. and the regulations promulgated thereunder.

1.3 The purposes of the Covil QSF are to provide funds to pay for costs incurred by the parties in connection with claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos ("Covil Asbestos Suits"); to pay the legal fees of the parties related to such Covil Asbestos Suits; to pay for administrative and management costs; and to do all things necessary or appropriate in connection with the Covil QSF.

1.4 The Hartford-Covil Settlement Agreement provides for consideration that is fair and reasonable, in consideration for a release of rights against Hartford, commonly referred to as a policy "buy back," and the settlement has been concluded by means of good faith negotiations between the parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.

1.5 The Hartford policies, allegedly issued or issued to Covil, or providing coverage to Covil, known and unknown, are being exhausted by and through this settlement.

1.6 Hartford, in addition to the transfer of cash to the Covil QSF, has also assigned to the Covil QSF, all claims for contribution, indemnification, subrogation and otherwise ("Contribution Claims"), which are equitable claims that Hartford has and to which it has

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succeeded or will succeed by reason of its transfer of the settlement amount to the Covil QSF. In consideration therefor, Covil, Covil QSF, and Hartford agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims asserted against Hartford will be directed to the Covil QSF and shall not be brought against Hartford. As these are the only parties to this action, this requested relief is approved. This Court is not making any ultimate determination on such claims if ever made.

B. TIG-Covil Settlement Agreement

1.7 The Receiver and TIG Insurance Company have entered into a final comprehensive settlement agreement titled "Confidential Settlement Agreement and Release" ("TIG-Covil Settlement Agreement"). The TIG-Covil Settlement Agreement resolves all disputes between TIG Insurance Company and Covil under the policies TIG issued to Covil. The settlement agreement also resolves any claim that policies issued by Evanston Insurance Company ("Evanston") to Covil are responsive to Covil's asbestos suits by way of an acknowledgment that the Evanston policies are not responsive to Covil asbestos suits by virtue of the policies being "claims made" policies where the window of time for asserting claims has long since expired. The Covil-TIG Settlement Agreement was reached in good faith and provides for a fair exchange of consideration, and complies with law as set forth herein.

1.8 The TIG-Covil Settlement Agreement provides that TIG Insurance Company shall transfer funds and claims to a Qualified Settlement Fund ("Covil QSF"), as defined by Section 468B of the I.R.C. and the regulations promulgated thereunder.

1.9 The purposes of the Covil QSF are to provide funds to pay for costs incurred by the parties in connection with claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos ("Covil Asbestos Suits"); to pay the legal fees of the parties

related to such Covil Asbestos Suits; to pay for administrative and management costs; and to do all things necessary or appropriate in connection with the Covil QSF.

1.10 The TIG-Covil Settlement Agreement provides for consideration that is fair and reasonable, in consideration for a release of rights against TIG Insurance Company, commonly referred to as a policy "buy back," and the settlement has been concluded by means of good faith negotiations between the parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.

1.11 The TIG policies, allegedly issued or issued to Covil, or providing coverage to Covil, known and unknown, are being exhausted by and through this settlement.

1.12 TIG Insurance Company, in addition to the transfer of cash to the Covil QSF, has also assigned to the Covil QSF all claims for contribution, indemnification, subrogation and otherwise ("Contribution Claims"), which are equitable claims that TIG has and to which it has succeeded or will succeed by reason of its transfer of the settlement amount to the Covil QSF. In consideration therefor, Covil, Covil QSF, and TIG agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that all similar Contribution Claims asserted against TIG Insurance Company by other insurers of Covil will be directed to the Covil QSF and shall not be brought against TIG Insurance Company or Evanston. As these are the only parties to this action, this requested relief is approved. This Court is not making any ultimate determination on such claims if ever made.

C. Sentry-Covil Settlement Agreement

1.13 The Receiver and Sentry have entered into a final comprehensive settlement agreement titled, "Confidential Settlement Agreement and Release" ("Sentry-Covil Settlement

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Agreement"). The Sentry-Covil Settlement Agreement resolves all disputes between Sentry and Covil under the policies Sentry issued to Covil.

1.14 The Court is convinced the terms of the Sentry-Covil Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.. The legal disputes between Sentry and Covil Corporation have been contested, and this settlement will avoid what would otherwise be years of contentious and expensive litigation.

1.15 Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Covil Corporation's assets and garner those assets for the defense and resolution of future Covil Asbestos bodily injury suits.

1.16 Likewise, to the extent Covil Corporation has any chose-in actions against Sentry, whether in tort, contract, law or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership. Upon completion and funding of the settlement to the Covil QSF LLC, Sentry's policies issued to Covil or under which Covil is entitled to benefits from Sentry, known and unknown, including but not limited to the policies described in the Policy Stipulation, are deemed forever extinguished and all insurance coverage potentially available under the policies are fully exhausted such that no further insurance coverage will be available under the policies, and Sentry shall have no obligation to make any other payment of any type whatsoever under those policies, including no obligation to make any payments for Covil Asbestos Bodily Injury Suits in the form of defense, indemnity, or otherwise.

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1.17 The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Sentry, thereby forever extinguishing any contractual obligations Sentry may have owed to Covil Corporation under the insurance policies.

1.18 Covil, Covil QSF, and Sentry agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims of against Sentry for contribution, indemnification, subrogation, spoliation, alter-ego, veil piercing, corporate successorship, bodily injury or other claims shall be directed to the Covil QSF. This Court ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

1.20 Upon completion and funding of the settlement to the Covil QSF LLC, Sentry is forever relieved of any and all obligations it may owe in connection with Covil.

1.21 Covil, Covil QSF, and Sentry agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims any and all claims against Sentry relating to obligations arising out of Covil's Asbestos Bodily Injury Suits or other bodily injury or property damage liabilities, including any claims asserting that Covil was an alter ego of Sentry, if pursued, are directed to be filed against the Covil QSF for the reasons discussed above. This Court ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

1.22 In 1991, as Covil was closing its business operations, a representative for Covil notified insurer-retained defense counsel for Covil that Covil would be selling its assets and discarding its corporate records (hereinafter "Covil's Historic Records"). Insurer-retained defense counsel retrieved Covil's Historic Records from Covil before they were destroyed and retained

those documents. No evidence has been presented that, at any time, did Sentry come into possession of Covil's Historic Records.

1.23 Covil's Historic Records included a data tape that appears to have last been backed up in 1991. There is no evidence that Sentry did, at any time, obtain the data tape. There is no evidence that Sentry was ever notified of the data tape's existence when counsel obtained Covil's Historic Records in 1991 or thereafter until years later, after Peter Protopapas was appointed as the Covil Receiver. At no time did Sentry instruct defense counsel to hide the data tape or conceal its existence.

1.24 On April 24, 2019, the Receiver filed a Summons and Complaint in the Richland County Court of Common Pleas asserting legal malpractice claims against the law firm of Wall, Templeton & Haldrup, P.A., and asserting causes of action against Sentry for aiding and abetting breach of fiduciary duty, breach of contract, bad faith failure to defend, bad faith processing of claims, negligence, declaratory judgment, and alter-ego/instrumentality. In connection with this settlement agreement, the Receiver will dismiss its claims against Sentry in that case, with prejudice, and Sentry will assign, to the fullest extent permissible, its claims against Wall Templeton & Haldrup, P.A. to the Receiver.

1.25 Proceedings have taken place before this Court involving Covil, by its Receiver, and Sentry, a non-party. In connection with those proceedings, Sentry has produced a very large volume of documents consisting of hundreds of thousands of pages of historical records and other documents. Sentry has withheld certain documents due to privilege, and Sentry did not complete its production prior to reaching an agreement-in-principle with Covil. However, Covil Corporation, through its Receiver, is satisfied that it has now reviewed adequate information to enter into the Settlement Agreement. Moreover, by reviewing the documents produced by Sentry

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and other carriers, Covil has been able to determine and stipulate to certain facts as set forth in the Court's Findings.

1.26 There is no evidence that Sentry hid, concealed, or destroyed any Covil-related evidence, nor that it was involved in any such conduct.

1.27 Sentry never directed counsel for Covil Corporation to not file an answer or otherwise protect Covil Corporation in any asbestos bodily injury suit, including but not limited to the suits of *James Michael Hill v. Advance Auto Parts, Inc., et al*., Civil Action No. 2018-CP-40-04680 and *Denver D. Taylor and Janice Taylor v. Air & Liquid Systems Corporation, et al*., Civil Action No. 2018-CP-40-04940.

1.28 Sentry did not receive notice from Jim Covil or any other current or former Covil agent, director, employee, officer, or representative of any actual or attempted service in *Hill* or *Taylor* prior to the defaults in those cases.

1.29 At no time did Sentry exercise any control over Covil Corporation beyond its contractual right to control the defense of those Covil asbestos bodily injury suits implicating or alleging exposures that may have fallen under a Sentry insurance policy. Therefore, Covil never became Sentry's alter ego.

1.30 The Receiver is authorized to execute these Settlement Agreements and the Court hereby ratifies the execution of the Settlement Agreements.

1.31 The Settlement Amounts paid by the Settling Insurers shall be deposited into the Covil QSF and managed and used as specified in the Settlement Agreements and related documents.

D. Approval of Qualified Settlement Fund

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2.1 Treasury Regulation § 1.468B-1 authorizes the establishment of a Qualified Settlement Fund if the requirements of paragraph (c) of the section are met.

2.2 The requirements of Treasury Regulation § 1.468B-1(c)(2) have been satisfied, as the Hartford-Covil Settlement Agreement, the TIG-Covil Settlement Agreement and the Sentry-Covil Settlement Agreement all provide for the transfer of funds, claims and other things of value to the Covil QSF and each will resolve the Receiver's claims for coverage against Sentry, Hartford and TIG.

2.3 The limited liability company referenced above as "Covil QSF LLC" will be constituted and will operate as the Covil QSF. This Court will keep continuing jurisdiction over Covil QSF LLC.

2.4 The assets of the Covil QSF are segregated from the assets of Covil, Sentry, TIG, and Hartford, satisfying the requirements of Treasury Regulation § 1.468B-1(c)(3).

2.5 The Hartford-Covil Settlement Agreement, the TIG-Covil Settlement Agreement, the Sentry-Covil Settlement Agreement, the establishment of the Covil QSF and the transfer of the funds to the Covil QSF pursuant to the terms of the Sentry-Covil Settlement Agreement, Hartford-Covil Settlement Agreement, and the TIG-Covil Settlement Agreement comply with law as set forth herein.

CONTRACTS WITH ATTORNEYS

In its capacity as the Receivership Court, this Court has directed the Receiver to marshall the assets of Covil to make such assets available to meet the costs and expenses of Covil's Asbestos Suits, including Covil's insurance policies and proceeds. Further, in the order appointing the Receiver, this Court authorized the Receiver to "hire any person or company necessary to

accomplish any right or power under this Order." The Court finds that the Receiver has been diligent in carrying out these duties.

Immediately following his appointment as the Receiver for Covil, Mr. Protopapas retained a team of well-regarded law firms to litigate a number of complex claims, in multiple jurisdictions, against Covil's historic insurance carriers. Given Covil's complete lack of financial resources, each of these law firms agreed to assume the significant risk of undertaking this representation on the basis of contingent fee contracts.

The Receiver entered into contingent fee contracts with the following highly qualified law firms: Morgan Lewis Bockius, LLP ("Morgan Lewis"); Smith Robinson Holler DuBose and Morgan, LLC ("Smith Robinson"), and Rikard & Protopapas, LLC.

Morgan Lewis is a global law firm and is highly skilled and experienced in asbestos litigation and in complex insurance coverage litigation. Smith Robinson is, likewise, a highly regarded firm in the State of South Carolina and throughout the Southeast with experience in insurance coverage litigation. The Receiver also engaged lawyers with his own firm, Rikard & Protopapas, LLC, who are experienced in engaging in complex litigation and insurance coverage litigation.

Each of the law firms has fully performed their services under the contingency fee contracts, and as such, the Receiver seeks the Court's approval of the attorneys' contingency fee of thirty-three and one-third percent (33 1/3%) of the gross settlement amount between Covil and the settling insurers and approval of reimbursement costs incurred by the law firms to date.

Since his appointment, the Receiver has been actively involved in complex and aggressive litigation that has demanded the expenditure of extraordinary time and resources. The Receiver, through his professionals, has been engaged in litigation with the insurers that have hundreds of

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filings. From the Court's perspective, these law firms have achieved remarkable results, in a compressed timeframe, and under difficult circumstances. The Court has been impressed by the quality of the work generated by these firms and the professionalism exhibited by each of the lawyers at these firms. Finally, the Court notes the remarkable results reflected in finalizing $44,500,000.00 in settlements to date in connection with this receivership, noting that Covil had no liquid assets when the receivership began. As such, the Court approves the attorneys' fee contracts and attorneys' fees in the amount of thirty-three and one-third percent (33 1/3%) of the gross settlement amount between Covil and the settling insurers, in addition to approval of reimbursement for costs incurred to date. In light of the attorneys' fee awarded, in part, to the Receiver's law firm, that attorneys' fee will be in lieu of any Receiver fee for the Receiver's extensive work to date.

IT IS THEREFORE ORDERED THAT

(1) The Covil-Hartford Settlement Agreement is a reasonable settlement of disputes between Covil and Hartford;

(2) Covil is selling, and Hartford is purchasing, all interests in the Covil policies, and this "buy back" of policy rights is being consummated in good faith;

(3) The Covil Policies issued by, or allegedly issued by, Hartford to Covil, are exhausted and Hartford has no further obligation to make payments thereunder, including with regard to Covil Asbestos-Related Suits; and

(4) Consistent with Hartford's assignment of Contribution Claims to the Covil QSF; Covil, Covil QSF and Hartford agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose, that all Claims for contribution, indemnification, subrogation, or otherwise against Hartford by other insurers of Covil are barred, and directs that all such Claims

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shall be brought or made solely to the QSF. The Covil QSF shall be entitled to substitute itself for Hartford in any such Claim upon motion brought to this or other court having jurisdiction over such Claims. This Court approves and ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

(5) The Covil-TIG Settlement Agreement is a reasonable settlement of disputes between Covil and TIG Insurance Company;

(6) Covil is selling, and TIG is purchasing, all interests in the Covil policies, and this "buy back" of policy rights is being consummated in good faith;

(7) The Covil Policies issued by, or allegedly issued by, TIG Insurance Company to Covil, are exhausted and TIG has no further obligation to make payments thereunder, including with regard to Covil Asbestos-Related Suits; and

(8) Consistent with TIG Insurance Company's assignment of Contribution Claims to the Covil QSF; Covil, Covil QSF and TIG Insurance Company agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose, that all Claims for contribution, indemnification, subrogation, or otherwise against TIG and/or Evanston by other insurers of Covil and/or by any other claimant are barred, and directs that all such Claims shall be brought or made solely to the QSF. The Covil QSF shall be entitled to substitute itself for TIG and/or Evanston in any such Claim upon motion brought to this or other court having jurisdiction over such Claims. This Court approves and ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

(9) The Court is convinced the terms of the Covil-Sentry Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties conducted under the Absolute Mediation Privilege. The legal disputes between Sentry and Covil

Corporation have been contested, and this settlement will avoid what would otherwise be years of contentious and expensive litigation.

(10) Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Covil Corporation's assets and garner those assets for the defense and resolution of future Covil asbestos suits.

(11) Likewise, to the extent Covil Corporation has any chose-in actions against Sentry, whether in tort, contract, law or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership.

(12) Covil and Sentry agree that upon completion and funding of the settlement to the Covil QSF LLC, Sentry's policies issued to Covil or under which Covil is entitled to benefits from Sentry, known and unknown, including but not limited to the policies described in the Policy Stipulation, are deemed forever extinguished and all insurance coverage potentially available under the policies are fully exhausted such that no further insurance coverage will be available under the policies, and Sentry shall have no obligation to make any other payment of any type whatsoever under those policies, including no obligation to make any payments for Covil asbestos bodily injury suits in the form of defense, indemnity, or otherwise.

(13) The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Sentry, thereby forever extinguishing any contractual obligations Sentry may have owed to Covil Corporation under the insurance policies.

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(14) Covil, Covil QSF, and Sentry agree that claims of any asbestos bodily injury claimants, other insurers, or any other party against Sentry for contribution, indemnification, subrogation, spoliation, alter-ego, veil piercing, corporate successorship, bodily injury or other claims shall be barred and directed to the Covil QSF. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made.

(15) Covil, Covil QSF, and Sentry agree that any and all claims by underlying asbestos claimants, now and in the future, direct or derivative, against Sentry, including but not limited to "alter ego" or other veil piercing or corporate successorship claims are barred and must be directed to the Covil QSF. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made.

(16) Covil and Sentry agree that upon completion and funding of the settlement to the Covil QSF LLC, that Sentry is forever relieved of any and all obligations it may owe in connection with Covil. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above.

(17) Covil and Sentry agree that any and all claims against Sentry relating to obligations arising out of Covil's Asbestos Bodily Injury Suits or other bodily injury or property damage liabilities are forever ended, including any claims asserting that Covil was an alter ego of Sentry. The other parties to these cases, the underlying asbestos plaintiffs do not object to this

relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above.

(18) Based on a stipulation between the parties, the Court finds that there is no evidence that Sentry hid, concealed, or destroyed any Covil-related evidence, nor that it was involved in any such conduct.

(19) Based on a stipulation between the parties, the Court finds that Sentry never directed counsel for Covil Corporation to not file an answer or otherwise protect Covil Corporation in any asbestos bodily injury suit, including but not limited to the suits of *James Michael Hill v. Advance Auto Parts, Inc., et al.*, Civil Action No. 2018-CP-40-04680 and *Denver D. Taylor and Janice Taylor v. Air & Liquid Systems Corporation, et al.*, Civil Action No. 2018-CP-40-04940.

(20) Based on a stipulation between the parties, the Court finds that at no time did Sentry exercise any control over Covil Corporation beyond its contractual right to control the defense of those Covil asbestos bodily injury suits implicating or alleging exposures that may have fallen under a Sentry insurance policy. Therefore, Covil never became Sentry's alter ego.

(21) The Receiver is authorized to execute the Settlement Agreement, and if the Settlement Agreement has already been executed, the Court hereby ratifies the execution of the Settlement Agreement.

(22) As to Sentry only, this Court hereby vacates its prior rulings and findings in the Rule to Show Cause Proceedings, including but not limited to the rulings and findings in the attached Orders of September 19, 2019, and January 8, 2020. All findings and rulings in the Rule to Show Cause proceedings against any other insurer remain in effect, but the findings and rulings shall have no binding effect on or applicability to Sentry.

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(23) The Covil QSF, which is the Delaware limited liability company known as "Covil QSF, LLC," with Peter D. Protopapas, the duly ordered Receiver of Covil Corporation as its sole Member and Manager, is hereby established as a Qualified Settlement Fund in compliance with § 468B of the Internal Revenue Code of 1986, as amended, and Treasury Regulations §§ 1.468B, *et seq.*, in order to receive settlement proceeds and claims from the Sentry–Covil Settlement Agreement, Hartford-Covil Settlement Agreement and the TIG-Covil Settlement Agreement, as well as any future transfers of funds, claims or things of value relating to Covil or its assets, including its insurance policies;

(24) The Receiver's Contracts with his lawyers are approved as set forth above, and

(25) The Court retains continuing jurisdiction in accordance with Income Tax Regulation § 1.468B-1(c)(1) of all matters related to this Order.

IT IS SO ORDERED.

_____

HON. JEAN H. TOAL, CHIEF JUSTICE (Ret.)

SIGNED this _____ day of _____, 2020

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York Common Pleas

Case Caption: Charlotte Gaye Smith , plaintiff, et al VS CBS Corporation , defendant, et al

Case Number: 2015CP4602155

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

EXHIBIT 31

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	C/A NO.: 2015-CP-46-02155
	)	
ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH,	)	
	)	ORDER GRANTING JOINT MOTIONS
Plaintiffs,	)	TO ESTABLISH COVIL QUALIFIED
	)	SETTLEMENT FUND AND TO APPROVE
vs.	)	SETTLEMENTS BETWEEN THE
	)	RECEIVER FOR COVIL AND (1)
CBS Corporation, et al.,	)	HARTFORD, (2) TIG, AND (3) SENTRY
	)	AND TO KEEP CONTINUING
Defendants.	)	JURISDICTION OVER THIS
In Re:	)	QUALIFIED SETTLEMENT FUND
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	C/A NO.: 2015-CP-46-03456
	)	
TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe,	)	
	)	ORDER GRANTING JOINT MOTIONS
Plaintiffs,	)	TO ESTABLISH COVIL QUALIFIED
	)	SETTLEMENT FUND AND TO APPROVE
vs.	)	SETTLEMENTS BETWEEN THE
	)	RECEIVER FOR COVIL AND (1)
Air & Liquid Systems Corporation, et al.,	)	HARTFORD, (2) TIG, AND (3) SENTRY
	)	AND TO KEEP CONTINUING
Defendants.	)	JURISDICTION OVER THIS
In Re:	)	QUALIFIED SETTLEMENT FUND
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND
STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04940 ORDER GRANTING JOINT MOTIONS TO ESTABLISH COVIL QUALIFIED SETTLEMENT FUND AND TO APPROVE SETTLEMENTS BETWEEN THE RECEIVER FOR COVIL AND (1) HARTFORD, (2) TIG, AND (3) SENTRY AND TO KEEP CONTINUING JURISDICTION OVER THIS QUALIFIED SETTLEMENT FUND

This matter came before the Court on the joint motions of Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation (the "Receiver"), Hartford Accident and Indemnity Company and First State Insurance Company (collectively "Hartford"), and TIG Insurance Company, as successor to Ranger Insurance Company ("TIG"); and Sentry Insurance, a Mutual Company ("Sentry") to establish a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of 1986, as amended ("I.R.C.") to Approve the Settlements between the Receiver and each of Hartford, TIG, and Sentry, and to keep continuing jurisdiction over the Qualified Settlement Fund. Having considered the joint motions, together with the exhibits submitted with these motions, the Court hereby decides the matter on the filings and rules as follows:

FINDING RELATED TO CORONAVIRUS EMERGENCY PROCEDURES

On April 3, 2020, the South Carolina Supreme Court issued an Order providing guidance to the courts of South Carolina to help ensure the continued operation of the courts during the

Coronavirus emergency. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. The Supreme Court indicated South Carolina trial judges, after allowing all parties the opportunity to file responses to a motion, "may elect to not hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." *See* April 3, 2020 Order of the South Carolina Supreme Court. This Court advised all parties and non-parties by email of the opportunity to file briefs on or before March 30, 2020. The Court finds these motions have been fully and exhaustively briefed, and, after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and may readily be decided without further input from the lawyers. Ruling on these motions is also in the best interest of the Receivership as delay in these perilous times threatens the assets of the Receivership and the proposed liquidation of those assets into a qualified settlement fund.

FINDINGS REGARDING PARALLEL PROCEEDINGS

In the case of *Covil Corporation By Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich, USF&G et al*. in the United States District Court for the District of South Carolina, Spartanburg Division, CA No. 7:18-3291-BHH, United States District Judge Bruce Howe Hendricks issued an Opinion and Order dated February 27, 2020 in which she reviewed comprehensively the procedural complexities of the insurance coverage case before her involving claims and cross-claims regarding the question of coverage of policies issued or allegedly issued by various insurance companies to Covil at various times between the l950s and 1993.

Judge Hendricks also detailed the responsibilities assigned to this Court regarding the trial of asbestos cases in South Carolina and the supervision of the Receivership of Covil. In her order, Judge Hendricks declined to issue a broad moratorium on further proceedings before this Court as

the Receivership Court. Judge Hendricks found: "It is abundantly clear that Justice Toal, for whom the undersigned has the highest respect, has done and is doing her best to keep the underlying state tort suits moving forward appropriately without interfering with the coverage issues pending here."

In this order, this Court intends to faithfully adhere to Judge Hendricks' rulings and stay out of ruling on coverage matters that are before Judge Hendricks' Court.[1]

With regard to these proposed settlements, these three settling insurers were parties to the case pending before Judge Hendricks, but each settling insurer has now been dismissed without prejudice from that proceeding. In each case, the settling parties indicated to Judge Hendricks that the requested dismissals were to be without prejudice because each settlement still required the approval of this Court. In addition, the Receiver filed with Judge Hendricks the proposed approval Orders submitted to this Court. The settling parties also advised Judge Hendricks that, upon the Receivership Court's approval, the parties would return to Judge Hendricks' Court in order to convert the dismissals without prejudice into final dismissals *with* prejudice. The non-settling insurers did not object to any of these motions even though the motions were predicated on this Court's considering the proposed Orders approving settlement to which they now object.

As to each settling insurer, Judge Hendricks signed the dismissals without prejudice on this basis, and as a result the settling insurers have all been dismissed from the above-referenced case

[1] Although the Objecting Insurers have taken the position that the Receiver and the Settling Insurers are seeking insurance rulings from this Court in requesting the approvals for these settlements, the Court notes that USF&G is the one that has sought substantive insurance rulings from this Court during this settlement approval process. The Court takes Judge Hendricks' order very seriously. It is disingenuous for non-party USF&G to assert such strident objections to this Court's adjudication of these joint settlement motions while, at the same time, USF&G has sought the exact types of rulings from this Court that are prohibited by Judge Hendricks' order. This Court rejects USF&G's blatant attempts to circumvent the spirit and substance of Judge Hendricks' directives.

in Judge Hendricks' court. Therefore, it is not possible for this Court to rule on the coverage matters pending before Judge Hendricks as this Court evaluates whether to approve the proposed settlements from the settling insurers, each of which has now been dismissed from Judge Hendricks' case.

ASBESTOS DOCKET MANAGEMENT

The establishment of the Covil QSF, and the approval of the settlements made the basis of these motions and the Court's continuing jurisdiction over the Covil QSF, as provided for by I.R.C. Section 468B, all directly relate to this Court's responsibility to manage South Carolina's statewide asbestos litigation docket. Asbestos litigation is often repetitive, serial litigation, and many similar issues present themselves repeatedly for routine adjudication by this Court. To the extent any claims are made that are addressed in this order, this Court can use its experience in managing the South Carolina asbestos litigation to establish efficient procedures to address, at the outset, a variety of these recurring, housekeeping issues. The Court intends to do so as a way to streamline future asbestos proceedings and to minimize the burden on this Court and the litigants of these prospective filings if ever made. Throughout this order, in establishing the mechanism for treatment of future claims related to asbestos issues, the Court will exercise its inherent authority to manage its docket so as to maximize the efficiency of the procedures being established by way of this order.

PROCEDURAL HISTORY

Covil Corporation was a business organized under the laws of the State of South Carolina and was previously incorporated in the State of South Carolina. Covil Corporation is alleged to have made, manufactured, sold, distributed, installed, removed and disturbed thermal insulation

materials that, at certain times, contained asbestos. As a result, Covil Corporation has been named as a defendant in numerous asbestos-related bodily injury actions (hereinafter "Asbestos Bodily Injury Suits"). Sentry's predecessor Hardware Mutual Casualty Company issued certain policies of liability insurance to Covil Corporation or its predecessors that were in effect from April 21, 1964 through March 31, 1970. Hartford issued certain policies of liability insurance to Covil Corporation or its predecessors that were in effect from 1977 to 1986. TIG's predecessor Ranger Insurance Company issued or allegedly issued certain policies of excess liability insurance to Covil Corporation or its predecessors that were in effect from 1976-1979.

As part of the Settlement Agreements at issue with these joint motions, Covil Corporation, through its Receiver, and each of Sentry, Hartford, and TIG, have entered into stipulations identifying the year, limits, and basic terms of these insurance policies, and of certain claims made policies issued by Evanston Insurance Company, now managed by an affiliate of TIG.

Beginning in or about 1976, Covil began being named as a defendant in Asbestos Bodily Injury Suits. Shortly thereafter, Sentry began participating in the defense of Covil. At that time, Covil was still a functioning business entity with its own corporate counsel.

In 1991, Covil ceased business operations. In 1993, the Secretary of State revoked Covil's corporate charter. However, Covil continued to be named as a defendant in Asbestos Bodily Injury Suits. Sentry, along with Zurich American Insurance Company and United States Fidelity & Guaranty Company, continued defending Covil after Covil ceased operations. Covil Corporation was aware that it had pending asbestos bodily injury suits when it ceased operations.

ANALYSIS AND TREATMENT OF CONFIDENTIAL SETTLEMENT AGREEMENTS

The Receiver for Covil Corporation and Covil QSF LLC have entered into proposed Settlement Agreements with each of the settling insurers, Hartford, TIG, and Sentry. Sentry,

Hartford and TIG, jointly with Covil Corporation, have moved this Court to authorize the establishment of Covil QSF LLC as the Covil Qualified Settlement Fund ("QSF") for the defense and payment of Covil's Asbestos Bodily Injury Suits. The proposed Settlement Agreements provide that funds paid by Hartford, TIG, and Sentry as part of the Settlement Agreement will all be deposited into the Covil QSF. The Court has thoroughly reviewed each of the proposed Settlement Agreements. Covil and the settling insurers have asked that the settlement agreements remain sealed.

In weighing the factors outlined in Rule 41.1(c) of the South Carolina Rules of Civil Procedure, the Court finds there is no compelling reason to seal the aggregate amount of the settlements which is $44,500,000. However, the Court, while mindful of our state's public policy favoring the transparency of court proceedings, has reviewed the comprehensive settlement agreements in detail *in camera* and all submissions related to this Motion and finds Receiver has met his burden to show sealing the settlement agreements is proper and necessary under Rule 41.1(c) of the South Carolina Rules of Civil Procedure. Specifically, the Court finds that, although the litigation of asbestos suits is of great public importance, the specific terms of the liquidation of Receiver assets arising from a settlement between the Receiver and the settling insurance companies does not have great public significance.

The Court agrees with Receiver that the settlement agreements do not attempt to hide important or damaging information from the public and are only related to liquidating Receiver assets from three insurers who, in each instance, have voluntarily agreed to the liquidation for amounts in excess of their stated applicable policy limits. The Court holds that sealing the settlement agreements is necessary and beneficial to the public to ensure the longevity of the Qualified Settlement Fund and allow for the fair and just compensation of injured parties who may

have legitimate future claims against Covil due to asbestos-related injuries. This Court will retain continuing jurisdiction over the Qualified Settlement Fund and will be able to adjudicate any matter brought before the Court concerning these settlements and their transfer of funds to Covil QSF.

Although these settlement agreements fully resolve the disputes the Receiver has with TIG, Sentry, and Hartford, the Receiver is still deeply involved in disputes over other Receiver assets and is working towards a resolution with other Covil insurers in other forums.

The premature disclosure of the specific details of these settlement agreements could be misappropriated and could chill the Receiver's ability to equitably liquidate other Receivership assets. Furthermore, the underlying asbestos litigation is still ongoing, and sealing these settlement agreements will allow these asbestos cases to continue forward in the same manner in which other cases move forward. The Court further finds sealing the settlement agreements is the best way to balance the potential harm to the settling parties with the public interest, and there are no other alternatives in this case to protect the private interests of the settling parties.

LIQUIDATION OF RECEIVERSHIP ASSSETS AND APPROVAL OF SETTLEMENTS

"A sale of receivership property by the receiver, under an order of court, is a judicial sale." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935). "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, in order to distribute the proceeds among creditors, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent person or corporation." *Id.* at 876. Moreover, "it is often of great importance that such assets should be disposed of by a receiver, duly appointed, because of his special knowledge of such assets and

because the receiver takes manual possession and custody of the property for the purpose of disposing of it and distributing the proceeds." *Id.* Thus, when the Court deems it appropriate, it "may make an order to the receivers to sell at private sale, or the court may accept an offer made directly to the court, or it may ratify a sale already made." *Id.*

The Court has previously held that the insurance policies are in the possession of the Court under the receivership. Like any contractual right, the insurance contracts constitute property of Covil Corporation that may be liquidated by way of a sale. As part of the Settlement Agreements, Hartford, TIG, and Sentry have offered to buy back any policies that it or its predecessors may have sold to Covil Corporation or Covil Corporation's predecessors. Doing so will allow the insurance assets to be liquidated for use in the administration of the Receivership, and by the QSF for the defense of asbestos bodily injury suits and payment of asbestos bodily injury claims.

The Receiver and the Settling Insurers are seeking approval for the Receiver to sell the Receivership's property. Specifically, the Receiver is selling the insurance policies issued by the Settling Insurers to Covil back to the respective Settling Insurers to establish and fund a qualified settlement fund. This Court has jurisdiction over the assets of Covil through its un-appealed and unchallenged Order appointing Receiver dated November 2, 2018. Furthermore, South Carolina law vests this Court with discretion to dispose of the Receivership's assets and direct disposition of those assets.[2] The Court is further keeping continuing jurisdiction over the QSF and all of its assets.

[2] It is clear that this Court's jurisdiction extends over Covil's assets which include its insurance policies. *See Buist v. Merchant's & Planter's Bank* 65 S.C. 487, 489, 43 S.E. 958, 959 (S.C. 1903) (Receiver can liquidate property under Court supervision); *Clyburn v. Reynolds,* 31 S.C. 91, 105, 9 S.E. 973, 975 (1889) (Court can empower receivers to sell the assets of the receivership); *Montgomery & Crawford v Arcadia Mills*, 173 S.C. 464, 490, 176 S.E. 589, 599 (1934) (Receivership Court has the power to liquidate the rights of creditors pursuant to their priorities) *In re State ex rel Hutchinson*, 182 S.C. 369, 375, 189 S.E. 475, 477-78 (1937) (holding the power

OBJECTIONS BY NON-PARTY INSURERS

USF&G and Zurich (collectively referred to as "Objecting Insurers") filed objections to the establishment of the qualified settlement fund and to this Court's approval of the proposed settlements.[3] The Objecting Insurers vigorously assert they are not parties to the case but still seek to object to establishment of the Covil QSF and the sale of Receivership assets. Although the existence of these settlements have been known to the Objecting Insurers for months, the Objecting Insurers have not intervened in any of these matters. If the Objecting Insurers wished to object to the establishment of the Covil QSF or to the approval of these settlements then they were required to seek leave to intervene in these cases. They chose not to do so.

In South Carolina, an insurer does not have standing to challenge a Court order issued in a case where the insurer is not a party. *See Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013)(holding that a non-party insurer did not have standing to challenge an Order). As a result, the Objecting Insurers repeated assertion that they are non-parties to the case (and their decision not to intervene) is fatal to their objections because they do not have standing to challenge the Motions under their own theory.

To the extent the Objecting Insurers believe that they have standing to challenge the establishment of the Covil QSF or the liquidation of the Receiver's assets because of this Court's prior Orders Sanctioning Objecting Insurers for their misconduct, they are mistaken. The Court's

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to appoint a receiver is vested in every circuit court of the State, and nowhere in the body of the law is there any limitation upon this authority); *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 345 (1928) (holding the effect of the appointment of the receiver is to take property and place it in the hands of a third party pending litigation); S.C. Code Ann. § 15-65-10.

[3] Covil's other known and solvent insurer, Pennsylvania National Mutual Casualty Insurance Company, chose not to object to the establishment of the qualified settlement fund or to any of these settlements. Furthermore, none of the asbestos Plaintiffs have objected to these settlements or the propriety of a Qualified Settlement Fund for future asbestos Plaintiffs.

prior Orders addressed an Objecting Insurer's violation of South Carolina's mediation rules and the Objecting Insurers' refusal to provide information required by this Court to manage its asbestos docket. Those orders do not form a basis for the Objecting Insurers to challenge the establishment of the Covil QSF or the routine disposal of Receivership assets.

If this Court were to reach the Objecting Insurers' objections, the Court has evaluated them and finds that they are without merit. The Objecting Insurers assert two arguments: (1) if the Court approves the settlement agreements, the Objecting Insurers contend that they would be deprived of purported contractual and equitable rights and (2) issuing an order to prevent suits against the Settling Insurers violates due process.

First, the Objecting Insurers argue that they will be deprived of rights of subrogation and contribution. Such an objection is without merit because the Receiver and the Settling Insurers proposed that the QSF stand in the shoes of the Settling Insurers in all respects, as provided for by federal law as set forth in 26 U.S.C. § 468B. Additionally, the Court finds that the Objecting Insurers are in no way harmed by these settlements because Settling Insurers have agreed to pay more in its settlement than the policy limits applicable to the Settling Insurers' responsive policies. And, this Court has kept continuing jurisdiction over the QSF and stands ready to address any claim properly brought to or against the QSF.

Furthermore, the Objecting Insurers failed to establish any contractual relationship with the Settling Insurers. USF&G contracted with Covil for defense and indemnification against Covil's potential liability to pay damages for, among other things, bodily injury during the policy period. USF&G did not contract with any of the Settling Insurers. To the extent that the Objecting

Insurers contend that subrogation or contribution are contractual rights, they are incorrect because subrogation and contribution are equitable rights.[4]

Subrogation is an equitable claim against a tortious third party. *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960). Specifically, "Where the tortious conduct of a third person is the cause of a loss covered by an insurance policy, the insurer, upon payment of the loss, becomes subrogated *pro tanto* by operation of law to whatever rights the insured may have against the wrongdoer." *Globe & Rutgers Fire Ins. Co. v. Foil*, 189 S.C. 91, 200 S.E. 97, 100; *Lucas v. Garrett*, 209 S.C. 521, 41 S.E.2d 212; *Pringle v. Atlantic Coast Line R. Co.*, 212 S.C. 303, 47 S.E.2d 722. Those types of rights are not implicated here.

As it pertains to the equitable remedy of contribution, the Objecting Insurers have failed to provide the Court with any documentation or information about the existence, let alone the potential value, of any such claims sufficient even to argue that these settlements (in excess of policy limits) impact the Objecting Insurers' theoretical, future claims. The Court believes that these sophisticated settlement agreements provide the Objecting Insurers with a mechanism to make claims and demands for contribution directly against the Covil Qualified Settlement Fund, which will be responsible for such claims, under this Court's careful and continuing supervision.

Second, the Objecting Insurers insinuate that this Court is issuing a "channeling injunction" that will deprive the Objecting Insurers of a property right in violation of their due process

[4] *Calvert Fire Ins. Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) ("Legal subrogation is not dependent upon contract. The doctrine is an equitable one, founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties."); *Cooper v. Ga. Cas. & Sur. Co.*, 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) ("The rule of contribution is an *equitable rule* and is based on the fact that those who insure or become sureties for the same duty ought [] share the results of the default.").

rights. To the contrary, the settling parties request that as part of the sale of a receivership asset, anyone that seeks to sue or make a Covil-related claim against a Settling Insurer should simply sue the Qualified Settlement Fund instead because the Qualified Settlement Fund is assuming all of the responsibilities of the Settling Insurers. The Court notes that this is no different than Zurich as the successor to Maryland Casualty Company's responsibilities to Covil or TIG as the successor in interest to Fairmont Specialty Insurance Company's responsibilities to Covil. Here, the Fund is within the exclusive jurisdiction of the Receivership and the Receivership Court, and as mentioned above, the Court intends to exercise its inherent authority to manage its asbestos docket to fashion a streamlined process for the Court and future litigants.

To the extent that the Objecting Insurers bring a contribution claim against the QSF before this Court, this Court can adjudicate all such claims: "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, in order to distribute the proceeds among creditors, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent person or corporation." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935) (emphasis added).

For the foregoing reasons, this Court finds that, if it were to reach the Objections raised by non-parties Zurich and USF&G, those objections are without merit and are overruled. As such, the Court enters the following Findings of Fact and Conclusions of Law as to the Joint Motions to Approve Settlement Agreements and to Approve the QSF Formation.

FINDINGS OF FACT

A. Hartford-Covil Settlement Agreement

1.1 The Receiver and Hartford have entered into a final comprehensive settlement agreement titled, "Confidential Settlement Agreement and Release" ("Hartford-Covil Settlement Agreement"). The Hartford-Covil Settlement Agreement resolves all disputes between Hartford and Covil under the policies Hartford issued to Covil.

1.2 The Hartford-Covil Settlement Agreement provides that Hartford shall transfer funds and claims to a Qualified Settlement Fund ("Covil QSF"), as defined by Section 468B of the I.R.C. and the regulations promulgated thereunder.

1.3 The purposes of the Covil QSF are to provide funds to pay for costs incurred by the parties in connection with claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos ("Covil Asbestos Suits"); to pay the legal fees of the parties related to such Covil Asbestos Suits; to pay for administrative and management costs; and to do all things necessary or appropriate in connection with the Covil QSF.

1.4 The Hartford-Covil Settlement Agreement provides for consideration that is fair and reasonable, in consideration for a release of rights against Hartford, commonly referred to as a policy "buy back," and the settlement has been concluded by means of good faith negotiations between the parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.

1.5 The Hartford policies, allegedly issued or issued to Covil, or providing coverage to Covil, known and unknown, are being exhausted by and through this settlement.

1.6 Hartford, in addition to the transfer of cash to the Covil QSF, has also assigned to the Covil QSF, all claims for contribution, indemnification, subrogation and otherwise ("Contribution Claims"), which are equitable claims that Hartford has and to which it has

succeeded or will succeed by reason of its transfer of the settlement amount to the Covil QSF. In consideration therefor, Covil, Covil QSF, and Hartford agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims asserted against Hartford will be directed to the Covil QSF and shall not be brought against Hartford. As these are the only parties to this action, this requested relief is approved. This Court is not making any ultimate determination on such claims if ever made.

B. TIG-Covil Settlement Agreement

1.7 The Receiver and TIG Insurance Company have entered into a final comprehensive settlement agreement titled "Confidential Settlement Agreement and Release" ("TIG-Covil Settlement Agreement"). The TIG-Covil Settlement Agreement resolves all disputes between TIG Insurance Company and Covil under the policies TIG issued to Covil. The settlement agreement also resolves any claim that policies issued by Evanston Insurance Company ("Evanston") to Covil are responsive to Covil's asbestos suits by way of an acknowledgment that the Evanston policies are not responsive to Covil asbestos suits by virtue of the policies being "claims made" policies where the window of time for asserting claims has long since expired. The Covil-TIG Settlement Agreement was reached in good faith and provides for a fair exchange of consideration, and complies with law as set forth herein.

1.8 The TIG-Covil Settlement Agreement provides that TIG Insurance Company shall transfer funds and claims to a Qualified Settlement Fund ("Covil QSF"), as defined by Section 468B of the I.R.C. and the regulations promulgated thereunder.

1.9 The purposes of the Covil QSF are to provide funds to pay for costs incurred by the parties in connection with claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos ("Covil Asbestos Suits"); to pay the legal fees of the parties

related to such Covil Asbestos Suits; to pay for administrative and management costs; and to do all things necessary or appropriate in connection with the Covil QSF.

1.10 The TIG-Covil Settlement Agreement provides for consideration that is fair and reasonable, in consideration for a release of rights against TIG Insurance Company, commonly referred to as a policy "buy back," and the settlement has been concluded by means of good faith negotiations between the parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.

1.11 The TIG policies, allegedly issued or issued to Covil, or providing coverage to Covil, known and unknown, are being exhausted by and through this settlement.

1.12 TIG Insurance Company, in addition to the transfer of cash to the Covil QSF, has also assigned to the Covil QSF all claims for contribution, indemnification, subrogation and otherwise ("Contribution Claims"), which are equitable claims that TIG has and to which it has succeeded or will succeed by reason of its transfer of the settlement amount to the Covil QSF. In consideration therefor, Covil, Covil QSF, and TIG agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that all similar Contribution Claims asserted against TIG Insurance Company by other insurers of Covil will be directed to the Covil QSF and shall not be brought against TIG Insurance Company or Evanston. As these are the only parties to this action, this requested relief is approved. This Court is not making any ultimate determination on such claims if ever made.

C. Sentry-Covil Settlement Agreement

1.13 The Receiver and Sentry have entered into a final comprehensive settlement agreement titled, "Confidential Settlement Agreement and Release" ("Sentry-Covil Settlement

Agreement"). The Sentry-Covil Settlement Agreement resolves all disputes between Sentry and Covil under the policies Sentry issued to Covil.

1.14 The Court is convinced the terms of the Sentry-Covil Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties in connection with a mediation conducted pursuant to the Absolute Mediation Privilege.. The legal disputes between Sentry and Covil Corporation have been contested, and this settlement will avoid what would otherwise be years of contentious and expensive litigation.

1.15 Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Covil Corporation's assets and garner those assets for the defense and resolution of future Covil Asbestos bodily injury suits.

1.16 Likewise, to the extent Covil Corporation has any chose-in actions against Sentry, whether in tort, contract, law or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership. Upon completion and funding of the settlement to the Covil QSF LLC, Sentry's policies issued to Covil or under which Covil is entitled to benefits from Sentry, known and unknown, including but not limited to the policies described in the Policy Stipulation, are deemed forever extinguished and all insurance coverage potentially available under the policies are fully exhausted such that no further insurance coverage will be available under the policies, and Sentry shall have no obligation to make any other payment of any type whatsoever under those policies, including no obligation to make any payments for Covil Asbestos Bodily Injury Suits in the form of defense, indemnity, or otherwise.

1.17 The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Sentry, thereby forever extinguishing any contractual obligations Sentry may have owed to Covil Corporation under the insurance policies.

1.18 Covil, Covil QSF, and Sentry agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims of against Sentry for contribution, indemnification, subrogation, spoliation, alter-ego, veil piercing, corporate successorship, bodily injury or other claims shall be directed to the Covil QSF. This Court ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

1.20 Upon completion and funding of the settlement to the Covil QSF LLC, Sentry is forever relieved of any and all obligations it may owe in connection with Covil.

1.21 Covil, Covil QSF, and Sentry agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose that claims any and all claims against Sentry relating to obligations arising out of Covil's Asbestos Bodily Injury Suits or other bodily injury or property damage liabilities, including any claims asserting that Covil was an alter ego of Sentry, if pursued, are directed to be filed against the Covil QSF for the reasons discussed above. This Court ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

1.22 In 1991, as Covil was closing its business operations, a representative for Covil notified insurer-retained defense counsel for Covil that Covil would be selling its assets and discarding its corporate records (hereinafter "Covil's Historic Records"). Insurer-retained defense counsel retrieved Covil's Historic Records from Covil before they were destroyed and retained

those documents. No evidence has been presented that, at any time, did Sentry come into possession of Covil's Historic Records.

1.23 Covil's Historic Records included a data tape that appears to have last been backed up in 1991. There is no evidence that Sentry did, at any time, obtain the data tape. There is no evidence that Sentry was ever notified of the data tape's existence when counsel obtained Covil's Historic Records in 1991 or thereafter until years later, after Peter Protopapas was appointed as the Covil Receiver. At no time did Sentry instruct defense counsel to hide the data tape or conceal its existence.

1.24 On April 24, 2019, the Receiver filed a Summons and Complaint in the Richland County Court of Common Pleas asserting legal malpractice claims against the law firm of Wall, Templeton & Haldrup, P.A., and asserting causes of action against Sentry for aiding and abetting breach of fiduciary duty, breach of contract, bad faith failure to defend, bad faith processing of claims, negligence, declaratory judgment, and alter-ego/instrumentality. In connection with this settlement agreement, the Receiver will dismiss its claims against Sentry in that case, with prejudice, and Sentry will assign, to the fullest extent permissible, its claims against Wall Templeton & Haldrup, P.A. to the Receiver.

1.25 Proceedings have taken place before this Court involving Covil, by its Receiver, and Sentry, a non-party. In connection with those proceedings, Sentry has produced a very large volume of documents consisting of hundreds of thousands of pages of historical records and other documents. Sentry has withheld certain documents due to privilege, and Sentry did not complete its production prior to reaching an agreement-in-principle with Covil. However, Covil Corporation, through its Receiver, is satisfied that it has now reviewed adequate information to enter into the Settlement Agreement. Moreover, by reviewing the documents produced by Sentry

and other carriers, Covil has been able to determine and stipulate to certain facts as set forth in the Court's Findings.

1.26 There is no evidence that Sentry hid, concealed, or destroyed any Covil-related evidence, nor that it was involved in any such conduct.

1.27 Sentry never directed counsel for Covil Corporation to not file an answer or otherwise protect Covil Corporation in any asbestos bodily injury suit, including but not limited to the suits of *James Michael Hill v. Advance Auto Parts, Inc., et al.*, Civil Action No. 2018-CP-40-04680 and *Denver D. Taylor and Janice Taylor v. Air & Liquid Systems Corporation, et al.*, Civil Action No. 2018-CP-40-04940.

1.28 Sentry did not receive notice from Jim Covil or any other current or former Covil agent, director, employee, officer, or representative of any actual or attempted service in *Hill* or *Taylor* prior to the defaults in those cases.

1.29 At no time did Sentry exercise any control over Covil Corporation beyond its contractual right to control the defense of those Covil asbestos bodily injury suits implicating or alleging exposures that may have fallen under a Sentry insurance policy. Therefore, Covil never became Sentry's alter ego.

1.30 The Receiver is authorized to execute these Settlement Agreements and the Court hereby ratifies the execution of the Settlement Agreements.

1.31 The Settlement Amounts paid by the Settling Insurers shall be deposited into the Covil QSF and managed and used as specified in the Settlement Agreements and related documents.

D. Approval of Qualified Settlement Fund

2.1 Treasury Regulation § 1.468B-1 authorizes the establishment of a Qualified Settlement Fund if the requirements of paragraph (c) of the section are met.

2.2 The requirements of Treasury Regulation § 1.468B-1(c)(2) have been satisfied, as the Hartford-Covil Settlement Agreement, the TIG-Covil Settlement Agreement and the Sentry-Covil Settlement Agreement all provide for the transfer of funds, claims and other things of value to the Covil QSF and each will resolve the Receiver's claims for coverage against Sentry, Hartford and TIG.

2.3 The limited liability company referenced above as "Covil QSF LLC" will be constituted and will operate as the Covil QSF. This Court will keep continuing jurisdiction over Covil QSF LLC.

2.4 The assets of the Covil QSF are segregated from the assets of Covil, Sentry, TIG, and Hartford, satisfying the requirements of Treasury Regulation § 1.468B-1(c)(3).

2.5 The Hartford-Covil Settlement Agreement, the TIG-Covil Settlement Agreement, the Sentry-Covil Settlement Agreement, the establishment of the Covil QSF and the transfer of the funds to the Covil QSF pursuant to the terms of the Sentry-Covil Settlement Agreement, Hartford-Covil Settlement Agreement, and the TIG-Covil Settlement Agreement comply with law as set forth herein.

CONTRACTS WITH ATTORNEYS

In its capacity as the Receivership Court, this Court has directed the Receiver to marshall the assets of Covil to make such assets available to meet the costs and expenses of Covil's Asbestos Suits, including Covil's insurance policies and proceeds. Further, in the order appointing the Receiver, this Court authorized the Receiver to "hire any person or company necessary to

accomplish any right or power under this Order." The Court finds that the Receiver has been diligent in carrying out these duties.

Immediately following his appointment as the Receiver for Covil, Mr. Protopapas retained a team of well-regarded law firms to litigate a number of complex claims, in multiple jurisdictions, against Covil's historic insurance carriers. Given Covil's complete lack of financial resources, each of these law firms agreed to assume the significant risk of undertaking this representation on the basis of contingent fee contracts.

The Receiver entered into contingent fee contracts with the following highly qualified law firms: Morgan Lewis Bockius, LLP ("Morgan Lewis"); Smith Robinson Holler DuBose and Morgan, LLC ("Smith Robinson"), and Rikard & Protopapas, LLC.

Morgan Lewis is a global law firm and is highly skilled and experienced in asbestos litigation and in complex insurance coverage litigation. Smith Robinson is, likewise, a highly regarded firm in the State of South Carolina and throughout the Southeast with experience in insurance coverage litigation. The Receiver also engaged lawyers with his own firm, Rikard & Protopapas, LLC, who are experienced in engaging in complex litigation and insurance coverage litigation.

Each of the law firms has fully performed their services under the contingency fee contracts, and as such, the Receiver seeks the Court's approval of the attorneys' contingency fee of thirty-three and one-third percent (33 1/3%) of the gross settlement amount between Covil and the settling insurers and approval of reimbursement costs incurred by the law firms to date.

Since his appointment, the Receiver has been actively involved in complex and aggressive litigation that has demanded the expenditure of extraordinary time and resources. The Receiver, through his professionals, has been engaged in litigation with the insurers that have hundreds of

filings. From the Court's perspective, these law firms have achieved remarkable results, in a compressed timeframe, and under difficult circumstances. The Court has been impressed by the quality of the work generated by these firms and the professionalism exhibited by each of the lawyers at these firms. Finally, the Court notes the remarkable results reflected in finalizing $44,500,000.00 in settlements to date in connection with this receivership, noting that Covil had no liquid assets when the receivership began. As such, the Court approves the attorneys' fee contracts and attorneys' fees in the amount of thirty-three and one-third percent (33 1/3%) of the gross settlement amount between Covil and the settling insurers, in addition to approval of reimbursement for costs incurred to date. In light of the attorneys' fee awarded, in part, to the Receiver's law firm, that attorneys' fee will be in lieu of any Receiver fee for the Receiver's extensive work to date.

IT IS THEREFORE ORDERED THAT

(1) The Covil-Hartford Settlement Agreement is a reasonable settlement of disputes between Covil and Hartford;

(2) Covil is selling, and Hartford is purchasing, all interests in the Covil policies, and this "buy back" of policy rights is being consummated in good faith;

(3) The Covil Policies issued by, or allegedly issued by, Hartford to Covil, are exhausted and Hartford has no further obligation to make payments thereunder, including with regard to Covil Asbestos-Related Suits; and

(4) Consistent with Hartford's assignment of Contribution Claims to the Covil QSF; Covil, Covil QSF and Hartford agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose, that all Claims for contribution, indemnification, subrogation, or otherwise against Hartford by other insurers of Covil are barred, and directs that all such Claims

shall be brought or made solely to the QSF. The Covil QSF shall be entitled to substitute itself for Hartford in any such Claim upon motion brought to this or other court having jurisdiction over such Claims. This Court approves and ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

(5) The Covil-TIG Settlement Agreement is a reasonable settlement of disputes between Covil and TIG Insurance Company;

(6) Covil is selling, and TIG is purchasing, all interests in the Covil policies, and this "buy back" of policy rights is being consummated in good faith;

(7) The Covil Policies issued by, or allegedly issued by, TIG Insurance Company to Covil, are exhausted and TIG has no further obligation to make payments thereunder, including with regard to Covil Asbestos-Related Suits; and

(8) Consistent with TIG Insurance Company's assignment of Contribution Claims to the Covil QSF; Covil, Covil QSF and TIG Insurance Company agree and the only other parties to this case, the underlying asbestos plaintiffs, do not oppose, that all Claims for contribution, indemnification, subrogation, or otherwise against TIG and/or Evanston by other insurers of Covil and/or by any other claimant are barred, and directs that all such Claims shall be brought or made solely to the QSF. The Covil QSF shall be entitled to substitute itself for TIG and/or Evanston in any such Claim upon motion brought to this or other court having jurisdiction over such Claims. This Court approves and ratifies the Agreement. Further, this Court is not making any ultimate determination on such claims if ever made.

(9) The Court is convinced the terms of the Covil-Sentry Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties conducted under the Absolute Mediation Privilege. The legal disputes between Sentry and Covil

Corporation have been contested, and this settlement will avoid what would otherwise be years of contentious and expensive litigation.

(10) Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Covil Corporation's assets and garner those assets for the defense and resolution of future Covil asbestos suits.

(11) Likewise, to the extent Covil Corporation has any chose-in actions against Sentry, whether in tort, contract, law or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership.

(12) Covil and Sentry agree that upon completion and funding of the settlement to the Covil QSF LLC, Sentry's policies issued to Covil or under which Covil is entitled to benefits from Sentry, known and unknown, including but not limited to the policies described in the Policy Stipulation, are deemed forever extinguished and all insurance coverage potentially available under the policies are fully exhausted such that no further insurance coverage will be available under the policies, and Sentry shall have no obligation to make any other payment of any type whatsoever under those policies, including no obligation to make any payments for Covil asbestos bodily injury suits in the form of defense, indemnity, or otherwise.

(13) The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Sentry, thereby forever extinguishing any contractual obligations Sentry may have owed to Covil Corporation under the insurance policies.

(14) Covil, Covil QSF, and Sentry agree that claims of any asbestos bodily injury claimants, other insurers, or any other party against Sentry for contribution, indemnification, subrogation, spoliation, alter-ego, veil piercing, corporate successorship, bodily injury or other claims shall be barred and directed to the Covil QSF. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made.

(15) Covil, Covil QSF, and Sentry agree that any and all claims by underlying asbestos claimants, now and in the future, direct or derivative, against Sentry, including but not limited to "alter ego" or other veil piercing or corporate successorship claims are barred and must be directed to the Covil QSF. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made.

(16) Covil and Sentry agree that upon completion and funding of the settlement to the Covil QSF LLC, that Sentry is forever relieved of any and all obligations it may owe in connection with Covil. The other parties to these cases, the underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above.

(17) Covil and Sentry agree that any and all claims against Sentry relating to obligations arising out of Covil's Asbestos Bodily Injury Suits or other bodily injury or property damage liabilities are forever ended, including any claims asserting that Covil was an alter ego of Sentry. The other parties to these cases, the underlying asbestos plaintiffs do not object to this

relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above.

(18) Based on a stipulation between the parties, the Court finds that there is no evidence that Sentry hid, concealed, or destroyed any Covil-related evidence, nor that it was involved in any such conduct.

(19) Based on a stipulation between the parties, the Court finds that Sentry never directed counsel for Covil Corporation to not file an answer or otherwise protect Covil Corporation in any asbestos bodily injury suit, including but not limited to the suits of *James Michael Hill v. Advance Auto Parts, Inc., et al.*, Civil Action No. 2018-CP-40-04680 and *Denver D. Taylor and Janice Taylor v. Air & Liquid Systems Corporation, et al.*, Civil Action No. 2018-CP-40-04940.

(20) Based on a stipulation between the parties, the Court finds that at no time did Sentry exercise any control over Covil Corporation beyond its contractual right to control the defense of those Covil asbestos bodily injury suits implicating or alleging exposures that may have fallen under a Sentry insurance policy. Therefore, Covil never became Sentry's alter ego.

(21) The Receiver is authorized to execute the Settlement Agreement, and if the Settlement Agreement has already been executed, the Court hereby ratifies the execution of the Settlement Agreement.

(22) As to Sentry only, this Court hereby vacates its prior rulings and findings in the Rule to Show Cause Proceedings, including but not limited to the rulings and findings in the attached Orders of September 19, 2019, and January 8, 2020. All findings and rulings in the Rule to Show Cause proceedings against any other insurer remain in effect, but the findings and rulings shall have no binding effect on or applicability to Sentry.

(23) The Covil QSF, which is the Delaware limited liability company known as "Covil QSF, LLC," with Peter D. Protopapas, the duly ordered Receiver of Covil Corporation as its sole Member and Manager, is hereby established as a Qualified Settlement Fund in compliance with § 468B of the Internal Revenue Code of 1986, as amended, and Treasury Regulations §§ 1.468B, *et seq.*, in order to receive settlement proceeds and claims from the Sentry–Covil Settlement Agreement, Hartford-Covil Settlement Agreement and the TIG-Covil Settlement Agreement, as well as any future transfers of funds, claims or things of value relating to Covil or its assets, including its insurance policies;

(24) The Receiver's Contracts with his lawyers are approved as set forth above, and

(25) The Court retains continuing jurisdiction in accordance with Income Tax Regulation § 1.468B-1(c)(1) of all matters related to this Order.

IT IS SO ORDERED.

_____

HON. JEAN H. TOAL, CHIEF JUSTICE (Ret.)

SIGNED this _____ day of _____, 2020

EXHIBIT 32

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNT□ OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

DIANNE MCCULLOUGH and FLO□D DAVID COOPER, individually and as Personal Representatives of the Estate of OLIN D. COOPER,	)	C/A No. □□□□□□□□□□□□□□□□□□□□□□□□□□
Plaintiffs,	)	In Re: Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
4520 CORP., INC.;	)	**SUMMONS**
ABLEST INC.;	)	
AECOM ENERG□ & CONSTRUCTION, INC.;	)	
AIR & LI□UID S□STEMS CORPORATION;	)	
ALLSTATE INSURANCE COMPAN□;	)	
ARMSTRONG INTERNATIONAL, INC.;	)	
ASCEND PERFORMANCE MATERIALS OPERATIONS LLC;	)	
AURORA PUMP COMPAN□;	)	
BAHNSON, INC.;	)	
BASF CATAL□STS LLC;	)	
BASF CORPORATION;	)	
BA□ER CORPORATION;	)	
BONITZ, INC.;	)	
BW/IP INC.;	)	
CARBOLINE COMPAN□;	)	

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

CELANESE CORPORATION;

CHESNEE TELEPHONE COMPAN□, INCORPORATED;

CIRCOR INSTRUMENTATION TECHNOLOGIES, INC.;

CLEAVER-BROOKS, INC.;

CNA HOLDINGS LLC;

CONTINENTAL TIRE THE AMERICAS, LLC;

COVIL CORPORATION;

CRANE CO.;

C□PRUS AMA□ MINERALS COMPAN□;

C□PRUS MINES CORPORATION;

DANIEL INTERNATIONAL CORPORATION;

THE DOW CHEMICAL COMPAN□;

FLOWSERVE US INC.;

FLUOR CONSTRUCTORS INTERNATIONAL;

FLUOR CONSTRUCTORS INTERNATIONAL, INC.;

FLUOR DANIEL SERVICES CORPORATION;

FLUOR ENTERPRISES, INC.;

FOSTER WHEELER ENERG□ CORPORATION;

GENERAL ELECTRIC COMPAN□;

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

THE GOOD□EAR TIRE & RUBBER COMPAN□;

GOULDS PUMPS, INCORPORATED;

H. M. RO□AL INC.;

INGERSOLL-RAND COMPAN□;

ITT LLC;

J. & L. INSULATION, INC.;

J & L INSULATION, INC.;

MCNEIL (OHIO) CORPORATION;

MCNEIL & NRM, INC.;

MAGNOLIA FINISHING PLANT;

THE MARLE□-W□LAIN COMPAN□;

METROPOLITAN LIFE INSURANCE COMPAN□;

MICHELIN NORTH AMERICA, INC.;

MILLIKEN & COMPAN□;

PFIZER, INC.;

PIPE & BOILER INSULATION, INC.;

R.T. VANDERBILT HOLDING COMPAN□, INC.;

SOUTHERN INSULATION, INC.;

SPIRA□ SARCO, INC.;

SP□ COOLING TECHNOLOGIES, INC.;

STARR DAVIS COMPAN□, INC.;

STARR DAVIS COMPAN□ OF S.C., INC.;

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

TUTOR PERINI CORPORATION;	)
UNITED INSULATION CO. OF WILMINGTON, INC.;	)
UNITED STATES FIDELIT□ AND GUARANT□ COMPAN□;	)
VANDERBILT MINERALS, LLC;	)
VIACOMCBS INC.;	)
WARREN PUMPS LLC;	)
THE WILLIAM POWELL COMPAN□;	)
ZURICH AMERICAN INSURANCE COMPAN□;	)
Defendants.	)

SUMMONS

TO DEFENDANTS ABOVE-NAMED:

□OU ARE HEREB□ SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the Plaintiffs□counsel, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

[THIS SPACE INTENTIONALL□ LEFT BLANK]

Respectfully submitted,

s/Theile B. McVey

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ATTORNEYS FOR PLAINTIFFS

April 14, 2020

Columbia, South Carolina

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

STATE OF SOUTH CAROLINA □ **IN THE COURT OF COMMON PLEAS**

□

COUNTY OF RICHLAND □ **FOR THE FIFTH JUDICIAL CIRCUIT**

DIANNE MCCULLOUGH and **FLOYD DAVID COOPER**, individually and as Personal Representatives of the Estate of **OLIN D. COOPER,**

Plaintiffs,

v.

□□2□**CORP., INC.** individually and as successor-in-interest to BENJAMIN F. SHAW COMPAN□

ABLEST INC. as successor-by-merger to C. H. Heist Corp. as successor-in-interest to PIPE & BOILER INSULATION, INC.

AECOM ENERGY & CONSTRUCTION, INC., individually and as successor-in-interest to □EARGIN CONSTRUCTION COMPAN□, INC.

AIR & LI□UID SYSTEMS CORPORATION individually and as successor-in-interest to BUFFALO PUMPS, INC.

ALLSTATE INSURANCE COMPANY

ARMSTRONG INTERNATIONAL, INC.

ASCEND PERFORMANCE MATERIALS OPERATIONS LLC f/k/a ASCEND PERFORMANCE MATERIALS LLC, a subsidiary of SK CAPITAL PARTNERS, individually, and as successor-in-interest to THE CHEMSTRAND CORPORATION

AURORA PUMP COMPANY

BAHNSON, INC.

C□A No. □□□□□□□□□□□□□□□□□□□□□□□□□□

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

Mesothelioma
Wrongful Death and Survival Action

COMPLAINT

(Jury Trial Demanded)

ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

BASF CATALYSTS LLC
successor-in-interest to
ENGELHARD, PITA REALT□ and
EASTERN MAGNESIA TALC

BASF CORPORATION
individually and as successor-by-merger to
BADISCHE CORPORATION
f/k/a DOW BADISCHE COMPAN□

BAYER CORPORATION
individually, and as successor-in-interest to
PHARMACIA, LLC and MONSANTO
COMPAN□

BONIT□, INC.
individually and as successor-in-interest to
BONITZ INSULATION CO. OF SOUTH
CAROLINA

BW□P INC.
and its wholly-owned subsidiaries

CARBOLINE COMPANY

CELANESE CORPORATION

CHESNEE TELEPHONE COMPANY, INCORPORATED, d/b/a CHESNEE
COMMUNICATIONS, INC.

CIRCOR INSTRUMENTATION TECHNOLOGIES, INC.
f/k/a HOKE INC.

CLEAVER-BROOKS, INC.
f/k/a A□UA-CHEM, INC.
d/b/a CLEAVER-BROOKS DIVISION

CNA HOLDINGS LLC
f/k/a CELANESE CORPORATION f/k/a
HOECHST CELANESE CORPORATION,
sued individually and as successor in-interest-
to FIBER INDUSTRIES, INC.

CONTINENTAL TIRE THE AMERICAS, LLC, d/b/a GENERAL TIRE)
)
COVIL CORPORATION)
)
CRANE CO.)
)
CYPRUS AMA□ MINERALS COMPANY, individually, d/b/a and as successor-in-interest to SIERRA TALC COMPAN□, UNITED SIERRA DIVISION OF C□PRUS MINES, C□PRUS INDUSTRIAL MINERALS COMPAN□, AMERICAN TALC COMPAN□, METROPOLITAN TALC COMPAN□, INC., CHARLES MATHIEU INC., RESOURCE PROCESSORS, INC., and WINDSOR MINERALS, INC.)
)
CYPRUS MINES CORPORATION individually, d/b/a and as successor to SIERRA TALC COMPAN□, AMOCO MINERALS CO., C□PRUS INDUSTRIAL MINERALS CO., and C□PRUS GEORESEARCH CO., a wholly-owned subsidiary of C□PRUS MINES CORP. and successor to CHARLES MATHIEU INC. (d/b/a CHARLES MATHIEU & CO. and CHAS. MATHIEU INC.), AMERICAN TALC COMPAN□ INC., METROPOLITAN TALC COMPAN□ INC., IMPERIAL PRODUCTS CO. INC., and RESOURCE PROCESSORS INC.)
)
DANIEL INTERNATIONAL CORPORATION)
)
THE DOW CHEMICAL COMPANY)
)
FLOWSERVE US INC. individually, and as successor-in-interest to EDWARD VALVES, INC.)
)
FLUOR CONSTRUCTORS INTERNATIONAL f/k/a/ FLUOR CORPORATION)

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ELECTRONICALLY FILED - 2020 Apr 14 4:11 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4001952

FLUOR CONSTRUCTORS INTERNATIONAL, INC.

FLUOR DANIEL SERVICES CORPORATION

FLUOR ENTERPRISES, INC.

FOSTER WHEELER ENERGY CORPORATION

GENERAL ELECTRIC COMPANY

THE GOODYEAR TIRE & RUBBER COMPANY

GOULDS PUMPS, INCORPORATED

H. M. ROYAL INC.

INGERSOLL-RAND COMPANY

ITT LLC
f/k/a ITT CORPORATION, ITT INDUSTRIES, INC., ITT FLUID PRODUCTS CORP., HOFFMAN SPECIALT□ MFG. CORP., BELL and GOSSETT COMPAN□, and ITT MARLOW

J. & L. INSULATION, INC.

J & L INSULATION, INC.

MCNEIL □OHIO□CORPORATION

MCNEIL & NRM, INC.

MAGNOLIA FINISHING PLANT
a division of MILLIKEN & COMPAN□

THE MARLEY-WYLAIN COMPANY
d/b/a WEIL-MCLAIN

METROPOLITAN LIFE INSURANCE COMPANY, a wholly owned subsidiary of METLIFE INC.

MICHELIN NORTH AMERICA, INC. f/k/a MICHELIN TIRE CORPORATION

MILLIKEN & COMPANY

PFI□ER, INC.

PIPE & BOILER INSULATION, INC.

R.T. VANDERBILT HOLDING COMPANY, INC. individually and as successor-in-interest to R.T. VANDERBILT COMPAN□, INC.

SOUTHERN INSULATION, INC.

SPIRA□ SARCO, INC.

SP□ COOLING TECHNOLOGIES, INC. individually, and as successor-in-interest to MARLE□ COOLING TOWERS CO.

STARR DAVIS COMPANY, INC.

STARR DAVIS COMPANY OF S.C., INC.

TUTOR PERINI CORPORATION

UNITED INSULATION CO. OF WILMINGTON, INC., individually, and as successor-in-interest to ELLINGTON INSULATION COMPAN□, INC.

UNITED STATES FIDELITY AND GUARANTY COMPANY

VANDERBILT MINERALS, LLC f/k/a R.T. VANDERBILT COMPAN□, INC., individually and as successor-in-interest to INTERNATIONAL TALC CO.

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VIACOMCBS INC.
f/k/a CBS CORPORATION, a Delaware corporation f/k/a VIACOM, INC., successor-by-merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION

WARREN PUMPS LLC

THE WILLIAM POWELL COMPANY

□URICH AMERICAN INSURANCE COMPANY
a/k/a ZURICH NORTH AMERICA, INC.

Defendants.

PLAINTIFFS□ORIGINAL COMPLAINT

Plaintiffs DIANNE MCCULLOUGH and FLO□D DAVID COOPER, individually and as Personal Representatives of the Estate of OLIN D. COOPER, sues the named Defendants for compensatory and punitive damages, by and through their attorneys, and comes before this court and alleges as follows:

GENERAL ALLEGATIONS

1. This action is brought pursuant to the Wrongful Death Act, S.C. Gen. Stat. 15-51-10 *et seq*., for the wrongful death of the Decedent, Olin D. Cooper, on behalf of all persons entitled to recover damages.

2. This Court has personal jurisdiction over Defendants because Plaintiffs□claims arise from Defendants□conduct in:

(a) Transacting business in this State, including the sale, supply, purchase, and/or use of asbestos and/or asbestos-containing products, within this State;

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(b) Contracting to supply services or things in the State;

(c) Commission of a tortious act in whole or in part in this State;

(d) Having an interest in, using, or possessing real property in this State; and/or

(e) Entering into a contract to be performed in whole or in part by either party in this State.

3. Each Defendant, or its predecessors in interest, that manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials for use in South Carolina and other states at times relevant to this action are referred to herein as "Product Defendants." At all times relevant to this action, the Product Defendants and the predecessors of the Product Defendants for whose actions the Product Defendants are legally responsible, were engaged in the manufacture, sale, and distribution of asbestos-containing products and raw materials.

4. Each Defendant, or its predecessors in interest, that owned and/or controlled the work sites where Decedent, Olin D. Cooper, experienced occupational exposure as a result of working with and around others working with asbestos and/or asbestos-containing products, materials, or equipment in his immediate vicinity are referred to herein as the "Premises Defendants." At all times relevant to this action:

(a) the Premises Defendants owned the property and approved the use of asbestos-containing materials on its premises.

(b) the Premises Defendants invited the Decedent, Olin D. Cooper as a carpenter, on to Defendant's premises to perform construction work for Defendant's benefit. Decedent was an invitee who had express permission to enter Defendant's premises for the purpose of benefitting the owner (Defendant).

(c) the Premises Defendants owed a duty of due care to discover risks and take safety precautions to warn of and eliminate unreasonable risks.

(d) the Premises Defendants' failure to warn of or eliminate the unreasonable risks associated with working on or around asbestos-containing materials on Defendants' premises was a substantial factor contributing to cause Decedent Olin D. Cooper's mesothelioma.

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5. Plaintiffs claims against the Product Defendants, as defined herein, arise out of Defendants purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

6. Plaintiffs claims against the Premise Defendants, as defined herein, arise out of Defendants ownership and/or control of real property located in South Carolina and the purchase and use of asbestos-containing products on their premises located in South Carolina.

7. All of the named Defendants are corporations who purposefully availed themselves of the privilege of doing business in this State, and whose substantial and/or systematic business in South Carolina exposed Decedent Olin D. Cooper to asbestos in this State, subjecting them to the jurisdiction of the South Carolina courts pursuant to the South Carolina Long-Arm Statute and the United States Constitution.

8. Decedent Olin D. Cooper s cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent s mesothelioma and other related injuries and therefore under South Carolina law, is the legal cause of Decedent s injuries and damages.

9. Decedent was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

10. Decedent worked with, or in close proximity to others who worked with, asbestos-containing materials including but not limited to asbestos-containing products and other asbestos-containing materials manufactured and/or sold by Defendants identified above.

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11. Each of the named Defendants is liable for damages stemming from its own tortious conduct or the tortious conduct of an "alternate entity" as hereinafter defined. Defendants are liable for the acts of their "alternate entity" and each of them, in that there has been a corporate name change, Defendant is the successor by merger, by successor in interest, or by other acquisition resulting in a virtual destruction of Plaintiffs' remedy against each such "alternate entity"; Defendants, each of them, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; such "alternate entities" have acquired the assets, product line, or a portion thereof of each such Defendant; Defendants, and each of them, caused the destruction of Plaintiffs' remedy against each such "alternate entity"; each such Defendant has the ability to assume the risk-spreading role of each such "alternate entity;" and that each such defendant enjoys the goodwill originally attached to each "alternate entity."

DEFENDANT	ALTERNATE ENTITY
4520 CORP., INC.	as successor-in-interest to BENJAMIN F. SHAW COMPAN
ABLEST INC.	as successor-by-merger to C. H. Heist Corp. as successor-in-interest to PIPE & BOILER INSULATION, INC.
AECOM ENERG & CONSTRUCTION, INC.	as successor-in-interest to EARGIN CONSTRUCTION COMPAN, INC.
AIR & LI UID S STEMS CORPORATION	as successor-in-interest to BUFFALO PUMPS, INC.
ASCEND PERFORMANCE MATERIALS OPERATIONS LLC	f/k/a ASCEND PERFORMANCE MATERIALS LLC, a subsidiary of SK CAPITAL PARTNERS, individually, and as successor-in-interest to THE CHEMSTRAND CORPORATION
BASF CATAL STS LLC	successor-in-interest to ENGELHARD, PITA REALT and EASTERN MAGNESIA TALC

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DEFENDANT	ALTERNATE ENTITY
BASF CORPORATION	as successor-by-merger to BADISCHE CORPORATION f/k/a DOW BADISCHE COMPAN□
BA□ER CORPORATION	as successor-in-interest to PHARMACIA, LLC and MONSANTO COMPAN□
BONITZ, INC.	as successor-in-interest to BONITZ INSULATION CO. OF SOUTH CAROLINA
BW/IP INC.	and its wholly-owned subsidiaries
CHESNEE TELEPHONE COMPAN□, INCORPORATED	d/b/a CHESNEE COMMUNICATIONS, INC.
CIRCOR INSTRUMENTATION TECHNOLOGIES, INC.	f/k/a HOKE INC.
CLEAVER-BROOKS, INC.	f/k/a A□UA-CHEM, INC. d/b/a CLEAVER-BROOKS DIVISION
CNA HOLDINGS LLC	f/k/a CELANESE CORPORATION f/k/a HOECHST CELANESE CORPORATION, sued individually and as successor in-interest-to FIBER INDUSTRIES, INC.
CONTINENTAL TIRE THE AMERICAS, LLC	d/b/a GENERAL TIRE
C□PRUS AMA□ MINERALS COMPAN□	d/b/a and as successor-in-interest to SIERRA TALC COMPAN□, UNITED SIERRA DIVISION OF C□PRUS MINES, C□PRUS INDUSTRIAL MINERALS COMPAN□, AMERICAN TALC COMPAN□, METROPOLITAN TALC COMPAN□, INC., CHARLES MATHIEU INC., RESOURCE PROCESSORS, INC., and WINDSOR MINERALS, INC.
C□PRUS MINES CORPORATION	d/b/a and as successor to SIERRA TALC COMPAN□, AMOCO MINERALS CO., C□PRUS INDUSTRIAL MINERALS CO., and C□PRUS GEORESEARCH CO., a wholly-owned subsidiary of C□PRUS MINES CORP. and successor to CHARLES MATHIEU INC. (d/b/a CHARLES

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DEFENDANT	ALTERNATE ENTITY
	MATHIEU & CO. and CHAS. MATHIEU INC.), AMERICAN TALC COMPAN INC., METROPOLITAN TALC COMPAN INC., IMPERIAL PRODUCTS CO. INC., and RESOURCE PROCESSORS INC.
FLOWSERVE US INC.	as successor-in-interest to EDWARD VALVES, INC.
FLUOR CONSTRUCTORS INTERNATIONAL	f/k/a FLUOR CORPORATION
ITT, LLC	f/k/a ITT CORPORATION, ITT INDUSTRIES, INC., ITT FLUID PRODUCTS CORP., HOFFMAN SPECIALT MFG. CORP., BELL and GOSSETT COMPAN, and ITT MARLOW
MAGNOLIA FINISHING PLANT	a division of MILLIKEN & COMPAN
THE MARLE-W LAIN COMPAN	d/b/a WEIL-MCLAIN
METROPOLITAN LIFE INSURANCE COMPAN	a wholly owned subsidiary of METLIFE INC.
MICHELIN NORTH AMERICA, INC.	f/k/a MICHELIN TIRE CORPORATION
R.T. VANDERBILT HOLDING COMPAN, INC.	as successor-in-interest to R.T. VANDERBILT COMPAN, INC.
SP COOLING TECHNOLOGIES, INC.	as successor-in-interest to MARLE COOLING TOWERS CO.
UNITED INSULATION CO. OF WILMINGTON, INC.	as successor-in-interest to ELLINGTON INSULATION COMPAN, INC.
VANDERBILT MINERALS, LLC	f/k/a R.T. VANDERBILT COMPAN, INC., individually and as successor-in-interest to INTERNATIONAL TALC CO.

DEFENDANT	ALTERNATE ENTITY
VIACOMCBS INC.	f/k/a CBS CORPORATION, a Delaware corporation f/k/a VIACOM, INC., successor-by-merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION
ZURICH AMERICAN INSURANCE COMPAN□	a/k/a ZURICH NORTH AMERICA, INC.

12. Plaintiffs have been informed and believe, and thereon allege, that at all times herein mentioned, Defendants or their □alternate entities□were or are corporations, partnerships, unincorporated associations, sole proprietorships and/or other business entities organized and existing under and by virtue of the laws of the State of South Carolina, or the laws of some other state or foreign jurisdiction, and that said Defendants were and/or are authorized to do business in the State of South Carolina, and that said Defendants have regularly conducted business in the State of South Carolina.

13. Plaintiffs have been informed and believe, and thereon allege, that progressive lung disease, mesothelioma and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

14. As a direct and proximate result of the conduct as alleged within, Decedent Olin D. Cooper suffered permanent injuries, including, but not limited to, mesothelioma and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

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15. As a direct and proximate result of the conduct as hereinafter alleged, Decedent Olin D. Cooper incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiffs at this time. Plaintiffs request leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent's medical treatment is ascertained.

16. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent Olin D. Cooper incurred, and will incur, loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs. Plaintiffs pray for leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

17. Plaintiffs hereby disclaim each and every claim or cause of action which does or may arise from any United States Air Force service or on any federal enclave. This disclaimer is not related solely to actions taken by or at the direction of a federal officer, but is, rather broader. Plaintiffs are not making any claims and are not alleging any causes of action against any entity for any asbestos exposure of any kind which occurred as a result of Decedent's United States Air Force service. Moreover, Plaintiffs are further disclaiming each and every claim or cause of action arising from any exposure to asbestos as a result of the Decedent's presence on or at any federal enclave. Plaintiffs further disclaim each and every claim or cause of action arising under the United States Constitution and under any Federal Law or Regulation. Finally, Plaintiffs disclaim each and every claim or cause of action which may be asserted under federal admiralty or maritime law. Courts across the Country have found that such disclaimers are proper and within the province of the Plaintiffs to disclaim. Any removal by any defendant on the basis of the disclaimed claims will result in a motion for sanctions and seeking attorneys' fees.

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THE PARTIES

18. Plaintiffs DIANNE MCCULLOUGH and FLO□D DAVID COOPER are currently residents of the State of South Carolina. Decedent, OLIN D. COOPER was exposed to asbestos during the course of his career at various job sites, including but not limited to, locations in South Carolina, North Carolina and Georgia.

19. Defendant, □□**2**□ **CORP., INC.**, individually and as successor-in-interest to BENJAMIN F. SHAW COMPAN□, was and is a Delaware corporation with its principal place of business in Oregon. At all times material hereto, 4520 CORP., INC., individually and as successor-in-interest to BENJAMIN F. SHAW COMPAN□, mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. 4520 CORP., INC. is sued as a Product Defendant. 4520 CORP., INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□claims against 4520 CORP., INC. arise out of this Defendant□s business activities in the State of South Carolina.

20. Defendant, **ABLEST INC.**, as successor-by-merger to C. H. HEIST CORP. as successor-in-interest to PIPE & BOILER INSULATION, INC., was and is a Delaware corporation with its principal place of business in California. At all times material hereto, ABLEST INC., as successor-by-merger to C. H. HEIST CORP. as successor-in-interest to PIPE & BOILER INSULATION, INC., mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or

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asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. ABLEST INC. is sued as a Product Defendant. ABLEST INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□claims against ABLEST INC. arise out of this Defendant□s business activities in the State of South Carolina.

21. Defendant, **AECOM ENERGY & CONSTRUCTION, INC.**, individually and as successor-in-interest to □EARGIN CONSTRUCTION COMPAN□, INC., was and is an Ohio corporation with its principal place of business in California. At all times material hereto, AECOM ENERG□ & CONSTRUCTION, INC., individually and as successor-in-interest to □EARGIN CONSTRUCTION COMPAN□, INC., mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. AECOM ENERG□ & CONSTRUCTION, INC. is sued as a Product Defendant. AECOM ENERG□ & CONSTRUCTION, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□ claims against AECOM ENERG□ & CONSTRUCTION, INC. arise out of this Defendant□s business activities in the State of South Carolina.

22. Defendant, **AIR & LI□UID SYSTEMS CORPORATION**, individually and as successor-in-interest to BUFFALO PUMPS, INC., was and is a Pennsylvania corporation with its

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principal place of business in Pennsylvania. At all times material hereto, AIR & LI□UID S□STEMS CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Buffalo pumps. AIR & LI□UID S□STEMS CORPORATION is sued as a Product Defendant. Plaintiffs□claims against AIR & LI□UID S□STEMS CORPORATION arise out of this Defendant□s business activities in the State of South Carolina.

23. Defendant, **ALLSTATE INSURANCE COMPANY**, was and is an Illinois corporation with its principal place of business in Illinois. At all times material hereto, ALLSTATE INSURANCE COMPAN□ owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Allstate Insurance facility in Charlotte, North Carolina. ALLSTATE INSURANCE COMPAN□ is sued as a Premises Defendant. Plaintiffs□ claims against ALLSTATE INSURANCE COMPAN□ arise out of this Defendant□s business activities in the State of South Carolina.

24. Defendant, **ARMSTRONG INTERNATIONAL, INC.**, was and is a Michigan corporation with its principal place of business in Michigan. At all times material hereto, ARMSTRONG INTERNATIONAL, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Armstrong steam traps and strainers. ARMSTRONG INTERNATIONAL, INC. is sued as a Product Defendant. Plaintiffs□ claims against ARMSTRONG

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INTERNATIONAL, INC. arise out of this Defendant's business activities in the State of South Carolina.

25. Defendant, **ASCEND PERFORMANCE MATERIALS OPERATIONS LLC**, f/k/a ASCEND PERFORMANCE MATERIALS LLC, a subsidiary of SK CAPITAL PARTNERS, individually, and as successor-in-interest to THE CHEMSTRAND CORPORATION, was and is a Delaware limited liability company with its principal place of business in Texas. At all times material hereto, ASCEND PERFORMANCE MATERIALS OPERATIONS LLC, f/k/a ASCEND PERFORMANCE MATERIALS LLC, a subsidiary of SK CAPITAL PARTNERS, individually, and as successor-in-interest to THE CHEMSTRAND CORPORATION, owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Monsanto facility in Blacksburg, South Carolina. ASCEND PERFORMANCE MATERIALS OPERATIONS LLC is sued as a Premises Defendant. Plaintiffs' claims against ASCEND PERFORMANCE MATERIALS OPERATIONS LLC arise out of this Defendant's business activities in the State of South Carolina.

26. Defendant, **AURORA PUMP COMPANY**, was and is a Delaware corporation with its principal place of business in Illinois. At all times material hereto, AURORA PUMP COMPAN mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Aurora pumps. AURORA PUMP COMPAN is sued as a Product Defendant. Plaintiffs' claims against AURORA PUMP COMPAN arise out of this Defendant's business activities in the State of South Carolina.

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27. Defendant, **BAHNSON, INC.**, was and is a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, BAHNSON, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. BAHNSON, INC. is sued as a Product Defendant. BAHNSON, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs claims against BAHNSON, INC. arise out of this Defendant s business activities in the State of South Carolina.

28. Defendant, **BASF CATALYSTS LLC**, successor-in-interest to ENGELHARD, PITA REALT and EASTERN MAGNESIA TALC, was and is a Delaware limited liability company with its principal place of business in New Jersey. At all times material hereto, BASF CATAL STS LLC mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. BASF CATAL STS LLC is sued as a Product Defendant. Plaintiffs claims against BASF CATAL STS LLC arise out of this Defendant s business activities in the State of South Carolina.

29. Defendant, **BASF CORPORATION**, individually and as successor-by-merger to BADISCHE CORPORATION f/k/a DOW BADISCHE COMPAN , was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, BASF CORPORATION owned and/or controlled premises at which Decedent Olin D. Cooper was

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exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the DOW Badische facility in Anderson, South Carolina. BASF CORPORATION is sued as a Premises Defendant. Plaintiffs claims against BASF CORPORATION arise out of this Defendant s business activities in the State of South Carolina.

30. Defendant, **BAYER CORPORATION**, individually and as successor-in-interest to PHARMACIA, LLC and MONSANTO COMPAN , was and is an Indiana corporation with its principal place of business in New Jersey. At all times material hereto, BA ER CORPORATION, individually and as successor-in-interest to PHARMACIA, LLC and MONSANTO COMPAN , owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Monsanto facility in Blacksburg, South Carolina. BA ER CORPORATION is sued as a Premises Defendant. Plaintiffs claims against BA ER CORPORATION arise out of this Defendant s business activities in the State of South Carolina.

31. Defendant, **BONIT , INC.**, individually and as successor-in-interest to BONITZ INSULATION CO. OF SOUTH CAROLINA, was and is a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, BONITZ, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. BONITZ, INC. is sued as a Product Defendant. BONITZ, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands

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of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against BONITZ, INC. arise out of this Defendant's business activities in the State of South Carolina.

32. Defendant, **BW/IP INC.** and its wholly-owned subsidiaries, was and is a Delaware corporation with its principal place of business in Texas. At all times material hereto, BW/IP INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Byron Jackson pumps. BW/IP INC. is sued as a Product Defendant. Plaintiffs' claims against BW/IP INC. arise out of this Defendant's business activities in the State of South Carolina.

33. Defendant, **CARBOLINE COMPANY**, was and is a Delaware corporation with its principal place of business in Missouri. At all times material hereto, CARBOLINE COMPAN mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing coatings. CARBOLINE COMPAN is sued as a Product Defendant. Plaintiffs' claims against CARBOLINE COMPAN arise out of this Defendant's business activities in the State of South Carolina.

34. Defendant, **CELANESE CORPORATION**, was and is a Delaware corporation with its principal place of business in Texas. At all times material hereto, CELANESE CORPORATION owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Hoechst Celanese facilities a/k/a Fiber Industries

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in Greer, South Carolina, Spartanburg, South Carolina and Salisbury, North Carolina. CELANESE CORPORATION is sued as a Premises Defendant. Plaintiffs claims against CELANESE CORPORATION arise out of this Defendant s business activities in the State of South Carolina.

35. Defendant, **CHESNEE TELEPHONE COMPANY, INCORPORATED** d/b/a CHESNEE COMMUNICATIONS, INC., was and is a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, CHESNEE TELEPHONE COMPAN , INCORPORATED owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Chesnee Telephone Company facility in Chesnee, South Carolina. CHESNEE TELEPHONE COMPAN , INCORPORATED is sued as a Premises Defendant. Plaintiffs claims against CHESNEE TELEPHONE COMPAN , INCORPORATED arise out of this Defendant s business activities in the State of South Carolina.

36. Defendant, **CIRCOR INSTRUMENTATION TECHNOLOGIES, INC.** f/k/a HOKE INC., was and is a New ork corporation with its principal place of business in South Carolina. At all times material hereto, CIRCOR INSTRUMENTATION TECHNOLOGIES, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Hoke valves. CIRCOR INSTRUMENTATION TECHNOLOGIES, INC. is sued as a Product Defendant. Plaintiffs claims against CIRCOR INSTRUMENTATION TECHNOLOGIES, INC. arise out of this Defendant s business activities in the State of South Carolina.

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37. Defendant, **CLEAVER-BROOKS, INC.**, f/k/a A□UA-CHEM, INC. d/b/a CLEAVER-BROOKS DIVISION, was and is a Delaware corporation with its principal place of business in Georgia. At all times material hereto, CLEAVER-BROOKS, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Cleaver-Brooks boilers. CLEAVER-BROOKS, INC. is sued as a Product Defendant. Plaintiffs□claims against CLEAVER-BROOKS, INC. arise out of this Defendant□s business activities in the State of South Carolina.

38. Defendant, **CNA HOLDINGS LLC**, f/k/a CELANESE CORPORATION f/k/a HOECHST CELANESE CORPORATION, sued individually and as successor in-interest-to FIBER INDUSTRIES, INC., was and is a Delaware limited liability company with its principal place of business in Texas. At all times material hereto, CNA HOLDINGS LLC owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Hoechst Celanese facilities a/k/a Fiber Industries in Greer, South Carolina, Spartanburg, South Carolina and Salisbury, North Carolina. CNA HOLDINGS LLC is sued as a Premises Defendant. Plaintiffs□claims against CNA HOLDINGS LLC arise out of this Defendant□s business activities in the State of South Carolina.

39. Defendant, **CONTINENTAL TIRE THE AMERICAS, LLC** d/b/a GENERAL TIRE, was and is an Ohio limited liability company with its principal place of business in South Carolina. At all times material hereto, CONTINENTAL TIRE THE AMERICAS, LLC owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing

products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the General Tire facility in Charlotte, North Carolina. CONTINENTAL TIRE THE AMERICAS, LLC is sued as a Premises Defendant. Plaintiffs' claims against CONTINENTAL TIRE THE AMERICAS, LLC arise out of this Defendant's business activities in the State of South Carolina.

40. Defendant, **COVIL CORPORATION**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, COVIL CORPORATION manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. COVIL CORPORATION is sued as a Product Defendant. COVIL CORPORATION is also sued for the work it did at the various industrial sites in the southeastern United States which, during the actual operations of Covil Corporation, exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against COVIL CORPORATION arise out of this Defendant's business activities in the State of South Carolina.

41. Defendant, **CRANE CO.**, was and is a Delaware corporation with its principal place of business in Connecticut. At all times material hereto, CRANE CO. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Crane gaskets and valves. CRANE

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CO. is sued as a Product Defendant. Plaintiffs□claims against CRANE CO. arise out of this Defendant□s business activities in the State of South Carolina.

42. Defendant, **CYPRUS AMA□ MINERALS COMPANY**, individually, d/b/a, and as successor-in-interest to SIERRA TALC COMPAN□, UNITED SIERRA DIVISION OF C□PRUS MINES, C□PRUS INDUSTRIAL MINERALS COMPAN□, AMERICAN TALC COMPAN□, METROPOLITAN TALC COMPAN□, INC., CHARLES MATHIEU INC., RESOURCE PROCESSORS, INC., and WINDSOR MINERALS, INC., was and is a Delaware corporation with its principal place of business in Arizona. At all times material hereto, C□PRUS AMA□ MINERALS COMPAN□ mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. C□PRUS AMA□ MINERALS COMPAN□ is sued as a Product Defendant. Plaintiffs□claims against C□PRUS AMA□ MINERALS COMPAN□ arise out of this Defendant□s business activities in the State of South Carolina.

43. Defendant, **CYPRUS MINES CORPORATION**, individually, d/b/a, and as successor-in-interest to SIERRA TALC COMPAN□, AMOCO MINERALS CO., C□PRUS INDUSTRIAL MINERALS CO., and C□PRUS GEORESEARCH CO., a wholly-owned subsidiary of C□PRUS MINES CORP. and successor to CHARLES MATHIEU INC. (d/b/a CHARLES MATHIEU & CO. and CHAS. MATHIEU INC.), AMERICAN TALC COMPAN□ INC., METROPOLITAN TALC COMPAN□ INC., IMPERIAL PRODUCTS CO. INC., and RESOURCE PROCESSORS INC., was and is a Delaware corporation with its principal place of business in Arizona. At all times material hereto, C□PRUS MINES CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced,

repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. C□PRUS MINES CORPORATION is sued as a Product Defendant. Plaintiffs□claims against C□PRUS MINES CORPORATION arise out of this Defendant□s business activities in the State of South Carolina.

44. Defendant, **DANIEL INTERNATIONAL CORPORATION**, was and is a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, DANIEL INTERNATIONAL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. DANIEL INTERNATIONAL CORPORATION is sued as a Product Defendant. DANIEL INTERNATIONAL CORPORATION is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□ claims against DANIEL INTERNATIONAL CORPORATION arise out of this Defendant□s business activities in the State of South Carolina.

45. Defendant, **THE DOW CHEMICAL COMPANY**, was and is a Delaware corporation with its principal place of business in Michigan. At all times material hereto, THE DOW CHEMICAL COMPAN□ owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Dow Badische facility in Anderson, South Carolina. THE DOW CHEMICAL COMPAN□ is sued as a Premises Defendant. Plaintiffs□claims

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against THE DOW CHEMICAL COMPAN arise out of this Defendant s business activities in the State of South Carolina.

46. Defendant, **FLOWSERVE US INC.**, individually and as successor-in-interest to EDWARD VALVES, INC., was and is a Delaware corporation with its principal place of business in Texas. At all times material hereto, FLOWSERVE US INC**.** mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Edward valves. FLOWSERVE US INC**.** is sued as a Product Defendant. Plaintiffs claims against FLOWSERVE US INC**.** arise out of this Defendant s business activities in the State of South Carolina.

47. Defendant, **FLUOR CONSTRUCTORS INTERNATIONAL**, was and is a California corporation with its principal place of business in Texas. At all times material hereto, FLUOR CONSTRUCTORS INTERNATIONAL mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. FLUOR CONSTRUCTORS INTERNATIONAL is sued as a Product Defendant. FLUOR CONSTRUCTORS INTERNATIONAL is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs claims against FLUOR CONSTRUCTORS INTERNATIONAL arise out of this Defendant s business activities in the State of South Carolina.

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48. Defendant, **FLUOR CONSTRUCTORS INTERNATIONAL, INC.**, was and is a California corporation with its principal place of business in Texas. At all times material hereto, FLUOR CONSTRUCTORS INTERNATIONAL, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. FLUOR CONSTRUCTORS INTERNATIONAL, INC. is sued as a Product Defendant. FLUOR CONSTRUCTORS INTERNATIONAL, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs claims against FLUOR CONSTRUCTORS INTERNATIONAL, INC. arise out of this Defendant s business activities in the State of South Carolina.

49. Defendant, **FLUOR DANIEL SERVICES CORPORATION**, was and is a Delaware corporation with its principal place of business in Texas. At all times material hereto, FLUOR DANIEL SERVICES CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. FLUOR DANIEL SERVICES CORPORATION is sued as a Product Defendant. FLUOR DANIEL SERVICES CORPORATION is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper,

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to lethal doses of asbestos. Plaintiffs claims against FLUOR DANIEL SERVICES CORPORATION arise out of this Defendant s business activities in the State of South Carolina.

50. Defendant, **FLUOR ENTERPRISES, INC.**, was and is a California corporation with its principal place of business in Texas. At all times material hereto, FLUOR ENTERPRISES, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. FLUOR ENTERPRISES, INC. is sued as a Product Defendant. FLUOR ENTERPRISES, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs claims against FLUOR ENTERPRISES, INC. arise out of this Defendant s business activities in the State of South Carolina.

51. Defendant, **FOSTER WHEELER ENERGY CORPORATION**, was and is a Delaware corporation with its principal place of business in New Jersey. At all times material hereto, FOSTER WHEELER ENERG CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Foster Wheeler boilers. FOSTER WHEELER ENERG CORPORATION is sued as a Product Defendant. Plaintiffs claims against FOSTER WHEELER ENERG CORPORATION arise out of this Defendant s business activities in the State of South Carolina.

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52. Defendant, **GENERAL ELECTRIC COMPANY**, was and is a New ork corporation with its principal place of business in Massachusetts. At all times material hereto, GENERAL ELECTRIC COMPAN mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing General Electric turbines and generators. GENERAL ELECTRIC COMPAN is sued as a Product Defendant. Plaintiffs claims against GENERAL ELECTRIC COMPAN arise out of this Defendant s business activities in the State of South Carolina.

53. Defendant, **THE GOODYEAR TIRE & RUBBER COMPANY**, was and is an Ohio corporation with its principal place of business in Ohio. At all times material hereto, THE GOOD EAR TIRE & RUBBER COMPAN mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Durabla gaskets. THE GOOD EAR TIRE & RUBBER COMPAN is sued as a Product Defendant. Plaintiffs claims against THE GOOD EAR TIRE & RUBBER COMPAN arise out of this Defendant s business activities in the State of South Carolina.

54. Defendant, **GOULDS PUMPS, INCORPORATED**, was and is a Delaware corporation with its principal place of business in New ork. At all times material hereto, GOULDS PUMPS, INCORPORATED mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Goulds pumps. GOULDS PUMPS, INCORPORATED is sued as a Product Defendant.

Plaintiffs□claims against GOULDS PUMPS, INCORPORATED arise out of this Defendant□s business activities in the State of South Carolina.

55. Defendant, **H. M. ROYAL INC.**, was and is a New Jersey corporation with its principal place of business in New Jersey. At all times material hereto, H. M. RO□AL INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. H. M. RO□AL INC. is sued as a Product Defendant. Plaintiffs□claims against H. M. RO□AL INC. arise out of this Defendant□s business activities in the State of South Carolina.

56. Defendant, **INGERSOLL-RAND COMPANY**, was and is a New Jersey corporation with its principal place of business in North Carolina. At all times material hereto, INGERSOLL-RAND COMPAN□ mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Ingersoll-Rand compressors and pumps. INGERSOLL-RAND COMPAN□ is sued as a Product Defendant. Plaintiffs□claims against INGERSOLL-RAND COMPAN□ arise out of this Defendant□s business activities in the State of South Carolina.

57. Defendant, **ITT LLC**, f/k/a ITT CORPORATION, ITT INDUSTRIES, INC., individually and as successor to ITT FLUID PRODUCTS CORP., ITT HOFFMAN, ITT BELL & GOSSETT COMPAN□, and ITT MARLOW, was and is an Indiana limited liability company with its principal place of business in New □ork. At all times material hereto, ITT LLC mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing

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products, materials, or equipment, including, but not limited to, asbestos-containing Bell and Gossett pumps and valves. ITT LLC is sued as a Product Defendant. Plaintiffs claims against ITT LLC arise out of this Defendant s business activities in the State of South Carolina.

58. Defendant, **J. & L. INSULATION, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, J. & L. INSULATION, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. J. & L. INSULATION, INC. is sued as a Product Defendant. J. & L. INSULATION, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which, during the actual operations of J. & L. Insulation, Inc., exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs claims against J. & L. INSULATION, INC. arise out of this Defendant s business activities in the State of South Carolina.

59. Defendant, **J & L INSULATION, INC.**, was a Georgia corporation with its principal place of business in Georgia. At all times material hereto, J & L INSULATION, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. J & L INSULATION, INC. is sued as a Product Defendant. J & L INSULATION, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which,

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during the actual operations of J & L Insulation, Inc., exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against J & L INSULATION, INC. arise out of this Defendant's business activities in the State of South Carolina.

60. Defendant, **MCNEIL (OHIO) CORPORATION**, was and is a Minnesota corporation with its principal place of business in Minnesota. At all times material hereto, MCNEIL (OHIO) CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing tire curling presses. MCNEIL (OHIO) CORPORATION is sued as a Product Defendant. Plaintiffs' claims against MCNEIL (OHIO) CORPORATION arise out of this Defendant's business activities in the State of South Carolina.

61. Defendant, **MCNEIL & NRM, INC.**, was and is a Delaware corporation with its principal place of business in Ohio. At all times material hereto, MCNEIL & NRM, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing tire curling presses. MCNEIL & NRM, INC. is sued as a Product Defendant. Plaintiffs' claims against MCNEIL & NRM, INC. arise out of this Defendant's business activities in the State of South Carolina.

62. Defendant, **MAGNOLIA FINISHING PLANT,** a division of MILLIKEN & COMPAN a Delaware corporation with its principal place of business in South Carolina. At all times material hereto, MAGNOLIA FINISHING PLANT owned and/or controlled premises at

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which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Magnolia Finishing facility in Blacksburg, South Carolina. MAGNOLIA FINISHING PLANT is sued as a Premises Defendant. Plaintiffs□claims against MAGNOLIA FINISHING PLANT arise out of this Defendant□s business activities in the State of South Carolina.

63. Defendant, **THE MARLEY-WYLAIN COMPANY** d/b/a WEIL-MCLAIN, was and is a Delaware corporation with its principal place of business in Indiana. At all times material hereto, THE MARLE□-W□LAIN COMPAN□ mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Weil boilers. THE MARLE□-W□LAIN COMPAN□ is sued as a Product Defendant. Plaintiffs□claims against THE MARLE□-W□LAIN COMPAN□ arise out of this Defendant□s business activities in the State of South Carolina.

64. Defendant, **METROPOLITAN LIFE INSURANCE COMPANY**, was and is a company incorporated under the laws of the State of New □ork with its principal place of business in New □ork. METROPOLITAN LIFE INSURANCE COMPAN□ has done and does business in the State of South Carolina. METROPOLITAN LIFE INSURANCE COMPAN□ is named as a conspiracy defendant.

65. Defendant, **MICHELIN NORTH AMERICA, INC.** f/k/a MICHELIN TIRE CORPORATION, was and is a New □ork corporation with its principal place of business in South Carolina. At all times material hereto, MICHELIN NORTH AMERICA, INC. owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not

limited to, the Michelin Tire facility in Spartanburg, South Carolina. MICHELIN NORTH AMERICA, INC. is sued as a Premises Defendant. Plaintiffs' claims against MICHELIN NORTH AMERICA, INC. arise out of this Defendant's business activities in the State of South Carolina.

66. Defendant, **MILLIKEN & COMPANY**, was and is a Delaware corporation with its principal place of business in South Carolina. At all times material hereto, MILLIKEN & COMPAN owned and/or controlled premises at which Decedent Olin D. Cooper was exposed to asbestos-containing products, equipment, and asbestos dust from said products at various facilities, including but not limited to, the Sylvan Chemical facility in Inman, South Carolina, Milliken Research Center in Spartanburg, South Carolina, Magnolia Finishing plant in Blacksburg, South Carolina and Gayley Mill facility in Marietta, South Carolina. MILLIKEN & COMPAN is sued as a Premises Defendant. Plaintiffs' claims against MILLIKEN & COMPAN arise out of this Defendant's business activities in the State of South Carolina.

67. Defendant, **PFI ER, INC.**, was and is a Delaware corporation with its principal place of business in New ork. At all times material hereto, PFIZER, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. PFIZER, INC. is sued as a Product Defendant. Plaintiffs' claims against PFIZER, INC. arise out of this Defendant's business activities in the State of South Carolina.

68. Defendant, **PIPE & BOILER INSULATION, INC.**, was and is an North Carolina corporation with its principal place of business in New ork. At all times material hereto, PIPE & BOILER INSULATION, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of

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asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. PIPE & BOILER INSULATION, INC. is sued as a Product Defendant. PIPE & BOILER INSULATION, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against PIPE & BOILER INSULATION, INC. arise out of this Defendant's business activities in the State of South Carolina.

69. Defendant, **R.T. VANDERBILT HOLDING COMPANY, INC.**, individually and as successor-in-interest to R.T. VANDERBILT COMPANY, INC., was and is a Delaware corporation with its principal place of business in Connecticut. At all times material hereto, R.T. VANDERBILT HOLDING COMPANY, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. R.T. VANDERBILT HOLDING COMPANY, INC. is sued as a Product Defendant. Plaintiffs' claims against R.T. VANDERBILT HOLDING COMPANY, INC. arise out of this Defendant's business activities in the State of South Carolina.

70. Defendant, **SOUTHERN INSULATION INC.**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, SOUTHERN INSULATION INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the

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southeastern United States. SOUTHERN INSULATION INC. is sued as a Product Defendant. SOUTHERN INSULATION INC. is also sued for the work it did at the various industrial sites in the southeastern United States which, during the actual operations of Southern Insulation Inc., exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against SOUTHERN INSULATION INC. arise out of this Defendant's business activities in the State of South Carolina.

71. Defendant, **SPIRA' SARCO, INC.**, was and is a Delaware corporation with its principal place of business in South Carolina. At all times material hereto, SPIRA' SARCO, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Sarco steam traps and valves. SPIRA' SARCO, INC. is sued as a Product Defendant. Plaintiffs' claims against SPIRA' SARCO, INC. arise out of this Defendant's business activities in the State of South Carolina.

72. Defendant, **SP' COOLING TECHNOLOGIES, INC.**, individually, and as successor-in-interest to MARLE' COOLING TOWERS CO., was and is a Delaware corporation with its principal place of business in Kansas. At all times material hereto, SP' COOLING TECHNOLOGIES, INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Marley cooling towers. SP' COOLING TECHNOLOGIES, INC. is sued as a Product Defendant. Plaintiffs' claims against SP' COOLING TECHNOLOGIES, INC. arise out of this Defendant's business activities in the State of South Carolina.

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73. Defendant, **STARR DAVIS COMPANY, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, STARR DAVIS COMPAN□, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. STARR DAVIS COMPAN□, INC. is sued as a Product Defendant. STARR DAVIS COMPAN□, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which, during the actual operations of Starr Davis Company Inc., exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□ claims against STARR DAVIS COMPAN□, INC. arise out of this Defendant□s business activities in the State of South Carolina.

74. Defendant, **STARR DAVIS COMPANY OF S.C., INC.**, was a South Carolina corporation with its principal place of business in North Carolina. At all times material hereto, STARR DAVIS COMPAN□ OF S.C., INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. STARR DAVIS COMPAN□ OF S.C., INC. is sued as a Product Defendant. STARR DAVIS COMPAN□ OF S.C., INC. is also sued for the work it did at the various industrial sites in the southeastern United States which, during the actual operations of Starr Davis Company of S.C. Inc., exposed tens of thousands of people, including the Decedent

Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against STARR DAVIS COMPANY OF S.C., INC. arise out of this Defendant's business activities in the State of South Carolina.

75. Defendant, **TUTOR PERINI CORPORATION**, was and is a Massachusetts corporation with its principal place of business in California. At all times material hereto, TUTOR PERINI CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. TUTOR PERINI CORPORATION is sued as a Product Defendant. TUTOR PERINI CORPORATION is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs' claims against TUTOR PERINI CORPORATION arise out of this Defendant's business activities in the State of South Carolina.

76. Defendant, **UNITED INSULATION CO. OF WILMINGTON, INC.**, individually and as successor-in-interest to ELLINGTON INSULATION COMPANY, INC., was and is an North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, UNITED INSULATION CO. OF WILMINGTON, INC., individually and as successor-in-interest to ELLINGTON INSULATION COMPANY, INC., mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation at numerous jobsites throughout the southeastern United States. UNITED INSULATION CO. OF WILMINGTON, INC., individually and as successor-in-

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interest to ELLINGTON INSULATION COMPAN□, INC., is sued as a Product Defendant. UNITED INSULATION CO. OF WILMINGTON, INC., individually and as successor-in-interest to ELLINGTON INSULATION COMPAN□, INC., is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Olin D. Cooper, to lethal doses of asbestos. Plaintiffs□claims against UNITED INSULATION CO. OF WILMINGTON, INC., individually and as successor-in-interest to ELLINGTON INSULATION COMPAN□, INC., arise out of this Defendant□s business activities in the State of South Carolina.

77. Defendant, **UNITED STATES FIDELITY AND GUARANTY COMPANY**, (□USF&G□or □Covil□s Alter Ego□) is a Connecticut corporation with its principal place of business in Connecticut. UNITED STATES FIDELIT□ AND GUARANT□ COMPAN□ is an insurance company subject to the jurisdiction of this Honorable Court by virtue of its direct acts within the state of South Carolina which give rise to the claims herein against it. At all times pertinent herein USF&G was the alter-ego of Defendant Covil Corporation and as such, is directly liable for the tortious conduct of Covil Corporation.

78. Defendant, **VANDERBILT MINERALS, LLC** f/k/a R.T. VANDERBILT COMPAN□, INC., individually and as successor-in-interest to INTERNATIONAL TALC CO., was and is a Delaware limited liability company with its principal place of business in Connecticut. At all times material hereto, VANDERBILT MINERALS, LLC mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing talc. VANDERBILT MINERALS, LLC is sued

as a Product Defendant. Plaintiffs' claims against VANDERBILT MINERALS, LLC arise out of this Defendant's business activities in the State of South Carolina.

79. Defendant, **VIACOMCBS INC.** f/k/a CBS CORPORATION, a Delaware corporation f/k/a VIACOM, INC., successor-by-merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION, was and is a Delaware corporation with its principal place of business in New York. At all times material hereto, VIACOMCBS INC. mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Westinghouse blowers, generators and turbines. VIACOMCBS INC. is sued as a Product Defendant. Plaintiffs' claims against VIACOMCBS INC. arise out of this Defendant's business activities in the State of South Carolina.

80. Defendant, **WARREN PUMPS LLC**, was and is a Delaware limited liability company with its principal place of business in Massachusetts. At all times material hereto, WARREN PUMPS LLC mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Warren pumps. WARREN PUMPS LLC is sued as a Product Defendant. Plaintiffs' claims against WARREN PUMPS LLC arise out of this Defendant's business activities in the State of South Carolina.

81. Defendant, **THE WILLIAM POWELL COMPANY**, was and is an Ohio corporation with its principal place of business in Ohio. At all times material hereto, THE WILLIAM POWELL COMPAN mined, manufactured, processed, imported, converted,

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compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, asbestos-containing Powell valves. THE WILLIAM POWELL COMPAN is sued as a Product Defendant. Plaintiffs claims against THE WILLIAM POWELL COMPAN arise out of this Defendant s business activities in the State of South Carolina.

82. Defendant, **URICH AMERICAN INSURANCE COMPANY** a/k/a ZURICH NORTH AMERICA, INC. (Zurich or Covil s Alter Ego) is a New ork corporation with its principal place of business in Illinois. ZURICH AMERICAN INSURANCE COMPAN is an insurance company subject to the jurisdiction of this Honorable Court, which, on information and belief, at all times pertinent herein was the liability insurer of Defendant Covil Corporation and by virtue of its direct acts within the state of South Carolina which give rise to the claims herein against it. At all times pertinent herein Zurich was the alter-ego of Defendant Covil Corporation and as such, is directly liable for the tortious conduct of Covil Corporation.

83. Decedent Olin D. Cooper experienced further occupational exposure as a result of working with asbestos-containing equipment in his immediate vicinity at his work site, the premises of Defendants ALL STATE INSURANCE COMPAN, ASCEND PERFORMANCE MATERIALS OPERATIONS LLC, BASF CORPORATION, BA ER CORPORATION, CELANESE CORPORATION, CHESNEE TELEPHONE COMPAN INCORPORATED, CNA HOLDINGS LLC, CONTINENTAL TIRE THE AMERICAS LLC, THE DOW CHEMICAL COMPAN, MAGNOLIA FINISHING PLANT, MICHELIN NORTH AMERICA, INC., and MILLIKEN & COMPAN (collectively, hereinafter the Premises Defendants). All other Defendants, or their applicable predecessors in interest, (except for METROPOLITAN LIFE INSURANCE COMPAN) were engaged in the manufacture, sale, distribution and/or installation

of asbestos-containing products or raw asbestos materials for use in South Carolina and other states at times relevant to this action. At all times relevant to this action, the Defendants and the predecessors of the Defendants, for whose actions the Defendants are legally responsible, were engaged in the manufacture, sale, distribution, and/or installation of asbestos-containing products and raw materials for use in South Carolina and other states at times relevant to this action.

BACKGROUND FACTS

84. Plaintiffs, Dianne McCullough and Floyd David Cooper, brings this action for monetary damages as a result of Decedent, Olin D. Cooper contracting an asbestos-related disease.

85. Decedent, Olin D. Cooper was diagnosed with malignant Mesothelioma on or about June 13, 2018.

86. Decedent s mesothelioma was caused by his exposure to asbestos during the course of his employment.

87. During his work history, Decedent was exposed to Defendants asbestos-containing products through his work as a carpenter, iron worker, and rebar steel placement worker from approximately 1961 to early 1990s at various industrial jobsites primarily in South Carolina, North Carolina and Georgia. Decedent performed a variety of tasks throughout the facilities where he worked, which included, but were not limited to building platforms and pipe rack structures, building scaffolding for pipefitters and insulators, and removing insulation. All of these activities exposed Decedent to asbestos and asbestos-dust.

88. During his work history, Decedent was further exposed through his work around other trades including carpenters, mechanics, pipefitters, boilermakers, insulators, and electricians. Decedent worked near and closely to a variety of tradesmen working on asbestos-containing pipe

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insulation, generators, turbines, boilers, valves, steam traps, pumps, furnaces, and other equipment. All of these activities exposed Decedent to asbestos.

89. During his work history, Decedent was exposed to Defendants asbestos-containing products through his work as a carpenter, iron worker and rebar steel placement worker for Daniel Construction from approximately 1961 to early 1970s at various industrial jobsites primarily in South Carolina, North Carolina and Georgia. During these periods, Decedent worked at various industrial locations, including but not limited to the following:

- Monsanto Chemical plant in Blacksburg, SC
- Magnolia Finishing in Blacksburg, SC
- Hoechst Celanese / Fiber Industries in Greer, SC and Spartanburg, SC
- Dow Badische BASF in Anderson, SC
- Sylvan Chemical plant in Inman, SC
- Milliken Research Center in Spartanburg, SC
- Joanna Mills in Joanna, SC
- Delta Finishing in Cheraw, SC
- Montgomery Mills in Chesnee, SC
- Gayley Mills in Marietta, SC
- Hoechst Celanese / Fiber Industries in Salisbury, NC
- General Tire in Charlotte, NC

90. During his work history, Decedent was exposed to Defendants asbestos-containing products while employed as a foreman and superintendent for various employers from approximately early 1970s to early 1990s at various industrial jobsites primarily in South Carolina, North Carolina and Georgia. During these periods, Decedent worked on new construction,

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renovations and maintenance at various industrial locations, including but not limited to the following:

- Cherokee County Memorial Hospital in Gaffney, SC
- Dorman High School in Spartanburg, SC
- Michelin Tire in Spartanburg, SC
- Chesnee Telephone Company in Chesnee, SC
- Allstate Insurance in Charlotte, NC
- Compoli and Loparo Dental office in Charlotte, NC
- General Electric building in Charlotte, NC
- I.R.M. Insurance Building in Charlotte, NC
- Wachovia Center in Charlotte, NC

91. Decedent was further exposed to Defendants asbestos-containing products while using certain of the Defendants talc products from 1940s through the 2000s. These products released airborne asbestos fibers, which covered portions of Decedent Olin D. Cooper s body. As a result of the Defendants failure to warn about the dangers of asbestos, Mr. Cooper, inhaled or ingested these fibers causing him to contract lung cancer, an asbestos-related disease.

92. During the course of Decedent Olin D. Cooper s employment at the location(s) listed above, during other occupational work projects, and in other ways, Decedent was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers emanating from certain products he was working around.

93. Defendants USF&G and Zurich, and their predecessors, acting as the alter egos of Covil Corporation, owed a duty to Decedent to warn, protect, enforce safety, hygiene rules and policies or otherwise use their superior knowledge to provide a safe environment.

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94. Decedent Olin D. Cooper's cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent's mesothelioma and other related injuries and therefore under South Carolina law, is the legal cause of Decedent's injuries and damages.

95. Decedent Olin D. Cooper was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

96. Plaintiffs are informed and believe, and thereon allege, that progressive lung disease, mesothelioma and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

97. As a direct and proximate result of the conduct as alleged within, Decedent suffered permanent injuries, including, but not limited to, mesothelioma and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

98. As a direct and proximate result of the conduct as hereinafter alleged, Decedent incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiffs at this time. Plaintiffs request for leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent's medical treatment is ascertained.

99. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent incurred loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs. Plaintiffs

request leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FACTUAL BACKGROUND AS TO COVIL

100. Covil was a seller and installer of thermal insulation that contained asbestos.

101. Covil conducted these operations from at least 1964 until approximately 1991, after which Covil ceased to conduct business operations and, in 1993 ultimately, dissolved.

102. Covil's operations from 1964 through at least 1986 included the sale, installation, repair, replacement, removal or disturbance of asbestos-containing thermal insulation and other building materials, and those operations exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations").

103. The alleged bodily injury resulting from the Asbestos Allegations has resulted in claims and lawsuits against Covil ("Covil Asbestos Suits").

104. From at least in or about 1991, until the appointment of the Receiver, on November 2, 2018, the defense of the Covil Asbestos Suits was controlled by Defendants Zurich, and USF&G (collectively "the Primary Insurers") and their lawyers. Moreover, on and after 1991, the Primary Insurers conducted all of Covil's affairs, including after Covil was dissolved, extending until appointment of the Receiver.[1] During the course of their work, the lawyers have also exerted control and domination of Covil sufficiently to qualify them as Alter-Egos.

105. The Primary Insurers issued insurance policies to Covil from in or about 1964 until approximately 1978.

[1] For reasons set forth herein, the appointment of the receiver does not alleviate the obligations of the Alter-Egos as it relates to Covil's current and future debts.

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106. From at least in or about 1991, continuing until appointment of the Receiver, Zurich and USF&G, in conjunction with their lawyers, managed Covil, making all determinations as to use and the disposition of Covil's assets which consisted primarily of corporate documents and insurance policies.

107. The Primary Insurers, and as of 2018, the Alter-Egos made all determinations as to the disposition of Covil Asbestos Suits as well as the treatment and characterization of claims under the Covil insurance policies.

108. Since as early as approximately 1991, the Primary Insurers in conjunction with their lawyers acted in concert for the common purpose of ensuring that there was no independent person or entity acting by or on behalf of Covil. The Alter-Egos and prior to 2018, the Primary Insurers and their lawyers, determined that the only Covil that could exist would be a Covil that was for all purposes the Primary Insurers' alter ego, and/or controlled entity.

109. The Primary Insurers and their lawyers effectuated their common purpose of exclusive, unilateral control of Covil by running Covil's affairs in all material aspects.

110. At no time did the Primary Insurers and their lawyers make efforts to appoint an independent person or entity to determine what was in Covil's best interest. Rather, the Primary Insurers and their lawyers unilaterally determined what was best for Covil, or disregarded what was best for Covil, acting in their own interest, regardless of whether there was an actual or potential conflict between their interest and Covil's interest.

111. Each of the Primary Insurers' actions on behalf of Covil was for the purpose of protecting the Primary Insurers rather than Covil.

112. Each of the lawyers' actions on behalf of Covil was for the purpose of earning a fee from the Primary Insurers rather than protecting Covil.

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113. In addition to controlling the assets and affairs of Covil, the Primary Insurers unilaterally hired agents for Covil, including experts and a professional 30(b)(6) witness to act as and on behalf of, and to constitute Covil, de facto or de jure.

114. The Primary Insurers are required to act in good faith and to engage in fair dealing in all of their actions in regard to Covil.

115. The lawyers are required to exercise loyalty to Covil, and not the insurance companies that pay their bills. Statements made in open court by Mark Wall, named partner in one of the lawyers' firms, demonstrates that the lawyers did not understand, much less adhere to this requirement. During a hearing on the issue on February 21, 2019, Mark Wall stated:

> THE COURT: Those kind of things you have got to provide, Mr. Wall.
>
> MR. WALL: Under what theory, Your Honor?
>
> THE COURT: I have appointed these people as receivers for Covil.
>
> MR. WALL: Yes, Your Honor.
>
> THE COURT: Covil is your client. They stand in the shoes of Covil.
>
> MR. WALL: Are they my client, Your Honor?
>
> THE COURT: Sir?
>
> MR. WALL: Are they my client?
>
> THE COURT: Covil is your client.
>
> MR. WALL: No, Your Honor, are they my client? That is the issue.
>
> THE COURT: Yes, they are your client because they are the receiver for Covil.
>
> MR. WALL: So I now have attorney-client privilege with them?
>
> THE COURT: That's right.
>
> MR. WALL: And that is protected by the Court?
>
> THE COURT: Yes, sir.
>
> MR. WALL: As long as --
>
> THE COURT: And I get why you want that protection. I'm not saying this in a hostile way

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116. In South Carolina, when an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured, *i.e.*, the insured client of the attorney. Pursuant to that relationship, the attorney owes the insured client not the insurer a fiduciary duty. The loyalties of the attorney may not be divided.

117. Lawyers were hired to protect Covil s interest but became part of the Primary Insurers scheme to run Covil as an effective subsidiary, agency or alter ego of the Primary Insurers. Lawyers followed the Primary Insurers instructions and together with the Primary Insurers acted as Covil.

118. The attorney s conduct of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR (A lawyer shall not accept compensation for representing a client from one other than the client unless: ... (2) there is no interference with the lawyer s independence of professional judgment or with the client-lawyer relationship; ....); Rule 5.4(c), RPC, Rule 407, SCACR ([a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer s professional judgment in rendering such legal services).

119. Lawyers by acting for Covil when Covil was in no position to act for itself stood in the shoes of Covil and became, in conjunction with the Primary Insurers, Covil s Alter Ego.

120. Lawyers failed to ensure proper procedures were in place for Covil to express its interests including but not limited to the procedures provided by S.C. Code Ann. § 15-65-10 and Rule 66, SCRCP; therefore, lawyers simply made decisions, in conjunction with the Primary insurers about how to handle the litigation.

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121. The result of the Alter-Ego's actions were to effectuate the Primary Insurers' desire that no Covil separate and apart from the Alter-Egos would exist.

122. The Alter-Egos' complete control over Covil, and management of Covil's affairs, included, but not limited to, the Covil asbestos suits.

123. Asbestos litigation is littered with the bodies of those who made and sold asbestos containing insulation. Some of the largest companies in the world, many of them insured by the Primary Insurers, have gone bankrupt because of the harm asbestos insulation causes. That any reasonable person believed that Covil would not be found liable in amounts far exceeding the claimed liability limits of the Primary Insureds is difficult to fathom.

124. By way of example only, some communications between the Alter-Egos demonstrate how the Alter-Egos ran Covil. The pertinent communications include:

Date	**From**	**To/CC**	**Subject**	**Key points of email**
10/9/18 3:46 pm	Mark Wall	Irene Muse; Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New cases	Covil has been named in at least two new cases, but we have no Notice of Service. I'm assuming we need to be served before appearing. Agree.
10/18/18 1:49 pm	Mark Wall	Irene Muse Barb Davis; Steven Fries; Gerry Begley; John Weiss; Carol Weill; William Silverman; Pauline Burdin	New trial etc. / new cases	Unserved case Hill set for March; depo scheduled; recommend not appear.

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Date	From	To/CC	Subject	Key points of email
10/19/18 9:07am	Barb Davis	Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss Carol Weill	New cases	Do we really think we would not be served at some point? If we had already been served, would still recommend not attending the plaintiff deposition?
10/22/18 3:47pm	Mark Wall	Irene Muse Barb Davis Steven Fries Carol Weill	FW James Michael Hill v. Advance Auto Parts Amended NOD of James Michael Hill	FYI see attached communications.
10/22/18 3:57pm	Carol Weill	Barb Davis Mark Wall Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	New cases	Request for response to inquiries.
10/23/18 2:07pm	Mark Wall	Carol Weill; Barb Davis; Irene Muse Gerry Begley John Weiss William Silverman Pauline Burdin Steven Fries travelers Sara Schrodetzki Tommy Boger	Covil unserved cases	Maybe Jim stopped accepting service. If we get served later, and Hill is still alive, we re-depose him. If we were served, we should attend; however, we checked the docket and there was no proof of serviced filed.
10/23/18 4:15pm	Carol Weill	Mark Wall Barb Davis Irene Muse Steven Fries Gerry Begley John Weiss William Silverman Pauline Burdin Sara Schrodetzki Tommy Boger	Covil Unserved cases	Zurich would recommend that Mark not appear for depositions in cases where service has not yet been effectuated.

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Date	From	To/CC	Subject	Key points of email
10/31/18 3:57pm	Mark Wall	Irene Muse Steven Fries Carol Weill Barb Davis Gerry Begley John Weiss Pauline Burdin	FW Hill and email from Theile asking about answers	It didn't take them very long to figure out. What response at this point?
11/1/18 1:53pm	Mark Wall	Irene Muse Steven Fries Carol Weill Erin Corbally, Barb Davis Gerry Begley John Weiss	FW Hill and Taylor	FYI see below. Below is Mark's email stating that he had not been asked to represent Covil in Hill and Taylor and Theile's email from 11/1/18 at 10:34 am asking about past due answers.
11/1/18 2:00pm	Steven Fries	Mark Wall, Irene Muse Carol Weill Erin Corbally Davis Barb Gerry Begley John Weiss	Re. Hill and Taylor	I thought you said yesterday that if approached by Plaintiff on these cases that we're going to tell them no record of service.
11/1/18 2:04pm	Mark Wall	Steven Fries Irene Muse Carol Weill Erin Corbally Barb Davis Gerry Begley John Weiss	Re. Hill and Taylor	In face of what has been filed today, I thought I would start slowly and leave service to last. I want to see what they say about service.

125. Defendants acted in concert when deciding what actions to take or not take and without any input from an independent Covil. These actions were in breach of their duties to Covil.

126. Primary Insurers' pattern and practice has made the Primary Insurers fully responsible for all of Covil's liabilities prior to appointment of the Receiver.

127. Under a number of legal theories, Primary Insurers are Covil and acted as for nearly 30 years.

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128. Primary Insurers have entered into a joint venture with each other to take over Covil and become Covil. For example:

a. A special combination of the Primary Insurers and Covil for the specific venture of limiting or eliminating Covil as a direct voice in the management of Covil's assets so that the Primary Insurers would protect and save their money;

b. The retention of a separate corporate personality for Covil would promote fraud, wrong, injustice and contravene public policy; and

c. Each Primary Insurer had an equal right to control the conduct of their joint venture and of Covil.

129. Covil has become the alter ego of the Primary Insurers:

a. The Primary Insurers have shown a total domination and control over Covil;

b. The domination was so complete that Covil never manifested separate corporate interests of its own and functioned solely to achieve the purposes of the Insurers;

c. The insurers misused their domination of Covil and were not entitled to dominate Covil;

d. Inequitable consequences have resulted with the unilateral application of insurance proceeds, default judgments, and verdicts;

e. The Primary Insurers were the principals and Covil the agent or agency;

f. Primary Insurers manifested complete control over Covil and purported to act on Covil's behalf;

g. The course of dealing between the principal and the agent clearly show no independent Covil; and

h. Primary Insurers became active participants in Covil rather than simply insurers.

130. Primary Insurers' acts and omissions satisfy the elements of Alter-Ego under South Carolina law and the requested finding by the Court is that the Primary Insurers are the Alter-Ego of Covil and thus, responsible for the debts, present and future, or Covil.

131. Lawyers in conjunction with the Primary Insurers acted to control and dominate Covil in such a way to ensure that Covil had no actual representation;

132. Lawyers in conjunction with the Primary Insurers acted intentionally to avoid the statutory procedures that would give Covil a voice in its representation, operation and defense.

133. The Lawyers acts and omissions satisfy the elements of Alter-Ego under South Carolina law and the requested finding by the Court is that the Lawyers are the Alter-Ego of Covil and thus, responsible for satisfying the Debts of Covil, past and present.

134. Because the Primary insurers, for nearly 30 years, have controlled Covil, they have made Covil s defense of asbestos litigation nearly, if not completely, impossible.

135. The Primary insurers took no steps to accumulate or preserve Covil s documents. The Primary Insurers took no steps to procure or preserve the testimony of material fact witnesses who, through the passage of time, are now no longer available to Covil.

136. The result of these failures is that Covil is now irretrievably defenseless in asbestos cases. These failures will continue to haunt Covil at all times going forward. Because of this, the Primary insurers can now no longer claim that any control or domination of Covil and the damages resulting therefrom ended in November of 2018 with the appointment of the receiver.

137. Plaintiffs therefore seek a declaratory judgment that the Primary Insurers are the Alter-Ego of Covil after November 2, 2018 as well as before.

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FOR A FIRST CAUSE OF ACTION
Product Liability Negligence

Plaintiffs Complain of Defendants for a Cause of Action for Negligence Alleging as Follows

138. Plaintiffs incorporate herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

139. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as alternate entities, engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products.

140. At all times herein mentioned, Defendants and/or their alter egos and/or their alternate entities singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products, in that said products caused personal

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injuries to Decedent and others similarly situated, (hereinafter collectively called "exposed persons"), while being used for their intended purpose and in a manner that was reasonably foreseeable.

141. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos and asbestos-containing products from causing Decedent's mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent's lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Decedent. Defendants and/or their "alternate entities" had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants, each of them, breached said duty of due care.

142. Defendants and/or their alter egos and/or their "alternate entities" knew or should have known, and intended that the aforementioned asbestos and asbestos-containing products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be

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used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding sawing, chipping, hammering, scraping, sanding, breaking, removal, rip-out, and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling by exposed persons, including Decedent Olin D. Cooper, would use or be in proximity to and exposed to said asbestos fibers.

143. At all times relevant, Defendants and/or their alter egos and/or their alternate entities were aware of their asbestos and asbestos-containing products defect but failed to adequately warn Decedent, Decedent s family members or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit their products. A reasonable manufacturer, distributor, or seller of Defendants products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

144. Decedent, Decedent s family members and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Decedent s exposure to asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

145. Decedent Olin D. Cooper suffered from mesothelioma, a cancer related to exposure to asbestos and asbestos-containing products. Decedent was not aware at the time was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury or disease.

146. Defendants and/or their alter egos conduct and defective products as described in this cause of action were a direct cause of Decedent s injuries, and all damages thereby sustained

by Decedent. Plaintiffs therefore seek all compensatory damages in order to make them whole, according to proof.

147. Furthermore, the conduct of Defendants and/or their alter egos and/or their "alternate entities" in continuing to market and sell products which they knew were dangerous to Decedent and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Decedent and others similarly situated.

148. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, Defendants and/or their alter egos and/or their "alternate entities" did so with conscious disregard for the safety of "exposed persons" who came in contact with asbestos and asbestos-containing products, in that Defendants and/or their alter egos and/or their "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos, asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, asbestosis, mesothelioma, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their alter egos and/or their "alternate entities."

149. Defendants and/or their alter egos and their "alternate entities" were aware that members of the general public and other "exposed persons," who would come in contact with their

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asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products, could cause injury, and Defendants and/or their alter egos and their "alternate entities," each of them, knew that members of the general public and other "exposed persons," who came in contact with asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

150. The above-referenced conduct of Defendants and/or their alter egos and their "alternate entities," was motivated by the financial interest of Defendants, their "alternate entities," and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Defendants, their "alternate entities," and each of them consciously disregarded the safety of "exposed persons" in pursuit of profit. Defendants were consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to "exposed persons" without warning them of the potential hazards and further induced persons to work with and be exposed thereto, including Decedent Olin D. Cooper.

151. Decedent Olin D. Cooper and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos containing-products, and products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were

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not readily recognizable by Decedent or other exposed persons. Defendants and/or their alternate entities further failed to adequately warn of the risks to which Decedent and others similarly situated were exposed.

152. Defendants and/or their alter egos and/or their alternate entities are liable for the fraudulent, oppressive, and malicious acts of their alternate entities, and each Defendant s officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their alternate entities as set forth herein.

153. The herein-described conduct of Defendants and their alternate entities, was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiffs, for the sake of example and by way of punishing said Defendants, seek punitive damages according to proof.

FOR A SECOND CAUSE OF ACTION
Product Liability Strict Liability - S.C. Code Ann. sec. 1 - -1 , et se .

As a Second and Distinct Cause of Action for Strict Liability, Plaintiffs Complain of Defendants, and Allege as Follows

154. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

155. Decedent Olin D. Cooper suffered from mesothelioma, a cancer related to exposure to asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Decedent was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

156. The Product Defendants and/or their alter egos conduct and defective products as described above were a direct cause of Decedent s injuries, and the injuries and damages thereby sustained by Plaintiffs.

157. Furthermore, the Defendants and/or their alter egos conduct and that of their alternate entities in continuing to market and sell products which they knew were dangerous to Decedent and the public without adequate warnings or proper use instructions, was done in a conscious disregard and indifference to the safety and health of Decedent and others similarly situated.

158. Defendants and/or their alter egos and/or their alternate entities knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, rip-out, and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling, exposed persons, including Decedent, would use or be in proximity to and exposed to said asbestos fibers.

159. Decedent, Decedent s family members, and others in their vicinity used, handled or were otherwise exposed to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, referred to herein in a manner that was reasonably foreseeable. Decedent Olin D. Cooper s exposure to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products occurred at various locations as set forth in this Complaint.

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160. Defendants and/or their alter egos and/or their "alternate entities" knew and intended that the above-referenced asbestos and asbestos-containing products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

161. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products from causing Decedent Olin D. Cooper's mesothelioma, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent's lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their alter egos and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products of Defendants and/or their alter egos and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

162. The defect existed in the said products at the time they left the possession of defendants, and/or their alter egos and/or their "alternate entities," and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said

products did, in fact, cause personal injuries, including mesothelioma, asbestosis, other lung damage, and cancer to exposed persons, including Decedent herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

163. Decedent Olin D. Cooper and other exposed persons did not know of the substantial danger of using Defendants asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Decedent or other exposed persons. Said Defendants and/or their alternate entities further failed to adequately warn of the risks to which Decedent and others similarly situated were exposed.

164. Defendants defective products as described above were a direct cause of Decedent s injuries, and the damages thereby sustained.

165. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, Defendants, and/or their alter egos and/or their alternate entities, and each of them, did so with conscious disregard for the safety of Decedent and other exposed persons who came in contact with the asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, in that Defendants and/or their alter egos and/or their alternate entities had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products or products manufactured for

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foreseeable use with asbestos products, including, but not limited to, mesothelioma, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their alternate entities.

166. Defendants and/or their alter egos and/or their alternate entities were aware that members of the general public and other exposed persons, who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products could cause injury. Defendants and/or their alter egos and/or their alternate entities further knew that members of the general public and other exposed persons, who came in contact with asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products would assume, and in fact did assume, that exposure to asbestos and asbestos- containing products was safe, when in fact exposure was extremely hazardous to health and human life.

167. The above-referenced conduct of Defendants and/or their alter egos and/or their alternate entities motivated by the financial interest of Defendants, their alternate entities, and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products. Defendants and/or their alternate entities consciously disregarded the safety of exposed persons in their pursuit of profit and in fact consciously intended to cause injury to Decedent and other exposed persons and

induced persons to work with, be exposed to, and thereby injured by asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products.

168. Defendants are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities," and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of their "alternate entities" as set forth herein.

169. The conduct of said defendants, their "alternate entities," and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all defendants.

170. At all times herein mentioned, each of the named Defendants and/or their alter egos was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos and products manufactured for foreseeable use with asbestos products.

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FOR A THIRD CAUSE OF ACTION
Vicarious Liability of Defendants Based upon Respondeat Superior

As a Third Distinct Cause of Action Against Defendants, Plaintiffs Bring this Third Cause of Action for Vicarious Liability of Product and Premises Defendants Based upon Respondeat Superior and Allege as Follows

171. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

172. Prior to and during all relevant times Defendants and/or their alter egos and/or their alternate entities employed workers (hereinafter employees) in areas where defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent worked and/or spent time as alleged above.

173. At all times herein mentioned, Defendants employees frequently encountered asbestos-containing products, materials, and debris during the course and scope of their employment, and during their regular work activities negligently disturbed asbestos-containing materials to which Decedent Olin D. Cooper was exposed.

174. Employees handling and disturbing asbestos-containing products in Decedent Olin D. Cooper s vicinity were the agents and employees of defendants and at all times relevant were subject to the control of Defendants with respect to their acts, labor, and work involving (a) the removal, transport, installation, cleaning, handling, and maintenance of asbestos-containing products, materials, and debris, and (b) the implementation of safety policies and procedures. Defendants controlled both the means and manner of performance of the work of their employees as described herein.

175. Employees handling and disturbing asbestos-containing products in Decedent s, Decedent s family members and others vicinity received monetary compensation from

Defendants in exchange for the work performed and these employees performed the work in the transaction and furtherance of Defendants□ businesses.

176. Harmful asbestos fibers were released during Defendants□ employees□ use, handling, breaking, or other manipulation of asbestos-containing products and materials.

177. Once released, the asbestos fibers contaminated the clothes, shoes, skin, hair, and body parts of those exposed, including Decedent Olin D. Cooper, who also inhaled those fibers, and on the surfaces of work areas, where further activity caused the fibers to once again be released into the air and inhaled by Decedent.

178. The asbestos and asbestos-containing materials were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air onto surrounding surfaces, and onto persons in the area. The inhalation of asbestos fibers can cause serious disease and death.

179. Defendants□ employees□ use, handling and manipulation of asbestos-containing materials, as required by their employment and occurring during the course and scope of their employment, did in fact, cause personal injuries, including mesothelioma and other lung damage, to exposed persons including Decedent.

180. Defendants□ employees were negligent in their use, handling and manipulation of said products in that they failed to isolate their work with asbestos and/or to suppress asbestos fibers from being released into the air and surrounding areas. They also failed to take appropriate steps to learn how to prevent exposure to asbestos, failed to warn and/or adequately warn Decedent that he was being exposed to asbestos, failed to adequately warn Decedent of the harm associated with his exposure to asbestos, and provide him with protection to prevent his inhalation of asbestos.

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181. Defendants employees knew or should have known that failure to take such steps would result in exposure to bystanders including Decedent Olin D. Cooper.

182. Defendants employees owed Decedent a duty to exercise due care and diligence in their activities while he was lawfully on the premises so as not to cause him harm.

183. Defendants employees breached this duty of care as described above.

184. At all times mentioned, Decedent was unaware of the dangerous condition and unreasonable risk of personal injury created by Defendants employees use of and work with asbestos-containing products and materials.

185. As a direct result of the Defendants employees conduct, Decedent s exposure to asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products, each individually and together, caused severe and permanent injury to Decedent Olin D. Cooper and the damages and injuries as complained of herein by Plaintiffs.

186. The risks herein alleged and the resultant damages suffered by the Decedent were typical of or broadly incidental to Defendants business enterprises. As a practical matter, the losses caused by the torts of Defendants employees as alleged were sure to occur in the conduct of Defendants business enterprises. Nonetheless, Defendants engaged in, and sought to profit by, their business enterprises without exercising due care as described in this Complaint, which, on the basis of past experience, involved harm to others as shown through the torts of employees.

187. Based on the foregoing, Defendants as the employers of said employees are vicariously liable under the doctrine of respondeat superior for all negligent acts and omissions committed by their employees in the course and scope of their work that caused harm to Decedent Olin D. Cooper.

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FOR A FOURTH CAUSE OF ACTION
Premises Liability Negligence as to Premise Owner Contractor

As a Fourth Distinct Cause of Action for General Negligence, Plaintiffs Complain of Defendants, and Allege as Follows

188. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

189. Prior to and during all relevant times, the Premises Defendants employed workers in areas where Premises Defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent Olin D. Cooper worked and/or spent time.

190. At all times herein mentioned, Premises Defendants selected, supplied, and distributed asbestos-containing materials to their employees for use during their regular work activities, and said employees disturbed those asbestos-containing materials.

191. Premises Defendants were negligent in selecting, supplying, distributing and disturbing the asbestos-containing products and in that said products were unsafe. Said products were unsafe because they released asbestos fibers and dust into air when used which would be inhaled by Decedent Olin D. Cooper and settled onto Decedent s clothes, shoes, hands, face, hair, skin, and other body parts thus creating a situation whereby workers and by-standers including Decedent would be exposed to dangerous asbestos dust beyond the present.

192. The asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products described herein were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air, and the inhalation of asbestos fibers causes serious disease and death. Here, the handling of the above-described asbestos-containing materials by Premises Defendants employees, as required by their employment and occurring during the course and scope of their employment, did, in fact, cause

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personal injuries, including mesothelioma and other lung damage, to exposed persons, including Decedent Olin D. Cooper.

193. At all times herein mentioned, Premises Defendants knew or should have known that its employees and bystanders thereto, including Decedent, frequently encountered asbestos-containing products and materials during the course and scope of their work activities.

194. At all times herein mentioned, Premises Defendants knew or should have known that the asbestos-containing materials encountered by its employees and bystanders thereto including Decedent, were unsafe in that harmful asbestos fibers were released during the use, handling, breaking, or other manipulation of asbestos-containing products and materials, and that once released, asbestos fibers can be inhaled, and can alight on the clothes, shoes, skin, hair, and body parts of those exposed, where further activity causes the fibers to once again be released into the air where they can be inhaled, all of which causes serious disease and/or death.

195. At all times herein mentioned, Premises Defendants, in the exercise of reasonable diligence, should have known that absent adequate training and supervision, their employees and bystanders thereto including Decedent were neither qualified nor able to identify asbestos-containing products nor to identify the hazardous nature of their work activities involving asbestos-containing products.

196. At all times herein mentioned, Decedent Olin D. Cooper was unaware of the dangerous condition and unreasonable risk of personal injury created by the presence and use of asbestos-containing products and materials.

197. At all times herein mentioned, Premises Defendants, in the exercise of reasonable diligence, should have known that workers and bystanders thereto, would bring dangerous dust

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home from the workplace and contaminate their family cars and homes, continuously exposing and potentially causing injury to others off the premises.

198. At all times herein mentioned, Premises Defendants had a duty to use due care in the selection, supply, distribution and disturbance of asbestos-containing products and materials to its employees, to adequately instruct, train, and supervise their employees and to implement adequate safety policies and procedures to protect workers and persons encountering those workers, including Decedent, from suffering injury or death as a result of the asbestos hazards encountered and created by the work of Premises Defendants employees.

199. Premises Defendants duties as alleged herein exist and existed independently of Premises Defendants duties to maintain their premises in reasonably safe condition, free from concealed hazards.

200. Premises Defendants negligently selected, supplied, and distributed the asbestos-containing materials and failed to adequately train or supervise their employees to identify asbestos-containing products and materials; to ensure the safe handling of asbestos-containing products and materials encountered during the course of their work activities; and to guard against inhalation of asbestos fibers and against the inhalation of asbestos fibers by those who would come into close contact with them after they had used, disturbed, or handled, said asbestos-containing products and materials during the course and scope of their employment by defendants.

201. Premises Defendants failed to warn its employees and bystanders thereto, including Decedent Olin D. Cooper, of the known hazards associated with asbestos and the asbestos-containing materials they were using and/or disturbing.

202. As a direct and proximate result of the conduct of Premises Defendants in selecting, supplying, distributing and disturbing asbestos-containing materials or products manufactured for

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foreseeable use with asbestos products and failing to adequately train and supervise their employees and failing to adopt and implement adequate safety policies and procedures as alleged herein, Decedent became exposed to and inhaled asbestos fibers, which was a substantial factor in causing Decedent Olin D. Cooper to develop asbestos-related mesothelioma, and to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION
Product Liability Breach of Implied Warranties - S.C. Code Ann. -2- 1

As a Fifth Distinct Cause of Action for Breach of Implied Warranties, Plaintiffs Complain of Defendants and Allege as Follows

203. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

204. Each of the Defendants and/or their alter egos impliedly warranted that their asbestos materials or asbestos-containing products were of good and merchantable quality and fit for their intended use.

205. The implied warranty made by the Defendants and/or their alter egos that the asbestos and asbestos-containing products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Decedent carried out his duties and was inhaled by Decedent Olin D. Cooper.

206. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Decedent Olin D. Cooper was exposed to Defendants asbestos, asbestos-containing products, and/or products manufactured for foreseeable use with asbestos products and consequently developed mesothelioma, causing Decedent to suffer all damages attendant thereto.

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FOR A SI□TH CAUSE OF ACTION
□Fraudulent Misrepresentation□

For a Sixth Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiffs Complain of Defendants, and Allege as Follows□

207. Plaintiffs repeat and re-allege the portions of the above paragraphs where relevant.

208. That during, before and after Decedent Olin D. Cooper□s exposure to asbestos products manufactured by Defendants, the Defendants and/or their alter egos and/or their □alternate entities,□ falsely represented facts, including the dangers of asbestos exposure to Decedent in the particulars alleged in the paragraphs above, while Defendants each had actual knowledge of said dangers of asbestos exposure to persons such as Decedent. At the same time of these misrepresentations, Defendants each knew of the falsity of their representations and/or made the representations in reckless disregard of their truth or falsity.

209. The foregoing representations were material conditions precedent to Decedent Olin D. Cooper□s continued exposure to asbestos-containing products. Defendants and/or their alter egos and/or their □alternate entities,□each intended that Decedent act upon the representations by continuing his work around, and thereby exposure to, the asbestos products. Decedent was ignorant of the falsity of Defendants□representations and rightfully relied upon the representations.

210. As a direct and proximate result of Decedent Olin D. Cooper□s reliance upon Defendants□false representations, Decedent suffered injury and damages as described herein.

FOR A SEVENTH CAUSE OF ACTION
□Conspiracy, Concert of Action □Defendant Metropolitan Life Insurance Company□

For a Seventh Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiffs Complain of Defendant Metropolitan Life Insurance Company, and Allege as Follows□

211. Plaintiffs repeat and re-allege the portions of the above paragraphs where relevant.

212. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

213. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/ Raymark Industries, Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

214. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

215. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and omissions, Defendant caused asbestos to be used in the occupational settings from which Decedent breathed asbestos dust which resulted in Decedent's injuries. Defendant Met Life, through its agents and

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employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Decedent herein.

216. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Decedent was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Decedent□s illness.

217. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

218. Decedent unwittingly and justifiably relied upon the thoroughness of Met Life□s tests and information dissemination, the results of which Met Life published in leading medical journals.

219. As a direct and proximate contributing result of Met Life□s failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Decedent from asbestos exposure was increased, and (ii) Decedent suffered the injuries described herein.

220. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were

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obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other Defendants materially to understate the hazards of asbestos exposure, all for its own profit and gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Decedent.

221. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Decedent was caused to remain ignorant of all the dangers of asbestos resulting in Decedent's wife, his co-workers, his family, and the general public to be unaware of the true and full dangers of asbestos, depriving Decedent of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Decedent the opportunity to take precautions against the dangers of asbestos and proximately caused Decedent's damages herein.

222. During the relevant time period the Decedent was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

223. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Decedent, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Decedent or his wife in the course of or as a consequence of the conspiracy of concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action:

(a) In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New

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Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.

(b) Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as "fatal" and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.

(c) In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.

(d) By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.

(e) At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators thereby fraudulently

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misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Decedent.

(f) As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.

(g) Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.

(h) For many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.

(i) Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Decedent who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Decedent of the dangers to which he was exposed when they knew of the dangers.

(j) By the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Decedent to rely upon said false

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and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

224. Decedent reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

225. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Decedent has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result brought home on his clothes, hair, shoes, and in his case asbestos dust or fibers contracted asbestos-related diseases and other conditions, and/or aggravated pre-existing conditions, as a result of which the Decedent has been damaged.

FOR AN EIGHTH CAUSE OF ACTION
Wrongful Death Action, S.C. Code Ann. 1-1-1 et seq.

For an Eighth Distinct Cause of Action for Wrongful Death, Plaintiffs Complain of Defendants, and Allege as Follows:

226. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

227. Plaintiffs bring this cause of action for Olin D. Cooper's wrongful death pursuant to S.C. Code Ann. § 15-51-10, for the benefit of Dianne McCullough, as the widow of Decedent, and on behalf of the heirs of Olin D. Cooper, as defined by S.C. Code § 15-51-20.

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228. As a direct and proximate result of the negligence, recklessness, carelessness, and intentional actions of Defendants as described above, Olin D. Cooper died on August 7, 2018, and his common law wife and heirs have and will endure pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, loss of love, loss of society with the Decedent, loss of guidance from the Decedent, loss of his companionship and deprivation of the use and comfort of the Decedent's experience, knowledge and judgment in managing the affairs of himself and his beneficiaries, and they have been otherwise seriously damaged. Moreover, reasonable funeral expenses were incurred, and Plaintiffs pray for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

FOR A NINTH CAUSE OF ACTION
"Loss of Consortium"

For a Ninth Distinct Cause of Action for Loss of Consortium, Plaintiff Dianne McCullough Complains of Defendants, and Alleges as Follows:

229. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

230. Decedent Olin D. Cooper and Dianne McCullough have been together since 1984, and at all times relevant to this action were husband and wife by common law.

231. Prior to his injuries as alleged, Decedent Olin D. Cooper was able and did perform his spousal duties. As a proximate result thereof, subsequent to the injuries, Decedent was unable to perform his spousal duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiff Dianne McCullough was deprived of the consortium of her spouse, including the performance of duties, all to Plaintiff's damages, in an amount presently unknown to Plaintiff but which will be proven at time of trial.

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232. As a direct and proximate result of the acts of Defendants and/or their alternate entities and the severe injuries and death caused to Decedent Olin D. Cooper as set forth herein, Decedent s spouse and Plaintiff Dianne McCullough suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love and affection of her spouse, and has suffered severe mental and emotional distress and general nervousness. Plaintiff prays for judgment against defendants, their alternate entities, and each of them, as hereinafter set forth.

FOR A TENTH CAUSE OF ACTION
Survival Action, S.C. Code Ann. 1

For a Tenth Distinct Cause of Action, known statutorily as a Survival Action, Plaintiffs Complain of Defendants, and Allege as Follows

233. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

234. Plaintiff, Dianne McCullough, is the common law spouse of Decedent Olin D. Cooper. Plaintiff, Floyd David Cooper, is the brother of Decedent Olin D. Cooper. Plaintiffs, Dianne McCullough and Floyd David Cooper, individually and as the Personal Representatives of the Estate of Olin D. Cooper, deceased, bring this survival action as allowed under S.C. Code Ann. § 15-5-90.

235. Plaintiffs bring this cause of action for Decedent s medical, surgical and hospital bills, as well as for Decedent s conscious pain and suffering prior to his untimely death, as well as for the mental distress of Decedent due to knowledge of his impending death from his incurable disease.

236. As a direct and proximate result of the negligence, recklessness, carelessness, and in some cases intentional actions of Defendants as described, Decedent Olin D. Cooper endured conscious pain, suffering, mental anguish and distress until his untimely death, and Plaintiffs pray for judgment

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against Defendants in such amount of actual and punitive damages as the trier of fact may determine is just.

FOR AN ELEVENTH CAUSE OF ACTION
Alter Ego As to United States Fidelity And Guaranty Company and urich American Insurance Company

For an Eleventh Distinct Cause of Action, Alter Ego Claims, Plaintiffs Complain of Defendants, and Allege as Follows

237. Covil Corporation (Covil), a South Carolina company founded on selling asbestos insulation throughout South Carolina and the southeast, began its corporate life in 1954. In 1993, Covil Corporation, after the death of its founder Palmer Covil from mesothelioma[2], understanding it had sold asbestos all over South Carolina and the immense implications for the health of workers of South Carolina, quietly dissolved its corporate existence leaving behind only insurance coverage. Between 1993 and 2018, Covil s insurance carriers and their lawyers, including Wall Templeton and Haldrop, P.A. (WTH) and Gallivan White and Boyd, PA (GWB and together with WTH, the lawyers), without an insured or client, appeared for Covil, answered Covil s lawsuits, decided how to defend the suits, what representations to make to court and counsel, answered discovery for Covil (making factual representations), determined how and when to make settlement offers, if any were made at all, and how, if at all, to respond to demands. In essence, Covil s insurers and their lawyers were Covil, turned on the lights in the morning and turned them off when they left and made every decision for Covil in between.

238. Covil s lawyers and carriers have assumed the mantle of Covil. For nearly thirty years, they have acted for and as the company with no regard to the desires or wishes of their

[2] [M]esothelioma, [is] an invariably fatal cancer for which asbestos exposure is the only known cause In re Patenaude, 210 F.3d 135, 138 (3d Cir.), cert. denied, 531 U.S. 1011 (2000).

insured. The result is that they are the alter-egos of Covil and are responsible for all of the debts it has and continues to incur.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, joint and several, against Defendants and/or their "alternate entities" in an amount to be proved at trial, as follows:

1. For Decedent's actual damages according to proof, including Decedent's pain and suffering, mental distress, as well as medical, surgical and hospital bills;

2. For loss of income or earnings according to proof;

3. For loss of care, comfort and society;

4. For pecuniary loss of the beneficiaries/heirs including but not limited to funeral and burial costs, for mental shock and suffering of the beneficiaries/heirs, for wounded feelings of the beneficiaries/heirs, for grief and sorrow of the beneficiaries/heirs, loss of his companionship and deprivation of the use and comfort of the Decedent's experience, knowledge and judgment in managing the affairs of himself and his beneficiaries;

5. For punitive damages according to proof;

6. For Plaintiffs' cost of suit herein;

7. For damages for breach of implied warranty according to proof;

8. For damages for fraudulent misrepresentation according to proof;

9. For damages for conspiracy, concert of action (as to Defendant Metropolitan Life Insurance Company);

10. All economic and non-economic damages allowed pursuant to the Survival and Wrongful Death Act;

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11. That United States Fidelity And Guaranty Company and Zurich American Insurance Company are found to be the alter egos of Covil and, co-extensively liable with Covil as found by the jury in this case; and

12. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

s/Theile B. McVey

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ATTORNEYS FOR PLAINTIFFS

April 14, 2020

Columbia, South Carolina

EXHIBIT 33

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C/A NO.: 2018-CP-40-04940 **NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT**

TO: M. TODD CARROLL, ESQUIRE, WILLIAM P. DAVIS, ESQUIRE, MARIEL D. NORTON, ESQUIRE, ATTORNEYS FOR UNITED STATES FIDELITY & GUARANTY COMPANY:

PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation ("the Receiver"), by and through the undersigned counsel, will move before the Honorable Chief Justice Jean Hoefer Toal ten (10) days after this Motion is served upon you, or as soon thereafter as this matter may be conveniently heard, for an Order of the Court granting sanctions against United States Fidelity & Guaranty Company ("USF&G") and its attorneys[1] pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings and Sanctions Act[2] ("the Act"). This Motion is based upon frivolous objection to settlement, the following grounds and any other

[1] USF&G (Travelers) is a sophisticated litigant with national counsel, and this motion is directed towards USF&G and its national counsel rather than its local counsel.
[2] S.C. Code Ann. §§ 15-36-10 to -100.

grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion.[3]

A. LAW GOVERNING FRIVOLOUS CONDUCT

Two sets of laws govern frivolous conduct of parties and their attorneys: the Act and Rule 11, SC.R.C.P. The Act precludes sophisticated litigants, such as USF&G, from filing frivolous objections, motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(3). The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable

[3] In an effort to procedurally simplify this Motion, the Receiver has filed this Motion only in the above-referenced case. However, the Receiver notes USF&G's sanctionable conduct also occurred in *Roxanne Falls, et al. v. Covil, et al.*, C/A No.: 2015-CP-46-02155; *Timothy W. Howe, et. al v. Covil, et al.*, C/A No.: 2015-CP-46-03456; *Charles T. Hopper, et al. v. Covil, et al.*, C/A No.: 2019-CP-40-00076; and *James Hill, et al. v. Covil, et al.*, C/A No.: 2018-CP-40-04680.

attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id.

On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G).

In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person

alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E).

Similarly, Rule 11 also requires every pleading, motion, or other paper to be signed by at least one attorney of record who is admitted to practice law in South Carolina or the unrepresented party. Rule 11(a), SCRCP. "The . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." *Id.* If a pleading, motion, or other paper is signed in violation of Rule 11,

> the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id. The standard for sanctions under Rule 11 is essentially the same as that of the FCPSA, Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). Both the Rule and the Act afford this Court the opportunity to review and sanction Frivolous conduct.

B. PATTERN OF FRIVILOUS AND IMPROPER CONDUCT

USF&G, a subsidiary of Travelers, has utilized improper tactics to frustrate the purpose of the Receivership. The tactics have been deployed in several courts, including this Court. This strategy has resulted in USF&G and its national attorneys filing frivolous discovery, motions and memoranda. USF&G has repeatedly engaged in frivolous and improper arguments that a sophisticated litigant such as USF&G and a reasonable attorney would know were not supported by law, in violation of both the Act and Rule 11. Up to this point, the Receiver has abstained from seeking a finding of frivolous conduct against USF&G for this pattern of obstruction and delay.

The Receiver has not sought frivolous proceedings sanctions for (1) an improper removal, (2) improper use of mediation communications, (3) failing to comply with this Court's September Order and produce evidence of the issuance of insurance policies including those from 1954-1964; and (4) threats against the Receiver and abusive discovery tactics.

1. Improper Removal

On June 18, 2019, the Receiver filed a Motion for a Status Conference due, in part, to his inability to obtain necessary information from Covil's insurers, including USF&G, regarding insurance policies issued to Covil. On June 21, 2019, this Court emailed the Receiver along with USF&G and other insurers and indicated the Court was setting a status conference for July 11, 2019 at 10:00 a.m. In a response email, USF&G objected to the Court's jurisdiction to hold the status conference due to pending litigation between USF&G and Covil in the United States District Court for the District of South Carolina. On July 5, 2019, this Court filed an Order granting Receiver's Motion for a Status Conference and set a status conference for July 11, 2019, and requiring USF&G and other insurers to attend the status conference in the July 5, 2019 Order.

On the evening of July 10, 2019, counsel for USF&G emailed the Court and all parties, advising the Court it no longer had jurisdiction to hold the status conference due to the removal of the status conference and USF&G would not be in attendance. Despite being told by the Court that the status conference would still take place and USF&G was expected to be there, USF&G's counsel filed notice of the improper removal thirty minutes after the status conference began on July 11, 2019, and failed to appear at the status conference until the Court contacted counsel for USF&G multiple times.

Despite there being no action to remove to federal court, USF&G attempted to remove what it termed the "amorphous proceeding" of the status conference solely to prevent the Court

from exercising its jurisdiction. The filed removal documents were in clear violation of Rule 11 and the Act. Judge Hendricks dismissed the attempted removal and noted USF&G's baseless removal was an attempt to "manufactur[e] a removable 'action'" for the sole purpose of "stall[ing] the underlying state court proceedings." *See* Exhibit A, July 26, 2019 Order, Civil Action No. 3:19-1948-BHH. Furthermore, even after this Court informed USF&G at the July 11, 2019 status conference that the removal was improper and was not supported by law, USF&G continued to insist the Court did not have jurisdiction to have the status conference due to the removal despite not being able to cite to any supporting law allowing it to remove a status conference. As already noted by the District Court, the removal documents and arguments before this Court were clearly meant to subvert the Court's jurisdiction and delay the status conference without any reasonable basis in the law. As such, this conduct by USF&G and its national attorneys is sanctionable under Rule 11 and the Act.

2. Improper use of mediation communications

On February 28, 2019, this Court issued an Order requiring Covil's Insurers to attend mediation on March 4-6, 2019 in Charleston. One of the cases the Court ordered into mediation was *Taylor v. Covil*, 2018-CP-40-04940, which along with *Hill v. Covil*, was in default. Mediation occurred in March 2019 and all parties at the mediation, including Covil's Insurers, agreed all documents "prepared for the purpose of, or in the course of, or pursuant to, the mediation" were subject to confidentiality and not admissible into evidence in any other action. The parties were unable to resolve *Hill* and *Taylor* at mediation but continued negotiating after mediation. On March 20, 2019, this Court denied Covil's Motion to Lift Entry of Default in *Hill* and *Taylor*.

The parties reached a settlement agreement in *Hill* and *Taylor* on April 19, 2019. The day before the settlement, on April 18, 2019, the Receiver communicated with Covil's Insurers in an

email with the subject line "Covil – Subject to Absolute Mediation Privilege" in which he set forth his position regarding settlement.

On April 24, 2019, the Receiver filed an action in state court against Wall, Templeton & Haldrup PA and Covil's Insurers asserting, in part, that Covil's Insurers acted as Covil and the lawyers hired by Covil's Insurers were negligent. Covil's Insurers removed this case to federal court on June 6, 2019.[4] USF&G used these protected communications in the federal court proceeding against the Receiver. The Receiver sought, and this Court imposed non-monetary sanctions against USF&G for sharing the protected communications. *See* Exhibit B, September 19, 2019 Orders, Order on Mediation.

3. Failure to disclose purge of documents and failure to disclose secondary evidence of 1964-64 policies

From his appointment in November of 2018, the Receiver has sought documents evidencing Covil's insurance policies. In particular, the Receiver sought insurance policies that Palmer Covil asserted that USF&G had issued from 1964-1964. USF&G frustrated the Receiver's multiple requests for this information thereby necessitating Court intervention. The Court required USF&G to produce its policies as well as documents which would evidence an insuring relationship. As a result of the Court's intervention, the Receiver obtained evidence of insurance policies issued by USF&G to Covil from 1954-1964.

USF&G produced some claims' ledgers pursuant to this Court's Order that directly show a contractual relationship between Covil and USF&G during the 1950s and 1960s. *See* Exhibit B, September 19, 2019 Orders, Order on Documents. As evidence of USF&G's continued defiance,

[4] There is currently a Motion to Remand pending in the federal court action.

to date, USF&G has not complied with this Court's September Order and completed its review of its records from the 1950s and 1960s. *See* January 30, 2020 Deposition of Mark Esposito p. 12-13 ll 21-5. Furthermore, USF&G was not able to produce the actual insurance policies from 1954-1964. Throughout these extensive Court proceedings, USF&G did not ever disclose, but the Receiver was able to identify, the reason that the policies could not be produced. Starting in 1984, USF&G engaged in a purge of insurance policies to preclude asbestos claims coverage by their insureds. USF&G should have been candid with this Court.[5]

4. Threats to the Receiver and Improper Discovery

Since the Receiver's appointment, he has been barraged with threats of personal litigation by several of Covil's insurers, particularly USF&G. In fact, whether the Receiver may be sued was an issue subject of the Receiver's June 18, 2019 Motion for Status Conference and July 11, 2019 hearing in *Falls v. CBS Corporation, et al.*, 2015-CP-02155; *Howe v. Air & Liquid Systems Corporation, et al.*, 2015-CP-46-03456; *Hopper v. Air & Liquid Systems Corporation, et al.*, 2019-CP-40-00076; *Hill v. Advance Auto Parts, Inc., et al.*, 2018-CP-40-04680; and *Taylor v. Air & Liquid Systems Corporation, et al.*, 2018-CP-40-04940. At the time, the Court gave the insurers the benefit of the doubt in considering the threats to be hyperbole, however, noting that threatening to sue the Receiver would be "highly inadvisable." (Hrg. Tr. 131:9-25, Jul. 11, 2019).

Despite the Court's admonition, USF&G continues to improperly threaten the Receiver personally. By letter dated January 22, 2020, counsel for USF&G threatened the Receiver, **personally**, for failure to cooperate and with bad faith allegations of "undermin[ing] the Insurer's defense of Covil." *See* January 22, 2020 Letter from Simpson Thacher to Receiver's Counsel filed

[5] The Receiver provides this information as background context. The Receiver is not seeking rulings or sanctions related to USF&G's insurance policies.

on February 7, 2020 **under seal**. USF&G even went so far as to seek discovery of the Receiver's personal insurance information, because USF&G contended that it may "have rights of action against the Receiver for which the Insurers may be entitled to coverage[.]" *Id.* at pp. 2-3.

USF&G also improperly served a subpoena on the Law Offices of Dean Omar Branham & Shirley, LLP ("Dean Omar") seeking almost every communication between Dean Omar and the Receiver; USF&G apparently speculates there is collusion between the Receiver and Dean Omar in which the Receiver "has received or been promised payments." *Id.* at p. 3. The threats, thinly veiled as discovery requests, were not appropriate, and the North Carolina court found that the discovery "border[ed] on harassment." *See* Exhibit C, March 11, 2020 North Carolina Order. The North Carolina Court invited a motion for sanctions (which the Receiver declined to file) but Dean Omar did seek sanctions. The Motion for Sanctions was resolved by payment from USF&G to Dean Omar of the full amount sought in sanctions. *See* Exhibit D, Dean Omar Branham Shirley LLP's and the Individual Defendants Motion for Attorney's Fees filed March 23, 2020 at ECF 275 in Zurich v. Covil, Case Number 1:18-cv-932).

USF&G has furthered contended that the Receiver has been derelict in his obligations by failing to wind up Covil's business and publish notice of Covil's dissolution. Certainly, if USF&G has a complaint with the way that the Receiver is discharging his responsibilities as Receiver, it should address those complaints with this Court, the Court responsible for overseeing the Receivership.

The threats have continued, most recently, by way of email correspondence from USF&G's counsel in which USF&G threatened "to file a motion to enforce the February 27, 2020 injunction, unless the Receiver is willing to withdraw his March 30, 2020 Supplemental Memorandum In Support of Motions to Approve Settlements and his April 7, 2020 Proposed Order on Objections

to Settlement." *See* Exhibit E, April 8, 2020 Email Correspondence from Simpson Thacher. Despite being assured by this Court that it would "faithfully adhere to Judge Hendricks' rulings and stay out of ruling on coverage matters that are before [Judge Hendricks]," USF&G made good on its threat and filed a motion to enforce the injunction on April 14, 2020. *See* Exhibit E and *See* Exhibit F, USF&G's Motion to Enforce Injunction filed at ECF 142 in Covil v. Zurich, Case Number 7:18-cv-03291-NHH on April 10, 2020. Notably, keeping with its recurrent theme of threatening the Receiver personally, USF&G seeks sanctions against the Receiver personally for seeking this Court's approval of the Receiver's settlements with TIG, Hartford, and Sentry.

Not having learned its lesson for having to settle a sanctions motion in North Carolina for an improper subpoena, USF&G's continued its pattern of "subpoena harassment" to South Carolina by issuing an improper subpoena in the above captioned cases. Despite not being a party, USF&G issued a subpoena in the above matter on March 18, 2020. The improper subpoena sought seven categories of documents related to the proposed Qualified Settlement Fund and settlement agreements between the Receiver, TIG, Sentry, and Hartford. On its face, the improper subpoena purported to require the document production *two days later* by March 20, 2020 by 5:00 p.m. The subpoena is facially invalid as to the issuer, the time for compliance, and the documents requested.[6]

USF&G's improper threats have been unrelenting against the Receiver for nearly the entirety of the Receiver's appointment. The insurers opposed the Receiver's appointment and USF&G has, since that time, continued to obstruct and harass the Receiver, who is simply effectuating his Court-ordered duties. The repeated threats and litigation misconduct of USF&G and its national lawyers warrant sanctions.

[6] The Receiver filed a Motion to Quash the unlawfully issued subpoena on March 20, 2020 in which he is also seeking sanctions and costs and incorporates by reference his prior filings relating to the Motion to Quash.

C. OBJECTION TO SETTLEMENT

USF&G's latest frivolous act and the basis for this motion, was objecting to settlements with TIG, Hartford, and Sentry. S.C. Code Ann. § 15-36-10(E) sets forth seven factors for the Court to consider: (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. USF&G's objections to the establishment of the Qualified Settlement Fund and this Court's approval of the settlements satisfy the relevant Frivolous Proceeding factors.

USF&G and its national attorneys filed non-party objections to the Receiver's and the Settling Insurers' joint motions to approve settlements with TIG, Sentry, and Hartford and the joint motion seeking the establishment of a Qualified Settlement Fund. [7] The Receiver and the Settling Insurers filed the Joint Motion to Establish a Qualified Settlement Fund on March 4, 2020, and joint motions to approve the three settlement agreements on March 5, 6, and 16, 2020. The Court set a hearing on the motions for March 23, 2020. On March 19, 2020, counsel for USF&G sent an email correspondence to this Court and others ***notifying*** this Court, that in light of a COVID-19 Administrative Order, they "..will look forward to Monday's hearing being rescheduled at an appropriate time…". Once again, USF&G took up it upon itself to issue directives to this Court in an effort unilaterally to subvert this Court's jurisdiction and docket management. Once again this Court found itself in the position of informing USF&G counsel that the hearing was not

[7] This action satisfies the first factor for Frivolous Proceeding, the number of parties because USF&G was not a party.

cancelled because the Chief Justice of the South Carolina Supreme Court, by Administrative Order, had permitted such hearings to proceed.

Undaunted, on March 20, 2020 (the Friday afternoon before the Monday hearing), Counsel for USF&G filed a frivolous non-party objection to the establishment of the Qualified Settlement Fund and the approval of the three settlements which necessitated the Court to postpone the hearing to allow the Receiver and settling insurers time to respond to USF&G's newly raised and meritless objections. USF&G improperly filed the objection despite not being a party to the action or settlements and not having standing to object.[8]

On April 8, 2020, nineteen days after USF&G filed their last-minute objection and nine days after the Receiver filed his opposing memorandum, national counsel for USF&G emailed the Court objecting to the Court ruling on the settlements, reasoning it needed additional time to respond to new issues allegedly raised by the Receiver. USF&G's representation to the Court that it had not had a full opportunity to respond to the issues related to the settlements and QSF was disingenuous and merely an attempt to further delay the Court from ruling. When the Court emailed the parties and counsel for non-party USF&G on April 9, 2020 of its intent to issue an Order on USF&G's objection and on the Joint Motion of the Receiver and Settling Carriers' Motion to Establish a Qualified Settlement Fund and Approve Settlement, USF&G's out of state attorney Andy Frankel (who has not been admitted pro hac vice in this case) informed this Court that he represented USF&G and posited arguments and "clarification" to this Court on the motions

[8] This action satisfies the second factor for Frivolous Proceeding, the complexity of the claims and defenses, as it is not complex to file for leave to intervene in a case. It further satisfies the third factor, the length of time available to investigate, as USF&G has been aware of the settlements since November of 2018. *See* Exhibit G, November 21, 2019 Text Entry of Partial Settlement in Principle filed in Zurich v. Covil, 1:18-cv-932, Middle District North Carolina.

pending before this Court. This Court notified Attorney Frankel of his lack of bar credentials in this matter and suggested Attorney Frankel read the Order when it was submitted. [9]

Since the appointment of a Receiver, USF&G and its attorneys have undertaken a plan to prevent rulings from this Court and subvert the Court's jurisdiction by any means possible regardless of the confines of the law. As discussed above, these attempts have included, but are not limited to, baseless attempts to prevent and postpone this Court's hearings on at least two separate occasions, failing to produce insurance policies and evidence of insurance policies,[10] filing numerous motions and memoranda without any appropriate legal support, violating the confidentiality of mediation,[11] and obstinately refusing to abandon their frivolous arguments even when confronted with the arguments' legal inadequacy. When faced with no legal grounds to object, USF&G has attempted to manufacture reasons to prevent this Court from ruling and has shown its willingness to ignore South Carolina law to do so.

Instead of following proper channels to raise objections, such as by intervening as a party in the matter which it has vigorously argued it is not a party, USF&G has attempted to improperly forge its own path outside of the confines of the law. USF&G and its attorneys know these arguments by USF&G were not raised in good faith and were merely meant to harass the Receiver and delay this Court from ruling in an effort to obtain more favorable rulings from other jurisdictions.

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[9] The Receiver filed an Objection and has a pending Motion to Reconsider the Pro Hac Vice admittance of Attorney Frankel in another case involving USF&G and the Receiver (Pavlish v. Covil, et al, C/A No. 2019-CP-42-03968).

[10] USF&G's prior conduct in failing to produce evidence of their insurance policies speaks to the fourth factor of a frivolous proceeding motion, information disclosed or undisclosed through discovery or investigation.

[11] The prior finding of violating mediation privileges implicates the fifth factor, previous violations of the provisions of this section.

D. CONCLUSION

USF&G's conduct satisfies the relevant factors for a frivolous proceeding and Rule 11 sanction. Accordingly, the Receiver respectfully requests the Court sanction USF&G and its national attorneys for their conduct in violation of Rule 11 and the Act and award the Receiver attorney's fees and costs incurred as a result of USF&G's numerous frivolous motions, documents, and arguments. The Receiver further requests any other relief the Court deems just and proper. Pursuant to Rule 11, the undersigned counsel certifies that further consultation would serve no useful purpose in resolving the issues raised herein.

Respectfully submitted,

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Attorneys for the Receiver

This 20th Day of April, 2020

EXHIBIT 34

ELECTRONICALLY FILED - 2020 Apr 20 8:56 PM - YORK - COMMON PLEAS - CASE#2015CP4602155

STATE OF SOUTH CAROLINA COUNT□ OF □ORK RO□ANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GA□E SMITH, Plaintiff, v. CBS Corporation, et al., Defendant. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE SI□TH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-02155
STATE OF SOUTH CAROLINA COUNT□ OF □ORK TIMOTH□ W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE SI□TH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456

STATE OF SOUTH CAROLINA COUNT□ OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076
STATE OF SOUTH CAROLINA COUNT□ OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNT OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TA LOR and JANICE TA LOR,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

NON-PARTY USF&G S MOTION TO RECONSIDER, ALTER OR AMEND APPROVAL ORDER OF APRIL 1 , 2 2

Pursuant to South Carolina Rules of Civil Procedure (SCRCP) 6(a), 52(b), 59(e), and 60(b), United States Fidelity and Guaranty Company (USF&G) respectfully submits this Memorandum in Support of its Motion to Reconsider, Alter or Amend the Approval Order entered by this Court on April 10, 2020 (the Approval Order), which granted joint motions (the Joint Motions) filed by Peter Protopapas, as the Receiver of Covil Corporation (Covil) (the Receiver) and Hartford Accident and Indemnity Company and First State Insurance Company (collectively, Hartford), TIG Insurance Company, as successor to Ranger Insurance Company (TIG) and Sentry Insurance, a Mutual Company (Sentry and, together with Hartford and TIG, the Settling Insurers) to (i) establish a ualified Settlement Fund (the SF), and (ii) to approve the settlements agreements (the Settlement Agreements) between the Receiver and each of the Settling Insurers.

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USF&G respectfully requests that this Court reconsider, alter or amend its Approval Order for the following reasons.[1]

Covil's Prior Judicial Dissolution and its Impact on the Approval Order

1. Subsequent to the filing of the Receiver's Joint Motions and after the close of briefing, USF&G has become aware that, by order dated May 11, 1992, Covil was *judicially* dissolved after the appointment of W. Winston Lee as Covil's general receiver. *First Savings Bank, FSB v. Covil Corp., et al.*, No. 91-CP-23-4445 (Greenville Cty. Common Pleas May 11, 1992) ("Dissolution Order") (attached hereto as Ex. A). Among other things, the Dissolution Order specifically enjoins all persons "from instituting or prosecuting any action or proceeding against Covil Corporation . . . other than as set forth in th[e] [Dissolution Order] or from levying upon, attaching, distraining, or selling . . . any of the property of Covil Corporation . . . ." Based on its current understanding and belief, USF&G is not aware that Covil or its prior counsel in connection with the prior receivership proceedings had disclosed Covil's judicial dissolution to this Court or USF&G. To the contrary, the Receiver has in various pleadings represented that

[1] This Memorandum refers to and incorporates herein by reference the following filings, including all exhibits attached thereto, all of which have been filed in the above-captioned actions (2015-CP-46-02155, 03456, 2019-CP-40-00076, 2018-CP-40-04680 & 04940):

USF&G's Limited Objection to Joint Motions to (i) Establish and Approve "ualified Settlement Fund; and (ii) Approve Settlement Agreements With Hartford, TIG and Sentry filed on March 20, 2020 ("USF&G Limited Objection");

USF&G's Response in Further Opposition to Motions to Approve and in Opposition to Motions to "uash and to Seal filed on April 8, 2020 ("USF&G Opposition") and Certification of Craig Johnson ("Johnson Cert.").

By submitting this Memorandum, USF&G does not intend to waive any of its objections, including those not specifically addressed in this Motion for Reconsideration. As used herein, "reconsider" or "reconsideration" includes clarification, correction, modification, amendment, voidance, specificity, legal justification, and similar relief.

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Covil was only administratively dissolved.[2] USF&G and Covil's other insurers had continued to defend and indemnify Covil, and USF&G continues to do so to this day, based on the understanding that Covil's management had determined not to formally dissolve and that Covil had only been administratively dissolved.

2. In the recent settlements with Hartford, TIG and Sentry, the Receiver purports to sell the insurance policies issued by the Settling Insurers back to the Settling Insurers. By its clear terms, however, the Dissolution Order precludes anyone other than Covil's prior receiver, who was appointed as "the permanent Receiver of Covil Corporation" and whose "responsibility and authority [had been] broadened to that of a general receiver for Covil Corporation," from selling Covil's property. Dissolution Order, at 1, 2.

3. In addition to the injunction against any sales of Covil's property or assets or the commencement of any actions against Covil by any creditors or other persons, it now appears that by operation of law Covil no longer has any underlying liabilities in the asbestos suits currently pending against Covil or which may be filed in the future, as any such claims had been extinguished ten years following Covil's dissolution. S.C. Code § 33-14-107(c).

4. USF&G and Zurich are still investigating these matters. However, it is apparent that they raise a host of very significant issues that should be fully investigated and resolved. For

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[2] *See*, *e.g.*, The Receiver's Brief in Further Support of His Presentation of Nov. 12, 2019 in Support of Order on Rule to Show Cause, C/A Nos. 2015-CP-46-02155, 2015-CP-46-03456, 2019-CP-40-00076, 2018-CP-40-04680, 2018-CP-40-04940 (filed Nov. 22, 2019) ("Peter D. Protopapas, as Receiver for Covil Corporation, *an administratively-dissolved South Carolina corporation*, (the "Receiver") respectfully submits the following brief in further support of the arguments presented to this Court during the Rule to Show Cause hearing on November 12, 2019.") (emphasis added).

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example,[3] the prior receivership calls into question this Court's jurisdiction to appoint a subsequent receiver for Covil, as well as orders entered pursuant to that appointment. Irrespective of the Court's subject matter jurisdiction to appoint a receiver, the need for *any* receiver has been called into question, if, in fact, the asbestos claims by claimants have been extinguished and Covil no longer faces exposure in ongoing asbestos litigation. *See, e.g., In re All Cases Against Sager Corp.*, 967 N.E.2d 1203 (Ohio 2012) (reversing appointment of receiver to marshal insurance assets of dissolved company given that claims against the dissolved company had been extinguished under Illinois dissolution statute).

5. For these and other reasons, concurrently herewith USF&G is seeking a stay of enforcement of the Court's Approval Order. *See* USF&G's Motion to Stay (filed concurrently herewith).

6. The following is set forth without waiver of any rights, claims, or defenses, that USF&G has or may have, including but not limited to those arising from the Final Dissolution Order and Covil's prior judicial dissolution.

Standing

7. USF&G seeks reconsideration on the basis that the Court erroneously found that USF&G lacks standing to challenge or object to the Receiver's settlements with the Settling Insurers and/or entry of the Approval Order. *See* Approval Order, at 11. Neither USF&G's status as a non-party, nor the fact that it has not intervened in the above-captioned actions, deprive USF&G of standing to challenge the Joint Motions. *See Ross Dev. Fund v. Fireman's Fund Insurance Co.*, 809 F.Supp. 2d 449 (D.S.C. 2011). Rather, because the Joint Motions sought

[3] These issues will be raised separately in the appropriate proceedings and with further briefing. They are noted here solely to apprise the Court of these developments and to demonstrate why a stay is necessary.

approval of orders that materially impair USF&G's contractual and common law rights, USF&G has standing to challenge the motions.

8. USF&G satisfies each of the prerequisites of standing: (1) injury-in-fact, (2) causal connection; and (3) redressability. As to injury-in-fact, by directing claims for contribution, subrogation and indemnity away from the solvent Settling Insurers and toward a □SF with an unknown amount of funds, and by approving a □SF operating agreement (□□SF Operating Agreement□) that would render the Settling Insurers□policies excess to the □SF, the Approval Order impairs USF&G's rights. Moreover, USF&G faces imminent injury because it has defended and continues to defend and pay indemnity on all asbestos-related lawsuits tendered by the Receiver. As a result of the terms and conditions of the Settlement Agreements and □SF Operating Agreement, USF&G may be required to absorb the Settling Insurers□share of settlements and/or may be foreclosed from asserting valuable rights of contribution for amounts USF&G already has paid in excess of its pro rata share. USF&G's injury is thus directly caused by the Settlement Agreements it has challenged. As to redressability, denial of the Joint Motions would prevent impairment of USF&G's rights and thus would redress the complained-of injury. *See Smiley v. S.C. Dep't of Health and Envtl. Control*, 374 S.C. 326, 329 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560□61 (1992)).

9. USF&G further seeks reconsideration on the basis that the Court has purported to expand the Receiver's authority to □all asbestos related cases and for all asbestos related matters.□ *Taylor v. Air & Liquid Systems Corp.*, No. 2018CP4004940 (Common Pleas, 5th Jud. Dist. March 1, 2019). USF&G does not concede, and expressly denies, that the Receiver was properly appointed or that his authority can be summarily expanded in this manner. However, to the extent the Receiver was vested with such authority and to the extent the Court's Approval Order is

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intended to apply to cases beyond the above-captioned matters, USF&G is, in fact, a party in some of those cases.

10. USF&G seeks reconsideration on the basis that, because USF&G was entitled to but was not afforded a meaningful opportunity to be heard in connection with the Joint Motions (and other related motions) prior to the Court entering the Approval Order, the provision of the order barring USF&G from asserting its rights against the Settling Insurers violates USF&G's due process rights. *See Thornton v. Alford*, 274 S.C. 1, 3 (1979) (holding that injunction issued without opportunity to be heard against person with interests adverse to movant was invalid as a matter of due process). *See also Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, *an opportunity to be heard in a meaningful way*, and judicial review.") (emphasis added). *Cf. Trans. Assoc., Inc. v. Bishop*, 2015 WL 94488, at *1 (Ct. App. 2015) (holding that "trial court did not violate the Due Process Clause "[in determining width of easement] because court "afforded [] notice that the issue would be considered, *an opportunity to be heard in a meaningful way*, and a fair hearing.") (emphasis added). This is especially true because, despite the Receiver raising the issue of standing for the first time in a supplemental submission filed after USF&G's initial Limited Objection, this Court indicated that USF&G was not authorized to file a response.[4]

11. Further, to the extent USF&G's status as a non-party renders it without standing to object to the Receiver's requested relief or challenge the Joint Motions or subsequent Approval Order, the Court should vacate its January 8, 2020 Order on Rule to Show Cause (the "January 8

[4] Although USF&G ultimately filed the April 8, 2020 response that it was preparing to file at the very moment when this Court indicated that a response was not authorized, the Approval Order does not appear to consider the standing arguments asserted therein. The Court should have considered USF&G's April 8 Opposition.

Order□). If USF&G does not have standing to object to approval of the Settlement Agreements that impair its rights, it cannot follow that USF&G is subject to the jurisdiction of this Court for purposes of the January 8 Order purporting to decide insurance coverage issues against USF&G.

USF&G□s Rights of Contribution, Subrogation and Indemnity

12. USF&G seeks reconsideration on the basis that South Carolina precedent holds that a receiver cannot □change any existing contractual relation or create any new contractual relation or right of action thereon.□ *National Cash Register Co. v. Burns*, 217 S.C. 310, 60 S.E.2d 615 (1950). In other words, a receiver □holds the property [of the insolvent entity] by the same right and title as the person for whose property he is receiver and becomes merely the assignee of the insolvent having exactly the same rights.□ *Jeffcoat v. Morris*, 389 S.E.2d 159, 160, 300 S.C. 526, 528 (Ct. App. 1989). The Court□s Approval Order is inconsistent with these principles. By approving the □SF Operating Agreement, the Approval Order indisputably changes the existing contractual relations as between Covil and USF&G because, by deeming the Settling Insurers□ policies to be excess policies, the □SF Operating Agreement could, if applied to the Settling Insurers□policies, effectively eliminate USF&G□s rights of contribution and increase USF&G□s exposure to asbestos claims. *See* Limited Objection, at 7.

13. USF&G seeks reconsideration on the basis that the Court□s Approval Order violates its due process rights by impairing USF&G□s state law contribution, subrogation and/or indemnity rights without compensation or credit. *See South Carolina Nat. Bank v. Central Carolina Livestock Market, Inc.*, 345 S.E.2d 485, 487, 289 S.C. 309, 312 (S.C. 1986) (holding a person cannot be deprived of property □without due process of law□). *See also Toomer v. Norfolk Southern Ry. Co.*, 544 S.E.2d 634, 636, 344 S.C. 486, 490 (S.C. Ct. App. 2001) (□South Carolina has long recognized the principle of equitable indemnification.□); *Lucas v. Garrett*, 41 S.E.2d 212, 215, 209 S.C. 521, 528 (S.C. 1947) (recognizing □the well-established right of subrogation□).

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14. To the extent the SF has insufficient funds for USF&G to seek contribution for indemnity from the SF, the Approval Order, which provides no credit to USF&G in exchange for barring its contribution rights, deprives USF&G of its property without due process of law.

15. USF&G seeks reconsideration on the basis that the Approval Order does not address USF&G s argument that S.C. Code Ann. § 15 65 20 (2013), the statute pursuant to which the Receiver was given authority to administer Covil s assets, does not give the Receiver or this Court the authority to alter, extinguish and/or impair USF&G s state law rights to contribution, subrogation and/or indemnity as against third parties, such as the Settling Insurers. *See* Limited Objection, at 7. The Approval Order cites to no statutory provision providing for the type of protections, such as a fairness hearing or judgment reduction credit, that must be afforded as a matter of due process to bar or enjoin state law granted rights even assuming there exists statutory or other authority to issue such an injunction.

16. USF&G seeks reconsideration on the basis that the Court finds, without explanation or analysis, that USF&G s argument that it will be deprived of valuable contribution, subrogation and/or indemnity rights is without merit because the Receiver and the Settling Insurers proposed that the SF stand in the shoes of the Settling Insurers in all respects, as provided for by federal law as set forth in 26 U.S.C. § 468B. Approval Order, at 12. The referenced federal law does not speak to, much less address, any of USF&G s issues or concerns with how the Settlement Agreements and SF Operating Agreement purport to alter USF&G s rights vis- -vis Covil and the Settling Insurers. Moreover, the finding in the Approval Order that the SF steps in the shoes of the Settling Insurers policies is inconsistent with the provisions of the SF Operating Agreement that purport to make the SF excess to non-settling insurers policies.

17. USF&G seeks reconsideration based on the finding that USF&G failed to provide the Court with any documentation or information about the existence, let alone the potential value,

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of any such claims sufficient even to argue that these settlements (in excess of policy limits) impact the Objecting Insurers theoretical, future claims. Approval Order, at 13. USF&G submitted a certification[5] explaining the basis for its rights of contribution and attesting to their substantial value. *See* April 8, 2020 Certification of Craig Johnson.[6]

18. Further, in stating that the Settling Insurers contributions were in excess of policy limits, the Court failed to take into consideration, as Covil has repeatedly argued, that for claims that are not subject to aggregate limits, only per occurrence limits apply. Covil, in fact, has consistently maintained that such limits apply separately for each individual asbestos claim. Although USF&G has disputed that contention, it is nevertheless not clear what the Court meant by stating that the settlements were in excess of policy limits. It apparently does not mean, as the Court may have suggested, that the Settling Insurers paid more than they would otherwise have owed under the terms of their policies in the normal course of defending and settling Covil s asbestos lawsuits.

19. USF&G seeks reconsideration on the basis that the Court incorrectly found that USF&G s subrogation rights are equitable. USF&G has a contractual right to subrogation, which is enforceable under South Carolina law.

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[5] Pursuant to orders of the South Carolina Supreme Court issued in connection with the COVID-19 pandemic, certifications may be submitted in lieu of notarized affidavits.

[6] As noted at the outset, it now appears that Covil has no significant asbestos liabilities given its prior dissolution. For that reason, there would no longer be any coverage obligation by any of Covil s former insurers, including USF&G and the Settling Insurers. Nonetheless, the Johnson Certification and USF&G s prior submissions were submitted before USF&G became aware of the Final Dissolution Order. As explained above, the Final Dissolution Order may impact significantly the extent of any obligations of Covil and all of its insurers, regardless of whether such insurers have settled. As noted above, USF&G does not waive any of its rights, claims, or defenses relating to the Prior Dissolution Order.

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20. USF&G seeks reconsideration on the basis that the Court did not address USF&G's argument that (i) the January 8 Order specifically preserves USF&G's contractual rights and forbids the Receiver's "no recovery from insurers" approach, (ii) that the January 8 Order is not final and (iii) that the January 8 Order was a discovery sanction that had nothing to do with USF&G's rights to contribution and subrogation.

21. USF&G seeks reconsideration on the basis that the Court's finding that USF&G is "in no way harmed" by the Settlement Agreements is unsupported by the record. The Approval Order cites to no evidence and contains no analysis to support the finding that USF&G's rights are preserved by the terms and conditions of the Settlement Agreements and/or "SF Operating Agreement. The Approval Order is also silent on how much of the aggregate settlement will be available, after deducting the Court-approved attorney's fees of 33.3", plus other undisclosed costs, for Covil's anticipated present and future liabilities from asbestos lawsuits against Covil, which are likely to persist well into the future. Nor does the Approval Order make any findings as to how much of the "SF will remain available to pay contribution claims after accounting for fees, costs, and payments to personal injury claimants. There is, therefore, no factual or legal basis to support the Court's finding that USF&G's ongoing rights of contribution, subrogation and/or indemnity would be protected or preserved by redirecting such claims to the "SF.

22. USF&G seeks reconsideration on the basis that the Approval Order does not take into account that, under South Carolina law, insurers are not jointly and severally liable for the loss incurred by the insured. *See* USF&G Opposition, at 11 (citing *Crossmann Cmtys. of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 591 (S.C. 2011) (finding the scope of an insurer's duty to indemnify was limited to damages accrued during the insurer's time on the risk, overruling earlier case law that held an insurer's liability was joint and several); and *Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 803 S.E.2d 288 (S.C. 2017) (same)). Thus, if

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USF&G pays more than its pro rata share in resolving a claim against Covil (for which it is also providing a defense), it has an absolute right under South Carolina law to recover the difference by contribution.

23. USF&G seeks reconsideration on the basis that the Approval Order fails to address the reasonable modifications proposed by USF&G to the Approval Order, which would have preserved USF&G's rights while also permitting the settlements to be approved.

Motion to Seal and Motion to Quash

24. USF&G seeks reconsideration on the basis that the Approval Order erroneously granted the Receiver's Motion to Seal the Settlement Agreements and Motion to Quash the subpoena USF&G served on the Receiver seeking information about the Settlement Agreements and USF. *See* USF&G Opposition, at 15-19. A denial of the Motion to Seal was warranted because the Receiver failed to establish that the interest in secrecy in the Settlement Agreement outweighs the presumption of public disclosure and, as such, failed to meet his burden under SCRCP 41.1. *See Dearybury v. Dearybury*, No. 2016-001206, 2018 WL 1865750, at *1 (S.C. Ct. App. Apr. 18, 2018) (citing *Ex parte Capital U–Drive–It, Inc.*, 369 S.C. 1, 12 (2006)). The Receiver's Motion to Seal also failed to identify specific harms to his or the Settling Insurers' privacy interest, which is yet another reason why that motion should have been denied. *Id*. at 17-18.

25. USF&G seeks reconsideration on the basis that the Court granted the Motion to Seal without considering whether there are alternatives to sealing (*e.g.*, redacting the Settlement Agreements on the public record while providing the full Settlement Agreements to USF&G under an appropriate confidentiality order), as a means of protecting the Receiver's and Settling Insurers' legitimate privacy interests, if any. *See* USF&G Opposition, at 18. Because alternatives to sealing are clearly available, the Court should have denied the Motion to Seal.

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26. USF&G seeks reconsideration on the basis that the Court did not address USF&G□s argument asserted in the Motion to □uash that it is entitled to the information sought by the Subpoena, which will enable it to (a) confirm that the Receiver will contribute properly to any resolved Covil Asbestos Claims that implicate insurance policies issued by the Settling Insurers and (b) determine the extent to which the Hartford Settlement, TIG Settlement and Sentry Settlement are fair and reasonable and/or how the □SF Operating Agreement may extinguish or impair USF&G□s rights.

27. USF&G seeks reconsideration on the basis that the Approval Order wrongly places the burden of obtaining information about the Settlement Agreements on USF&G. *See* Approval Order at 13 (□As it pertains to the equitable remedy of contribution, the Objecting Insurers have failed to provide the Court with any documentation or information about the existence, let alone the potential value, of any such claims[.]□). USF&G tried the only available means to obtain this information so that it could make this determination on its own, but the Court refused to direct the Receiver to answer the Subpoena. As a matter of due process, the Court should have directed the Receiver to comply with the Subpoena, as USF&G requested in its April 8 submission. *See* USF&G Opposition, at 19-23.

Objections to Factual Findings

28. USF&G seeks reconsideration on the basis that the Court□s finding that the Settlement Agreements provide fair and reasonable consideration to support the release of Covil□s rights against the Settling Insurers is not supported by the record. The Receiver refused to provide information requested by USF&G via subpoena that is necessary to determine whether the consideration provided in exchange for the policy □buy back□is sufficient to exhaust the Settling Insurers□policies.

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29. USF&G seeks reconsideration on the basis that the Approval Order finds, without explanation or analysis, that the consideration provided in exchange for the policy buy-back is sufficient to exhaust the Settling Insurers' policies. Although the Approval Order includes findings that the Settling Insurers paid more than their policy limits in purchasing back their policies, that does not mean that the policies are necessarily exhausted. In particular, with respect to operations claims (*i.e.*, claims in which there were ongoing operations during the Settling Insurers' policy periods), there is no aggregate limit and only per occurrence limits. Accordingly, the finding in the Approval Order that the Settling Insurers paid more than their policy limits should not be afforded any weight.

CONCLUSION

30. For all of the reasons set forth above and in USF&G's prior submissions, USF&G respectfully requests that the Court reconsider, alter or amend its Approval Order.

Respectfully submitted:

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(*Frankel Pro Hac Vice admitted - Roxanne Falls, 2015-CP-46-02155*)

Attorneys for Defendant United States Fidelity and Guaranty Company

Date: April [20], 2020

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EXHIBIT 35

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STATE OF SOUTH CAROLINA COUNTY OF YORK ROXANNE FALLS, Individually and as Personal Representative of the Estate of CHARLOTTE GAYE SMITH, Plaintiffs, vs. CBS Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-02155 **ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA COUNTY OF YORK TIMOTHY W. HOWE, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT C/A NO.: 2015-CP-46-03456 **ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY**

ELECTRONICALLY FILED - 2020 May 07 8:03 AM - YORK - COMMON PLEAS - CASE#2015CP4603456

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND CHARLES T. HOPPER and REBECCA HOPPER, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-40-00076 **ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JAMES MICHAEL HILL, Plaintiff, vs. Advance Auto Parts, Inc., et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A NO.: 2018-CP-40-04680 **ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY**

ELECTRONICALLY FILED - 2020 May 07 8:03 AM - YORK - COMMON PLEAS - CASE#2015CP4603456

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE TAYLOR,	)	**ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY**
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

This matter is before the Court on (1) Non-Party USF&G's Motion to Reconsider, Alter, or Amend this Court's Approval Order of April 10, 2020, (2) Non-Party USF&G's April 20, 2020 Motion to Stay, and (3) Non-Party Zurich American Insurance Company's Motion to Reconsider, Alter, or Amend Approval Order of April 10, 2020. In these motions and the extensive briefing and exhibits submitted in support thereof, non-party USF&G and non-party Zurich ("the Objecting Insurers") complain that this Court granted joint motions filed by Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation (the "Receiver"), Hartford Accident and Indemnity Company and First State Insurance Company (collectively "Hartford"), TIG Insurance Company, as successor to Ranger Insurance Company ("TIG"), and Sentry Insurance a Mutual Company ("Sentry") (jointly the "Settling Insurers") to (1) establish a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of

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1986, as amended ("I.R.C."), (2) keep continuing jurisdiction over that Qualified Settlement Fund, and (3) approve the settlements between the Receiver and each of Hartford, TIG, and Sentry.

The Court has ruled that the Objecting Insurers are not parties to these actions, have failed to avail themselves of the procedures available to become parties to these actions, and therefore lack standing to file any objections in these actions. During the several weeks since this Court's order, nothing has changed in this regard related to the Objecting Insurers' lack of standing. Having considered the Objecting Insurers' motions and the applicable responses, together with the exhibits submitted with these motions and responses, the Court hereby decides the matter on the filings and rules as follows:

I. FINDINGS RELATED TO CORONAVIRUS EMERGENCY PROCEDURES

On April 3, 2020, the South Carolina Supreme Court issued an Order providing guidance to the courts of South Carolina to help ensure the continued operation of the courts during the Coronavirus emergency. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. The Supreme Court indicated South Carolina trial judges, after allowing all parties the opportunity to file responses to a motion, "may elect to not hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers." *See* April 3, 2020 Order of the South Carolina Supreme Court.

The Court finds these motions have been fully and exhaustively briefed, and, after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and these motions may readily be decided without further input from the lawyers. Ruling on these motions is also in the best interest of the Receivership as delay in these perilous times imperils

assets of the Receivership and the proposed liquidation of those assets into a qualified settlement fund.

II. FINDINGS REGARDING PARALLEL FEDERAL PROCEEDINGS

In the case of *Covil Corporation By Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich, USF&G et al.* in the United States District Court for the District of South Carolina, Spartanburg Division, CA No. 7:18-3291-BHH, United States District Judge Bruce Howe Hendricks issued an Opinion and Order dated February 27, 2020 in which she reviewed comprehensively the procedural complexities of the insurance coverage case before her involving claims and cross-claims regarding insurance coverage for policies issued or allegedly issued by various insurance companies to Covil at various times between the l950s and 1993.

Judge Hendricks also detailed the responsibilities assigned to this Court regarding the trial of asbestos cases in South Carolina and the supervision of the Receivership of Covil. In her order, Judge Hendricks declined to issue a broad moratorium on further proceedings before this Court as the Receivership Court. Judge Hendricks found: "It is abundantly clear that Justice Toal, for whom the undersigned has the highest respect, has done and is doing her best to keep the underlying state tort suits moving forward appropriately without interfering with the coverage issues pending here."

As this Court explained in its April 10, 2020 Order, this Court again intends to faithfully adhere to Judge Hendricks' rulings and stay out of ruling on coverage matters that are before Judge Hendricks' Court.

With regard to the proposed settlements, the three Settling Insurers were parties to the case pending before Judge Hendricks, but each Settling Insurer has now been dismissed

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without prejudice from that proceeding. In each case, the settling parties indicated to Judge Hendricks that the requested dismissals were to be without prejudice because each settlement still required the approval of this Court. In addition, the Receiver filed with Judge Hendricks the proposed Orders submitted to this Court. The settling parties also advised Judge Hendricks that, upon the Receivership Court's approval, the parties would return to Judge Hendricks' Court in order to convert the dismissals without prejudice into final dismissals with prejudice. Objecting Insurers did not object to any of these motions even though the motions were predicated on this Court's considering the proposed Orders approving settlement to which they now object.

As to each settling insurer, Judge Hendricks signed the dismissals without prejudice on this basis, and as a result the settling insurers have all been dismissed from the above-referenced case in Judge Hendricks' court. Therefore, it is not possible for this Court to rule on the coverage matters pending before Judge Hendricks in regard to the settling insurers because these matters are no longer pending as to these settling parties.

Since this Court signed its April 10, 2020 Approval Order, Judge Hendricks has continued to dismiss claims as a result of the settlement agreements approved therein. *See* April 15, 2020 Order Dismissing Sentry without Prejudice from *Peter D. Protopapas, as Receiver for Covil Corporation v. Wall Templeton & Haldrup, P.A. et al.* in the United States District Court for the District of South Carolina, Columbia Division, CA No. 3:19-01635-BHH. As such, this Court will continue to meet its responsibilities for managing the South Carolina asbestos docket, and the Covil receivership, without interfering with issues subject to coverage litigation pending before Judge Hendricks.

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III. OBJECTIONS TO THE QUALIFIED SETTLEMENT FUND

A Qualified Settlement Fund is a creature of statute based on Section 468B of the Internal Revenue Code. The establishment of a Qualified Settlement Fund serves to streamline the income tax treatment of a policyholder's settlement proceeds with an insurer, provided that the full amount of the settlement proceeds are dedicated to meeting the costs and liabilities associated with the insured risk. At the conclusion of such liability, any residual amounts in a Qualified Settlement Fund must be donated to one or more 501(c)(3) charitable institutions.

The use of a Qualified Settlement Fund is routine in the resolution of a complex insurance coverage dispute. The Receiver has satisfied the criteria established by Congress for establishing a Qualified Settlement Fund, and the QSF will remain subject to the ongoing jurisdiction and supervision of this Court. The Objecting Insurers cannot, and certainly have not even tried, to explain why they would benefit from the Settling Insurers' settlement payments being fully subject to payment of federal income tax. The Receiver is exercising financial prudence in implementing a tax planning structure for the receipt of these settlement funds. The Objecting Insurers' continued objections to this Court's approval of the Receiver's use of this ubiquitous tax planning vehicle are baseless.

IV. IMPACT OF PRIOR RECEIVERSHIP PROCEEDINGS

Non-Party USF&G waited until its Motion to Reconsider (and concurrently filed Motion to Stay) to lodge, for the first time, an objection to this Court's Approval order based on the existence of a prior receiver for Covil, Mr. Winston Lee. In lodging this objection, USF&G claims that it just recently discovered that Covil was "judicially dissolved" after the appointment of Winston Lee as Covil's general receiver. USF&G Mot. to Reconsider at 2; Mot. to Stay at 2.

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However, based on the conclusive evidence submitted in connection with this motion, it is abundantly clear that USF&G and Zurich have been aware of the first Covil receivership since at least 1991. Yet, remarkably, USF&G waited over 28 years to raise this objection and now feigns to have only recently learned about this previous receivership proceeding. USF&G even goes so far as to blame Covil, a corporation that was administratively dissolved in 1993 and operated by the Objecting Insurers until the appointment of a Receiver in 2018, for not bringing this prior receivership to this Court's attention. USF&G is not being honest with this Court.

A. Background of Objecting Insurers' Knowledge of Prior Covil Receivership

In responding to Non-Party USF&G's objections, the Receiver for Covil established the following historic timeline related to USF&G's knowledge of this prior receivership.

In 1991, Greenville County Master in Equity, Judge Simmons appointed L. Winston Lee as Receiver in a case entitled: *In Re: The First Savings Bank, FSB v. Covil Corporation, Oxytherm, Inc., and Equitable Enterprises, a South Carolina General Partnership*: C/A 1991-CP-23-4445 (Greenville County). On November 14, 1991, the lawyer retained to defend Covil by the Objecting Insurers, Mr. Danny White, wrote to inform the Objecting Insurers that "Covil Corporation has now been placed in receivership and L. Winston Lee, as Receiver, has been charged with the responsibility to gather the assets of Covil Corporation for public auction on December 5, 1991." *See* Letter from Danny White dated November 14, 1991. David N. Kappus of Maryland Casualty n/k/a Zurich and Richard L. Teal of USF&G n/k/a Travelers were recipients of this correspondence. In this letter, Mr. White further explained, "Covil does not intend to dissolve as a corporation but rather, in fact, will remain a corporation which can sue and be sued."

Finally, White requested the permission of the insurers to "gather and store all personnel records and job files of Covil Corporation which have potential relevance to the asbestos litigation."

On that same day in November of 1991, the Objecting Insurers' appointed defense counsel Mr. White also wrote to Covil's first receiver, L. Winston Lee, requesting permission to review Covil's records and cautioning against their destruction. As to the potential destruction, Mr. White wrote, "Because of outstanding discovery requests against Covil and the potential for new lawsuits, I would suggest that the destruction of these records may violate current discovery orders and potentially be considered contempt of court." *See id.* Historical records indicate that by April 15, 1992, White had made "arrangements to retrieve Covil's personnel records and job files which may be of potential future relevance in this litigation," and was "storing those files in [his] office." *See* Letter from Danny White to Richard Teal, David Kappus, and Dave Christian, dated April 15, 1992.

Mr. White's third letter of November 14, 1991 was addressed to counsel for the underlying asbestos personal injury plaintiffs. Enclosing a copy of the Receivership's filing in Common Pleas of a Notice to Creditors, White informed the counsel that "[t]he Order indicates that there appears to be no assets available from which payment may be made to unsecured creditors." *Id.* The letter ended, "You are placed on such notice of this receivership as you deem proper to protect the interests of your clients." *Id.* After being advised of the Receivership and its status, Covil's insurers continued to pay settlements to Covil asbestos personal injury claimants. *See* Letter from Kelly Brunker to John Truzzolino and Lori Sheppard dated September 15, 1994 (noting, "This serves to reiterate our September 9, 1994 conversation in reference to the disposition of Covil in the asbestos litigation," and outlining the jointly-determined authority for payment of asbestos personal injury claims).

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The L. Winston Lee receivership continued until the Master-in-Equity signed a Final Order on November 30, 1992. The Final Order accepted the Receivership Accounting, which included a listing of all receipts and disbursements undertaken by the receiver. The receipts for Covil during the receivership included $562,500 for the sale of real estate, $26,755.27 in auction proceeds, and $80,209.74 in cash surrender value from New York Life, among others. *See id*. at 5. All remaining receivership funds, and all remaining accounts receivable of Covil, were assigned to First Savings Bank, which the receiver identified in his Final Report as a "priority line creditor." *See id.* at 2-3; *see also*, Final Report of the Receiver at 4. All other Covil assets that were not receivership funds or accounts receivable were abandoned to the shareholders and partners of Covil. *See* ("That the abandonment by the Receiver of all remaining assets of the above-named Defendants is hereby approved"); ("That your Petitioner is informed and believes that any remaining assets of the Defendants are without monetary value and that your Petitioner should be authorized and directed to abandon any and all such remaining assets, if any, to the shareholders and partners of the Defendants.").

More than six months after the Master-in-Equity entered the Final Order, on July 30, 1993, the South Carolina Secretary of State signed a Certificate of Revocation of Authority for Covil. The document indicates Covil was dissolved for failure to file its annual report and to pay its franchise tax. *See id.* No other document produced in this case demonstrates that the South Carolina Secretary of State prepared any document dissolving Covil Corporation prior to the Certificate of Revocation of Authority on July 30, 1993.

Apparently, the Objecting Insurers waited twenty-seven years to consult the public files of the prior receivership court. During that time, Covil-related litigation continued apace throughout the courts of South Carolina as well as in other states. Undeterred by this prior

receivership, the Objecting Insurers carried on with "business as usual" for Covil as an active litigant in numerous courts for decades – never mentioning anything to any of these many courts about this prior receivership until only a few days ago.

B. Impact of Prior Receivership on Current Receivership

Non-Party USF&G contends that its late objection based on the prior receivership "raises significant doubts as to whether the Receiver possesses the authority to sell Covil's insurance policies back to the Settling Insurers, whether Covil is properly subject to suit in any of the underlying asbestos claims against Covil, and whether this Court's November 2018 order appointing Mr. Protopapas as Covil's Receiver should be vacated." Mot. to Stay at 3.

As explained above, Non-Party USF&G lacks standing to complain about these proceedings. In light of Non-Party USF&G objection, the Court will state its rationale and rulings if it were to reach Non-Party USF&G's objections.

In addition to being untimely, Non-Party USF&G's objections are simply incorrect. It does not matter if Covil was administratively or judicially dissolved in the early 1990s. The current Covil Receiver was appointed under Section 15-65-10 of the South Carolina Code of Laws, which provides, "A receiver may be appointed by a judge of the circuit court … (4) When a corporation has been dissolved . . ." *Id.* at 15-65-10(4). The statute does not require that the corporation was previously "administratively dissolved" or "judicially dissolved." It just says dissolved. Thus, whether Covil was administratively or judicially dissolved in 1992, the current Receiver's appointment is lawful. USF&G does not attempt to cite or explain away the plain language of Section 15-65-10.

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USF&G also makes the erroneous assertion that the current Receiver may not administer Covil's assets because the prior Receiver is "the permanent Receiver of Covil Corporation." Mot. to Reconsider at 3; Mot. to Stay at 6. The Final Order, however (the one USF&G fails to cite) shows that the prior receiver was "discharged as Receiver."

USF&G also claims Section 33-14-107 "bars claims against a judicially dissolved entity that are asserted more than ten years following the entity's publication of notice of dissolution." Mot. to Reconsider at 3; Mot. to Stay at 6 (citing S.C. Code Ann. § 33-14-107(c)). USF&G urges this Court to find that "Covil no longer has any underlying liabilities in the asbestos suits." Mot. to Reconsider at 3; Mot. to Stay at 6. USF&G cites no authority for this proposition, instead noting that USF&G and Zurich "are still investigating these matters." *Id.*

USF&G fails to cite the rest of the statute. Section 33-14-107 plainly provides that "[u]nknown claims . . . may be enforced under this section (1) against the dissolved corporation to the extent of its undistributed assets." S.C. Code Ann. § 33-14-107(d)(1). Under all three types of dissolution, "A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs." S.C. Code Ann. § 33-14-105(a) (voluntary); *id.* at § 33-14-210(d) (administrative); *id.* at § 33-14-330(b) (judicial dissolution statute providing, "After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with Section 33-14-105").

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The issues raised by USF&G have been thoroughly addressed by the Delaware Supreme Court *In the Matter of Krafft-Murphy*, 82 A.3d 696 (Del. 2013). The South Carolina Supreme Court has looked to Delaware case law to inform interpretation of the South Carolina Business Corporations Act. For example, in the 1975 case of *Santee Oil Co. v. Cox*, 265 S.C. 270, 272-273, 217 S.E.2d 789, 791 (1975), the South Carolina Supreme Court addressed an issue involving the South Carolina Business Corporations Act. It stated:

> No prior decision of this Court has come to our attention which is at all helpful, but courts of other states, particularly the courts of Delaware, the home of so many corporations, have had fairly frequent occasions to define and apply such term under corporation law similar to ours.

Id. at 791. The Court then relied extensively on Delaware law to decide the matter at issue under the South Carolina Business Corporations Act. *Id.* at 791-92.

In the Matter of Krafft-Murphy, 82 A.3d 696 (Del. 2013) soundly rejects USF&G's position. There, similar to here, asbestos "tort claimants in lawsuits pending against [Krafft-Murphy] in other jurisdictions [sought] the appointment of a receiver to enable them lawfully to pursue those claims." *Id.* at 698. Krafft-Murphy had "formally dissolved in 1999" and its "only assets [were] its unexhausted insurance policies." *Id.* at 699. As here, the insurers in *Krafft-Murphy* attempted to argue that asbestos lawsuits were barred because of the dissolution. After a thorough analysis, the *Krafft-Murphy* Court held, "Delaware's dissolution statutes impose no generally applicable statute of limitations that would time-bar claims against a dissolved corporation by third parties." 82 A.3d at 698. The court also held "that as a *body corporate* a dissolved corporation ceases to exist and is not amenable to suit after the expiration of § 278's three year period. From that it does not follow, however, that § 278 extinguishes the corporation's underlying liability to third parties. To the contrary, § 279 enables a dissolved corporation to

(through a receiver) 'sue and *be sued*' after the expiration of the § 278 three year period." *Id.* (footnotes omitted). The same is true in South Carolina.

The Delaware Supreme Court noted that its statutes expressly barred certain claims, but not the asbestos claims at issue in that case. *Id.* at 705. "The five and ten year claims planning periods were not intended to operate as general statutes of limitation." *Id.* at 706. South Carolina's statute applies the same way. *See* S.C. Code Ann. § 33-14-107(b)(3).

Moreover, there is no basis for USF&G's assertion that the current Receivership is unnecessary. After the *Krafft-Murphy* Court noted that the "Insurers are continuing to defend those lawsuits on [Krafft-Murphy's] behalf," it found that the Insurers "cannot re-infuse the Corporation with a legal existence that by statute has terminated. The only means by which the Corporation may become re-empowered to defend its interests in the litigation is through the appointment of a receiver." *Id.* at 710. USF&G also relies on *All Cases Against Sager Corp.*, 967 N.E. 2d 1203 (Ohio 2012). Mot. to Reconsider at 4. The *Sager* decision is an Ohio case applying Illinois law. It relies upon *Pielet v. Pielet*, 942 N.E.2d 606 (Ill App. 2010). *See Sager*, 967 N.E.2d at 1210. USF&G, however, may not rely on *Sager*, and should not have cited it to this Court, because the Illinois Supreme Court reversed the lower court in *Pielet v. Pielet*, 978 N.E.2d 1000 (Illinois 2012). *Id.* at 1013 ("the precedent in Illinois has consistently held that the survival provisions of section 12.80 and its antecedents may only be invoked in aid of a cause of action against a dissolved corporation where the cause of action accrued prior to the corporation's dissolution.").

In short, "*Kraf[f]t-Murphy* makes clear that there is no time limit on when a party can request a receiver be appointed to represent a dissolved corporation and there is no ten (10) year statute of limitations on bringing a suit against a dissolved corporation." *United States v.*

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Marmon Holdings, Inc., Civ. No. 2:10-cv-00526-EJL-CWD, 2015 WL 5822620, at *12 (D. Idaho Sept. 30, 2015).

Further, a review of the statutory history of the statute USF&G attempts to rely on to support its newly found, self-serving argument that Covil no longer has any underlying liabilities in asbestos cases in South Carolina due to its dissolution shows the statute was materially different at the time of Covil's dissolution. Even if the Court ignored the clear language in section 33-14-107(d), the sound analysis of the Delaware courts on this issue, and the fact that the Objecting Insurers appear to have themselves reanimated Covil for the past two decades, there is no basis for USF&G's argument that section 33-14-107(c) prohibits asbestos claims against the dissolved Covil.

The Court finds sections 33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil. Further, section 33-14-107(c)(3) did not exist at the time of Covil's 1992 dissolution, and the Comments to section 33-14-107 show the General Assembly specifically chose not to adopt what is today subsection (c)(3), which addresses the bar of contingent claims and claims based on an event after dissolution, from the Model Act. In fact, the Comments note the clear legislative intent behind the version of the statute in effect at the time of Covil's dissolution was that "[t]he statue of repose only applie[d] *to claims existing at dissolution*." *See* South Carolina Reporter's Comments, S.C. Code Ann. 33-14-107. The General Assembly did not adopt subsection (c)(3) until 2004, and as such, this subsection, which did not exist until either eleven or twelve years after Covil's dissolution, clearly cannot apply.

The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution, regardless of whether Covil was dissolved in 1992 or 1993.

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This Court appointed Mr. Protopapas as the Receiver for Covil Corporation, pursuant to South Carolina statute, to marshal Covil's assets and administer those assets for use in the defense of Covil's asbestos litigation. Given the unusual nature of latent occupational disease, the Court understands that Mr. Protopapas may find that he is required to serve in this role for years to ensure that Covil meets its obligations to future South Carolinians diagnosed with asbestos-related disease as a result of Covil's business operations.

The Objecting Insurers repeatedly insinuate that the Receiver's key role in these proceedings is to protect the Objecting Insurers from the contractual obligations that they voluntarily assumed when they sold insurance policies to Covil. This Court views the Receiver's role differently. As the Court's appointed receiver, Mr. Protopapas is charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion. This Court's appointed Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases. Non-Party USF&G's contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd.

This Court manages the South Carolina docket, and has observed Covil's behavior in numerous asbestos cases since Mr. Protopapas was appointed. From this Court's perspective, Mr. Protopapas has managed Covil's defense in those cases appropriately and professionally, while consistently meeting his obligations to Covil's insurers.

Having tried a Covil asbestos case to verdict, this Court is keenly aware of Covil's history and finds that this course of action – although it may take years to conclude - is equitable to all involved, including the insurers who sold liability insurance to Covil and to the people of

South Carolina who have been (and may in the future) diagnosed with asbestos-related diseases potentially attributable to Covil's business operations.

As to the Objecting Insurers, this Court again notes the extreme inconsistency in the positions advanced in objecting to the Court's establishment of the Covil QSF and approval of these three settlements. The Objecting Insurers knew about the previous receivership for almost three decades, yet USF&G waits until its motion to reconsider to raise an objection based on this previous receivership. At this late hour, USF&G now takes the position that the prior receivership may mean that Covil is not subject to suit in any underlying asbestos claim. *See* Motion to Stay at 2. The Court would note that USF&G, along with Zurich, animated an otherwise dissolved Covil for purposes of defending Covil's asbestos litigation from 1993 until 2018. In its role as the South Carolina Asbestos Court and as the trial court in a Covil asbestos case tried to verdict, this Court observed that the Insurers operated Covil without input from any policyholder, and they did so without ever raising this new claim that Covil was not subject to suit because of a prior receivership.

This late and seemingly frivolous objection simply raises additional questions about the propriety of the Objecting Insurers' management of Covil prior to 2018. If the Objecting Insurers really relied on the position that they now have asserted, they would not have animated an otherwise extinct Covil for twenty-five years. Having demonstrated their true view of Covil's role in asbestos litigation for more than two decades, USF&G now raises a last-minute objection that is entirely inconsistent with its course of conduct since 1993.

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V. Objecting Insurers' Motion to Stay

USF&G also contends that these proceedings should be stayed. It asserts that a stay would not harm the Receiver. Once again, USF&G is simply not being honest with this Court. As noted in the Receiver's response, at the same time that USF&G advances its argument to stay the Receiver's settlements, USF&G is also demanding that the Receiver fund portions of underlying asbestos settlements. USF&G knows that the Covil QSF lacks funding to respond to these settlement demands, and USF&G is currently leading the effort to prevent the Covil QSF from receiving the proceeds from the sale of some of its insurance assets.

The Objecting Insurers object that they were not given time nor opportunity to file additional objections. This Court provided ample time for briefing on these matters and has never prohibited any such filings, despite how repetitive and voluminous many of the Objecting Insurers' filings have been.

The Objecting Insurers object that they have standing to behave as parties despite their oft-asserted status as non-parties. The fact remains that they are not parties, despite having had months to intervene in these proceedings. The case that they cite for the proposition that they need not be parties to object to these proceedings does not stand for this proposition at all. Contrary to the way that it was represented to this Court, the entity seeking relief in *Ross Development Corporation v. Fireman's Fund Insurance Co.*, 809 F.Supp. 2d 449 (D.S.C. 2011) was a third-party defendant (*i.e.*, a party) to the litigation described therein. Once again, the Objecting Insurers took liberties in representing authority to this Court.

The Objecting Insurers object that this Court's April 10, 2020 order impairs their contribution, indemnification, and subrogation rights. This Court already has addressed these

objections related to potential, future contribution rights. Perhaps USF&G said it best in its April 20, 2020 filing in Judge Hendricks' court: "USF&G does not, and cannot, know the extent of its contribution claims until its right to contribution is ripened by resolution of underlying claims…." *See* USF&G's April 21, 2020 Reply to Response in Opposition to Motion to Enforce Injunction at ECF 148 at 6, Case No. 7:18-cv-03291-BHH, in the United States District Court of South Carolina, Spartanburg Division. As this Court has observed before, this Court is charged with supervision of the South Carolina asbestos docket and the Covil receivership. The Receiver has reached settlements with three of Covil's insurers, and these parties seek approval and closure. The Objecting Insurers seek to prevent this settlement based on a theory that their future, possible, unknowable rights could be impaired. Yet USF&G did not even seek relief relating to these rights in the insurance coverage case pending with Judge Hendricks. *See* USF&G's January 18, 2019 Answer, ECF 39. Its motivation to assert future rights now is thus questionable.

Accordingly, this Court will not place its important business on hold while and until the Objecting Insurers' future potential rights "ripen" to the point that they are ready to have them adjudicated. The law of South Carolina favors settlements, and this Court has a complex asbestos docket to manage. The Receiver's significant settlements have already resulted in a decrease in litigation in multiple state and federal courts, and this Court stands ready to adjudicate contribution rights related to its asbestos docket and the Covil QSF that it will supervise should the necessity to adjudicate such rights ever materialize in any of this Court's cases.

Until such time, the Objecting Insurers cannot indefinitely block this Court's functions in defense of rights that they may, or may not, possess at some undetermined time in the future. Finally, the concept of subrogation, although mentioned frequently by the Objecting Insurers, is not at issue in these proceedings.

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VI. Ruling

For the reasons stated above, this Court hereby **DENIES** Non-Party United States Fidelity and Guaranty Company's ("USF&G") April 20, 2020 Motion to Reconsider, Alter or Amend Approval Order; Non-Party USF&G's April 20, 2020 Motion to Stay; and Non-Party Zurich's April 20, 2020 Motion to Reconsider, Alter or Amend Approval Order.

AND IT SO ORDERED this _____ day of _____, 2020.

_____
Jean H. Toal, Chief Justice of the Supreme Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.

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York Common Pleas

Case Caption: Wayne Ervin Howe , plaintiff, et al VS Air & Liquid Systems Corp , defendant, et al

Case Number: 2015CP4603456

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

EXHIBIT 36

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C/A NO.: 2018-CP-40-04940 **NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT**

TO: M. TODD CARROLL, ESQUIRE, WILLIAM P. DAVIS, ESQUIRE, MARIEL D. NORTON, ESQUIRE, MARY BETH FORSHAW, ESQUIRE AND ANDREW T. FRANKLE, ESQUIRE, ATTORNEYS FOR UNITED STATES FIDELITY & GUARANTY COMPANY AND JOHN WILKERSON, ESQUIRE ROBERT E. KNEECE, III, ESQUIRE AND TAYLOR STANLEY, ESQUIRE ATTORNEYS FOR ZURICH AMERICAN INSURANCE COMPANY:

PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation ("the Receiver"), by and through the undersigned counsel, will move before the Honorable Chief Justice Jean Hoefer Toal as soon as this matter may be conveniently heard, for an Order of the Court granting sanctions against United States Fidelity & Guaranty Company ("USF&G"), Zurich American Insurance Company ("Zurich") and their attorneys pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings and Sanctions Act[1] ("the Act"). This Motion is based upon the frivolous continued objection to settlement,[2] the following grounds, and any other

[1] S.C. Code Ann. §§ 15-36-10 to -100.

[2] The Receiver has a Motion pursuant to Rule 11 and the Act currently pending before the Court, filed on April 20, 2020, requesting sanctions against USF&G for its frivolous objection to

grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion.[3]

A. LAW GOVERNING FRIVOLOUS CONDUCT

Two sets of laws govern frivolous conduct of parties and their attorneys: the Act and Rule 11, SC.R.C.P. The Act precludes sophisticated litigants, such as USF&G, from filing frivolous objections, motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

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settlement and outlining the USF&G's pattern of frivolous conduct before the Court. The Receiver incorporates by reference his prior Motion and related filings herein. The Receiver now brings this Motion related to USF&G's and Zurich's frivolous conduct arising after the Receiver filed the April 20, 2020 Motion.

[3] In an effort to procedurally simplify this Motion, the Receiver has filed this Motion only in the above-referenced case. However, the Receiver notes USF&G and Zurich's sanctionable conduct also occurred in *Roxanne Falls, et al. v. Covil, et al.*, C/A No.: 2015-CP-46-02155; *Timothy W. Howe, et. al v. Covil, et al.*, C/A No.: 2015-CP-46-03456; *Charles T. Hopper, et al. v. Covil, et al.*, C/A No.: 2019-CP-40-00076; and *James Hill, et al. v. Covil, et al.*, C/A No.: 2018-CP-40-04680.

S.C. Code Ann. § 15-36-10(A)(3). The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id.

On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G).

In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time

available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E).

Similarly, Rule 11 also requires every pleading, motion, or other paper to be signed by at least one attorney of record who is admitted to practice law in South Carolina or the unrepresented party. Rule 11(a), SCRCP. "The . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." *Id.* If a pleading, motion, or other paper is signed in violation of Rule 11,

> the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id. The standard for sanctions under Rule 11 is essentially the same as that of the FCPSA. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). Both the Rule and the Act afford this Court the opportunity to review and sanction frivolous conduct.

B. FRIVOLOUS AND IMPROPER CONDUCT SINCE APRIL 20, 2020

After failing in its attempt to once again subvert this Court's jurisdiction by directing the Court on how to manage its docket and despite the Court's denial of their frivolous non-party objection to the three settlements, USF&G's and Zurich's frivolous conduct continues unabated. As seen in this Court and other courts, USF&G and Zurich have deployed improper tactics to obstruct and delay rulings from this Court at any cost and frustrate the purpose of the Receivership, even when it means filing frivolous discovery, motions, and memoranda that a reasonable attorney

would know was not supported by law. On April 20, 2020, USF&G and Zurich filed non-party Motions to Reconsider, Alter, or Amend ("Motion to Reconsider") this Court's April 10, 2020 Order approving the three settlements ("the settlement order"). USF&G also filed a non-party Motion to Stay the Court's enforcement of the settlement order until the Court ruled on its Motion to Reconsider and until the settlement order was not subject to further appellate review.

In its Motions to Reconsider, USF&G and Zurich largely reasserted their previous arguments, which the Court already ruled (1) they did not have standing to raise by virtue of their non-party status and refusal to avail itself of the procedure available to become a party to this action and (2) their arguments were without merit. *See* April 10, 2020 Order approving settlements and establishing qualified settlement fund, C/A No. 2015-CP-46-02155. Despite the Court repeatedly finding USF&G and Zurich lack standing to raise non-party objections, USF&G and Zurich continues to assert their non-party status and flout South Carolina law and procedure.

USF&G also raised, for the first time in its Motion to Reconsider, an argument about the effect of a prior Covil receivership on this Court's Receivership. Zurich has made these same frivolous arguments in other Courts. *See, e.g.*, Motion To Intervene and Motion for Relief from Judgment under Rule 60(b) filed in *Ann Finch v. Covil Corporation* on 5/1/20 (MDNC 1:16-CV-01077); Motion for Leave to Amend and Supplement Pleadings filed in *Covil Corporation v. Zurich American Insurance Company, et al* on 5/14/20 (DSC 7:18 -cv- 3291) ("As a result of disavowing and seeking judicial determination [from Chief Justice Toal] as to the invalidity of the statutory defense, the Receiver has breached his contractual duty to cooperate with Zurich in Covil's defense"); and Motion to Intervene and Motion for Relief from Order Transferring Jurisdiction Dated May 1, 2020 filed in *First Savings Bank v. Covil Corporation* on 5/15/20 (Greenville County Court of Common Pleas c/a/ 91-CP-23-4445). In their arguments, Zurich and

USF&G disingenuously argue they recently discovered Covil was judicially dissolved in the prior receivership, and the prior receiver was the permanent receiver of Covil. However, as the Court found in its Order denying reconsideration, USF&G knew about the prior receivership for over twenty-eight years, and any argument that the prior receivership affects these proceedings is meritless. *See* May 7, 2020 Order Denying Motions to Reconsider and Motion to Stay, C/A No.: 2015-CP-46-02155. The Receiver will provide the Court *in camera* with documents previously identified to Zurich and USF&G detaining their knowledge of the prior Receivership from 1992 to present. Those documents include:

DATE	**EVENT(S)**	DOCUMENT(S)
11.14.1991	Danny White (insurance appointed counsel for Covil) writes to the former Receiver, Winston Lee, and copied the three carriers, including USFG and Zurich (Maryland) adjuster, David Kappus.	Exh. A. Sealed ZUR 6413, produced by Zurich 11.8.2019
11.14.1991	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. B. Sealed ZUR 6414-6415, produced by Zurich 11.8.2019 (highlighted at ZUR 6414)

11.25.1991	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. C. Sealed ZUR 6408, produced by Zurich 11.8.2019 (highlighted at ZUR 6408)
2.14.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. D. Sealed ZUR 6366-6367, produced by Zurich 11.8.2019 (highlighted at ZUR 6367)
2.24.1992	Danny White (insurance appointed counsel for Covil) wrote to Reid Merline at Nelson Mullins Riley Scarborough advising: "[redacted]"	Exh. E. Sealed GWBC 4141
3.10.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. F. Sealed ZUR 6335-6336, produced by Zurich 11.8.2019

	[redacted]"	(highlighted at ZUR 6336)
3.10.1992	Danny White (insurance appointed counsel for Covil) writes to Jim Covil and copies the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: [redacted]	Exh. G. Sealed ZUR 6337, produced by Zurich 11.8.2019
4.15.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]	Exh. H. Sealed TRAV ST 13257- 13259 (highlighted at TRAV ST 0013258)
5.11.1992	Greenville County Master In Equity, Judge Simmons issues an interim Order setting forth judicial dissolution.	Exh. I. Not sealed 5/11/92 Order

6.24.1992	Danny White (insurance appointed counsel for Covil) writes to Jerri Soloman of Taraska, Grower, Unger and Ketcham law firm, blind copying three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus and Paul Inferrara: “[redacted]	Exh. J. Sealed TRAV ST 169098
12.7.1992	Greenville County Master In Equity, Judge Simmons issues the final Order and does not mention dissolution.	Exh. K. Not sealed 12/7/1992 Order
7.30.1993	South Carolina Secretary of State administratively revokes Covil Corporation.	Exh. L. Not Sealed 7/30/1993 SOS Record
3.23.1994	Lori J. Sheppard, adjuster for Zurich (Maryland) prepares an internal memorandum: “[redacted]	Exh. M. Sealed ZUR 905-907, produced by Zurich 11.8.2019 (highlighted at ZUR 906)
9.15.1994	Danny White (insurance appointed counsel for Covil) writes to Lori J. Sheppard, Environmental Claims Supervisor for Zurich (Maryland): “[redacted]	Exh. N. Sealed ZUR 5497-5498, produced by Zurich 11.8.2019 (highlighted at ZUR 5498)

	[redacted]	
9.15.1994	Lori Sheppard of Zurich (Maryland) prepares an internal Memorandum after a Conference call with Danny White (insurance appointed counsel for Covil), Zurich (Maryland), USFG, and Sentry and notes: "[redacted]	Exh. O. Sealed ZUR 5492-5496, produced by Zurich 11.8.2019 (highlighted at ZUR 5492)
11.11.1994	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, Lori J. Sheppard: [redacted]	Exh. P. Sealed ZUR 5473-5487, produced by Zurich 11.8.2019 (highlighted at ZUR 5474)
11.16.1994	Zurich Claim File Activity Memorandum handwritten notes: "[redacted]	Exh. Q. Sealed ZUR 5471, produced by Zurich 11.8.2019
10.3.1995	Zurich (Maryland) internal Memorandum from Paul Bender to Charles Brock: [redacted]	Exh. R. Sealed ZUR 5389, produced by Zurich 11.8.2019

5.3.1996	Zurich (Maryland) internal 180 Day Report: “[redacted]”	Exh. S. Sealed ZUR 1458-1461, produced by Zurich 11.8.2019 (highlighted at ZUR 1458)
8.16.1996	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote a letter to Harriet Vinyay of Teague Campbell. Teague Campbell was Covil’s lawyers in North Carolina asbestos Industrial Commission claims: “[redacted]”	Exh. T. Sealed GWBC 3578
8.31.1998	Gallivan White & Boyd (insurance appointed counsel for Covil) sends a billing statement billing for: “[redacted]”	Exh. U. Sealed TRAV ST 11510
8.25.1999	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote a letter to Regina Ryan of Zurich and USFG and the other carriers: “[redacted]”	Exh. V. Sealed TRAV ST 13014
11.17.1999	Gallivan White & Boyd (insurance appointed counsel for Covil) send a billing statement to John Truzzulonio of Zurich. Billing statement reflects that: Stephanie Flynn, attorney at Gallivan White & Boyd billed for [redacted]	Exh. W. Sealed ZUR 9218-9264 (extract only), produced by Zurich 11.8.2019 (highlighted at ZUR 9221)

3.19.2001	Zurich Claim File Activity Memorandum handwritten notes: “[redacted]”	Exh. X. Sealed. ZUR 6076, produced by Zurich 11.8.2019
4.4.2001	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote to Mona Wallace at Wallace and Graham copying Michele A. Horutz of Zurich, USF&G and other carriers: “[redacted]”	Exh. Y. Sealed. ZUR 5994-5995, produced by Zurich 11.8.2019 (highlighted at ZUR 5994)
4.5.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil’s Answer to First Amended Complaint: **“Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued.”**	Exh. Z. Not sealed. Finch v. BASF, ECF 74 - April 5, 2017 Covil’s Answer to First Amended Complaint
8.26.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil’s Answer to Second Amended Complaint: **“Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued.”**	Exh. AA. Not sealed. Finch v. BASF, ECF 87 - August 26, 2017 Covil’s Answer to Second Amended Complaint

10.23.2017	Danny White (insurance appointed counsel for Covil) billed Zurich for a telephone call he had with Carol Weill of Zurich: "[redacted]	Exh. BB. Sealed 1/31/2018 Gallivan White & Boyd Billing Statement Extract
11.17.2017	Ron Tate of Gallivan White & Boyd (insurance appointed counsel for Covil) billed Zurich for a research memo on [redacted]	Exh. BB. Sealed. 1/31/2018 Gallivan White & Boyd Billing Statement Extract
12.27.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil's Answer to Third Amended Complaint: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. CC. Not sealed Finch v. BASF, ECF 156 - December 27, 2017 Covil's Answer to Third Amended Complaint
1.5.2018	In Jerry H. Crawford v. Celanese Corporation, et al, (pending in Spartanburg County, South Carolina, Case Number 2017-CP-42-04429), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as it's 4th Affirmative Defense: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. DD. Not sealed. 1/5/2018 Covil Answer to Complaint.
3.1.2018	Hartford counsel James P. Ruggeri writes to Ronald G. Tate of Gallivan White & Boyd (insurance appointed counsel for Covil): "[redacted]	Exh. EE. Sealed. March 1, 2018 Ruggeri Letter to Gallivan White & Boyd.

	[redacted] ” He continues: “[redacted]	
3.13.2018	Barb Davis of Sentry Insurance emailed Gallivan White & Boyd (insurance appointed counsel for Covil) copying Zurich and USF&G: “[redacted] ” David Rheney of Gallivan White & Boyd (insurance appointed counsel for Covil) replied at 2:41 PM to Davis and copied Carol Weill and John Weiss of Zurich, and Steven Fries of Travelers: “[redacted]	Exh. FF. Sealed. TRAV ST 51550 –51551

	[redacted]	
5.18.2018	James P. Ruggeri of Hartford writes to Gerald Begley of Travelers: "[redacted]"	Exh. GG. Sealed. Receiver_Hartford005382
6.15.2018	Carol Weill of Zurich wrote to Mark Wall of Wall Templeton Haldrup (insurance appointed counsel for Covil) and carriers: "[redacted]" Mark Wall responded to Weill of Zurich: "[redacted]".	Exh. HH. Sealed TRAV ST 48242-48243
8.13.2018	William A. Bulfer of Teague Campbell (represents Zurich) writes to attorney for Hartford James P. Ruggeri: "[redacted]"	Exh. II. Sealed Receiver_Hartford004538

11.2.2018	Order Appointing a Receiver for Covil Corporation entered by Chief Justice Jean H. Toal (Ret): **"The Court finds that the application is meritorious under the applicable statute because Covil Corporation has dissolved."**	Exh. JJ. Not sealed. November 2, 2018 Order appointing Receiver
4.20.2020	USF&G's raises the prior receivership orders to Chief Justice Toal in Falls for Smith, Howe, Hopper, Hill and Taylor matters (pending in South Carolina state courts). USF&G's Motion to Reconsider: **"(I)t now appears that by operation of law Covil no longer has any underlying liabilities in the asbestos suits currently pending against Covil or which may be filed in the future as any such claims had been extinguished ten years following Covil's dissolution."** See USF&G's Motion to Reconsider, pg. 3, ¶3, filed in A) Falls for Smith vs. CBS Corporation, et al, York County, SC, 15-CP-46-02155; B) Howe vs. Air & Liquid Systems Corporation, et al, York County, SC, 15-CP-46-03456; C) Hopper vs. Air & Liquid Systems Corporation, et al, Richland County, SC, 19-CP-40-00076; D) Hill vs. Advance Auto Parts, Inc., et al, Richland County, SC, 18-CP-40-04680; and, E) Taylor vs. Air & Liquid Systems Corporation, et al, Richland County, SC, 18-CP-40-04940.	Exh. KK. Not sealed. April 20, 2020 Non-Party USF&G's Motion to Reconsider (without exhibits)
5.1.2020	Judge Simmons transfers First Savings Bank FSB vs. Equitable Enterprise, Covil Corporation, Oxytherm, Inc. (91-CP-23-0445) (the prior receivership) to Chief Justice Jean H. Toal: **"..the Court finds it proper that the within case be referred and transferred to the Honorable Jean Toal for any and all further proceedings"**	Exh. LL. Not sealed. May 1, 2020 Simmons Form 4 Order
5.7.2020	Chief Justice Toal denies USF&G and Zurich's Motions to Reconsider and Stay: **"Non-Party USF&G waited until its Motion to Reconsider (and concurrently filed Motion to**	Exh. MM. Not sealed.

	Stay) to lodge, for the first time, an objection to this Court's Approval order based on the existence of a prior receiver for Covil, Mr. Winston Lee….However, based on the conclusive evidence submitted in connection with this motion, it is abundantly clear that USF&G and Zurich have been aware of the first Covil receivership since at least 1991. Yet, remarkably, USF&G waited over 28 years to raise this objection and now feigns to have only recently learned about this previous receivership proceeding. USF&G even goes so far as to blame Covil, a corporation that was administratively dissolved in 1993 and operated by the Objecting Insurers until the appointment of a Receiver in 2018, for not bringing this prior receivership to this Court's attention. USF&G is not being honest with this Court." See Toal Order, p. 5-6 Toal continues: **"The Court finds sections 33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil. Further, section 33-14-107(c)(3) did not exist at the time of Covil's 1992 dissolution, and the Comments to section 33-14-107 show the General Assembly specifically chose not to adopt what is today subsection (c)(3), which addresses the bar of contingent claims and claims based on an event after dissolution, from the Model Act. In fact, the Comments note the clear legislative intent behind the version of the statute in effect at the time of Covil's dissolution was that "[t]he statue of repose only applie[d] *to claims existing at dissolution*." *See* South Carolina Reporter's Comments, S.C. Code Ann. 33-14-107. The General Assembly did not adopt subsection (c)(3) until 2004, and as such, this subsection, which did not exist until either eleven or twelve years after Covil's dissolution, clearly cannot apply."** See Toal Order, p. 13	May 7, 2020 Order Denying Motions to Reconsider and Motion to Stay

	Finally, Toal states: **"The Objecting Insurers repeatedly insinuate that the Receiver's key role in these proceedings is to protect the Objecting Insurers from the contractual obligations that they voluntarily assumed when they sold insurance policies to Covil. This Court views the Receiver's role differently. As the Court's appointed receiver, Mr. Protopapas is charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion. This Court's appointed Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases. Non-Party USF&G's contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd."** See Toal Order, p. 14	

USF&G also raised an argument that "Covil no longer ha[d] any underlying liabilities in the asbestos suits currently pending against Covil or which may be filed in the future, as any such claims had been extinguished ten years following Covil's dissolution." *See* USF&G's Motion to Reconsider, p. 3. Although this Court ruled against the Insurers on this baseless argument, Zurich has now repeatedly made this same argument in the above-referenced cases.

After the Receiver submitted a memorandum in opposition explaining why the bar did not apply and informing the Court of a relevant change in the statutory law that USF&G failed to mention, USF&G changed positions in an attempt to prevent a ruling from this Court by arguing that, although it was the one to raise the issues to the Court, it did not mean to seek a ruling from the Court "as to whether any asbestos claims are barred, whether jurisdiction is lacking over any claims or parties, or whether the Receiver was properly appointed." *See* USF&G's Reply in further

support of its Motion to Reconsider, p. 2. Zurich went so far as to file three documents in three different Courts arguing that the Receiver is failing to cooperate with Zurich because the Receiver is following this Court's rulings.

The frivolous conduct of USF&G and Zurich in continuing to raise meritless objections to this Court's approval order is sanctionable by the Court. Section 15-36-10(E) sets forth seven factors for the Court to consider: (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. USF&G's objections to the establishment of the Qualified Settlement Fund and this Court's approval of the settlements satisfy the relevant Frivolous Proceeding factors.

USF&G's and Zurich's conduct satisfies the relevant factors for a frivolous proceeding and Rule 11 sanction. As USF&G and Zurich are not a party to this action, this action satisfies the first factor the Court should consider in determining whether to award sanctions. This action further satisfies the second factor because it is not complex to file for leave to intervene as a party, and the Court has previously indicated USF&G must intervene as a party to have standing to raise these objections.[4]

As further outlined in the Receiver's pending April 20 Motion, USF&G and its attorneys have undertaken a plan to prevent rulings from this Court and subvert the Court's jurisdiction by any means possible regardless of the confines of the law. Even after specific rulings and directions from this Court, USF&G continues its attempts to manufacture reasons to prevent this Court from

[4] The Receiver incorporates the arguments set forth in it April 20, 2020 Motion for Sanctions which address the remaining factors.

ruling and has shown its willingness to ignore South Carolina law to do so. Instead of following proper channels to raise objections, such as by intervening as a party in the matter which it has vigorously argued it is not a party, USF&G has attempted to improperly forge its own path outside of the confines of the law. USF&G has further presented new, meritless arguments to this Court in its Motion to Reconsider, mischaracterizing its own knowledge of the facts and referring to law that did not apply during the relevant time period. Further, after raising issues to the Court in its argument in support of reconsidering the approval order, USF&G has changed positions to then argue the Court should reverse the approval order but not rule on the issues it raised. USF&G and its attorneys know these arguments by USF&G were not raised in good faith and were merely meant to harass the Receiver and delay this Court from ruling.

C. IMPACT OF MERITLESS LITIGATION AND OBJECTIONS ON SETTLEMENT

The Covil Qualified Settlement Fund (Covil QSF) exists as a tool to manage Covil's assets and defend against Covil's legacy liabilities. The Covil QSF's assets must be used to meet its expenses in handling Covil's litigation and to fund settlements or judgments in asbestos cases, as and where appropriate. At the conclusion of Covil's asbestos litigation experience, any remaining funds will be donated to several 501(c)(3) charitable organizations. Accordingly, Covil QSF's assets must be managed carefully and prudently with an eye toward these critical goals. Unfortunately, Zurich and USF&G's litigation misconduct places an unnecessary strain and burden on the Covil QSF's resources by forcing it to respond, again and again, to baseless and previously overruled litigation positions while being forced to hound these Insurers to respond responsibly to the scores of pending asbestos cases that Covil faces. This Court has maintained continuing jurisdiction over Covil QSF so as to supervise its operations to ensure that it fulfills its core functions. Likewise, the Receiver takes these obligations very seriously and would request

that Zurich and USF&G be required to reimburse and replenish the Covil QSF for the unnecessary expenses and undue burden that their misconduct has forced the Covil QSF to endure. These Insurers' strategy of "litigation attrition" is inappropriate, and it is not a burden that the Covil QSF should be required to bear in the first instance.

D. CONCLUSION

Accordingly, the Receiver respectfully requests the Court sanction USF&G and Zurich for their conduct in violation of Rule 11 and the Act and award the Receiver attorney's fees and costs incurred as a result of their numerous frivolous motions, documents, and arguments. The Receiver further requests any other relief the Court deems just and proper. Pursuant to Rule 11, the undersigned counsel certifies that further consultation would serve no useful purpose in resolving the issues raised herein.

Respectfully submitted,

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Attorneys for the Receiver

This 18th Day of May, 2020

EXHIBIT 37

ELECTRONICALLY FILED - 2020 May 20 6:38 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4004940

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE TAYLOR,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

NON-PARTY USF&G'S RESPONSE TO THE RECEIVER'S MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT

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PRELIMINARY STATEMENT[1]

The Receiver's motion for sanctions against United States Fidelity and Guaranty Company ("USF&G") and its attorneys[2] should be denied because the conduct at issue does not come close to satisfying the high bar required to establish sanctionable conduct under SCRCP 11 ("Rule 11") or the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"). USF&G and its attorneys take very seriously their obligations under Rule 11 and the Act and strongly object to the Receiver's allegations that they have advanced "frivolous" legal arguments or "utilized improper tactics to frustrate the purpose of the Receivership" in violation of those obligations. Such accusations require substantial support, and the standards to establish violations of Rule 11 and the Act are necessarily high, lest they be employed as tactical weapons to stifle zealous advocacy. For the reasons set forth below and in the accompanying expert affidavit of Desa Ballard, Esq., dated May 20, 2020 ("Ballard Aff."), which is attached hereto as Exhibit 1, the Receiver's motion falls far short of the required showing and should therefore be denied.[3]

While purportedly predicated on USF&G's recent limited objection to certain aspects of the Receiver's settlements with other insurers, most of the motion is dedicated to a recitation of alleged grievances about past conduct, including allegations concerning litigation in other courts,

[1] By filing this response to the Receiver's motion for sanctions, USF&G does not waive its continuing objections to the Court's personal jurisdiction over it.

[2] The Receiver seeks sanctions against "USF&G and its national counsel rather than its local counsel," *see* Mot. at 1 n.1. However, different firms were involved in the various matters the Receiver's motion refers to, and he does not distinguish between them. The motion is thereby deficient in failing to provide proper notice of the sanctions the Receiver seeks against which firms, and the specific misconduct each is alleged to have engaged in.

[3] As a general matter, USF&G incorporates by reference all prior filings it has submitted in this Court that relate to the issues discussed herein.

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which the Receiver characterizes as a "pattern of frivolous and improper conduct." Receiver's Motion For Sanctions Pursuant to Rule 11, SCRCP, and the South Carolina Frivolous Proceedings Sanctions Act ("Mot.") at 4–10. But each of these assertions fails for numerous reasons. Most fundamentally, the Receiver incorrectly seeks to elevate his (and, on some issues, the court's) substantive disagreement with USF&G's legal positions into sanctionable conduct, without ever substantiating his charge that USF&G's positions were frivolous, as Rule 11 and the Act require. USF&G has at all times advanced factual and legal arguments in this Court and other courts that it believes were both correct and supported by existing law. Objectively reasonable arguments made in good faith—as USF&G's arguments have always been—do not become sanctionable simply because a court rejects them. If that were the standard (and it is not), every losing litigant would be subject to sanctions. Instead, the test is whether the argument was frivolous when made, which is not remotely the case here.

Many of the Receiver's allegations are deficient for additional reasons. First, much of the conduct that is the subject of the Receiver's motion arose in federal court proceedings. The conduct of USF&G and its counsel in those litigations is not properly before this Court and is governed by those federal courts' sanctions rules. Neither Rule 11 nor the Act applies to conduct before other courts, and this Court lacks jurisdiction to enter sanctions based on such conduct. Second, the Receiver repeats many of the same allegations he previously relied upon in seeking and obtaining prior sanctions and contempt orders from this Court. Although the Receiver sought monetary sanctions in connection with those prior efforts, this Court declined to award them. The Receiver cannot now seek to revive his prior requests for monetary sanctions for the same conduct.

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Sanctions should be rarely sought and even more rarely granted. They are reserved for those exceptional circumstances where the conduct of a litigant and/or its counsel is so egregious as to warrant the invocation of such severe remedies. The Receiver's motion seeks instead to punish USF&G and its counsel for being adverse to the Receiver's own positions on a host of issues. That is not grounds for sanctions. The motion should be denied in its entirety.

LEGAL STANDARD

The Receiver seeks sanctions pursuant to both Rule 11 and the Act. But beyond simply reciting the rule and the statute, the Receiver provides no analysis of the standards under either. Under Rule 11, a party's litigation conduct is evaluated under a subjective standard to assess whether a filing or an argument was made in good faith. *See* Rule 11, SCRCP, Note (explaining that "[t]his version of Rule 11(a) is not nearly so stringent as the latest version of the Federal Rule which became effective August 1, 1983"); *Ex Parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 598 & n.8, 713 S.E.2d 624, 628 & n.8 (2011) ("Rule 11 is evaluated by a subjective standard."). It is violated only when a lawyer subjectively acts in bad faith—which there is no suggestion of in the Receiver's motion—or makes "a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Bon Secours*, 393 S.C. at 598, 713 S.E.2d at 628.

Similarly, sanctions under the Act may be imposed when a filing includes an argument that "a reasonable attorney in the same circumstances would believe" is "clearly not warranted under existing law"; "was intended merely to harass or injure the other party"; or "is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based." S.C. Code Ann. § 15-36-10(A)(4)(a) (1976). Like Rule 11, this sets a very high bar to establish sanctionable conduct. The statute's plain language makes clear that sanctions are

permitted only when a filing's sole purpose is something other than advancing a defensible litigation position. Otherwise, the statute could be misused as a sword to chill an adversary's willingness to present arguments and preserve issues for appellate review.

Accordingly, courts routinely reject sanctions requests under the Act. *See, e.g.*, *Salty Fin Holdings, LLC v. Salty Fin Int'l, LLC*, Case No. 3:16-1798-MGL, 2018 WL 321567, at *3 (D.S.C. Jan. 8, 2018) (denying motion for sanctions under the Act because "Plaintiffs articulated a nonfrivolous theory for pursuing [their] claims, and sanctions are not warranted simply because Plaintiffs' theory was incorrect"); *Ray v. Bechtel Savannah River, Inc.*, Case No. 1:06-2946-HFF-JRM, 2007 WL 9734948, at *3 (D.S.C. Sept. 25, 2007) (denying motion for sanctions under the Act because the court "cannot conclude that South Carolina law is crystal clear" regarding the issue upon which sanctions were sought); *Preservation Soc'y of Charleston v. S.C. DHEC*, ___ S.C. ___, ___ S.E.2d ___, 2020 WL 811729, at *11 (S.C. Feb. 19, 2020) (reversing sanctions awarded by Administrative Law Court and affirmed by Court of Appeals because there were "no cases directly on point" that foreclosed the appellants' litigation strategy, and acknowledging that misuse of the Act chills a litigant's "duty to diligently advance" its position and "suppresses the vigorous representation" required by the adversarial process); *see also Father v. S.C. DSS*, 353 S.C. 254, 259, 578 S.E.2d 11, 14 (2003) ("A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act than one who merely acts 'without substantial justification.'" (quoting *Heath v. Aiken County*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990))).

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Based on these authorities, as well as the plain language of Rule 11 and the Act, the Court should deny the Receiver's motion, as there is absolutely no support for sanctions here.[4]

ARGUMENT

I. USF&G's Prior Acts Are Not A "Pattern Of Frivolous And Improper Conduct"

A. USF&G's Removal Petition Was Reasonable, Supported By Law, And Done In Good Faith

The Receiver contends that USF&G's removal of what was initially labeled a status conference proceeding from this Court to the United States District Court for the District of South Carolina on July 10, 2019 was "in clear violation of Rule 11 and the Act." Mot. at 5–6. That is incorrect. Leaving aside the Receiver's nine-month delay in raising this issue, USF&G's removal was not sanctionable conduct because it was done in good faith based on the recognized legal principle, discussed below, that a claim against an insurer, even if brought in a state court tort action to which the insurer is not a party, is a separate "civil action" that is subject to removal under 28 U.S.C. §1441. *See* Ballard Aff. ¶ 37 ("In my expert opinion, the removal was a reasonable and sound legal judgment, fully supported by cited state court rules, federal case law and the detailed chronology set forth in the Notice of Removal."). Indeed, when discussing the removal with this Court at hearings in July and September 2019, USF&G's counsel reaffirmed the good-faith basis for the removal, which this Court acknowledged. The Receiver, present at the hearing, did not challenge that conclusion.[5]

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[4] The Receiver also provided USF&G with no advance notice of his sanctions motion. See Section 15-36-10(D) of the Act.

[5] *See* Ex. 35 at 114:20–115:5 (July 11, 2019 Hr'g Tr.) ("MR. GOLLOGLY: Your Honor, I'm in a – I'm in a difficult position here today because it's my understanding that I can't really reach the merits without jeopardizing the – the jurisdiction issues that Your Honor just referenced. And – and first of all, let me just say, I – we meant no discourtesy by filing the notice of removal last night. THE COURT: That's okay. You have to do what your client expects you to

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Removal was prompted by the Receiver seeking rulings against USF&G and Covil's other insurers in a "status conference" proceeding. On June 18, 2019, the Receiver filed a Motion for a Status Conference in five underlying asbestos cases pending before this Court. USF&G was not a party to any of the underlying asbestos actions. Belying its mundane title, the Receiver's status conference motion sought substantive rulings against USF&G and Covil's other insurers, including declaratory relief on insurance coverage issues, production of documents and information to the Receiver, and a finding of contempt. *See* Ex. 2 at 6–12 (Receiver's Mot. for Status Conf.). All this despite the fact that the insurance coverage disputes between the Receiver and Covil's insurers, including USF&G, were pending in two federal proceedings.

Removal was based on a reasonable interpretation of the statute and relevant case law. The removability of the status conference proceeding depended on whether it was a "civil action" under the removal statute. 28 U.S.C. § 1441. Substantial federal appellate authority from multiple Circuits stands for the principle that the Receiver's claim for relief against Covil's insurers, although labeled a status conference motion, was a removable "civil action" separate from the five underlying tort cases.[6] This principle is set forth in decisions cited in paragraph 1 of USF&G's Notice of Removal: *Labertew v. Langemeier*, 846 F.3d 1028, 1031–32 (9th Cir. 2017); *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1139 (11th Cir. 2013); *Travelers Prop. Cas. v. Good*, 689 F.3d 714, 725 (7th Cir. 2012); *Butler v. Polk*, 592 F.2d 1293,

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do. I understand. MR. GOLLOGLY: Thank you. THE COURT: That's no problem."); Ex. 8 at 34:6–13 (Sept. 13, 2019 Hr'g Tr.) ("MR. OGBURN: There was a substantial good-faith basis for that notice of removal in our judgment. THE COURT: I don't have any problem with that . . . . THE COURT: Mr. Ogburn, please understand these comments are not intended to castigate y'all for doing good lawyering on behalf of your client. That's no problem. What I'm simply saying is, that [removal] was attempted.").

[6] USF&G was not a party to, and did not remove, the five underlying asbestos actions.

1295–96 (5th Cir. 1979); *Adriaenssens v. Allstate Ins. Co.*, 258 F.2d 888, 890 (10th Cir. 1958). *See* Ex. 3 (Notice of Removal, "*In re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas*," (D.S.C. July 10, 2019)) ("Notice of Removal"). For example, in *Labertew*, the Ninth Circuit held that a garnishment issue was a removable "civil action" because it was separate from the issues in the underlying tort action, and implicated the rights of the insurer. 846 F.3d at 1031. The principle articulated in these decisions applied to the state court proceeding the Receiver labeled a "status conference" because he sought affirmative relief against Covil's insurers, who were not parties to that proceeding. Based on these authorities, USF&G argued that "an insurance coverage dispute—although filed in a tort action under the tort action's caption and not styled as an original case-initiating pleading—is a distinct civil action for purposes of federal removal jurisdiction." Ex. 3 ¶ 1 (Notice of Removal). Specifically, the discovery and coverage rulings sought by the Receiver gave rise to a distinct civil action because they were an "attempt[] to impose new liability on new parties." *Jackson-Platts*, 727 F.3d at 1134. Thus, USF&G had a substantial good-faith basis for removal. *See* Ballard Aff. ¶ 37 ("In light of the bizarre position USF&G found itself in, *i.e.*, being required to appear at a status conference of cases to which it was not a party, an attempt at removal is not frivolous, in bad faith, or below the standard of what a reasonable lawyer would do in those circumstances.").

Further demonstrating that the status conference proceeding was a separate "civil action," it was filed under the new caption, "In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas." Although the procedural posture the Receiver created by filing his motion under this caption was opaque, the substance of the Receiver's filing was clear: he sought discovery from and substantive coverage rulings against Covil's insurers, including

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USF&G.[7] Thus, under the established legal precedent on which USF&G relied in its Notice of Removal, the Receiver's claim for relief against the insurers was a "civil action" subject to removal under 28 U.S.C. §1441. Under the removal statute, federal courts are not limited by labels the parties use in state court, such as "Motion for Status Conference." *See Labertew*, 846 F.3d at 1031 ("the labels the case had in the state court and the fact that the whole sequence had only one case number" are not determinative of the question of whether an action is independent); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (Roberts, C.J.) ("[T]here is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases.").

In addition, as USF&G further explained in its Notice of Removal, "[f]ederal question jurisdiction exists where a state court action would interfere with the defendant's ability to vindicate a claimed federal right (here, the right to invoke removal jurisdiction) in a pending action or the federal court's ongoing consideration of that right." Ex. 3 ¶ 15 (Notice of Removal) (citing *Hodges v. Demchuk*, 866 F. Supp. 730, 733 (S.D.N.Y. 1994) (Sotomayor, J.)). USF&G believed in good faith that the status conference proceeding requested by the Receiver risked interfering with USF&G's right to invoke removal jurisdiction on diversity grounds in a separate action that was then pending in the District of South Carolina, *i.e.*, *Protopapas v. Wall, Templeton & Haldrup, P.A.*, No. 3:19-cv-01635-BHH.

[7] *See, e.g.*, Ex. 2 at 6, 10 (Receiver's Mot. for Status Conf.) ("The Receiver respectfully requests a status conference to address . . . [t]he remaining and applicable limits of Covil's insurance policies . . . ."); Ex. 36 (Receiver's Mem. of Law on the Jurisdiction of this Court) (asking this Court to assert exclusive *in rem* jurisdiction over insurance coverage disputes). *See also* Ballard Aff. ¶ 37 ("It does not appear that the asbestos 'docket' was ever intended to address coverage litigation, yet it has somehow evolved to include coverage issues, receivership and legal malpractice issues.").

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USF&G's concerns prompting removal of the action were subsequently vindicated by the District Court. Although the South Carolina District Court remanded the status conference proceeding, USF&G's belief that the Receiver sought insurance coverage rulings in the state court proceeding proved accurate. In fact, Judge Hendricks subsequently enjoined the Receiver from continuing to seek insurance coverage rulings in the "In re: Receivership" proceeding. *See* Ex. 4 at 23 (Order on Mot. for Permanent Injunction, *Covil Corp. v. Zurich Am. Ins. Co. et al.*, No. 7:18-3291-BHH (D.S.C. Feb. 27, 2020), ECF 105) ("Injunction Order") (holding that "the Receiver *cannot* use the Receivership Court as a mechanism to indirectly force the Insurers to stake out litigation positions integral to coverage issues") (emphasis in original). *See also* Ballard Aff. ¶ 37, n.35 ("The recent injunction by Judge Hendricks supports the conclusion that insurance coverage issues ought not to be addressed in the state court proceedings.").

In sum, USF&G's removal of the status conference proceeding was within established legal principles, was objectively reasonable, and thus did not violate Rule 11 or the Act.

B. USF&G's Filing Of A Mediation Communication Was Also Reasonable, Supported By Law, And Done In Good Faith

USF&G did not act improperly when it (and other insurers) filed under seal, in a separate federal court action, an email evidencing the terms of a settlement agreement. SCADR Rule 8(c)(4) expressly permits disclosure of mediation communications to establish the terms of settlement, as was the case here. Even though this Court has since held otherwise, USF&G conducted itself in good faith and with a reasonable basis under the law when it disclosed the communication at issue to the District Court. *See* Ballard Aff. ¶ 38. In addition, as discussed in Section II, the filing at issue was made in federal court, not state court, thus removing any question regarding the propriety of that filing from the purview of Rule 11 or the Act. Finally,

the Receiver is barred from seeking further sanctions from this Court on an issue that was the basis for a prior sanctions motion and order.

USF&G and other insurers reasonably concluded that disclosure of the at-issue communication would not violate SCADR Rule 8(c).[8] On April 24, 2019—five days after settling the *Hill* and *Taylor* cases—the Receiver filed a malpractice action in South Carolina state court against Covil's attorneys in those cases, Wall, Templeton & Haldrup, P.A. ("Wall Templeton"), and Covil's insurers. *See* Ex. 5 at 4 (Sept. 19, 2019 Order); *see also* Ex. E to Ex. 6 at 37–39 (Mot. to Reconsider Sept. 19, 2019 Order). The Receiver did so despite the fact that, as a condition of the *Hill* and *Taylor* settlements, the Receiver had agreed via email to cooperate with the insurers in the vindication of all parties' rights against Wall Templeton. The Receiver's filing of a go-it-alone complaint against Wall Templeton—containing allegations that, if proven, could have nullified any malpractice claim by the insurers against Wall Templeton—violated that condition of the settlement. After removing the Receiver's action to the District of South Carolina, USF&G and the other insurers filed a motion to dismiss the action, to which they attached, under seal, a redacted version of the email agreeing to the settlement condition at issue. *See* Ex. 7 (Joint Mot. to Seal and Mem. in Support, *Protopapas v. Wall, Templeton & Haldrup, P.A, et al.*, No. 3:19-cv-01635 (D.S.C. June 13, 2019), ECF No. 11) ("Joint Mot. to Seal").

[8] See Ex. 6 (USF&G's Motion to Alter or Amend Contempt Order of Sept.19, 2019, and the exhibits thereto) ("Mot. to Reconsider Sept. 19, 2019 Order") (responding to this Court's first contempt order against USF&G for allegedly improperly disclosing protected communications); Ex. 12 (USF&G's Motion to Reconsider, Alter or Amend Contempt Order of Jan. 8, 2020, and the exhibits thereto) ("Mot. to Reconsider Jan. 8, 2020 Order") (responding to this Court's second sanctions order finding USF&G in contempt for allegedly violating four of the Court's orders). The latter motion remains pending. *See also* Ex. 37 (USF&G's Supplemental Submission in Further Support of Its Motion to Reconsider, Alter or Amend Contempt Order of Jan. 8, 2020, and the exhibits thereto).

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The email evidences terms of the settlement agreement between the Receiver and insurers, and was filed to establish one of those terms. As a result, the filing on its face squarely falls within Rule 8(c)(4)'s exception to the general rule that mediation communications are confidential and cannot be disclosed. *See* SCADR Rule 8(c)(4); *see also* Ex. 6 at 6–7 (Mot. to Reconsider Sept. 19, 2019 Order); *May v. May*, 428 S.C. 131, 136, 833 S.E.2d 78, 80 (Ct. App. 2019) (explaining that mediation communications fall within Rule 8(c)(4)'s confidentiality exception if they are disclosed "for the limited purpose in judicial proceedings of *establishing*, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation") (emphasis added). As explained to this Court at a September 13, 2019 hearing, and again in USF&G's pending Motion to Reconsider the Sept. 19, 2019 Order, that was exactly the purpose of the filing here. *See* Ex. 8 at 120:23–125:9 (Sept. 13, 2019 Hr'g Tr.). At a minimum, there were substantial grounds supporting USF&G's view that filing the settlement communication under seal for the purpose of establishing the terms of settlement was permitted under SCADR Rule 8(c)(4). Indeed, USF&G was not alone in reaching that conclusion—Zurich's and Sentry's counsel joined the filing, further evidencing its objective reasonableness. *See* Ex. 7 (Joint Mot. to Seal).

The insurers also took appropriate measures to limit the disclosure, a fact that mitigates against imposition of any sanctions. They redacted all parts of the email other than the portion memorializing the specific language at issue and filed the redacted version under seal so that disclosure would be made to Judge Hendricks and court staff alone. *See* Ex. 7 (Joint Mot. to Seal). Disclosure of the redacted communication to the District Court was, therefore, reasonable and in good faith.[9] *See* Ballard Aff. ¶ 38 ("The conduct of USF&G's counsel in pointing out

[9] The Receiver alleges no harm from disclosure of the redacted email to Judge Hendricks.

exceptions to confidentiality as set forth in Rule 8, SCADR, but in cautiously using the proper procedure to seek to file under seal a document that might be protected by the ADR rules [was] professional and reasonable.").

C. USF&G's Attempts To Locate Any 1954 To 1964 Insurance Policies Provides No Basis For Sanctions

The Receiver argues that although USF&G has been unable to locate any comprehensive general liability ("CGL") policies issued to Covil from 1954 to 1964, such policies must nonetheless have once existed, must have been destroyed in a document "purge," and USF&G has not been "candid with this Court" about it. Mot. at 7-8. As explained in USF&G's prior filings and summarized below, this contention lacks any factual basis. In any event, the Receiver is barred from seeking sanctions based on this issue because it concerns discovery with respect to insurance coverage issues that the Receiver has been enjoined from raising in this Court, and (as discussed further in Section II) has already been the subject of sanctions as to which USF&G has moved for reconsideration.

USF&G has produced all relevant documents it has found concerning any possible insuring relationship with Covil from 1954 to 1964. The Receiver claims that, until this Court intervened, USF&G delayed providing any information to the Receiver about a possible CGL insuring relationship with Covil from 1954 to 1964. Mot. at 7. In fact, USF&G has undertaken enormous efforts to locate potentially relevant documents and has produced over 750,000 pages of documents to the Receiver in response to the Court's September 19, 2019 Order and January 8, 2020 Order, including records from the 1950s and 1960s. *See* Ex. 9 at 25:18–26:11 (Apr. 6, 2020 Hr'g Tr., *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C.)); Ex. 10 (Dec. 6, 2019 Affidavit of Mark S. Esposito) (discussing steps taken by USF&G to locate and produce relevant documents to the Receiver). *See also* Ballard Aff. ¶ 39 ("I am informed and believe that

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USF&G has undertaken herculean efforts to locate and produce a large volume of documents in response to the Receiver's document request. In my opinion, USF&G's counsel acted appropriately and reasonably to respond to discovery in a personal injury action to which it was not a party."). Despite these efforts, no evidence of any CGL policies between USF&G and Covil during the 1954 to 1964 time period has been found. The allegation that such coverage existed, however, was not hidden from the Receiver, who was in possession of testimony given by Palmer Covil in the 1970s concerning that topic.

There is likewise no merit to the Receiver's repeated refrain that any such policy documents were improperly "purged." *See, e.g.*, Mot. at 7–8. As USF&G has previously explained to both this Court and the judge presiding over the insurance coverage litigation in the Middle District of North Carolina (the "MDNC Action"), USF&G's standard document retention guidelines in the 1970s recommended retention of documents only "for three full years after the policy termination." *See e.g.*, Ex. 11 ¶ 32 (USF&G's Supplemental Mem. and Additional Submission of Facts Under Oath Regarding Compliance with the Court's Sept. 19, 2019 Show Cause Order); Ex. 12 ¶ 28 (Mot. to Reconsider Jan. 8, 2020 Order); Ex. 13 at 18–19 (USF&G's Opp'n to Covil's Mot. for Summary Judgment, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Mar. 9, 2020), ECF 254). Consequently, long before the alleged document "purge" in 1984, any alleged CGL policies from 1954 to 1964 would likely have been destroyed in the normal course. The Receiver's counsel were well aware of these document retention policies and practices from their involvement in the Western MacArthur case—litigation the Receiver has previously cited to this Court. *See* Ex. 14 at 9 (Jan. 8, 2020 Order). Moreover, as USF&G also previously noted, "[a]n insurer has no power over an insured's retention of a policy, . . . and bears none of the responsibility for an insured's loss of a policy. . . . [I]t is the

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responsibility of the insured, not the insurance company, to keep track of which carriers have provided it with liability insurance." *Olin Corp. v. Ins. Co. of North America*, 966 F.2d 718, 724–25 (2d Cir. 1992); *see also McPartlon v. Continental Cas. Co*., 2017 WL 4286280, at *4 (N.D.N.Y. Sept. 26, 2017) (same and rejecting the notion that "an insurer bears the burden of an insured's own negligence in maintaining his records"); *Travelers Indem. Co. v. U.S. Silica Co*., 237 W. Va. 540, 548, 788 S.E.2d 286, 294 (2015) (same).

The Receiver is enjoined from raising discovery issues concerning insurance coverage in this Court. The question of whether USF&G issued any CGL policies to Covil between 1954 and 1964 is not before this Court, and is the subject of a summary judgment motion by the Receiver in the insurance coverage litigation before the Middle District of North Carolina.[10] In addition, Judge Hendricks of the District Court for the District of South Carolina has enjoined the Receiver from pursuing rulings relating to insurance coverage issues in this Court. *See* Ex. 4 (Injunction Order). While the Receiver claims that including this issue in his motion is solely for "background context" and that he is "not seeking rulings or sanctions related to USF&G's insurance policies," *see* Mot. at 8, n.5, elsewhere in his motion the Receiver expressly relies upon this issue as support "for the fourth factor of a frivolous proceeding motion," *see* Mot. at 13, n.10. The Receiver cannot have it both ways. Insurance coverage issues, including associated discovery issues, are within the purview of the federal courts hearing the coverage actions, not this Court.

[10] *See* Ex. 38 at 11–17 (Covil's Mem. of Law ISO Mot. for Summary Judgment, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Feb. 10, 2020), ECF 210); Ex. 13 at 19–25 (USF&G's Opp'n to Covil's Mot. for Summary Judgment, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Mar. 9, 2020), ECF 254).

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D. USF&G Has Never Threatened To Personally Sue The Receiver

There is no factual basis for the Receiver's contention that he has been "barraged with threats of personal litigation by several of Covil's insurers, particularly USF&G." Mot. at 8. The Receiver contends that this issue was first raised at a July 11, 2019 status conference in this Court. Mot. at 8. But the transcript citation is to an unsubstantiated allegation by the Receiver's counsel that *a different insurer's* counsel made such a threat in a proceeding on the record before another court (an allegation that such counsel disputes).[11] The Receiver cites no such statement by USF&G or its counsel in connection with the July 11, 2019 status conference or otherwise. *See* Ballard Aff. ¶ 40 ("Lawyers for USF&G have made no threats against the Receiver that are borne out by this record nor in the records of related cases reviewed.") And even if the Court were to credit the Receiver's assertion that USF&G's conduct in the federal court coverage actions somehow amounts to threats to sue him—which is factually unsupported for the reasons discussed below—the Receiver identifies no filing, argument, or statement by USF&G to this Court on that topic that could potentially fall within the ambit of Rule 11 or the Act.

USF&G's discovery letter in the MDNC Action was not a threat to sue the Receiver. USF&G's and other insurers' requests to the Receiver for production of documents in the MDNC Action included a request that the Receiver produce copies of his insurance policies. Mot. at 8–9. Disclosure of insurance policies is mandatory under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(a)(1)(A)(iv). When the Receiver objected to producing the policies, in part on relevance grounds, USF&G explained in a January 22, 2020 meet-and-confer letter the potential relevance of such policies. *See* Ex. 15 at 2–3 (Jan. 22, 2020 Letter); Ballard

[11] *See* Ex. 18 ¶¶ 6, 8–10 (Affidavit of Andrew T. Frankel, filed in *Pavlish v. Covil Corp., et al*., 2019-CP-42-03968 on Mar. 20, 2020) ("Frankel Aff.") (discussing this same factual allegation).

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Aff. ¶ 40. When the Receiver's counsel claimed during a subsequent meet-and-confer call that USF&G was threatening to sue the Receiver, USF&G confirmed that it was not making any such threat; it was simply seeking the production of documents in the course of discovery to evaluate its claims and defenses. *Id.* In a further act of good faith in response to the Receiver's objections, USF&G agreed to put aside its request for copies of the Receiver's insurance policies, and has not further pressed that request. *See* Ex. 16 ¶ 7 (Decl. of Andrew T. Frankel ISO USF&G's Reply ISO Mot. to Compel Discovery from Covil, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Mar. 4, 2020), ECF 241) ("Frankel Decl.").

The only party who keeps raising the issue is the Receiver. On February 7, 2020, in *Pavlish v. Covil Corp., et al.*, 2019-CP-42-03968, the Receiver filed a motion for a status conference, attaching USF&G's January 22, 2020 discovery letter in the MDNC Action and asserting that it constituted a threat to sue him personally, despite having already been assured by USF&G that this was not the case. In response, USF&G once again confirmed that it was making no such threat; it was simply responding to the Receiver's discovery objections. *See* Ex. 17 at 3–4 (USF&G's Response to Receiver's Mot. for Status Conf.); *see also* Ex. 18 ¶¶ 6–8 (Frankel Aff.).[12] And in the MDNC Action, when USF&G moved to compel the Receiver to produce an entirely different category of documents—his communications with asbestos plaintiffs' counsel—the Receiver yet again incorrectly claimed that USF&G had threatened to sue him personally. *See* Ex. 19 at 1–3 (Covil's Response to USF&G's Mot. to Compel Discovery from Covil, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Mar. 2,

[12] The Receiver filed a motion for reconsideration of this Court's order admitting USF&G's counsel, Andrew T. Frankel, *pro hac vice* in another case (*Pavlish*). *See* Mot. at 13, n. 9. The Frankel Aff. was filed by USF&G in the *Pavlish* case in response to that motion, which provides no support for the Receiver's assertion that Mr. Frankel has not "show[n] the professionalism required by our Rules."

2020), ECF 238). USF&G explained in response that it "has never threatened to hold the Receiver personally liable for Covil's asbestos liabilities, is not trying to intimidate the Receiver, has not accused anyone of collusion, and is not moving to compel the Receiver's personal insurance information." Ex. 20 at 1 (USF&G's Reply ISO Mot. to Compel Discovery from Covil, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Mar. 4, 2020), ECF 240). USF&G's counsel also submitted a declaration attesting that he is "not aware of any effort by USF&G or its counsel in this case to threaten to hold the Receiver personally liable, or to 'intimidate' the Receiver in any manner." Ex. 16 ¶ 7 (Frankel Decl.); *see also* Ex. 18 ¶¶ 6–10 (Frankel Aff.). Against all this evidence to the contrary, the Receiver persists in alleging that USF&G's discovery requests in a separate federal coverage action somehow amount to a personal threat against him.

USF&G's third-party subpoena to the Dean Omar law firm in the MDNC Action was not a threat to sue the Receiver. Next, the Receiver alleges that USF&G's service of a subpoena on the Dean Omar law firm in the MDNC Action was a "thinly veiled" threat to sue the Receiver. Mot. at 9. This allegation likewise has no factual basis. The subpoena sought communications between the Dean Omar firm and the Receiver concerning the underlying asbestos cases that are relevant to the coverage action. Such communications are potentially relevant to the Receiver's coverage and bad faith claims and USF&G's breach of cooperation affirmative defense in the MDNC Action. *See* Ex. 21 at 5–10 (USF&G's Mem. of Law in Opp'n to Dean Omar's and the Individual Defendants' Mot. for Protection, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-00932 (M.D.N.C. Feb. 24, 2020), ECF 228). Moreover, the discovery sought in the subpoena was orders of magnitude narrower than what the Receiver has demanded (and this Court has ordered) from non-party USF&G. *See* Ex. 5 at 4–6 (Sept. 19, 2019 Order). While the MDNC

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court ultimately concluded that the subpoena was overbroad, the subpoena to Dean Omar cannot possibly be deemed sanctionable in this Court vis-à-vis the Receiver.[13]

USF&G has not alleged that the Receiver has been derelict in his duties. The Receiver offers no support whatsoever for his claim that USF&G has "contended that the Receiver has been derelict in his obligations by failing to wind up Covil's business and publish notice of Covil's dissolution." Mot. at 9. USF&G has made no such allegation.

USF&G's notice that it would move to enforce Judge Hendricks's injunction was not a "threat" to the Receiver. The Receiver next contends that USF&G's "threats have continued," including by "threatening" to file a motion in the District of South Carolina to enforce Judge Hendricks's injunction if the Receiver did not withdraw filings in this Court that violate the injunction. Mot. at 9–10. USF&G's notice was in no way a "threat"—such a meet-and-confer notice is required by the District of South Carolina Local Rules prior to filing a motion. *See* Receiver's Ex. E at 1; D.S.C. Ct. R. 7.02. USF&G also had a sound procedural and substantive basis to file the motion to enforce the injunction. On March 30 and April 7, 2020, when the Receiver responded to USF&G's limited objections to the Receiver's motions to approve its settlements with certain other insurers, the Receiver admitted that he was once again seeking insurance coverage determinations from this Court as to the applicable method of allocating asbestos-related tort liability across policy periods, as well as rulings limiting USF&G's subrogation and contribution rights. *See* Ex. 22 at 3 (USF&G's Mem. of Law ISO Mot. to

[13] As the Receiver acknowledges, Mot. at 9, the MDNC court provided an opportunity for both Dean Omar and the Receiver to seek attorneys' fees in connection with the motion practice associated with the subpoena and USF&G's parallel document requests to the Receiver. Dean Omar requested payment of its attorneys' fees, and USF&G paid them. The Receiver made no such request, and consequently cannot now seek his attorneys' fees or any other sanctions in a different court.

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Enforce Injunction, *Covil Corp. v. Zurich Am. Ins. Co. et al.*, No. 7:18-3291-BHH (D.S.C., Apr. 10, 2020), ECF 142-1). The Receiver's filings thus directly violated the terms of Judge Hendricks's injunction. *Id.* at 3-4. Indeed, this Court itself noted that "it is not possible for [the Court] to rule on the coverage matters before [Judge Hendricks] as [the Court] decide[s] whether to approve the proposed settlements" and directed the Receiver to modify his proposed order to make clear that the Court was making no insurance coverage determinations. *See* Receiver's Ex. E at 2. USF&G's motion in the District of South Carolina to enforce that court's injunction was neither a "threat" nor sanctionable conduct in this Court.

USF&G's subpoena seeking settlement information was not sanctionable conduct. The Receiver also contends that USF&G "continued its pattern of subpoena harassment" by issuing a subpoena in connection with the settlements between the Receiver, TIG, Sentry, and Hartford that is "facially invalid as to the issuer, the time for compliance, and the documents requested." Mot. at 10. For the reasons set forth in USF&G's opposition to the Receiver's motion to quash, the subpoena was issued in good faith and with a reasonable basis. *See* Ex. 23 at 19–23 (Non-Party USF&G's Response in Further Opp'n to Mot. to Approve and in Opp'n to Mot. to Quash and to Seal).

The document requests in the subpoena were appropriate because they sought information directly relevant to the settlements for which the Receiver sought this Court's approval. The subpoena became necessary because the Receiver rebuffed USF&G's multiple informal requests for the information, which were an effort to avoid the need for any subpoena. *See* Ex. 24 (Mar. 10–16, 2020 Emails Between Receiver's Counsel and USF&G's Counsel). Moreover, the subpoena is not invalid "as to issuer." The subpoena was issued in the *Pavlish* case, to which USF&G *is a party* and in which the Receiver initially filed his motions to approve

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the settlement agreement and establish the Qualified Settlement Fund, before he inexplicably withdrew those motions solely with respect to the *Pavlish* case on March 20, 2020 (two days *after* the subpoena was served). *See* Ex. 25 at 1 (Mar. 18, 2020 Subpoena to Receiver). The Receiver's claim that the subpoena's time for compliance was invalid is also without merit. The short period initially designated for response was dictated by the imminence of the settlement approval hearing. When the Court postponed the hearing, USF&G extended the due date for compliance to March 30, 2020, thereby providing the Receiver with the full amount of time for compliance provided by SCRCP 45. *See* Ex. 23 at 19–20 (Non-Party USF&G's Response in Further Opp'n to Mot. to Approve and in Opp'n to Mot. to Quash and to Seal).

II. The Receiver's Allegations Concerning USF&G's Prior Conduct Are Deficient for Additional Reasons

A. USF&G's Conduct Before Other Courts Falls Outside The Ambit Of Rule 11 And The Act

Most, if not all, of the Receiver's allegations concern conduct in litigation pending in other courts. This includes (1) USF&G's removal of the status conference proceeding to federal court (the removability of which is governed by federal law), (2) the insurers' filing of a settlement communication in federal court, (3) the sufficiency of USF&G's document production concerning insurance coverage issues that are pending in federal court, (4) the Receiver's allegation that USF&G's discovery requests in the MDNC Action amount to a threat to sue the Receiver, and (5) USF&G's motion to enforce an injunction issued by the District of South Carolina. None of this conduct involves any pleading, motion, or other paper filed with, or argument made in, this Court by USF&G or its counsel, and thus, does not come within the purview of either Rule 11 or the Act. *See* Rule 11(a), SCRCP; S.C. Code Ann. § 15-36-10(A)(4) (1976). *See also Pereira v. 3072541 Canada Inc.*, No. 17-CV-6945 (RA), 2018 WL 5999636, at *3 (S.D.N.Y. Nov. 15, 2018) (finding that it "lacks the authority to sanction attorneys" under

Rule 11 "for conduct that occurred in other courts"). Other courts are responsible for overseeing the conduct of litigation before them, and any party that believes sanctionable conduct has occurred in such proceedings may bring a motion in that court under that court's rules. The Receiver has not done so.

The same is true with respect to actions originally filed in this Court but removed to federal court, which is the case for the first two categories of prior conduct the Receiver cites—removal of the status conference proceeding and the filing of a settlement communication. As the Supreme Court of South Carolina has noted, "Section 1446(d) of the United States Code provides that after an action has been removed to federal court, 'the State court shall proceed no further unless and until the case is remanded.' 28 U.S.C.A. § 1446(d) (West 2013)." *Limehouse v. Hulsey*, 404 S.C. 93, 100, 744 S.E.2d 566, 570 (2013) (voiding state court proceedings when jurisdiction rested with the federal court). Even if the case is remanded, the federal court retains jurisdiction with respect to any sanctions based on conduct before that court prior to remand. *See Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1008 (4th Cir. 2014) (explaining that "a district court retains jurisdiction to impose sanctions after remanding an action to state court").

This Court lacks jurisdiction to sanction USF&G based on its conduct in other courts, and should reject the Receiver's request that it do so.

B. The Receiver Improperly Seeks Additional Sanctions For The Same Conduct On Which He Previously Sought And Obtained Sanctions

The Receiver provides no basis for his request that USF&G be sanctioned multiple times for the same conduct. The Receiver previously sought and obtained sanctions in June 2019 and December 2019 based on USF&G's alleged delays in producing documents, notwithstanding USF&G's non-party status at the time, as well as the insurers' disclosure of the settlement email to Judge Hendricks. The Receiver acknowledges that this Court has already imposed sanctions

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on USF&G for this conduct. *See* Mot. at 7. Specifically, this Court sanctioned USF&G in its September 19, 2019 Order, as well as its January 8, 2020 Order.[14] In connection with his June 2019 motion, the Receiver also sought—and this Court declined to impose—monetary sanctions for the same conduct. *See* Ex. 26 at 8 (Receiver's Mem. ISO Rule to Show Cause, filed June 27, 2019); Ex. 5 (Sept. 19, 2019 Order) (sanctioning USF&G, but not ordering attorneys' fees or costs); *see also* Ex. 14 (Jan. 8, 2020 Order) (same). Against this backdrop, the Receiver cannot revive his request for monetary sanctions, which he previously requested and this Court did not grant, based on the same underlying conduct. *See generally Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 232–33, 647 S.E.2d 488, 496 (Ct. App. 2007) (declining to award attorney's fees to a party whose motion for sanctions was previously denied).

III. USF&G's Objection To The Receiver's Settlements With Other Insurers Was Not Frivolous

While the Receiver spends most of his brief criticizing USF&G's past conduct, largely in connection with other cases in other courts, his sanctions motion in fact appears to be predicated solely on USF&G's recent objection to the Receiver's settlements with other insurers. *See* Mot. at 11 ("USF&G's latest frivolous act and *the basis for this motion*, was objecting to settlements with TIG, Hartford, and Sentry.") (emphasis added). The Receiver contends that USF&G's objection is sanctionable because "USF&G improperly filed the objection despite not being a party to the action or settlements and not having standing to object." Mot. at 12. But the Receiver never clearly explains what he contends was "frivolous" or "unreasonable" about USF&G's objection, his position is factually and legally incorrect, and in any event it does not

[14] Both orders are subject to motions for reconsideration pending before this Court. *See* Ex. 6 (Mot. to Reconsider Sept. 19, 2019 Order) and Ex. 12 (Mot. to Reconsider Jan. 8, 2020 Order).

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come close to meeting the high standard for sanctions under Rule 11 or the Act. *See* Ballard Aff. ¶ 35.

A. USF&G Had Standing To Object To The Settlements

Lacking any substantive basis to seek sanctions in connection with USF&G's objection to the settlements, the Receiver attempts to turn a procedural challenge as to USF&G's standing to object to the settlements into a sanctions issue. According to the Receiver, "USF&G improperly filed the objection despite not being a party to the action or settlements and not having standing to object." Mot. at 12. This argument fails for several reasons.

USF&G is a named party in several cases on this Court's asbestos docket. The Receiver's settlement approval motion purports to affect the parties' rights with respect to *all* asbestos cases on this Court's docket, even though the Receiver's filing is captioned for a limited number of cases.[15] That conclusion also follows from this Court's March 4, 2019 order, which "clarified" that the Receiver's appointment "is not limited to the *Taylor* case" and instead is deemed effective "in all asbestos related cases and for all asbestos related matters." Ex. 27 at 1, (Mar. 4, 2019 Order in *Taylor v. Air & Liquid Sys. Corp.*, Case No. 2018-CP-40-4940). USF&G is a named defendant in numerous asbestos cases pending on this Court's docket. Accordingly, it is a legal fiction to suggest that USF&G lacked standing to object to aspects of the settlements

[15] *See e.g.*, Ex. 39 ¶ 4A (Receiver and Sentry Joint Mot. to Approve Settlement Agreement filed Mar. 16, 2020) (asserting that "[t]he settlement will provide substantial funding to a qualified settlement fund for the benefit of *asbestos claimants asserting claims against Covil*" without limitation to any particular claims) (emphasis added); Ex. 40 ¶ 2 (Joint Mot. to Establish a Qualified Settlement Fund; Approve Covil QSF LLC as a Qualified Settlement Fund; and Retain Jurisdiction Over the Qualified Settlement Fund, filed Mar. 4, 2020) ("The Receiver, TIG and Hartford have separately entered into settlements that will result in the dismissal of the Receiver's claims against Hartford and TIG, and all of these insurers' claims against the Receiver and each other, *in all courts in which actions or other proceedings between the parties are pending*.") (emphasis added).

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that directly impair USF&G's rights simply because the Receiver only included a select few asbestos cases in the caption of his motion. According to this Court's prior ruling, any decision involving the Receiver applies "in all asbestos related cases and for all asbestos related matters," including cases to which USF&G is a party.[16]

USF&G is a defendant in the *Pavlish* case. The cases in which the Receiver filed his settlement approval motion include the *Pavlish* case, in which USF&G is a *named defendant*. *See* Ex. 28 (Receiver's Mot. to Approve Settlement Agreement, To Establish Covil Qualified Settlement Fund and Approving Covil QSF, LLC as a Qualified Settlement Fund and Retain Jurisdiction Over the Qualified Settlement Fund, filed in *Pavlish* on Mar. 13, 2020).[17] And in the days leading up to the then-scheduled March 23rd hearing on that motion, this Court made clear in multiple emails to counsel that it would hear the settlement motion as part of an omnibus hearing in the *Pavlish* case.[18] Only after USF&G filed its limited objection to the settlement order—and only in the *Pavlish* case—did the Receiver file a "Notice of Withdrawal of the Receiver's Motion to Approve Settlement Agreement," in an apparent attempt to manufacture a procedural argument that USF&G lacked standing to file its objection. *See* Ex. 29 (Receiver's

[16] If, on the other hand, the settlement order applies only to the few cases the Receiver included in the caption on his motion to approve the settlements, then the settlement order cannot impact the rights of USF&G or any other non-party to those cases.

[17] In addition, as discussed above, one of USF&G's national counsel, Mr. Frankel, is admitted *pro hac vice* as counsel in the *Pavlish* case. Accordingly, it is incorrect to suggest that Mr. Frankel cannot present USF&G's arguments regarding the settlement order to the Court, as the Receiver contends. *See* Mot. at 12–13.

[18] *See, e.g.*, Ex. 33 (Mar. 19, 2020 Email of Justice Toal to counsel) ("[T]he main focus of this hearing will be Motions in the Pavich [sic: Pavlish] case to approve settlements reached by the Receiver for Defendant Covil Corporation with three of its insurers, Hartford, TIG and Sentry."); Ex. 41 (Mar. 19, 2020 Email of Justice Toal to Law Clerk) (forwarding an order from Chief Justice Beatty authorizing a term of court for March 23rd "in the Pavich [sic: Pavlish] case over which I have been appointed to preside"); Ex. 42 (Mar. 20, 2020 Email of Justice Toal to Counsel) (explaining that Justice Toal had "postponed the Monday hearing in Pavlish").

Notice of Withdrawal in *Pavlish*). No court should countenance this kind of procedural gamesmanship, let alone accept an argument that USF&G's objection was retroactively rendered frivolous because the Receiver later withdrew his motion in one case.

USF&G had standing to object because its rights were affected. Even if the Court credits the Receiver's contention that USF&G is not a party to any action affected by the settlement order, USF&G still had standing to object because the settlements purport to eliminate certain of USF&G's legal rights and to rewrite certain contractual obligations and relationships. *See* Ballard Aff. ¶¶ 22–23, 27, 34. This State's courts routinely recognize non-settling parties' rights and require settling parties to modify their settlements to leave such rights intact. *See, e.g.*, *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 809 F. Supp. 2d 449, 458 (D.S.C. 2011) (refusing to approve a proposed settlement agreement until the parties to it "agree that the settlement will not extinguish the rights of individuals or entities who are not parties to the settlement agreement"); *Smiley v. S.C. DHEC*, 374 S.C. 326, 329, 649 S.E.2d 31, 32–33 (2007) (explaining the elements of standing to include an injury in fact that is fairly traceable to the adverse litigant, which can be redressed by the court). *See also* Ballard Aff. ¶ 25 (discussing South Carolina state court precedent permitting "a non-party to object to a settlement entered into by parties to separate litigation, without any suggestion that objections were violative of Rule 11"). Bringing such issues to the Court's attention cannot be characterized as frivolous.

B. USF&G's Objection Was Based On South Carolina Law, This Court's Prior Orders, And The Terms Of Its Insurance Contract

As USF&G has made clear in prior filings, it does not object to the Receiver's settlements with other insurers in their entirety, and does not seek to impede the Receiver from settling disputes with other insurers. Rather, USF&G objects to the settlements only to the extent they threaten USF&G's right to avoid overpaying on Covil-related asbestos claims

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without receiving any corresponding compensation or credit, in violation of due process. *See generally* Ex. 30 (USF&G's Limited Objection to Joint Mot. to (i) Establish and Approve Qualified Settlement Fund; and (ii) Approve Settlement Agreement with Hartford, TIG and Sentry). On these limited issues, USF&G's objections were, and remain, squarely in accord with South Carolina law.

The settlements mischaracterize the settled policies as "excess" coverage. The Receiver proposed to establish a qualified settlement fund with cash deposited by the settling insurers, but to pay claims as if the settling insurers' policies were *excess* policies that were obligated to pay claims only to the extent the non-settling insurers—USF&G and Zurich American Insurance Company ("Zurich")—did not have coverage to fully pay a claim. The Receiver's request is improper because the settling insurers' policies are *not* solely excess policies. Under settled South Carolina law, the Receiver cannot rewrite the terms of Covil's insurance policies. *See, e.g.*, *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 313–14, 60 S.E.2d 615, 617 (1950) ("The general rule is that the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto." (quoting 45 Am. Jur. 117)).

The settlement order modifies USF&G's contribution, indemnity, and subrogation rights. The Receiver's proposed settlement order also sought to eliminate USF&G's (and Zurich's) rights to contribution, indemnification, and subrogation vis-à-vis other insurers. Those rights are intended to ensure that each insurer pays only its pro rata obligation for claims brought against Covil, and elimination of such rights violates well-settled South Carolina law. *See, e.g.*, *Canal Ins. Co. v. Ranger Ins. Co.*, 489 F. Supp. 492, 496 (D.S.C. 1980) (applying South Carolina law and stating that "[t]here is no question that an insurer which pays more than its proportionate

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share of a debt which is equally and concurrently due by another insurer, or other insurers, has a right to contribution from the others"); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011) (holding that "the scope of [each insurer's] liability is limited to damages accrued during its 'time on the risk'").

Modification of the insurers' rights among themselves, in the manner the Receiver proposed, is also contrary to this Court's January 8, 2020 order, which specifically preserved each carrier's contribution rights. *See* Ex. 14 at 19 (Jan. 8, 2020 Order) ("Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit."). Indeed, this Court's April 9, 2020 email to the parties acknowledged as much, instructing the Receiver to modify the proposed settlement order to "[m]ake it clear that I am *making no determinations* regarding insurance policy coverage or *contributions*." Ex. 31 (Apr. 9, 2020 Email of Justice Toal) (emphasis added). The Receiver, however, ignored this Court's instruction, submitting a proposed order that *does* purport to make such determinations, which this Court then entered.[19]

The Receiver's proposed settlement order also contradicts the plain language of USF&G's 1976 insurance policy with Covil, which contains an unambiguous subrogation clause. *See* Ex. 32 at 56 (USF&G Policy) ("Section 14. In the event of any payment under this endorsement the Company shall be subrogated to all of the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatsoever else is necessary to secure such rights."). As noted above, courts

[19] The Court entered the proposed order less than 45 minutes after the Receiver submitted it, perhaps unaware that the Receiver had disregarded the Court's direct instruction regarding the scope of the proposed order.

cannot rewrite or eliminate contractual obligations through a receivership. *See National Cash Register*, 217 S.C. at 317, 60 S.E.2d at 618 ("Receivership may affect procedure upon, but not the substance of, contract obligations.").

In sum, although the Court granted the Receiver's motion for approval of settlements and the requested injunction against parties such as USF&G, USF&G's objection to the proposed settlements was far from frivolous. It was based on the law of this State, the orders of this Court, and the terms of its insurance contract with Covil. *See* Ballard Aff. ¶ 24 ("It is my firm opinion that USF&G's counsel (national or otherwise) was absolutely required to file the objections in order to adequately protect its client USF&G."); ¶ 26 ("In my expert opinion, the signature of USF&G's counsel to the Objections to Settlements were in full compliance with an attorney's obligations under Rule 11, SCRCP . . . ."); ¶ 34 ("[I]n my expert opinion, the filing of the objection to the purported settlements entered into by the Receiver which prejudiced and/or altered rights of USF&G without USF&G being a party was not only reasonable but an imperative obligation inherent in the duties USF&G's counsel owed to its client.").

C. USF&G's Scheduling Communications With The Court Were Appropriate

The Receiver contends that USF&G engaged in sanctionable conduct with respect to rescheduling of the March 23 hearing. As he puts it: "USF&G took it upon itself to issue directives to this Court in an effort unilaterally to subvert this Court's jurisdiction and docket management." Mot. at 11. This contention grossly mischaracterizes what occurred. With the COVID-19 pandemic bearing down on the United States, and in the wake of numerous orders by Governor McMaster and Chief Justice Beatty progressively restricting gatherings, on March 19 Chief Justice Beatty issued an order canceling all trial court proceedings State-wide beginning on March 23. One of USF&G's local counsel forwarded Chief Justice Beatty's order to Justice Toal and counsel, and wrote:

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> The Supreme Court has issued an order canceling all non-emergency proceedings from next Monday through May 1st. A copy of that Order can be found here: https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2466
>
> We will look forward to Monday's hearing being rescheduled at an appropriate time, and hope everyone stays safe in the meantime.

Ex. 33 (Mar. 19, 2020 Emails Between Justice Toal and Attorney Carroll). There is no way that this message—alerting the Court and counsel to a relevant order from the South Carolina Supreme Court—can seriously be considered "an effort unilaterally to subvert this Court's jurisdiction and docket management," as the Receiver contends. Mot. at 11.

D. None Of USF&G's Conduct With Respect To The Receiver's Settlements With Other Insurers Runs Afoul Of Rule 11 Or The Act

In sum, USF&G had standing to object to the Receiver's settlements with other insurers; its objection was fully supported by South Carolina law, this Court's prior orders, and USF&G's insurance contract with Covil; and it appropriately communicated with the Court. USF&G's objections were made in good faith and were objectively reasonable, and the Receiver cites no evidence to the contrary. There is therefore nothing "frivolous" about USF&G's filings, and the Receiver's motion fails as a matter of law. S.C. Code Ann. § 15-36-10(J) (1976).

The Receiver makes no real effort to analyze the factors listed in the Act as relevant to the Court's determination of whether the conduct at issue is sanctionable. And those that are potentially relevant here all point to the conclusion that USF&G's conduct did not violate the Act. For example, the first and second factors—"the number of parties" and "the complexity of the claims and defenses" § 15-36-10(E)(1)(2)—counsel in USF&G's favor. As this Court is aware, the parties are involved in an exceedingly complex set of proceedings, being litigated across multiple courts. The Receiver himself characterized this litigation as "complex" in his settlement approval motion. *See, e.g.*, Ex. 34 at ¶ 5b (Joint Mot. to Approve Settlement

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Agreement filed Mar. 6, 2020) ("The settlement will resolve complex coverage litigation between these two parties [*i.e.*, the Receiver and TIG] that has embroiled the Receiver, this Court and other courts in extensive adversarial proceedings."). The complexity of the litigation and the frequency of motion practice make sanctions even less appropriate.

The third and fourth factors—the amount of time a litigant had to investigate the situation, and the information available to it prior to making the filing that triggered the sanctions motion, §§ 15-36-10(E)(3) to (4)—also favor a finding that no violation occurred.[20] USF&G had limited time and information to respond to a filing that potentially significantly impacted its rights. It sought additional information from the Receiver on a consensual basis, served a subpoena when the Receiver ignored those requests, and filed an objection limited to preserving its contractual and other rights.

USF&G and its counsel's conduct here was reasonable, measured, and well within the bounds of appropriate conduct by a party and its attorneys. Indeed, had USF&G's counsel ignored the settlements, taken no steps to obtain additional information, and failed to preserve USF&G's objections—as the Receiver contends USF&G's counsel should have done—they would have been abdicating their ethical obligation to properly represent their client. *See* Ballard Aff. ¶ 24 ("Not only was the conduct of USF&G's counsel consistent with what a reasonable attorney would be expected to do in connection with its representation of its client in the position of USF&G, it is my opinion that a failure to have filed the objections to the settlements would have been an unacceptable abandonment of the attorneys' duties to USF&G."); ¶ 26 (opining

[20] The fifth factor is inapplicable, as there are no "previous violations" of the Act to consider here. S.C. Code Ann. § 15-36-10(E)(5) (1976). The remaining factors—USF&G's response to the motion and undefined "other factors" that should be considered, §§ 15-36-10(E)(6) to (7)—render sanctions inappropriate for the reasons discussed throughout this brief.

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that, "to have done less [than object to the settlements] would have reflected an inattention by USF&G's counsel to their duties and to the rights of their client, USF&G" and that "[i]t would have been an unreasonable position for counsel not to have filed the objections"). Sanctioning a party and its counsel for seeking to protect rights within the confines of appropriate litigation advocacy is not appropriate under Rule 11 or the Act.

CONCLUSION

For the foregoing reasons, USF&G respectfully requests that the Court deny the Receiver's motion in its entirety and decline to sanction USF&G and/or its national counsel.

Respectfully submitted this 20th day of May, 2020.

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EXHIBIT 38

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	Case No. 2018-CP-40-04940
	)	
Denver D. Taylor and Janice Taylor,	)	
	)	
Plaintiffs.	)	**AFFIDAVIT OF DESA BALLARD**
	)	
v.	)	
	)	
Air & Liquid Systems Corporation[1], *et al.*	)	
	)	
Defendants.	)	
	)	

Personally, appeared before me, Desa Ballard, who being duly sworn, deposes and says that:

1. I am over the age of eighteen (18) years, of sound mind and am competent to state the matters set forth herein.

2. I am a member of the South Carolina Bar, having been admitted in 1983, Bar No. 0000498. I am also member in good standing of United States District Court for the District of South Carolina (1984), the Fourth Circuit Court of Appeals (1984) and the United States Supreme Court (1987)[2].

3. My C.V. is attached. **Exhibit A.** My areas of practice concentrate on legal ethics, professional responsibility, licensing, and complex litigation, primarily in state courts and

[1] United States Fidelity & Guaranty Company (USF&G) is not a party to this action and the online docket does not list USF&G as a party.

[2] I am also a member of the Bars of the District of Columbia (2004), the Third Circuit Court of Appeals (1993), the Sixth Circuit Court of Appeals (1994), the Ninth Circuit Court of Appeals (2014), the Tenth Circuit Court of Appeals (1990), and I have a pending application for admission to the District Court for the Eastern District of Texas (2020). I was previously admitted *pro hac vice* in the United States District Court for the District of Nevada for a matter that is now ended, and also previously admitted *pro hac vice* to the State Court of San Francisco County, State of California Bar for a matter that is now ended.

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regulatory agencies. I have also served as first chair on an estimated half-dozen or so matters in the original jurisdiction of the South Carolina Supreme Court.

4. I served as an Adjunct Professor of Law at the University of South Carolina School of Law for approximately fifteen (15) years teaching Advanced Legal Profession, ending in 2015 when I simply could not make time for it anymore.

5. I am a former chairman of the Professional Responsibility Committee of the South Carolina Bar, former member of the Ethics Advisory Committee, and former member of the Unauthorized Practice of Law Committee. I am a frequent speaker in South Carolina at legal seminars on issues primarily related to the Code of Professional Responsibility and the Code of Judicial Conduct[3]. I have been recognized as an expert witness multiple times by state courts in South Carolina, and have provided expert witness affidavits for attorneys in approximately 100 cases[4].

6. In 2001, along with another private practitioner and a professor of ethics from the University of South Carolina School of Law, I was a co-founder of the South Carolina Association for Ethics Counsel (SCAEC), a nonprofit group of lawyers who associate to improve the attorney discipline system and to educate lawyers on ethics issues through seminars co-sponsored annually with the South Carolina Bar. I am the president of the SCAEC and have been since its inception.

7. I was retained by USF&G to provide an expert opinion regarding the conduct of certain of its attorneys[5] insofar as it relates to Motion for Sanctions under Rule 11, SCRCP and

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[3] I do not maintain a roster of seminar appearances.

[4] I do not maintain a roster of expert witness appearances.

[5] The motion does not name which of USF&G's attorneys are the subject of the motion other than to reference its "national attorneys." (Motion p. 14). However, I have reviewed the matter on the assumption that the motion is directed toward those attorneys who filed motions objecting to settlements with TIG, Hartford and Sentry, as those

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the South Carolina Frivolous Proceedings Sanctions Act[6] (hereafter "the Act") dated April 20, 2020, filed in the captioned cases. The focus of the motion is objections lodged by USF&G to proposed settlements entered into by and between the Receiver for Covil Corporation and various insurers of Covil Corporation during March, 2020, which settlements do not include USF&G, which settlements were made in cases to which USF&G was not a party.

8. Listed on **Exhibit B** are the documents I have been provided by counsel for USF&G. I also reviewed online dockets at the state court level and the District Court level via PACER, administrative orders of the South Carolina Supreme Court, SC Secretary of State information, and researched certain points of law relevant to my analysis of the facts presented. I have spoken several times with counsel for USF&G.

9. In my professional and expert opinion, **the attorneys who filed the Motions objecting to settlements between the Receiver and various other insurance companies were in full compliance with Rule 11, SCRCP and with the Act and should not be sanctioned. To the contrary, the conduct of counsel for USF&G was consistent with the highest standard of duties to one's client, and consistent with the duties imposed upon all attorneys pursuant to the preamble to the Rules of Professional Responsibility**[7].

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particular actions are the ones for which sanctions are sought (Motion p. 11). In what appears to be an effort to cloud the Court's view of this particular motion, the Motion references five (5) other allegedly offensive actions taken by USF&G in various cases, some of which are "asbestosis and asbestos litigation in the state court system" but others are not. For purposes of this affidavit, I assume the attorneys whose names appeared on the Motions objecting to the settlements are the only attorneys against which relief is specifically sought. *State v. Lyle* 125 S.C.406, 118 S.E.803 (1923) does not apply in civil actions.

[6] The correct name of the Act is the South Carolina Frivolous Civil Proceedings Sanctions Act, and is referred to herein as "the Act." *See* 15-36-10.

[7] Paragraph 8 of the Preamble provides "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assure that justice is being done." Paragraph 9 of the Preamble includes the following: "[M]any difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles

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RELEVANT BACKGROUND FACTORS CONSIDERED

10. The Chief Justice's orders assigning individual judges define the scope of the orders as "asbestosis and asbestos litigation filed within the state court system"; the language is identical in each order. (Chief Justice Orders 2009-06-29-01; 2017-03-03-01; 2019-03-28-01; 2019-05-28-02). There does not appear to be a published central docket, nor is there an order consolidating any cases that may be on the "asbestosis or asbestos" docket. Lastly, there is no definition in any of the Chief Justices' orders of what is, and what is not, an "asbestosis and asbestos litigation" case.

11. It appears that the "consolidated docket" concept may have arisen from a management order issued by then-Circuit Judge Garrison Hill[8] in Greenville County on October 13, 2010 to memorialize an *agreement* among "counsel for the plaintiffs and for the defendants in this litigation," which specific litigation is not identified (nor are the parties or the counsel who agreed to the order). (Order of Judge Hill dated September 30, 2010). However, Judge Hill's order said the coordinated docket included "all *personal injury* asbestos cases." *Id.* Therefore, coverage cases and legal malpractice cases were not included in the management order issued by Judge Hill and logically do not fall within the definition of "asbestosis and asbestos litigation filed within the state court system" as set forth in the various Chief Justices' orders and overseen by successor judges by special assignment of the Chief Justice. It is obvious that District Court cases from South Carolina or other states also do not fall within the management order; however as set forth below,

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underlying the Rules." Rule 407, SCACR. A decision to file any pleading requires "the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules", especially so when the motion to be filed is anticipated to be received by the Court and opposing parties as unwelcome.

[8] Then-Circuit Court Judge Hill was assigned the duties by then Chief Justice Toal's Order 2009-06-29-01, to replace retired Circuit Court Judge Larry R. Patterson. There is anecdotal evidence that Judge Patterson may have also issued a management order in 2002 but I have not been able to locate an order to that effect.

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the unrestrained nature of the scope of the settlements to which USF&G's counsel objected may be far-reaching and questions regarding jurisdiction and authority to approve settlements may result in even more litigation that delays the ultimate resolution of these matters even longer.

12. In his *consent* management order, Judge Hill said the "coordinated docket will be managed as a single asbestos docket, although each case will be handled by the parties and the Court on an individual basis." *Id.* I can find no evidence of an actual "docket" of "asbestosis and asbestos litigation" in the State. For purpose of my review, I have assumed that the current roster of "asbestosis and asbestos litigation in the state courts" remain under Judge Hill's management order, since I can find no subsequent or superseding management order[9]. It cannot be determined whether Covil was a party to Judge Hill's consent management order, but it is a certainty that USF&G, as an independent party, was not a separately named party and did not consent to the management order.

OBJECTION TO RECEIVER'S SETTLEMENTS

13. In the motion for sanctions, the Receiver focuses only on the filing by USF&G's national counsel of objections to proposed settlements that were entered into by the Receiver with other liability insurance carriers. However, he provides a litany of what would be "prior bad acts", none of which have legal significance for the issues presented here. *See* footnote 5.

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[9] The question arises whether a "consent" management order entered into by counsel for then-active parties to unidentified litigation has any current effect on parties who were not participants to the consent agreement, such as USF&G, which without dispute was not a party to the litigation at the time of the consent management order was entered. This is one of many future issues that remain to be litigated as a result of the Receiver's purported settlements with insurers other than USF&G and the establishment of Qualified Settlement Funds.

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14. In evaluating the conduct of the attorneys who filed the objections to motions by the Receiver to establish a settlement fund and related relief, it is noted that the motion for approval of settlements was filed in five (5) otherwise unrelated (and not consolidated) cases. The treatment of the five (5) cases as a single case, when they were never consolidated, began with the filing on June 18, 2019 of a Motion for a Status Conference in which the Receiver included five (5) otherwise unrelated captions on the motion.

15. The following cases were listed on the June 18, 2019 Receiver's Motion for Status Conference:[10]

    a. Falls PR/Smith, Case No. 2015-CP-46-02155 pending in York County (hereafter "the Falls PR/Smith case");

    b. Howe, Case No. 2015-CP-46-03456 pending in York County (hereafter "the Howe case");

    c. Hopper, Case No. 2019-CP-40-00076 pending in Richland County (hereafter "the Hopper case");

    d. Hill, Case No. 2018-CP-40-04680 pending in Richland County (hereafter "the Hill case"); and

    e. Taylor, Case No. 2018-CP-40-04940 pending in Richland County (hereafter "the Taylor case").

16. USF&G was not a party to any of the named cases when the status conference was sought on June 18, 2019, when the status conference was ordered via email in June, 2019, or on

[10] This appears to be the first time there was a caption listing all these cases on a single caption. I find no order consolidating these cases. There was an appeal filed to the Court of Appeals by Covil Corporation in 2018 which included three (3) cases on a consolidated caption, but the consolidated caption involved only two of the cases on the motion for status conference, and a sixth case involving a plaintiff named Calvin Sizemore. Appellate Case No. 2018-000385. The appeal was dismissed by consent of the parties as set forth in an order from the Court of Appeals issued on July 29, 2019.

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January 8, 2020 when an order was issued finding that USF&G has "issued general liability insurance coverage to Covil Corporation" for certain years:

a. Falls PR/Smith: USF&G was not named as a defendant when the case was filed. It was named as a defendant in the first amended complaint, and accepted service on March 17, 2016. USF&G was granted summary judgment and released from the case by order dated April 4, 2018.

b. Howe: USF&G was never named as a party to this case. Its name was added to the online docket on May 1, 2020 as "other party to case" almost a year after the motion for status conference was filed, and three months after USF&G was purportedly adjudicated to have provided insurance coverage to Covil for purposes of this case. However, there is no order adding USF&G as a party to the case.

c. Hopper: USF&G was never named as a party to this case. Its name was added to the online docket on May 1, 2020 as "other party to case" almost a year after the motion for status conference was filed and three months after USF&G was purportedly adjudicated to have provided insurance coverage to Covil for purposes of this case. However, there is no order adding USF&G as a party to this case.

d. Hill: USF&G was never named as a party to this case. Its name was added to the online docket on May 1, 2020 as "other party to case" almost a year after the motion for status conference was filed and three months after USF&G was purportedly adjudicated to have provided insurance coverage to Covil for

purposes of this case. However, there is no order adding USF&G as a party to the case.

e. Taylor: USF&G was never named a party to this case. Its name was added to the online docket on May 1, 2020 as "other party to the case" almost a year after the motion for status conference was filed and three months after USF&G was purportedly adjudicated to have provided insurance coverage to Covil for purposes of this case. However, there is no order adding USF&G as a party to the case.

17. While captioned with the five (5) individual captions, the motion for a status conference asked to address issues in *other* cases, none of which are "asbestosis [or] asbestos litigation in the state court system" as defined by the Chief Justices' orders. They are instead, respectively, two (2) coverage cases, and a legal malpractice action which likely do not fall within the docket of "asbestosis and asbestos litigation pending in state courts[11]."

i. *Zurich American Insurance Company v. Covil Corporation et al.*, Case No. 1:18-cv-932 (USDC Middle District NC);

ii. *Covil Corporation v. Zurich American Insurance Company et al.*, Case No. 2019-CP-40-02285[12];

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[11] In connection with the appointment of the Receiver for Covil, Retired Chief Justice Toal's role as administrative judge for the "asbestosis and asbestos litigation in the state court system" shifted to include a dispute between the Receiver and USF&G and to coverage issues, including the identification and construction of insurance policy language that are likely not within the original scope of the special docket for asbestosis personal injury cases. This was acknowledged in Retired Chief Justice Toal's order dated January 8, 2020 (which bore the same five (5) captions that originated with the Receiver's Motion for Status Conference) that "the matters associated with Covil Corporation have required a very significant amount of this Court's time and attention. . ." It is the coverage issues and the settlements entered into by and between the Receiver and certain insurers, which are certainly not personal injury cases, that have caused the confusion evident in these individual case dockets.

[12] The Complaint in this case is captioned as being in Spartanburg County, yet it refers to the Sixteenth Judicial Circuit (which does not include Spartanburg) and was apparently filed in Richland County. It bears a Richland County case number.

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iii. *Protopapas as Receiver v. Wall Templeton et al.*, Case No. 2019-CP-40-02285[13]. The Exhibit to the Motion for Status Conference identifying this case also bears docket stamps for filing in United States District Court Case No. 3:19-cv-01948-BHH, and a Richland Case Number, 2019-CP-40-000076. When removed to United States District Court on June 6, 2019, this case was assigned Case No. 3:19-cv-01948-BHH.

18. On June 21, 2019, a law clerk for Retired Chief Justice Jean Toal sent an email to multiple counsel, including counsel for USF&G, scheduling a status conference for July 11, 2019 at 10:00 am in Courtroom 3B. As set forth above, USF&G was not a party to the captioned cases when the order was issued. The status conference was eventually held on July 11, 2019[14].

19. Following several exchanges of email, Retired Chief Justice Toal clarified the June 21, 2019 email and stated "[by] attending this status conference, no counsel or party will waive their right to insist that South Carolina does not have jurisdiction to hear any or all of the cases filed in its Circuit Courts regarding Covil. As the Administrative Circuit Court judge for Asbestos Litigation matters, I simply want to get a handle on all these cases. All rights will be reserved." From my review of relevant records, Former Chief Justice Toal issued no mandate to any particular insurer or counsel to appear at the status conference.[15]

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[13] The Common Pleas Case number was verified by a search of the Richland County Circuit Court online docket. http://publicindex.sccourts.sorg/Richland/PublicIndex/caseDetails.aspx.

[14] The caption on the transcript of the status conference contains only one case reference, *i.e., Roxanne Falls as PR v. CBS Corporation et al.*, Case No. 2015-CP-46-02155, a York County case, with the additional caption reference of "In re Receivership of Covil Corporation *et al.*" (Transcript of July 11, 2019 hearing, Richland County, transcript prepared July 22, 2019).

[15] The order for status conference was removed to the United States District Court and assigned Case No. 3:19-1948 BHH. By order dated July 26, 2019, Judge Hendricks dismissed the removal, but noted the apparent mixture of personal injury claims and "collateral" issues "regarding the viability of the Receiver's claims against [a] third party being litigated in the state court."

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However, I can find no order preserving "all rights" to USF&G as was assured in the email referenced above.

20. The Order appointing the Receiver for Covil Corporation was issued in a single case, *Taylor v. Air & Liquid Systems Corporation et al.* Case No. 2018-CP-40-04940 (Richland County) by order of Retired Chief Justice Toal on November 2, 2018. There also appears to be an order appointing the same Receiver for a different asbestos defendant, Starr Davis Company Inc. and Star Davis Company of S.C. Inc. on February 22, 2019. That order was issued in a different case, *Hopper v. Air & Liquid Systems Corporation et al.*, Case No. 2019-CP-40-000076 (Richland County)[16]. A "clarifying" order was issued in the Taylor case on March 4, 2019. Another "clarifying" order was issued, this time in the Hopper case on April 24, 2020. Both "clarifying" orders stated that the orders of receivership appointed the Receiver in "all asbestos related cases and for all asbestos related matters." The "clarifying" orders greatly expanded the scope of the Receiver's authority, and seem to have been interpreted to allow the Receiver free reign over any insurer that ever issued a liability policy for either Covil or Starr Davis, regardless of whether Covil or Starr Davis are defendants in an individual action. That appears to be how the definition of "asbestosis and asbestos litigation in state court[17]"purportedly expanded to include coverage issues and other collateral matters that do not fall within the personal injury arena. This is the root, in my opinion, of the concerns of counsel for USF&G that jurisdiction is being exercised over USF&G in cases in which USF&G is not

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16 The Receiver also sought to be and was appointed over Southern Insulation Inc.

17 This is the language used by the Chief Justices in all of the orders appointing circuit judges to oversee the category of cases that, until recently was limited to asbestos personal injury cases.

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a party and that USF&G's rights are being adjudicated without it being a party to the cases in which the settlements are being made. **It is a valid concern.**

21. The instant issue arose when the Receiver filed motions in March 2020 seeking approval of settlements with certain other insurance carriers for Covil, which motions also sought establishment and approval of a qualified settlement fund under Section 468B of the Internal Revenue Code of 1986[18]. The motions for approval of settlements included the same five non-consolidated case captions that originated in the Receiver's Motion for Status Conference[19]. Still, USF&G was not a party to any of the cases under which the motions for approval of settlements were filed.

22. On March 20, 2020, USF&G filed a "Limited Objection(s)" to the proposed settlement agreements and establishment of Qualified Settlement Funds. USF&G pointed out numerous provisions of the proposed settlement agreements that would negatively impact the rights of USF&G as to other insurers by altering its rights as to contribution under law and under contracts between USF&G and other insurers. Most significantly, each of the proposed settlement agreements included an agreement by the Receiver that the funds contributed to the QSF by the settling insurance carriers would be treated as funds of "excess" carriers, purportedly moving USF&G to the front of the line in terms of which company has to pay for damages sustained in a personal injury asbestos case in the future. That provision purportedly altered the priority of payment to persons claiming injury by

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[18] Motions were filed by the Receiver for approval of purported settlements with First State Insurance, Hartford Accident and Indemnity Company and TIG Insurance company on March 4, 2020. The same motion was filed on March 16, 2020 as to purported settlements with Sentry Insurance Mutual Company, f/k/a Hardware Mutual Casualty Company.

[19] The Receiver also filed a motion for approval of the settlements in another case, *Pavlish et al. v. Covil Corp. et al*, Case No. 2019-CP-42-03968 (Spartanburg County) in which USF&G was a party. However, the Receiver on March 20, 2020 withdrew his motion in the Pavlish case.

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the insureds, and rewrote the relationships among co-insurers established by agreements and existing law. The settlements purportedly forced USF&G to the front of the line in terms of first level liability coverage when the settling insurers' policies were not excess policies (and should not be construed as excess policies based on a private agreement to which USF&G was not a party). In addition, under the settlement agreements, the Receiver obtained an order purporting to enjoin USF&G from seeking contribution from settling insurers and required any such claims to be brought solely against the QSF and adjudicated in South Carolina State Court. In other words, the settlement agreements purported to change the insurance landscape, without USF&G having had a voice in the terms of the settlement because it was not a party, a classic due process violation.

23. In addition to purportedly altering the rights of USF&G as to other liability insurance carriers (to USF&G's prejudice), the proposed settlement agreements also infringed on USF&G's existing legal rights in the following selected provisions. All of this was done without USF&G being a party to the litigation and therefore lacking the ability to substantively participate in a meaningful analysis of the effects of the settlements with other insurers. Among the terms which affected USF&G's rights were:

    a. The settlement resolved "all of [the settling] insurers' claims against the Receiver and each other, in all courts in which actions or other proceedings between the parties are pending." (Paragraph 2 of Proposed Settlement Agreement.) The universal scope of the language may well have a detrimental effect on USF&G in jurisdictions other than South Carolina, in cases not yet filed and to be filed for decades to come.[20]

[20] The qualified settlement fund Operating Agreement (a redacted copy of which was included in the Motions for Approval of Settlements), over which this particular court was to reserve jurisdiction, established the life of the

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b. Provided for payment from the fund to the settling insurers for "costs incurred . . . in connection with claims, suits and demands alleging personal injury and bodily injury from alleged exposure to asbestos-containing materials ("Covil Asbestos Suits"). . ." In other words, the QSF appears to be structured to not only pay injured parties or their personal representatives, but also to pay legal expenses incurred by the settling insurers in all such future personal injury suits in which the settling insurance carriers are named as defendants, not just in South Carolina but world-wide. The terms of the settlement agreements purport to position Covil's insurers (USF&G) as first source payment because the settling insurers are "excess" carriers only under the QSF. The Operating Agreement between the Receiver and the settling insurers will require Covil's insurers to be the first primary obligor for liability. *See* "Fund Purposes" to include "(iii) . . . provide advances to pay for legal fees and settlement costs of Covil Asbestos suits asserted against Covil Corporation, pending reimbursement or indemnification by other responsibility including (without limitation) Other Insurers of Covil; and (iv) to secure certain future potential contingent obligations to the [settling] Insurers. . ." Section 1.2 Operating Agreement, Exhibit B to Motions for Approval of Settlement.

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fund as 30 years, expiring on December 31, 2049. Section 1.6, Exhibit 2 to Motions for Approval of Settlements. The definition of "this Court" is not set forth within the Operating Agreement. The South Carolina Rules of Civil Procedure provide a successor plan for currently-serving circuit court (and other) judges, but not for a judge, retired or otherwise, who sits by special assignment of the Chief Justice. *See* Rule 63, SCRCP. Reservation of jurisdiction by a circuit judge who sits by special assignment of the Chief Justice makes the Chief Justice the perpetual gatekeeper for determining what judge, if any, takes over a case adjudicated by a judge sitting by special assignment. It also forces the Chief Justice into acting to determine whether a successor appointment will be made, who the successor will be, and what responsibilities the successor specially appointed judge will have. In normal circumstances, successor presiding judges are assigned by operation of law when the need arises, and the Chief Justice need not be consulted. *Id.*

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c. Section 1.2 of the Operating Agreements expressly provide that the QSF will "provide funds . . . used to pay for costs incurred by the parties hereto. . .", for claims for personal and bodily injury from alleged exposure, which includes the settling insurers' costs of defense in future personal injury claims to which Covil and derivatively USF&G will be a party.

d. Permanently vest in the South Carolina[21] courts the exclusive jurisdiction to litigate insurance allocation claims, as well as contribution and indemnification claims arising in personal injury cases that have no connection to South Carolina whatsoever, simply by naming Covil as a defendant. *See* Article III, Section 3.1, Operating Agreement, Exhibit B to Motions for Approve Settlements[22].

e. The Operating Agreements vest in the Receiver the authority to decide whether to settle claims in which Covil is a named insured, and for which USF&G will bear insurance liability for indemnification and defense, without requiring a showing of exposure to Covil products. Under she operating agreements Covil's non-settling insurers, such as USF&G, do not appear to get any credit or judgment reduction for amounts that are paid by the QSF for claimants.

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21 The efficacy of the Operating Agreement become effective only if "this court" retains jurisdiction over the QSF and matters related to it.

22 Since the Receiver has included within the scope of its authority coverage claims and legal malpractice claims, the QSF monies may also be allocated to pay expenses of the Receiver and the settling insureds for all such collateral litigation, while leaving Covil's insurers (including USF&G) as the primary source of personal injury liability recovery in asbestos personal injury suits, perhaps worldwide.

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RULE 11, SCRCP

24. It is my firm opinion that USF&G's counsel (national or otherwise) **was absolutely required to file the objections in order to adequately protect its client USF&G**. The proposed settlements, which have since been approved[23], have drawn USF&G into what will likely be a litigation vortex to untangle the rights and obligations it has relative to future personal injury asbestos cases and allocation of liability responsibility among insurers and the potential applicability of the QSF, especially as to cases litigated outside South Carolina and to which the Receiver's settlements may or may not be effective or binding. **Not only was the conduct of USF&G's counsel consistent with what a reasonable attorney would be expected to do in connection with its representation of its client in the position of USF&G, it is my opinion that a failure to have filed the objections to the settlements would have been an unacceptable abandonment of the attorneys' duties to USF&G.**

25. There is state court precedent for a non-party to object to a settlement entered into by parties to separate litigation, without any suggestion that objections were violative of Rule 11. The Charleston County sex abuse litigation has resulted in two (2) decisions from the South Carolina Supreme Court which arose when victims who had opted out of a class action of victims prior to settlement, and who later objected as non-parties to a settlement between the class and tortfeasors who agreed to compromise a resolution with the class. The opt-ed out victims objected to settlements made between the tortfeasors and those

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[23] I am informed and believe that the objections were denied without a hearing and the settlements have been approved. This has generated an environment of certain future litigation in which USF&G will be required through complex and lengthy litigation to protect its rights against orders issued in cases to which it was not a party and to which it had no opportunity to be heard.

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persons who remained in the class. *See Ex Parte Doe,* 393 S.C. 147, 711 S.E.2d 892 (2011)[24];

26. In my expert opinion, **the signature of USF&G's counsel to the Objections to Settlements were in full compliance with an attorney's obligations under Rule 11, SCRCP; moreover, to have done less would have reflected an inattention by USF&G's counsel to their duties and to the rights of their client, USF&G, leaning toward a deviation from the standard of care required of attorneys rather than a sanctionable filing. It would have been an unreasonable position for counsel not to have filed the objections.**

27. Retired Chief Justice Toal dismissed USF&G's assertion that it had not had a full opportunity to respond to the proposed settlements in an email dated April 8, 2020 at 3:46 pm. The Court made reference to the position of USF&G's counsel describing its client as "non Parties," and in that same email the Court stated that "[n]either of the non-party defendants has ever filed a Motion to Intervene as a party in this matter." USF&G was not a party to any of the individual personal injury cases listed on the motions for approval of settlements (other than Pavlish, *see supra.*) *Id.* Yet the motions sought rulings affecting USF&G's rights.

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[24] The State Supreme Court resolved the dispute regarding the objection by non-parties to the class action settlement, based on subsequent settlement agreements entered into by and between the opted-out class members and certain of the tortfeasors, which the Court held barred a viable objection to the class action settlement by the non-party objectors. However, the Court also pointed out that the opted-out parties could not be prejudiced or bound by provisions of the settlement agreement that was entered into between the class and the tortfeasors since they were not parties to the agreement. "Appellants opted out of the class and thus could not be harmed by any of the irregularities they allege. . . Appellants can claim no harm from the manner in which the class action settlement was handled." *Id.* 711 S.E.2d 892. A subsequent decision in the sex abuse cases may also be relevant to whether USF&G could have had its rights affected by the Receiver's settlements. "Due process guarantees to persons who never had a chance to present their evidence and arguments on a claim a full and fair opportunity to litigate the relevant issue even when 'one or more existing adjudications of the identical issue . . . stand squarely against their position' so long as the litigant was not a party or in privity with a party in the previous suit." *Doe v. Bishop of Charleston*, 407 S.C. 138, 743 S.E.2d 494, 499 (2014).

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28. A motion to intervene would have been a dangerous move by counsel for USF&G. By intervening, USF&G would have risked an irrevocable obligation to be bound by a decision in litigation which was quickly morphing into a negative adjudication of USF&G's rights. Had USF&G intervened, it would have risked being bound by the orders in these cases, to which it is otherwise not a party[25]. **Seeking to intervene as a party would have potentially waived personal jurisdiction, a defense I am informed and believe USF&G has asserted in multiple direct asbestos actions pending in South Carolina, and would have impacted the current and future ability of USF&G to claim lack of lack of due process and to assert that res judicata does not bar its rights to object to the attempt by the Receiver's settlements to prejudice its rights.**

THE ACT

29. The Act, established at S.C. Code Ann. 15-36-10(A)(1) *et seq*., was enacted in 1988, subsequent to the 1985 Constitutional Amendment which vested exclusive jurisdiction over conduct of attorneys in the South Carolina Supreme Court, and not in lower trial courts or the General Assembly. South Carolina Constitution Article V, Section 4A (1985 Act No. 8). Yet portions of the Act actually incorporate the standards of Rule 11[26], SCRCP as it relates to the filing of individual pleadings. *See* S.C. Code Ann. Section 15-36-10(A)(1), (2), (3)(a & b). Other portions of the Act focus on an attorney's actions in the "procurement, initiation, continuation or defense of a civil cause" and an examination of

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[25] Last week's decision by the South Carolina Supreme Court supports USF&G's position that a coverage dispute among competing insurers should be left to "a subsequent declaratory judgment action, . . . where it properly belongs." *Ex Parte: Builders Mutual Insurance Company et al, In Re: Palmetto Point at Peas Island Condominium Property Owners Association v. Island Pointe LLC et al.,* Op. No. 27970 (May 13, 2020), Appellate Case No. 2019-000238.

[26] In my expert opinion, Rule 11(a), SCRCP applies to individual filings, and not to conclusions as to a collective position advanced throughout the life of specific litigation.

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whether the "claim or defense is not . . . brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based." S.C. Code Ann. Section 15-36-10(A)(3)(c) and (d).

30. The substance of the Act that is not vitiated by Rule 11[27] relates to the "continuation or defense of a civil cause [that is] not intended merely to harass or injure the other party" and "brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense. . ."[28].

31. Judicial decisions focusing on sanctions sought or awarded under the Act have primarily focused on the collective conduct of the litigation as a whole, rather than on the filing of an individual pleading[29]. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (which held an award of sanctions under the Act could not be made when the Plaintiff's claim had survived a motion for summary judgment), *overruled in part Holmes v. E. Cooper Community Hospital Inc.,* 408 S.C. 138, 758 S.E.2d 483 (2014). *See also Clarendon County v. Tykat, Inc..*, 394 S.C. 21, 714 S.E.2d 305 (2011); *Father v. S.C. Dep't*

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[27] Judicial construction of the Act has unfortunately not focused on the apparent unconstitutional nature of that portion of the Act that echoes Rule 11, SCRCP. There is dicta in the opinion of the Supreme Court in Pee *Dee Health Care P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E2d 758 (2018) that recognizes the constitutional division of authority between the Supreme Court and the General Assembly with respect to procedural rules. That question is not the subject of inquiry here, unless an order is issued sanctioning USF&G's counsel under Rule 11 and the Act, since the motion for sanctions is focused only on the filing of an individual pleading and not the entirety of the litigation. Affiant's opinion is that an individual pleading can constitutionally be examined only under the provisions of Rule 11 and not the Act.

[28] Certain sections of the Act reference the distinction the filing of an individual pleading, which is addressed by Rule 11, yet other sections address the overall handling of a civil claim or defense to its conclusion, with little structure as to that large detail. *See* 15-36-10(A)(4)(a) which focuses on the filing of an the filing of an individual pleading, versus Section 15-36-10(A)(4)(a)(iii)(iv) and (A)(4)(b), which focus on the entirety of the litigation and the purposes of the "initiation, continuation or adjudication" of a particular matter as violative of the Act.

[29] One exception to the collection of decisions on Rule 11 versus the Act appears in *Ex Parte: Gregory*., 378 S.C. 430, 663 S.E2d 46 (2008). In that case, the only pleading filed prior to dismissal of the lawsuit in favor of the defendant was the complaint. Defendant sought and received sanctions under both Rule 11 and the Act, where the complaint was frivolous, the underlying investigation insufficient to support the filing of the complaint, and the complaint appeared to be filed for an ulterior purpose (generating news coverage prior to an election). Affiant was counsel of record for the successful party in *Ex Parte: Gregory*.

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of Social Services, 353 S.C. 254, 578 S.E.2d 11 (2003); *Rutland v. Holler, Dennis Corbett, Ormond & Gardner*, 371 S.C. 316, 637 S.E.2d 316 (Ct. App. 2006).

32. The non-Rule 11 provisions[30] of the Act contemplate a determination regarding the merits of the motion after the conclusion of litigation. S.C. Code Ann. Section 15-36-10(C)(1) ("At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.").

33. To the extent that the Act can constitutionally be applied to the filing of a single pleading, the Act contains a provision similar to the "safe haven" provision of the Federal Court's version of Rule 11. It is a condition precedent to an award of sanctions under the Act, that the allegedly offending filing be brought to the attention of the filer and the filer be given 30 days to elect to react, reconsider and possibly withdraw the allegedly offending filing. S.C. Code Ann. Section 15-36-10(D). If for no other reason, the Receiver's failure to comply with the "safe harbor" provision of the Act by giving the filing counsel an opportunity to withdraw the pleading precludes an award of sanctions under the Act.

34. The standard under that portion of the Act that echoes Rule 11 is whether "a reasonable attorney presented with the same circumstances would believe" that the filing was meritorious and "supported by the facts." Section 15-36-10(A)(4). As explained above, **in my expert opinion, the filing of the objection to the purported settlements entered into by the Receiver which prejudiced and/or altered rights of USF&G without**

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30 *See* ¶ 29.

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USF&G being a party was not only reasonable but an imperative obligation inherent in the duties USF&G's counsel owed to its client.

35. The Receiver's motion does not allege any reason why the filing of the objection to settlements were "frivolous", and instead merely states that the objections were frivolous. The Receiver offers no analysis of why the filing of the objections to settlements were "frivolous," he merely asserts that they were. (Motion for Sanctions, unnumbered P. 1). The insufficiency of any allegation as to why the objections were frivolous precludes an analysis of liability under the Act. Moreover, since the request for sanctions focuses on a single filing of objections (as to each settlement), the appropriate (and constitutionally-sound) basis for examining sanctions is Rule 11, not the Act.

ALLEGATIONS OF PRIOR BAD ACTS

36. While not relevant to an inquiry under Rule 11, the Receiver reminds the court by way of "background" of what it considers "prior bad acts" of the counsel against whom sanctions are sought[31]. Prior bad acts are not relevant in evaluating whether the filing of a specific pleading violated Rule 11; however, I have reviewed documentation of the prior bad acts alleged by the Receiver in order to comment.

37. Removal: Counsel for USF&G removed the status conference proceedings upon a sound legal basis, *i.e.,* "an insurance coverage dispute – although filed in a tort action under the tort action's caption and not styled as an original case-initiating pleading – is a distinct civil action for purposes of federal removal jurisdiction." They cited nationwide authority

[31] It is true that an examination under the Act would permit consideration of "previous violations of the provisions of this section." S.C. Code Ann. Section 15-36-10 (F). However, Rule 11 is the standard applicable to the filing of the objections to settlement.

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for doing so[32]. As noted above, the United States District Court dismissed the removal but the basis for removal was sound based on existing precedent. In light of the bizarre position USF&G found itself in, *i.e.,* being required to appear at a status conference of cases to which it was not a party, an attempt at removal is not frivolous, in bad faith, or below the standard of what a reasonable lawyer would do in those circumstances. To the contrary the Notice of Removal filed by USF&G reflects the thoughtful application of establish legal principles to an unusual set of facts, which is the essence of good lawyering as Retired Chief Justice Toal recognized[33]. Also, the notice of removal demonstrated - by the detailed explanation of what is a new action under the South Carolina Rules - that the action removed was a new action. **In my expert opinion, the removal was a reasonable and sound legal judgment, fully supported by cited state court rules, federal case law and the detailed chronology set forth in the Notice of Removal[34].** It does not appear that the asbestos "docket" was ever intended to address coverage litigation, yet it has somehow evolved to include coverage issues, receivership and legal malpractice issues[35]. There are significant due process concerns over the litigation to date as to USF&G.

38. Filing of email in United States District Court: Rule 8(c)(4), SCADR expressly provides an exception to confidentiality of mediation proceedings "for the limited purpose . . . of establishing, refuting, approving, voiding or reforming a settlement agreement reached

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32 The Notice of Removal cited *Labertew v. Langemeier*, 846 F.3d 1028, 1031-32 (9th Cir. 2017); *Jackson-Platts v. General Electric Capital Corp.*, 727 F.3d 1127, 1139 (11th Cir. 2013); *Travelers Property Casualty v. Good*, 689 F.3d 714, 725 (7th Cir. 2012); Butler v. Polk, 592 F.2d 1293, 1295-96 (5th Cir. 1979) and *Adriaenssens v. Allstate Insurance Company,* 258 F.2d 888, 890 (10th Cir. 1958) in support of the removal.

33 Transcript of September 13, 2019 hearing, page 34.

34 Notice of Removal (ECF 1), Paragraphs 1, 3, 8, 11,15, 17 and Sections III and IV.

35 The recent injunction by Judge Hendricks supports the conclusion that insurance coverage issues ought not to be addressed in the state court proceedings. Opinion and Order February 27, 2020 (ECF 105).

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during a mediation." *Id.* It was on that basis that Counsel concluded the use of the email was proper[36]. However, to be cautious, Counsel did exactly what it was supposed to do when relevant information in a document which might be confidential[37] needed to be disclosed to a court[38]. *See* Joint Motion to Seal and Memorandum in Support (ECF 11) in *Protopapas v. Wall, Templeton & Haldrup P.A., et al.*., Civil No. 3:19-1635-BHH (United States District Court for the District of South Carolina). The documents of record do not provide any evidence of when the mediation started and ended[39]. This Court has already sanctioned USF&G in an order dated September 19,2019 for what it terms a violation of the court's mediation order (even though USF&G was not a party to the cases which were ordered to mediation[40]). **The conduct of USF&G's counsel in pointing out exceptions**

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[36] Counsel relied upon *Huck v. Oakland Wings LLC,* 422 S.C. 430, 813 S.E.2d 288 (Ct. App. 2018); and a later case, *May v. May*., 428 S.C. 131, 833 S.E.2d 78 (Ct. App. 2019) (which cited the 2018 amendment of Rule 8 to add section (c)(4), and which cited a Florida case for recognizing the rationale for disclosing documents not prepared during the mediation itself. *See* Supreme Court Order 2018-05-01-01 (amending Rule 8 of the ADR Rules).

[37] Rule 8(b) and (c), SCADR provides numerous exceptions to confidentiality, and Rule 8(b) was especially relevant to the substantive content of the email which was sought to be filed under seal.

[38] The public record does not appear to establish the dates of mediation, although the online dockets do reflect when certain defendants were dismissed as defendants, which seems linked to a mediation with multiple parties. Normally the start and finish of a mediation is easily established, because the mediator is required to notify the court of the results of mediation, by filing a specific report as required by the ADR Rules. *See* Rule 13(e) ("Within ten (10) days of conclusion of the hearing. . . the arbitrator shall file with the Clerk of Court Proof of ADR on a form approved by the Supreme Court. No such ADR report can be located in the record, so the exact dates of mediation, and therefore the scope of matters which are confidential, are not apparent from this record. While orders in the relevant proceeding addressing the email state when the mediation started and when settlements were apparently entered, none of that information appears of record and the veracity of it cannot be verified, at least from public filings.

[39] The February 28, 2019 order of Retired Chief Justice Toal scheduled mediation to occur on March 4-6, 2019 in Charleston. The subsequent order issued on September 19, 2019 which sanctioned USF&G in connection with the email does not state when the mediation started and ended, but refers to when it was supposed to start and end pursuant to the February 28, 2019 order. In the absence of evidence of when mediation ended, merely labeling an email as part of a mediation process does not make it so. It would be farcical to assume that a mediation which ended without resolution somehow remained pending indefinitely. This record is absent of proof of when mediation ended.

[40] In its September 19, 2019 order, this Court referenced a 2002 Fourth Circuit case which discussed the elastic nature of when a mediation started and ended. However, the South Carolina ADR rules were amended by the Supreme Court in an order dated May 3, 2006 to require a written agreement to be executed by the parties "before the adjournment of the mediation" if the settlement is the result of mediation. ADR Rule 6(f). The 2002 Fourth Circuit case evaluated a prior version of the ADR rules that are not applicable to these proceedings.

to confidentiality as set forth in Rule 8, SCADR, but in cautiously using the proper procedure to seek to file under seal a document that might be protected by the ADR rules were professional and reasonable.

39. Failure to produce insurance policies and related documents[41]: The Receiver's stated difficulties in obtaining documents from USF&G are a result of his attempt to do so under the banner of personal injury cases to which USF&G is not a party rather than initiating independent litigation to gather the assets of Covil. The Receiver was already a party to two federal actions in which he had the right to seek discovery from the insurers rather than trying to obtain discovery from insurers who are not parties to certain of the individual personal injury cases. The gathering of assets should not be a part of the personal injury cases, but an independent enterprise entirely. In any event, I am informed and believe that USF&G has undertaken herculean efforts to locate and produce a large volume documents in response to the Receiver's document request[42]. **In my opinion, USF&G's counsel acted appropriately and reasonably to respond to discovery in a personal injury action to which it was not a party.**

40. Threats: Counsel for USF&G served discovery requests for documents in an action pending in the Middle District of North Carolina. These included a request for insurance policies that may provide coverage for actions by the Receiver for any acts he has or may take to "threaten, diminish and or otherwise undermine the Insurers' defense" and

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41 In his motion for sanctions, the Receiver expressly states this issue is provided for "background context" only and not as an independent basis for sanctions.

42 The affidavit of Mark S. Esposito, Dec. 6, 2019 in the five (5) captioned cases attests to the completion of document production by USF&G in response to the Receiver's discovery requests. In addition, the detailed steps undertaken by USF&G to locate and produce requested documents, including contacting former employees, are fully described in the Non-Party USF&G's Motion to Reconsider, Alter or Amend Contempt Order of January 8, 2020, specifically *see* ¶¶ 20-25.

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provides a non-exhaustive list of actions by way of example. When the Receiver answered the document request as "irrelevant," Counsel for USF&G wrote a consultation letter explaining why the requests were not irrelevant. (Letter from Alan Turner dated January 22, 2020 *in re*: *Zurich American Insurance company v. Covil Corporation et al*, Civil Action 1-18-cv-932 (M.D.N.C). When Counsel had a 'meet and confer' telephone call, Counsel for USF&G verbally told the Receiver that no threats were intended and stated USF&G had no intent to "hold the receiver personally liable or to 'intimidate' the Receiver in any manner." (Declaration of Andrew T. Frankel filed March 4, 2020 (ECF 241) in the Zurich case. **Lawyers for USF&G have made no threats against the Receiver that are borne out by this record nor in the records of related cases reviewed[43].**

CONCLUSION

For the reasons set forth above, **it is my expert opinion that the conduct of USF&G's counsel in filing the objections to the settlements, as well as in the "prior bad acts" referenced by the Receiver, were not only appropriate but entirely reasonable and warranted under the facts presented[44].**

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[43] That is not to suggest that are not remedies available against a Receiver in appropriate circumstances. The South Carolina Supreme Court has long recognized that the role of a Receiver is to be impartial and he "should be untrammeled in his relations, entirely indifferent between the parties, and absolutely fair and impartial, for the receiver not only represents all the parties interested in the estate, but he is an officer of the court. *Penn Mutual Life Insurance Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787 (1934). There is sparse law on the potential liability of a professional who is acting as an officer of the Court, but it is not without precedent for private individuals who serve as officers of the court to be subject to personal liability. *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1996) (finding that a court appointed guardian *ad litem* in family court is not protected by judicial immunity and is not an "employee" of the court system protected by the Tort Claims Act).

[44] Given the number of allegations included in the Receiver's motion, and the voluminous record to digest in a short amount of time, I have not attempted to address them all in this affidavit. USF&G responses to these allegations to date are set forth in briefs and supporting papers, each of which contains ample citations to legal and record support. Based on my review of the record, my opinion is that USF&G's positions were well-founded and do not come close to being a violation of Rule 11 or the Act in any way. The fact that I do not address every one of the

FURTHER DEPONENT SAYETH NOT.

Desa Ballard

Sworn to before me this
20th day of May,2020.

Notary public for South Carolina
My Commission expires: 3/7/2026

Receiver's allegations in this affidavit should not be considered my agreement that those allegations support sanctions.

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Curriculum Vitae

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EDUCATION

Juris Doctor - 1983
University of South Carolina School of Law

Bachelor of Arts – Journalism - 1980
University of South Carolina
Magna cum Laude, Phi Beta Kappa

PROFESSIONAL EXPERIENCE

Ballard & Watson, Attorneys at Law
West Columbia, South Carolina - 1997 - present.

Adjunct Professor, University of South Carolina School of Law
Columbia, South Carolina - Advanced Legal Profession. 2003 -2015.

Barnes, Alford, Stork & Johnson, L.L.P. – Of Counsel
Columbia, South Carolina - 2000 - 2003.

Ness, Motley, Loadholt, Richardson & Poole -
Charleston, South Carolina - Partner. 1987 - 1997.

Chief Justice J. B. Ness, South Carolina Supreme Court - Law Clerk to Chief Justice. 1985 - 1987.

South Carolina Supreme Court - Staff Attorney. 1984 – 1985.

Honorable Ralph King Anderson, Jr., Florence, South Carolina. Circuit Court Law Clerk. 1983 - 1984.

BAR MEMBERSHIPS

South Carolina Supreme Court
District of Columbia Bar
United States District Court, District of South Carolina
Third, Fourth, Fifth, Eighth, Tenth Circuit Court of Appeals
United States Supreme Court

PROFESSIONAL ACTIVITIES

South Carolina Trial Lawyers Association

Chairman, Ethics & Professionalism Committee, 1996 - 2007

Co-Editor, The Bulletin Magazine - 1993 - 1996

Member, Technology Committee, 1994 - 1996

Vice Chairman Amicus Committee, 1989 - 2000

Board of Governors, 1990 - 1993

Chairman CLE Committee, 1989 - 1992

Vice Chairman Publications Committee, 1989 - 1990

Vice Chairman CLE Committee, 1988 - 1989

South Carolina Bar

Member - Professional Responsibility Committee, 1994 – 2011; Chairman 1997-98.

Member**,** Lawyers Helping Lawyers 1995 – present.

Editorial Board, South Carolina Lawyer Magazine, 1993 - 1994.

Member - Ethics Advisory Committee, 1991 - 1999.

Member - Continuing Legal Education Committee, 1991 - 1992.

Member – Unauthorized Practice of Law Committee 2011- 2019.

South Carolina Administrative Law Judges Advisory Rules Committee 1994 - present.

South Carolina Criminal Practice Rules Committee 1987 - 1992.

South Carolina Judicial Council, Family Court Rules Subcommittee - 1986 - 1988.

Editorial Board - A Guide to South Carolina Legal Research South Carolina Bar CLE Division (1991).

Other Memberships

Center for Professional Responsibility
Association of Professional Responsibility Lawyers
South Carolina Association of Ethics Counsel
(Founding Member and Chairman)

PUBLICATIONS

A Force To Be Reckoned With - The South Carolina Delegates to the Constitutional Convention Co-Author with J. B. Ness - published by the National Conference of Chief Justices, 1993.

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***Tearing Down the Spider's Web* - The Deceptive Practice of Lawyer Bashing** Co-author with J. B. Ness - South Carolina Trial Lawyer Bulletin, Spring 1990.

South Carolina Jurisprudence - South Carolina Bar Encyclopedia. Contributing author on the topic of appellate practice, 1990.

Do The Write Thing - uarterly column on legal writing in the South Carolina LD Bar Tab, 1991 - 1993.

Punitive Damages Today - South Carolina Lawyer, January- February 1992.

Punitive Damages Today Part II - They're Back - South Carolina Lawyer, January - February 1994.

Brother, Can You Spare a Dime? - South Carolina Trial Lawyers Bulletin, Spring 1995.

Dicta from Desa - South Carolina Lawyers Weekly, 2009-2011.

CIVIC ACTIVITIES

Mental Health Association of South Carolina
Board Member - 1997 to 1999.

AWARDS

South Carolina Lawyers Weekly
Hall of Fame (2018)
Leadership in Law (2017)

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Materials Provided to Desa Ballard

- 2019.6.18 Receiver's Mot. for Status Conference Proceeding (SC State Court)
- 2019.6.26 Emails with Court re Status Conference Proceeding (SC State Court)
- 2019.6.26 Receiver's Memo. in Supp. of Mot. For a Rule to Show Cause (SC State Court)
- 2019.7.1 Receiver's Memo. of Law on Court's Jx (SC State Court)
- 2019.7.10 USF&G's Notice of Removal of Status Conference Proceeding (D.S.C)
- 2019.7.11 Status Conference Hearing Transcript (SC State Court)
- 2019.7.19 Receiver's Motion For Expedited Status Conference re Removal (D.S.C)
- 2019.7.26 Order Dismissing USF&G Removal of Status Conference Proceeding (D.S.C)
- 2019.4.24 Protopapas v. Wall Templeton, et al. Summons and Complaint
- 2019.6.13 Joint Mot. to Seal Mediation Email (Wall Templeton DSC)
- 2019.6.13 Mem. of Law ISO Insurer's Joint MTD (Wall Templeton D.S.C)
- 2019.9.13 Rule to Show Cause Hearing Transcript (SC State Court)
- 2019.9.19 Rule to Show Cause Sanctions Order (SC State Court)
- 2019.9.27 USF&G's Mot. to Reconsider Sept. 19 Order (SC State Court)
- 2019.11.11 USF&G Memo of Law re: RTSC (SC State Court)
- 2019.11.22 Receiver's Brief ISO RTSC (SC State Court)
- 2019.11.22 USF&G Supplemental Memo of Law re: RTSC (SC State Court)
- 2019.12.23 Receiver's Proposed order (SC State Court)
- 2020.1.6 USF&G Response to Receiver's Proposed Order re: RTSC (SC State Court)
- 2020.1.8 RTSC Sanctions Order (SC State Court)
- 2020.1.17 USF&G Motion to Reconsider (SC State Court)
- 2020.2.10 MSJ Briefing (MDNC)
- 2020.2.27 Judge Hendrick's Injunction Order (D.S.C.)
- 2019.11.21 Insurers' RFA to Receiver (MDNC)
- 2019.12.06 Affidavit of Mark S. Esposito (SC State Court)
- 2020.01.17 Non-Party USF&G's Motion to Reconsider *et al.* (SC State Court)
- 2020.1.22 USF&G's Meet and Confer Letter to Receiver (MDNC)
- 2020.2.7 Receiver's Mot. for Status Conference (Pavlish SC State Court)
- 2020.2.14 Dean Omar's Mot. for Protection (MDNC)
- 2020.2.24 USF&G's Mot. to Compel Receiver Communications (MDNC)
- 2020.2.24 USF&G's Opp'n to Dean Omar's Mot. for Protection (MDNC)
- 2020.2.26 Dean Omar's Reply ISO Mot. for Protection (MDNC)
- 2020.3.2 Receiver's Opp. to USF&G's Mot. to Compel Receiver Communications (MDNC)
- 2020.3.4 Frankel Decl. to USF&Gs Reply ISO Mot. to Compel (MDNC)
- 2020.3.4 USF&G's Reply ISO Motion to Compel Receiver Communications (MDNC)
- 2020.4.10 USF&G's Mot. to Enforce Judge Hendricks' Injunction (DSC)

- 2020.4.14 Receiver's Opp'n to USF&G's Mot. to Enforce Judge Hendricks' Injunction (DSC)
- 2020.4.21 USF&G's Reply ISO Mot. to Enforce Judge Hendricks' Injunction (DSC)
- 1976 USF&G Policy
- 2019.03.04 - Order Granting Receiver's Mot. to Clarify Receiver Order (Taylor; SC State Court)
- 2020.1.15 Memo of Law in Support of USF&G Motion to Dismiss (Pavlish)
- 2020.03.04 - Joint Mot. to Est. QSF, Approve Covil QSF, and Retain JX (SC State Court)
- 2020.03.05 - Joint Mot. to Approve Settlement Agreement w. Hartford (SC State Court)
- 2020.03.06 - Joint Mot. to Approve Settlement Agreement w. TIG (SC State Court)
- 2020.03.10-16 - USF&G's Emails to Receiver re Settlement-Related Doc Requests
- 2020.03.13 - Receiver's Mot. to Approve Settlements, Est. QSF (Pavlish; SC State Court)
- 2020.03.16 - Joint Mot. to Approve Settlement Agreement w. Sentry (SC State Court)
- 2020.03.18 - USF&G's Subpoena to Receiver re Settlement Docs (SC State Court)
- 2020.03.19 - Emails with Justice Toal re Pavlish Hearing (SC State Court)
- 2020.03.19 - Justice Toal Email re Scheduling Order (SC State Court)
- 2020.03.20 - Emails with Justice Toal re Pavlish Hearing (SC State Court)
- 2020.03.20 - Receiver's Mot. to Quash USF&G's Subpoena
- 2020.03.20 - USF&G's Limited Obj. to Mots. to Establish QSF and Approve Settlements
- 2020.3.20- Receiver’s Notice of Withdrawal of Motion to Approve Settlements Est. QSF (Pavlish; SC State Court)
- 2020.04.09 - Emails with Justice Toal re Receiver's Proposed Settlements
- 2020.4.20 Receiver of Covil's Motion for Sanctions Rule 11 and SCFPSA

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EXHIBIT 39

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	Case No. 2018-CP-40-04940
	)	
Denver D. Taylor and Janice Taylor,	)	
	)	
Plaintiffs.	)	**AFFIDAVIT OF DESA BALLARD**
	)	
v.	)	
	)	
Air & Liquid Systems Corporation[1], *et al.*	)	
	)	
Defendants.	)	
	)	

Personally, appeared before me, Desa Ballard, who being duly sworn, deposes and says that:

1. I am over the age of eighteen (18) years, of sound mind and am competent to state the matters set forth herein.
2. I am a member of the South Carolina Bar, having been admitted in 1983, Bar No. 0000498. I am also member in good standing of United States District Court for the District of South Carolina (1984), the Fourth Circuit Court of Appeals (1984) and the United States Supreme Court (1987) and numerous other jurisdictions as previously disclosed.
3. My professional background has previously been set forth in my affidavit dated May 20, 2020 filed in five unconsolidated cases (referred to herein as the "five unconsolidated cases"), which discussed my analysis of the propriety of actions taken by counsel for USF&G as it related to the current Receiver's request for sanctions for objecting to settlements which may have impacted USF&G's rights in several respects.

[1] United States Fidelity & Guaranty Company (USF&G) is not a party to this action and the online docket does not list USF&G as a party. Based on my examination of the online docket, it does not appear that USF&G was ever a party to this action.

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4. I was retained to review the conduct of USF&G's counsel and to provide my expert opinion regarding the conduct of counsel for USF&G [2] insofar as it relates to the Motion for Sanctions under Rule 11, SCRCP and the South Carolina Frivolous Proceedings Sanctions Act[3] (hereafter "the Act") dated May 18, 2020, filed in the captioned case[4] by the current Receiver for Covil Corporation.

5. I incorporate my analysis of Rule 11, SCRCP and the Act set forth in my prior affidavit dated May 20, 2020. Again, it appears the current Receiver is focusing on conduct that is governed by Rule 11, not by the Act (the portion of which essentially operates as a statutory Rule 11 likely violates the South Carolina Constitution, Article V, Section 4A).

6. The conduct which is the focus of the motion for sanctions, and which is addressed in this affidavit is: "frivolous continued objection to settlement, the following grounds and any other grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion." (Motion pp. 1-2).

7. Listed on **Exhibit A** are the documents I have been provided by counsel for USF&G in connection with this affidavit. I also have documents provided to me earlier in connection with the affidavit I submitted dated May 20, 2020. I have also reviewed numerous documents online in various litigation in South Carolina state courts and United States

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[2] Paragraph 1 of the motion (captioned as set forth here, dated May 18, 2020) seeks sanctions against "USF&G, Zurich, and their attorneys…" The closing paragraph of the motion only seeks sanctions against "USF&G and Zurich." This affidavit addresses my opinion of the conduct of counsel for USF&G.

[3] The correct name of the Act is the South Carolina Frivolous Civil Proceedings Sanctions Act, and is referred to herein as "the Act." *See* 15-36-10.

[4] Footnote 3 of the instant motion states that the current Receiver chose the above caption "to procedurally simplify this motion" but makes clear he seeks the same relief in the additional cases in which the current Receiver reached settlements which this court has approved.

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District Court and documents I previously examined in connection with my May 20, 2020 affidavit.

8. The conduct which is complained of in the current Receiver's motion for sanctions, is as follows[5]:

   a. April 20, 2020 Motion to Reconsider by USF&G (and Zurich) this Court's April 10, 2020 order approving the three settlements (which are not identified, but are assumed for purposes of this affidavit to be the settlements entered into by the current Receiver in the five (5) unconsolidated cases); and

   b. USF&G's Motion to Stay Enforcement of the settlement order "until the Court ruled on its Motion to Reconsider and until the settlement order was not subject to further appellate review." The motion is not identified by date in the current Receiver's motion but is presumed to be the motion filed April 20, 2020 in the five (5) non-consolidated cases.

   c. The current Receiver asserts the sanctionable conduct is that USF&G "largely reasserted [its] previous argument. . . [and] . . . USF&G. . . continue to assert [its] non-party status and flout South Carolina law and procedure." (Motion Page 5 of 21).

   d. The current Receiver asserts USF&G should be sanctioned for raising in its motion to reconsider "the effect of a prior Covil receivership on this Court's receivership." (Motion p. 5 of 21). The Receiver asserts that USF&G

[5] While the Receiver also alleges that counsel seeks to "subvert" and "direct[] the Court on how to manage its docket," engage in "frivolous conduct," and "deploy[] improper tactics to obstruct and delay rulings. . . and frustrate the purpose of the Receivership even when it means filing frivolous discovery, motions and memoranda that a reasonable attorney would know was not supported by law" there is no reference to specific filings except the two (2) as set forth in Paragraph 8 above.

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"disingenuously argue[s] [it] recently discovered Covil was judicially dissolved in the prior receivership. . ." (p. 5-6 of 21). The bulk of the Receiver's motion contains an exhaustive recitation of events from 1991 that reflect that USF&G had previous knowledge of the prior receivership, which I am informed is not disputed.

e. While not set forth as a separate ground for seeking sanctions, the current Receiver also characterizes USF&G's argument regarding the statute of repose set forth in the South Carolina Business Corporation Act, referring to the argument as a "baseless" argument. (Motion p. 18 of 21).

9. **In my professional opinion, the conduct of USF&G's counsel in filing the referenced motions and making the referenced arguments demonstrated the highest standards of professionalism of attorneys representing their clients. Raising these issues was and is required by counsel's fiduciary obligations to its client USF&G and in keeping with the duties inherent in the attorney-client relationship between a client and its counsel. Rather than serving as evidence of sanctionable conduct, the acts of USF&G's counsel instead show superior diligence and competence to vigorously preserve its client's rights for appellate review, despite unwarranted attacks on them by the current Receiver.** Each of the allegedly sanctionable events is discussed separately below.

A. April 20, 2020 Motion to Reconsider by USF&G (and Zurich) this Court's April 10, 2020 order approving the three settlements

1. Counsel for USF&G was required to file the Motion to Reconsider in order to preserve the issues for a future appeal of the April 10, 2020 order. Rule 59(e), SCRCP.

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2. South Carolina adopted Rule 59, SCRCP, when the Supreme Court of South Carolina adopted the South Carolina Rules of Civil Procedure (SCRCP), which became effective July 1, 1985. This was done as part of a compromise between the South Carolina Supreme Court and the General Assembly, in which the General Assembly recognized the exclusive jurisdiction of the South Carolina Supreme Court to promulgate rules governing the practice and procedure in the courts of this state. 1985 Act No. 100, Section 3, signed by the Governor on May 21, 1985.

3. Act No. 100 repealed hundreds of existing statutes which the General Assembly had previously enacted to govern practice and procedure in the trial courts of the state, which were generally referred to as the "Code of Civil Procedure[6]." At the same time, the Act recognized that "the South Carolina Rules of Civil Procedure shall control when in conflict with the Code of Civil Procedure. . ."[7]

4. The framework for the SCRCP was the Federal Rules of Civil Procedure, hence the adoption by the South Carolina Supreme Court included the first version of Rule 59 to exist in the state. The 1985 author's note to the rules state "This Rule 59 is substantially the Federal Rule." Prior statutory law did not include a corresponding procedure equivalent to Rule 59(e) for a Motion to Reconsider. The rationale for requiring a Rule 59(e) Motion to Reconsider as a prerequisite to addressing an issue on appeal evolved

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[6] The University of South Carolina School of Law, prior to 1985, taught state court practice and procedure under the course title "Code Pleading" presumably because the procedural rules were set forth within the South Carolina Code [of statutes].

[7] The Legislative/Judicial compromise included an amendment to South Carolina Constitution to include Article V, Section 4A effected by 1985 Act No. 8, memorializing the exclusive jurisdiction of the South Carolina Supreme Court to promulgate "all rules and amendments to rules governing practice and procedure in all courts of this State." 1985 Act No. 100 stated the legislative intent to recognize "the Rules of Civil Procedure governing practice and procedure in civil action of the Souths of this State. . . and it is the intent of the General Assembly to repeal provisions of the 1976 Code of Laws of South Carolina, to be replaced by the Rules of Civil Procedure."

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over time and is best described in I'on v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000[8]). There is some diverging authority among the appellate courts of the State as to exactly what type of issues have to be raised by a Rule 59(e) motion, with the Court of Appeals being more likely to refuse to examine an issue on appeal if a Rule 59(e) motion is not made. For that reason, a prudent lawyer always makes a Rule 59(e) motion following a court's initial order against it, since the time for appeal is tolled by the filing of a timely motion under Rule 59. A wise attorney will take all actions necessary to preserve issues for appellate review, which includes a Rule 59(e) motion, rather than risk having an appellate court refuse to address an issue based on counsel's failure to preserve the issue before the trial court.

5. **In order to adequately preserve an issue for appeal, counsel must file a Rule 59(e) motion or the appellate cannot address the issue. It is not frivolous to raise an issue on Rule 59(e) reconsideration; instead the standard of care for a lawyer in representation of a client requires counsel to file a Rule 59(e) motion prior to appeal in order to protect the client's rights on appeal.**

6. Counsel for USF&G has repeatedly raised and argued to the trial court the issue of its client's non-party status, but the trial judge nonetheless issued orders approving settlements that could be construed as impacting the rights of USF&G under existing law and contracts it previously entered into with other insurers. The trial court has

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[8] It is now established law that a party cannot raise, for the first time on appeal, an issue that was not raised to or ruled upon by the trial judge. *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 417 (1995). An issue is not preserved for appeal unless raised to the trial judge, typically by a motion pursuant to Rule 59(e). *Summer v. Carpenter*, 328 S.C. 492, 492 S.E.2d 55 (1997). The issue preservation issue has evolved in appellate decisions and it is now recognized that a second Motion to Reconsider under Rule 59(e) is not required if the issue was properly raised in a post-trial motion, but the trial judge failed to address it. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). The concept is that the trial judge must be given an opportunity to get it right before an appellate court will review (and possibly reverse the trial judge) based on an argument on appeal for the first time. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000).

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also sanctioned USF&G even though USF&G was not a party to the action(s) under which the sanction was allegedly imposed.

7. The current Receiver seeks sanctions because counsel for USF&G "continues to assert [its] non-party status. . ." (Motion p. 5). **Counsel was required to raise the issue to the trial court in order to preserve it for appeal.** It is, therefore, **not** frivolous for counsel to raise its client's non-party status to the Court's attention where, as here, the trial court has issued an order that may impact the non-party's rights in future proceedings.

8. **It is inaccurate to state that counsel for USF&G has "flout[ed] South Carolina law and procedure."** Based on my review of relevant filings, USF&G's counsel has been diligent and consistent in urging the trial judge to recognize that approval of the settlements between the current Receiver and other insurers under the terms proposed by the Receiver would have adverse consequences on the rights of USF&G in the future if the order is deemed enforceable against it, even though USF&G is not a party to the action and has not had an opportunity to litigate the issues which affect it. Should it be determined in subsequent litigation that the trial judge's order is preclusive as to any rights of USF&G, the failure by USF&G's counsel to raise the issue in a motion for reconsideration could be determined to be a deviation from the required standard of care by USF&G's current counsel. **In my opinion, counsel for USF&G was required to file the motion for reconsideration[9]. It would have been a deviation from the standard of care not to file the motion.**

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[9] Diligent counsel recognizes and takes steps to protect against future risks for its client; diligent counsel also takes such action as is necessary to protect its client in subsequent litigation, insofar as doing so falls within the scope of representation of the client. Because of the diligence of counsel for USF&G in this proceeding, USF&G may be permitted in subsequent actions to argue that it was denied its rights to due process during the South

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B. USF&G's Motion to Stay Enforcement of the settlement order until the Court ruled on its Motion to Reconsider.

1. The current Receiver takes issue with counsel for USF&G asking the trial court to stay the trial court's order approving settlements until USF&G's motion for reconsideration is addressed and pending appellate review. **Filing of the motion for stay was a wise and well-reasoned decision by USF&G's counsel and is consistent with USF&G's position that the trial court cannot adjudicate USF&G's rights without it being a party to the actions in which the settlements were entered and approved. The request for a stay was necessary and completely appropriate, particularly since there are competing actions in both state and District Court and, at least until recently, the current Receiver has attempted to litigate coverage issues in personal injury cases in state court rather than in a collateral coverage action.**

2. Once the motion for reconsideration is addressed (and now that it has been denied), the next step in which USF&G can seek relief from the trial court's judgment is the state appellate court. I am informed and believe that USF&G filed a notice of appeal of the trial court's order approving the settlements on June 5, 2020. Rule 241, SCACR, governs stays and supersedeas of orders on appeal. If the appeal by USF&G of the order approving the settlements does not operate to automatically stay the order on appeal, USF&G will be required to ask the trial court to issue a stay pending appeal prior to seeking supersedeas relief from the appellate court[10].

Carolina proceedings such that the trial court's orders here are not preclusive. Only a reckless attorney would fail to take action to protect its client from such future uncertainty. Based on my review of the record in these proceedings, it is my opinion that USF&G's rights to due process were, in fact, violated by the orders of the trial court that were issued without USF&G having been made a party or having had an opportunity to litigate the issues.

[10] Rule 241(d)(1), SCACR provides a limited exception to permit an appellant to seek supersedeas directly from the appellate court, bypassing the trial court, only "where extraordinary circumstances make it impracticable." Additionally, Section (d)(4)(c) of Rule 241 requires that a request to the appellate court for a stay or supersedeas

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C. The Receiver seeks sanctions because in its motion to reconsider, USF&G "largely reasserted [its] previous argument. . . [and] . . . USF&G. . . continues to assert [its] non-party status and flout South Carolina law and procedure."

1. As set forth above, **counsel for USF&G was required to seek reconsideration of the arguments it made to the trial court, especially arguments that were not addressed by the trial court in its order, to point out why the trial court's order is wrong, and give the trial court an opportunity to change its decision prior to raising the issue on appeal.** Suggesting that reasserting arguments already made to a trial court in a Motion to Reconsider is sanctionable conduct is, quite frankly, ridiculous, as is the argument that counsel for USF&G is "flout[ing] South Carolina law and procedure." **USF&G's counsel is zealously and appropriately advancing its client's positions before the trial court and in preserving issues for appeal and doing so with careful deliberation and appropriate citation to authority.**

D. The Receiver asserts USF&G should be sanctioned for raising in its motion to reconsider "the effect of a prior Covil receivership on this Court's receivership[11]."

1. The bulk of the current Receiver's motion is an exhaustive recitation of prior communications, both internal and external, demonstrating that [redacted][12]. The documents attached as exhibits to the motion do, in fact, make clear that [redacted]

include documents showing that the party's request for stay or supersedeas to the trial court "was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested." In my experience, the state appellate courts read the two (2) provisions together in addressing whether a stay request to the trial court was made, was sufficient, or can be excused by the appellate court prior to addressing a request for supersedeas on appeal.

11 That is not the issue that USF&G brought up in the Motion to Reconsider. Counsel for USF&G brought up its recent discovery of the prior judicial dissolution of Covil Corporation, not the prior receivership. The recent discovery of the earlier order of the judicial dissolution is a totally different issue from the prior receivership.

12 First Savings Bank F.S.B. v. Covil Corporation *et al.*, Case no. 91-CP-23-4445 (Greenville County Court of Pleas).

[redacted] What is new and potentially seismic in terms of countless other claims against Covil is the discovery that the corporation was judicially dissolved and that claims against Covil would be barred after the prescribed period of repose under South Carolina law. I am informed and believe that USF&G acknowledges it was aware of the prior limited receivership over Covil's property. I am informed and believe USF&G had no notice or reason to believe the prior receivership was converted to a general receivership, resulting in a final judicial dissolution of Covil Corporation, which is a completely different matter. If Covil Corporation was judicially dissolved in 1992, that decision has far-reaching implications for multiple persons and entities, not the least of which is USF&G and the current Receiver. Therefore, the revelation of the 1992 judicial dissolution for Covil Corporation is of utmost importance to any case in which Covil Corporation and/or its insurers such as USF&G is or will be named as a party, and accordingly it was appropriate for USF&G's counsel to flag this issue for the Court.

2. [redacted]

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[redacted][13]. *See* Exhibit B (ZUR 6414-6415; Exhibit D (ZUR 6366-6367); Exhibit F (ZUR 6335-6336); Exhibit H (TRAV ST 113257-13259); Exhibit J (TRAV ST 169098); Exhibit J (ZUR 905-907); Exhibit N (ZYR 5497-5498); Exhibit Q (ZUR 5471).

3. I reviewed documents furnished to me by counsel for USF&G, and my opinion is that Covil Corporation was judicially dissolved by order of Judge Charles Simmons in Greenville County dated May 11, 1992[14]. As I review the file, this appears to be the relevant series of events:

   a. The First Savings Bank, F.S.B. sued Covil Corporation and others in 1991 in Greenville Common Pleas for collection of a note originated in 1988 and modified in 1991. By order dated October 11, 1991, Circuit Court Judge Larry R. Patterson executed a consent order (signed by counsel for the Plaintiff and Counsel for Covil Corporation) to appoint L. Winston Lee as a receiver, for the specific and limited purpose of liquidating certain real and personal property of Covil Corporation to pay specific debts of Covil Corporation as set forth in the order and to report back to the court.

   b. In the same action, by consent order executed on November 27, 1991, Judge Patterson amended the October 11, 1991 order to broaden the scope of the prior

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13 [redacted] *See e.g.,* Exhibit S (ZUR 1458-1461); Exhibit T (GWBC 3578); Exhibit U (TRAV ST 11510); Exhibit V (TRAV ST 12014); Exhibit W (ZUR 9218-9264, 9221); Exhibit X (ZUR 6076). [redacted] *See* Section E.

14 The Richland County Court of Common Pleas is not the proper venue for appointment of a Receiver for Covil Corporation, which was based in Greenville County. S.C. Code Section 33-14-310(a).

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Receiver's authority and to include the remaining Defendants in the Receivership, insofar as the prior Receiver was to liquidate the personal property of Covil Corporation and another defendant as well the real property of Covil Corporation. This order did not distinguish among creditors, and was solely to liquidate the assets for further instruction from the court.

c. The November 27, 1991 order required Covil Corporation and its "officers, directors, employees, representatives, agents and all other persons" to "deliver to the Receiver all records, property and assets" of the named defendants, not just Covil Corporation. The order clearly contemplated a further order after the liquidation was accomplished, and directed that "[u]pon final liquidation of the personal property of the Defendants, the Receiver shall submit an accounting . . . and petition for authority to make final disbursement of the proceeds from such liquidation." This order also limited the Receiver's authority, just as the October, 1991 order did.

d. By order dated May 11, 1992, again by agreement of the parties (including Covil Corporation), Master in Equity Charles B. Simmons Jr.[15] granted the parties' and prior Receiver's request to change the prior Receiver's status to that of a general receiver. More importantly, "[a]t the request of [Covil Corporation and another defendant] [the prior Receiver] requests that these two

[15] According to the May 11, 1992 order, Judge Patterson had referred the matter to Judge Simmons with finality. I have not reviewed the order of reference.

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corporations be judicially dissolved." (Order p. 1 – Current Receiver's Exhibit I)[16].

e. The May 11, 1992 order of Judge Simmons "decreed [Covil Corporation] to be judicially dissolved as of the date of the filing of this Order. . .[17]" The order directed the clerk of court to deliver a certified copy of the order to the South Carolina Secretary of State. However, my review of the Secretary of State's records does not reflect a copy of this order in the Secretary of State's records. An order of administrative dissolution was issued by the Secretary of State on July 30, 1993. The Secretary of State's order of administrative dissolution did not note or acknowledge Judge Simmons's May 11, 1992 order of judicial dissolution.

f. There were several other orders in the prior receivership file. The clerk's file was closed on December 7, 1992, after the prior receiver filed an accounting of the assets of Covil Corporation which had been liquidated, including the cash surrender value of a life insurance policy issued by New York Life. The order also approved "the abandonment by the Receiver of all remaining assets. . ." The prior Receiver was discharged under the terms of the December 7, 1992 order. This order did not reference the earlier order of judicial dissolution, nor did it need to because the only remaining actions required were the winding up

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16 This further emphasizes that the chronology spelled out by the current Receiver in his motion for sanctions reflects no knowledge by any prior counsel for Covil Corporation or USF&G that there had been a judicial dissolution of Covil Corporation.

17 Judge Simmons' May 11, 1992 order bears a clocked-in stamp from the Greenville County Clerk of Court.

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of the corporation under S.C. Code Ann. Section 33-14-320 and 330[18]. It was not necessary or appropriate to again order judicial dissolution, because that had already occurred. The prior Receiver was simply doing the winding up required by judicial dissolution of a corporation.

4. The Motion for Reconsideration filed by USF&G on April 20, 2020 contained a disclosure to the trial court of the recent discovery of the judicial dissolution of Covil Corporation, the 1992 order for which had been located less than a week earlier. **If the Receiver is asserting that USF&G knew of the judicial dissolution prior to its disclosure in the Motion for Reconsideration, he has offered no evidence supporting this assertion.** Based on my review of relevant documents, the earliest date upon which counsel for USF&G knew of the existence of the order judicially dissolving Covil Corporation was sometime after the document was discovered by agents of Zurich on April 14, 2020. *See* Paragraph 5.

5. I have read the Memorandum of Law filed by Zurich American Insurance Company in Support of its Motion to Amend and Supplement (ECF 156-1, filed 5-14-2020) its pleadings in Covil Corporation v. Zurich American *et al.* Civil Action No.: 7:18-cv-3291-BHH. The pleading describes a years-long search by agents of Zurich American of the records for the prior Receivership from the Greenville County Clerk of Court. The motion and accompanying declaration detail how counsel for Zurich first located a copy of the May 12, 1992 order for judicial dissolution for Covil Corporation issued

[18] The documents I have reviewed from the 1992 judicial dissolution detail the total assets collected by the prior Receiver and their distribution, including auction proceeds in the amount of $26,755.27. All other assets were abandoned.

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by Judge Simmons on April 14, 2020, under Greenville County Judgement Roll No. 91-5988[19].

6. **There is no basis whatsoever for counsel for USF&G to be sanctioned in connection with USF&G's Motion for Reconsideration, the Motion for Stay, or for raising the very valid issue that the current Receiver may not have been properly appointed, since Covil Corporation was judicially dissolved in 1992.**

E. The effect of the judicial dissolution on claims made in the past and that may be made in the future against Covil Corporation is a monumental issue that requires close examination and which USF&G's counsel appropriately brought to the Court's attention.

1. The current Receiver makes light of the possibility that claims against Covil may have been extinguished by the statute of repose set forth in S.C. Code Ann. Section 33-14-107(c). However, the completion of Covil's judicial dissolution in 1992 triggers the statute of repose and has the effect of extinguishing claims against Covil.
2. This is significant in every case in which Covil is named as a party, and every case in which Covil has been named as a party at any point after which claims were extinguished by the statute of repose[20].
3. Early in the judicial history of asbestos litigation in South Carolina, the South Carolina Supreme Court recognized the massive difficulties for all parties in addressing their respective rights when an injury is caused by asbestos exposure in the workplace, citing

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[19] Per the motion and declaration, a reference to the Judgement Roll number from the 1991 case was found among documents contained in 236 boxes of files maintained by a law firm which previously represented Covil Corporation which were obtained in March and April, 2020.

[20] The current statute of repose bars actions "ten years after the publication date of the newspaper notice" of judicial dissolution, which is part of the statutory process for judicial dissolution to be completed. An earlier statute of repose made the period of repose five years. 2004 Act o. 221, Section 18.

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to the Occupational Disease Act. In Talley v. John-Manville Sales Corp., 285 S.C. 117, 328 S.E.2d 621 (1984), the Supreme Court addressed the "dilemma" faced by workers injured by asbestos exposure in the workplace in being forced to give up one of their two avenues for recovery[21] for injuries sustained by exposure to asbestos in the workplace. The Court invited the General Assembly to address this issue, noting that the Court was not the proper place to promulgate resolutions for the conflicts in substantive rights created by manifestation of latent disease.

4. During the last decades of the 20th century, South Carolina's legislature enacted statutes of repose in multiple circumstances. By way of example, statutes of repose were adopted for medical malpractice actions (Section 15-3-545(A)), construction defects claims (Section 15-3-640) and as relevant here, to claims against judicially dissolved corporations (Section 33-14-107(c)).

5. The appellate courts have construed statutes of repose as being different from statutes of limitations because they are the result of a legislative determination that certainty must occur at some point among potential litigants.

6. In Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993), the Supreme Court recognized that a statute of repose differs significantly from a statute of limitations in that the statute of repose extinguishes a right that previously existed, whereas a statute of limitations was merely a time bar to when an action for injury can be brought. The Court stated:

---

[21] The conflict addressed by Talley was the juxtaposition of an injured worker's right to obtain both workers compensation benefits and also seek relief via a third party action, because of the unique nature of asbestos disease as being a latent disease with damages to the injured not manifesting until many years after the exposure. The Court expressed concern over the incongruity caused by evaluating the different avenues for recovery by an employee injured by workplace exposure to asbestos having to choose only one of the traditional remedies available to workers injured in the workplace.

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> Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists. . . Society benefits when claims and causes are laid to rest after having been viable for [a] reasonable time. . . [and] society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission.
>
> *Id.* 313 S.C. at 404, 438 S.E.2d at 244 (emphasis added).

7. The Langley decision concluded that statutes of repose create substantive rights in the persons or companies who benefit from the extinguishment of potential claims against it after a reasonable period of time. The Court noted that such statutes are "due to necessity." *Id.*

8. The General Assembly also established a statute of repose extinguishing claims against judicially dissolved corporations, first in 1988 followed by an amendment in 2004. Section 33-14-107(c)).

9. If Covil was judicially dissolved in 1992, as it appears to have been, Covil, and consequently its insurers, may have obtained a substantive right not to be sued for acts of a corporation which has since ceased to exist for a reasonable period of time. It will require substantial judicial inquiry to determine whether the 1992 order of judicial dissolution vested any rights in the insurers of Covil, such as USF&G, to extinguish their liability to third parties who claim personal injury as a result of exposure to products from Covil. Most importantly, if Covil's insurers have a substantive right not to be required to defend under policies of insurance issued decades earlier, it is essential that USF&G have a right to have its rights determined. That is not possible in an action in which USF&G is not a party.

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10. Therefore, rather than being a frivolous claim raised by USF&G, the existence of a 1992 judicial dissolution of Covil is a significant legal issue which will impact not only USF&G but multiple other insurers, as well as persons who have asserted claims for personal injury against Covil after their claims were extinguished.

11. The chaos created here, in which the Receiver is attempting to litigate collateral issues such as insurance coverage as an extension of an ordinary personal injury action, reflects precisely why courts address only issues presented to them by pleadings. South Carolina precedent has been unwavering in its conclusion that collateral issues not raised by the pleadings will not be decided in a personal injury action.

12. **Rather than being frivolous, the prior judicial dissolution of Covil, which occurred by virtue of the 1992 order of Judge Simmons, is an issue that must be decided before there is an inquiry of what obligations USF&G has, if any, to persons who name a judicially-dissolved former insured such as Covil as a defendant in a personal injury action. This can only be done in an action in which the specific issues are pleaded, the relevant parties named, and the legal issues fully explored and resolved. At present, the status of the litigation of this and similar cases has USF&G's rights being determined without any due process of any kind. USF&G's counsel was obligated by virtue of its duties to the judicial process to raise the issue of the prior judicial dissolution of Covil to the Court.**

13. In my opinion, it was entirely proper for USF&G to make the Court aware of the discovery of Covil's prior judicial dissolution. USF&G emphasized when it raised this issue that it need not, and should not, be decided by the Court in the context of the settlement approval order, but rather should be decided on full briefing once the parties

had completed their investigation into the circumstances and consequences of the judicial dissolution. USF&G's reconsideration and stay briefing made clear that it was only raising the issue as a factor for the court to consider in determining whether to stay the effect of the settlement approval order.

CONCLUSION

It is my expert opinion that **no basis whatsoever exists to impose sanctions on counsel for USF&G**, who did precisely what was required of them to protect the rights of their client, and to alert the Court to a significant development affecting this litigation.

FURTHER DEPONENT SAYETH NOT.

Desa Ballard

Sworn to before me this
17th day of June, 2020.

Notary public for South Carolina
My Commission expires: 11-2-28

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Exhibit A:

Materials Provided to Desa Ballard

- 1991.10.11 Consent Order for Appointment of Receiver (FSB-000001)
- 1991.11.27 Amended Order for Appointment of Receiver (FSB-000071)
- 1992.05.11 Order (FSB-000006)
- 1992.05.21 Petition (FSB-000013)
- 1992.06.23 Final Order (FSB-000041)
- 1992.11.11 Petition of receiver (FSB-000050)
- 1992.11.11Order (FSB-000067)
- 1992.11.30 Final Order (FSB-000080)
- 1992.12.07 Final Order, Document 552-12, filed in Case 1:16-cv-01077-CCE-JEP on 05.13.20
- 2020.01.02 - Covil's Answers to Carriers' First Interrogatories (Zurich v. Covil Corp., et al., 1:18-CV-932, MDNC)
- 2020.04.10 - Order Granting Joint Motions to Establish Covil QSF and Approve Settlements (Toal Court)
- 2020.04.16 - Zurich American Insurance Company Second Supplemental Rule 26(a) Initial Disclosures with attached FSB 000001 – FSB000224 (Zurich v. Covil Corp., et al., 1:18-CV-932, MDNC)
- 2020.04.20 – USF&G's Motion to Reconsider, Alter or Amend Approval Order (Toal Court)
- 2020.04.20 – USF&G's Motion to Stay (Toal Court)
- 2020.04.27 - Receiver's Motion to File Under Seal (Toal Court)
- 2020.04.27 - Receiver's Response to USF&G's Motions to Reconsider & Stay (Toal Court)
- 2020.04.30 – USF&G's Reply Memorandum in Further Support of Its Motions to Reconsider and Stay (Toal Court)
- 2020.05.01 - Intervenor Zurich American Insurance Company's Motion for Relief from Judgment under Rule 60(b)(2) and 60(b)(4) (Redacted) (Finch v. Covil Corp., 1:16-CV-01077, MDNC, Document 538)

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- 2020.05.01 – Exhibit 5 to Zurich's Motion for Relief from Judgement under Rule 60(b)(2) and 60(b)(4) (Document 538-5), Order of Reference in FSB v. Covil Corp, et al., 91-CP-23-4445
- 2020.05.07 - ORDER Denying Motions to Reconsider and Motion to Stay (Toal Court)
- 2020.05.14 - Zurich's MOL ISO Motion for Leave to Amend and Supplement Pleadings (Redacted) (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 156-1).
- 2020.05.14 - Exhibit B – McCormac Declaration in Support of Zurich American Insurance Company's Motion for Leave to Amend and Supplement Pleadings (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 156-3).
- 2020.05.15 - Zurich American Insurance Company's Motion to Intervene (In Re First Savings Bank v. Covil, 91-CP-23-4445)
- 2020.05.15 - Intervenor Zurich's Motion for Relief from Order (In Re First Savings Bank v. Covil, 91-CP-23-4445)
- 2020.05.18 - Receiver's Motion for Sanctions (Unredacted) with exhibits (Toal Court)
- 2020.05.20 – USF&G's Petition for a Writ of Supersedeas
- 2020.05.21- USF&G's MOL ISO Mot for Leave to Amend and Supplement Pleadings (Redacted) (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 160-1).
- 2020.05.28 - Receiver's Response to Zurich's Motion for Leave to Amend and Supplement Pleadings (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 166)
- 2020.05.29 - Receiver's Motion to Dismiss Petition for Writ of Supersedeas
- 2020.06.04 – Receiver's Response in Opposition to USF&G's Motion to for Leave to Amend and Supplement Pleadings (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 171)
- 2020.06.04 - Declaration of Kerith Branham with exhibits (Covil Corp. v. Zurich, et al., 7:18-cv-3291-BHH, D.S.C., Entry No. 174-1)
- 2020.06.08 - USF&G's Return in Opposition to Motion to Dismiss Petition for a Writ of Supersedeas (Appellate Case No. 2020-000791)

EXHIBIT 40

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE TAYLOR,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	)	

NON-PARTY USF&G'S AND ITS COUNSEL'S RESPONSE TO THE RECEIVER'S MAY 18, 2020 MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT

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United States Fidelity and Guaranty Company ("USF&G") and its counsel respectfully submit this response to the Receiver's May 18, 2020 Notice of Motion and Motion for Sanctions Pursuant to Rule 11, SCRCP, and the South Carolina Frivolous Proceedings Sanctions Act ("Mot.").

PRELIMINARY STATEMENT[1]

For the second time in a month, the Receiver seeks sanctions against USF&G[2] for attempting to protect its rights, in an apparent effort to stifle USF&G's opposition to the Receiver's litigation positions. This time around, the Receiver alleges that USF&G supposedly engaged in "frivolous" conduct by filing motions seeking reconsideration and a stay of the Court's April 10, 2020 order approving the Receiver's settlements with other insurers over USF&G's and Zurich's objections (the "Approval Order").[3] The filing of those motions falls far short of the high bar required to establish sanctionable conduct under SCRCP 11 ("Rule 11") or the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), and should be denied for the following three reasons.

First, the Receiver's sanctions motion ignores the fact that, in South Carolina, filing a motion for reconsideration is a prerequisite to filing an appeal, especially where the Court's

[1] By filing this opposition to the Receiver's sanctions motion, USF&G does not waive its continuing objections to the Court's personal jurisdiction over it.

[2] The Receiver's motion seeks sanctions relief against USF&G, but is unclear as to whether it also seeks sanctions against USF&G's counsel. *Compare* Mot. at 1 (addressing motion to USF&G and certain of its counsel) and Mot. at 21 (concluding motion with request for sanctions against only USF&G). To the extent the Receiver seeks sanctions relief against USF&G's counsel, this response is also submitted on behalf of its counsel.

[3] Specifically, the Receiver seeks sanctions based on USF&G's April 20, 2020 Motion to Reconsider, Alter or Amend Approval Order of April 10, 2020 pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 6(a), 52(b), 59(e), and 60(b) (the "Reconsideration Motion"), and USF&G's related Motion for Stay (the "Stay Motion").

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opinion does not address issues raised by the potential appellant. For all practical purposes, the Receiver's motion thus seeks to sanction USF&G for properly preserving issues for appeal. Whatever the Receiver's or the Court's views as to the merits of USF&G's limited objection to the Court's approval of the settlements, USF&G clearly did not engage in any sanctionable conduct in attempting to protect its appellate rights. The Receiver cites no precedent for sanctioning a party in such circumstances.

Second, the Receiver's motion barely mentions the grounds on which USF&G moved for reconsideration: (1) the Court's finding that USF&G lacked standing to object to the Receiver's settlements with other insurers; (2) the Court's approval of the settlements notwithstanding their impact on USF&G's rights of contribution, subrogation, and indemnification; (3) the Court's granting of the Receiver's motion to seal the settlements and the Receiver's motion to quash USF&G's subpoena seeking production of the settlement agreements and related documents so that USF&G could fully evaluate the extent to which the settlements purported to impact its rights; and (4) the inclusion of unsupported factual findings and conclusions in the Approval Order. USF&G made good-faith and well-founded arguments on these issues, and, other than alluding in passing to USF&G's non-party status, the Receiver presents no legal argument or analysis in support of sanctions under Rule 11 or the Act.

Third, rather than explaining why he believes it was frivolous and sanctionable to seek reconsideration and a stay of the Approval Order, the Receiver's motion is devoted primarily to arguing that it was inappropriate for USF&G to alert the Court to the recent unearthing of 1992 court records concerning the previously-unknown judicial dissolution of Covil Corporation. *See First Savings Bank, FSB v. Covil Corp., et al.*, No. 91-CP-23-4445 (S.C. Ct. Com. Pl., Greenville Cty. May 11, 1992) (the "May 11, 1992 Order" or, more generally, "Dissolution Orders"). The

Dissolution Orders raised questions about the continuation of asbestos-related litigation against Covil. USF&G brought this development to the Court's attention in support of its motion to stay, as any responsible officer of the Court would do, but expressly asked the Court *not* to rule on the underlying dissolution issues until the litigants could properly investigate and make submissions to the Court regarding the consequences of Covil's judicial dissolution. USF&G's raising of the dissolution issue was entirely appropriate; USF&G provided sound legal analysis of the potential impact of the judicial dissolution on the current Receivership and ongoing asbestos claims against Covil; and the Receiver's contention that USF&G has known about the judicial dissolution for years is factually unsupported and legally irrelevant.

* * *

Sanctions should be rarely sought and even more rarely granted. They are reserved for those exceptional circumstances where the conduct of a litigant and/or its counsel is so egregious as to warrant the invocation of such severe remedies. USF&G and its counsel take very seriously their obligations under Rule 11 and the Act and strongly object to the Receiver's allegations that they have advanced frivolous legal arguments in violation of those obligations. Such accusations require substantial support, and the standards to establish violations of Rule 11 and the Act are necessarily high, lest they be employed as tactical weapons to stifle zealous advocacy.

The Receiver's motion seeks instead to punish USF&G and its counsel for opposing the Receiver's litigation positions. That is not grounds for sanctions. For the reasons set forth below and in the accompanying expert affidavit of Desa Ballard, Esq., dated June 17, 2020 ("Ballard

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Aff."), which is attached hereto as Exhibit 1 (filed under seal), the Receiver's motion falls far short of the required showing and should be denied.[4]

LEGAL STANDARD

The Receiver seeks sanctions pursuant to both Rule 11 and the Act. But the Receiver provides no analysis of the standards under either. Under Rule 11, a party's litigation conduct is evaluated under a subjective standard to assess whether a filing or an argument was made in good faith. *See* Rule 11, SCRCP, Note (explaining that "[t]his version of Rule 11(a) is not nearly so stringent as the latest version of the Federal Rule which became effective August 1, 1983"); *Ex Parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 598 & n.8, 713 S.E.2d 624, 628 & n.8 (2011) ("Rule 11 is evaluated by a subjective standard."). The Rule is violated only when a lawyer subjectively acts in bad faith—which there is no suggestion of in the Receiver's motion—or makes "a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Bon Secours*, 393 S.C. at 598, 713 S.E.2d at 628.

Similarly, sanctions under the Act may be imposed when a filing includes an argument that "a reasonable attorney in the same circumstances would believe" is "clearly not warranted under existing law"; "was intended merely to harass or injure the other party"; or "is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based." S.C. Code Ann. § 15-36-10(A)(4)(a) (1976). Like Rule 11, this sets a very high bar to establish sanctionable conduct. The statute's plain language makes clear that sanctions are permitted only when a filing's sole purpose is something other than advancing a defensible

[4] USF&G incorporates by reference all prior filings it has submitted in this Court that relate to the issues discussed herein, including but not limited to its Reconsideration Motion, Stay Motion, and Reply Brief.

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litigation position. Otherwise, the statute could be misused as a sword to chill an adversary's willingness to present arguments and preserve issues for appellate review.

Accordingly, courts routinely reject sanctions requests under the Act. *See, e.g.*, *Preservation Soc'y of Charleston v. S.C. DHEC*, ___ S.C. ___, ___ S.E.2d ___, 2020 WL 811729, at *11 (S.C. Feb. 19, 2020) (reversing sanctions awarded by Administrative Law Court and affirmed by Court of Appeals because there were "no cases directly on point" that foreclosed the appellants' litigation strategy, and acknowledging that misuse of the Act chills a litigant's "duty to diligently advance" its position and "suppresses the vigorous representation" required by the adversarial process); *Father v. S.C. DSS*, 353 S.C. 254, 259, 578 S.E.2d 11, 14 (2003) ("A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act than one who merely acts 'without substantial justification.'" (quoting *Heath v. Aiken County*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990)); *Salty Fin Holdings, LLC v. Salty Fin Int'l, LLC*, Case No. 3:16-1798-MGL, 2018 WL 321567, at *3 (D.S.C. Jan. 8, 2018) (denying motion for sanctions under the Act because "Plaintiffs articulated a nonfrivolous theory for pursuing [their] claims, and sanctions are not warranted simply because Plaintiffs' theory was incorrect"); *Ray v. Bechtel Savannah River, Inc.*, Case No. 1:06-2946-HFF-JRM, 2007 WL 9734948, at *3 (D.S.C. Sept. 25, 2007) (denying motion for sanctions under the Act because the court "cannot conclude that South Carolina law is crystal clear" regarding the issue upon which sanctions were sought).

Based on these authorities, as well as the plain language of Rule 11 and the Act, the Court should deny the Receiver's motion, as there is absolutely no support for sanctions here.[5]

[5] The Receiver also provided USF&G with no advance notice of his sanctions motion, as required under the Act. *See* Section 15-36-10(D) of the Act.

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ARGUMENT

I. USF&G's Reconsideration Motion Was Procedurally Proper To Preserve Its Appellate Rights

On April 20, 2020, USF&G timely filed its Reconsideration Motion and its related Stay Motion, asking the Court to reconsider its April 10, 2020 Order approving the Receiver's settlements with other insurers pursuant to Rule 59(e), SCRCP, and to stay enforcement of the Approval Order until after resolution of the Reconsideration Motion and any appellate review. The Receiver contends that USF&G's Reconsideration Motion was frivolous and deserving of sanctions because USF&G "largely reasserted [its] previous arguments, which the Court already ruled on." Mot. at 5.

Contrary to the Receiver's contentions, moving for reconsideration of arguments previously raised is not frivolous—it is instead squarely within the scope of Rule 59(e). The Supreme Court of South Carolina has explicitly stated that "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). Accordingly, "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.*" *Id.* at *21, 778–79 (emphasis added); *see also Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("[The] purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits."). *See also* Ballard Aff. at 9.

Moreover, under South Carolina law, "[w]here a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved." *Altman v. Griffith*, 372 S.C. 388, 396, 642 S.E.2d 619, 623 (Ct. App. 2007)

(quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 58 (2d ed. 2002)). Thus, to preserve an argument for appellate review, a party *must* seek reconsideration in such circumstances. *Smith v. NCCI, Inc*. 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006). *See also* Ballard Aff. at 5–7. If a party fails to seek reconsideration of an issue not ruled upon, it waives its arguments, and the appellate court cannot address the issue. *See Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (finding that an issue raised in but not ruled upon by the trial court and not presented to the trial court in a motion to amend the judgment is not preserved for appellate review); *see also Historic Charleston Holdings, LLC v. Mallon* 365 S.C. 524, 540, 617 S.E.2d 388, 396 (Ct. App. 2005), *rev'd on other grounds*, 381 S.C. 417 (2009) ("When a trial court makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.").

Accordingly, South Carolina courts encourage parties to seek reconsideration before filing an appeal. "[T]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.* "Preserving issues for appellate review is a fundamental component of appellate practice. . . . Thus, attorneys must properly preserve arguments for appellate courts to review the arguments." Jean Hoefer Toal, et al., Appellate Practice in South Carolina 55–56 (2d ed. 2002) (citing *I'On, L.L.C.*, 338 S.C. at 422,

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526 S.E.2d at 724–25, on the topic of appellate issue preservation). In fact, both the U.S. Supreme Court and the South Carolina Supreme Court have noted the importance of Rule 59(e)[6] for appellate review. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177–178 (1989) (Rule 59(e) "helps further the important goal of avoiding piecemeal appellate review of judgments" and fosters informed appellate review); *Elam,* 361 S.C. at 21, 602 S.E.2d at 779 (2004) ("[T]he wisdom of giving district 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.") (citation omitted); *see also* Ballard Aff. at 5–6, 9 ("[C]ounsel for USF&G was required to seek reconsideration of the arguments it made to the trial court, especially arguments that were not addressed by the trial court in its order, to point out why the trial court's order is wrong, and give the trial court an opportunity to change its decision prior to raising the issue on appeal.").

Here, the Court did not address in its Approval Order several arguments USF&G raised in its limited objection to the settlements. For example, in its objection, USF&G argued for reasonable modifications to the proposed Approval Order that would preserve USF&G's rights while also permitting the settlements to be approved. Reconsideration Mot. ¶ 23. USF&G also argued that it was entitled to the information sought in its March 18, 2020 subpoena to the Receiver. *Id*. ¶¶ 24, 26–27. Since neither argument was addressed in the Court's Approval Order, USF&G was *required* to seek reconsideration of these and other arguments in order to preserve the arguments for appellate review. As to the additional arguments raised by USF&G in its objection and briefly addressed in the Approval Order—including the question of USF&G's standing to object; preservation of USF&G's rights of contribution, subrogation, and

[6] "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam*, 361 S.C. at *22, 779.

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indemnification with respect to the settlements; USF&G's opposition to the Receiver's motion to seal the settlement papers; and the Court's various factual findings, *see* Reconsideration Mot. ¶ 7–29—USF&G was not only entitled but encouraged by South Carolina rules and practice to "first try and convince the lower court it has ruled wrongly" before raising those issues on appeal. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724; Ballard Aff. at 6 ("A wise attorney will take all actions necessary to preserve issues for appellate review, which includes a Rule 59(e) motion, rather than risk having an appellate court refuse to address an issue based on counsel's failure to preserve the issue before the trial court."). Accordingly, USF&G's Reconsideration Motion was entirely procedurally proper.

II. USF&G's Arguments In Support Of Reconsideration Were Not Frivolous

The Receiver contends that USF&G should be sanctioned for its allegedly "frivolous continued objection to settlement," Mot. at 1, but his motion barely mentions the arguments USF&G presented in its Reconsideration Motion, let alone explains why they are supposedly frivolous. USF&G's arguments in support of reconsideration cite and rely upon substantial South Carolina precedent, the orders of this Court, and the terms of USF&G's insurance contract with Covil. The Receiver's motion fails to adequately analyze these arguments under Rule 11 or with reference to the seven relevant factors under the Act:

> (1) the number of the parties; (2) the complexity of the claims and defenses; (3) the length of time available to the attorney or party to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4); (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation; (5) previous violations of the provisions of this section; (6) the response, if any, of the attorney or party to the allegation that he violated the provisions of this section; and (7) other facts the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)–(7) (1976).

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A. USF&G Had Standing To Object And To Seek Reconsideration

The Receiver suggests that USF&G's Reconsideration Motion was frivolous and sanctionable because USF&G lacked standing to object, purportedly as a non-party to any case in which the settlement approval motions were filed. Mot. at 5. Though USF&G is not a party to the *Taylor* action or the other captioned cases in which the Approval Order was entered, USF&G had standing as an affected litigant to object to the Approval Order to protect its rights that the settlements seek to impact. *See Kenny v. Quigg*, 820 F.2d 665, 668 (4th Cir. 1987); Ballard Aff. at 7 ("It is [] not frivolous for counsel to raise its client's non-party status to the Court's attention where, as here, the trial court has issued an order that may impact the non-party's rights in future proceedings.").

As explained in USF&G's Reconsideration Motion, three prerequisites establish standing: (1) injury-in-fact; (2) causal connection; and (3) redressability. *See* Reconsideration Mot. ¶ 8. USF&G presented well-supported, non-frivolous arguments showing how it satisfies all three requirements. *Id.*

First, the Approval Order on its face purports to preclude USF&G from seeking contribution, subrogation, and indemnification from the Settling Insurers and, instead, directs USF&G to pursue such claims against the QSF. Approval Order at 12–14. However, under the QSF Operating Agreement, the Settling Insurers' polices are deemed to be *excess* to the non-settling insurers' policies, thereby impairing USF&G's ability to seek contribution, subrogation, and indemnification from otherwise *primary* insurers. Reconsideration Mot. ¶ 8, 12. If the Approval Order is enforced as it currently stands, USF&G may be required to pay indemnity costs that would otherwise be shared with Settling Insurers. Thus, USF&G is directly harmed by the settlements and the Approval Order. *Second*, USF&G's injury is directly caused by the

Receiver's settlements and the Approval Order. *Id.* ¶ *8. And third*, as to redressability, should this Court amend its Approval Order, USF&G's rights would no longer be impaired, and, thus, the amendments USF&G requested in its limited objection to the settlements would redress the complained-of injury. *See Smiley v. S.C. Dep't of Health and Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32–33 (2007) (explaining the elements of standing to include an injury in fact that is fairly traceable to the adverse litigant, which can be redressed by the court).

Although the Approval Order purports to significantly impact USF&G's rights, USF&G was not afforded a meaningful opportunity to be heard with respect to the Approval Order, in particular the provision of the Order foreclosing USF&G's rights to assert various claims against the Settling Insurers. *See* Reconsideration Mot. ¶ 10; *Thornton v. Alford*, 274 S.C. 1, 3, 260 S.E.2d 179, 180 (1979) (holding that injunction issued without opportunity to be heard against person with interests adverse to movant was invalid as a matter of due process); *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). Notwithstanding USF&G's non-party status in the captioned actions, it had standing to object to the Approval Order because its due process rights were implicated in the Receiver's settlements. Engaging in necessary advocacy by bringing due process issues to the Court's attention is not sanctionable conduct.[7] *See* Ballard Aff. at 7–8, n.9.

[7] In any event, although USF&G is not a party to the cases captioned in the Approval Order, USF&G is a party to other cases on this Court's asbestos docket, to which the Approval Order and QSF also purportedly apply. *See Taylor v. Air & Liquid Systems Corp.*, No. 2018-CP-40-04940 (S.C. Com. Pl. March 1, 2019) (purporting to expand the Receiver's authority to "all asbestos related cases and for all asbestos related matters"). If the Approval Order instead only applies to the captioned cases in which USF&G is *not* a party, the Approval Order cannot bind USF&G. In addition, as USF&G noted in response to the Receiver's April 20, 2020 sanctions motion, it is a party in *Pavlish v. Covil*, No. 2019-CP-42-03968 (S.C. Ct. Com. Pl., Spartanburg

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Contrary to the Receiver's contention, USF&G's non-party status does not tip the first or second factors under the Act in the Receiver's favor. *See* Mot. at 19. The Receiver argues that "[a]s USF&G [is] not a party to this action, this action satisfies the first factor the Court should consider in determining whether to award sanctions." *Id*. The Receiver contends that the second factor is also satisfied because "it is not complex to file for leave to intervene as a party." *Id*. These assertions are not well taken. Factors one and two do not focus on whether the maker of the allegedly sanctionable filing is a party, or whether it is complex to file a motion to intervene as a party. They direct that the sanctionability of a filing under the Act should be considered in light of the numerosity of the parties and the complexities of the case. *See, e.g.*, *Holmes. v. East Cooper Cmty. Hosp., Inc.*, No. 2010CP1003410, 2012 WL 10890670, at *5 (S.C. Com. Pl. Feb. 1, 2012). USF&G's status as a party or non-party is irrelevant to the Court's consideration of whether sanctions should be granted, and the complexity of these actions certainly weighs against sanctions.[8] As such, neither of these factors supports the Receiver's Motion.

B. USF&G Appropriately Sought Reconsideration On The Grounds That The Approval Order Impacts Its Contribution, Subrogation, and Indemnification Rights in Violation of South Carolina Law

USF&G sought reconsideration on the grounds that the settlements and the Approval Order purported to alter USF&G's rights of contribution, subrogation, and indemnification.

Cty.). The Receiver initially filed his motions to approve the settlement agreements and establish the QSF in *Pavlish*, before he withdrew those motions solely with respect to the *Pavlish* case on March 20, 2020, after USF&G served a subpoena on the Receiver in that case seeking further information about the settlements. It cannot both be true that USF&G is a non-party without standing to object, and that USF&G is nonetheless bound by the Approval Order.

[8] Moreover, as USF&G explained in response to the Receiver's April 20, 2020 sanctions motion, moving to intervene would potentially have impacted USF&G's personal jurisdiction arguments in the various pending direct actions against USF&G, as well as USF&G's due process and *res judicata* arguments related to the rights prejudiced by the Approval Order.

Reconsideration Mot. ¶¶ 12–23. The Receiver does not articulate any argument that this particular aspect of USF&G's Reconsideration Motion was frivolous or sanctionable, nor could he.[9]

USF&G's Reconsideration Motion appropriately pointed out that the settlements mischaracterize the settled policies as "excess" coverage, when in fact the Settling Insurers' policies are *not* solely excess policies. *See* Reconsideration Mot. ¶¶ 8, 12. Under settled South Carolina law, the Receiver cannot rewrite the terms of Covil's insurance policies. *See, e.g.*, *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 313–14, 60 S.E.2d 615, 617 (1950) ("The general rule is that the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto." (quoting 45 Am. Jur. 117)).

The Reconsideration Motion also appropriately pointed out that the Approval Order purports to eliminate USF&G's rights to contribution, indemnification, and subrogation vis-à-vis other insurers. *See* Reconsideration Mot. ¶¶ 12–23. Those rights are intended to ensure that each insurer pays only its pro rata obligation for claims against Covil, and elimination of such rights violates well-settled South Carolina law. *See, e.g.*, *Canal Ins. Co. v. Ranger Ins. Co.*, 489 F. Supp. 492, 496 (D.S.C. 1980) (applying South Carolina law and stating that "[t]here is no

[9] *See* Ballard Aff. at 7 ("Based on my review of relevant filings, USF&G's counsel has been diligent and consistent in urging the trial judge to recognize that approval of the settlements between the current Receiver and other insurers under the terms proposed by the Receiver would have adverse consequences on the rights of USF&G in the future if the order is deemed enforceable against it, even though USF&G is not a party to the action and has not had an opportunity to litigate the issues which affect it. Should it be determined in subsequent litigation that the trial judge's order is preclusive as to any rights of USF&G, the failure by USF&G's counsel to raise the issue in motion for reconsideration could be determined to be a deviation from the required standard of care by USF&G's current counsel.")

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question that an insurer which pays more than its proportionate share of a debt which is equally and concurrently due by another insurer, or other insurers, has a right to contribution from the others"); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011) (holding that "the scope of [each insurer's] liability is limited to damages accrued during its 'time on the risk'").

The Reconsideration Motion also properly argued that modification of the insurers' rights, in the manner the Receiver proposed, was contrary to this Court's January 8, 2020 order, which specifically preserved each carrier's contribution rights. *See* Reconsideration Mot. ¶ 20; Ex. 2 at 19 (Jan. 8, 2020 Order). The Approval Order departed *sub silentio* from that aspect of the January 8, 2020 Order, notwithstanding this Court's express instruction to the Receiver to modify the proposed order to "[m]ake it clear that I am *making no determinations* regarding insurance policy coverage or *contributions*." Ex. 3 (Email from Justice Toal to Counsel, Apr. 9, 2020) (emphasis added). The Receiver ignored the Court's instruction, but the Court entered his proposed order anyway, without modification.

And finally, the Reconsideration Motion appropriately argued that the Approval Order contradicts the subrogation clause in USF&G's 1976 insurance policy with Covil. *See* Ex. 4 at 56 (USF&G Policy) ("Section 14. In the event of any payment under this endorsement the Company shall be subrogated to all of the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatsoever else is necessary to secure such rights."). As noted above, courts cannot rewrite or eliminate contractual obligations through a receivership. *See Nat'l Cash Register*, 217 S.C. at 317, 60 S.E.2d at 618 ("Receivership may affect procedure upon, but not the substance of, contract obligations.").

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USF&G's request that the Court reconsider the Approval Order in light of these serious legal issues was far from frivolous. USF&G's arguments in support of reconsideration were based on the law of this State, the orders of this Court, and the terms of its insurance contract with Covil. Raising such arguments in its Reconsideration Motion was not sanctionable conduct.

C. USF&G Appropriately Sought Reconsideration of the Court's Orders Granting the Receiver's Motions to Seal the Settlements and to Quash USF&G's Subpoena

USF&G also sought reconsideration on the grounds that the Receiver had not met the required standard on his motion to seal the settlements. Reconsideration Mot. ¶¶ 24–25. Sealing is an exception to the default presumption that court proceedings and filings are open to the public. Here, the Receiver did not establish that any interest in secrecy of the settlement agreements outweighed the presumption of public disclosure and, as such, failed to meet his burden under SCRCP 41.1. *See Dearybury v. Dearybury*, No. 2016–001206, 2018 WL 1865750, at *1 (S.C. Ct. App. Apr. 18, 2018) (citing *Ex parte Capital U–Drive–It, Inc.*, 369 S.C. 1, 12 (2006)). There was thus a sound, non-frivolous legal basis to seek reconsideration of the Court's order granting the Receiver's motion to seal.

In addition, USF&G sought reconsideration on the ground that the Court had improvidently granted the Receiver's motion to quash USF&G's subpoena seeking more information about the settlements. Reconsideration Mot. ¶¶ 26–27. The Reconsideration Motion highlighted that the Court had not addressed USF&G's arguments that it was entitled to the requested information to: (a) confirm that the Receiver will contribute properly to any resolved Covil asbestos claims that implicate insurance policies issued by the Settling Insurers; and (b) determine the extent to which the settlements are fair and reasonable and/or how the QSF Operating Agreement may extinguish or impair USF&G's rights. *Id*. Seeking reconsideration of

the Court's order quashing USF&G's subpoena was appropriately predicated on the Court not having addressed USF&G's arguments on that issue. This does not amount to sanctionable conduct.

D. USF&G Appropriately Sought Reconsideration of Unsupported Factual Findings in the Approval Order

Finally, USF&G appropriately sought reconsideration on the grounds that certain factual findings in the Approval Order were unsupported by the record before the Court. Reconsideration Mot. ¶¶ 28–29. Specifically, the finding in the Approval Order that the settlement agreements provide fair and reasonable consideration to support the release of Covil's rights against the Settling Insurers is not supported by the record. Reconsideration Mot. ¶ 28. And the finding in the Approval Order that the consideration provided in exchange for the policy buy-back was sufficient to exhaust the Settling Insurers' policies lacked any explanation or analysis. Reconsideration Mot. ¶ 29. A motion to reconsider unsupported factual findings cannot fairly be characterized as sanctionable conduct.

* * *

For the reasons discussed above, none of the arguments USF&G raised in support of reconsideration can even remotely be described as frivolous or sanctionable. The Receiver's conclusory assertion that USF&G's arguments "were not raised in good faith and were merely meant to harass the Receiver and delay this Court from ruling," Mot. at 19–20, are unsupported by any legal analysis or any recitation of the record. Under Rule 11 and the Act, sanctions should not be imposed without "reasonable factual support." *See Bon Secours*, 393 S.C. at 597, 713 S.E.2d at 628 (finding that a trial court's award of sanctions may be reversed if it "lack[s] reasonable factual support"); *cf. Dunn v. Dunn*, 298 S.C. 499, 503, 381 S.E.2d 734, 735–36 (1989) (reversing imposition of sanctions under Rule 37(b), SCRCP for failure to comply with

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discovery order where "there [was] no evidence in the record to reasonably support" sanctions). The Receiver has provided no reasonable factual support for sanctions here. And the Receiver cites no authority or precedent under South Carolina law to sanction a party for seeking reconsideration in circumstances such as these.

By contrast, USF&G has explained in depth and at length (both in this response and in its response to the Receiver's April 20, 2020 sanctions motion) why its limited objection to the settlements was made in good faith, was objectively reasonable, was grounded in sound and settled law, and was far from frivolous. USF&G provided substantial support in its Reconsideration and Stay Motions—including legal arguments backed by the record, relevant insurance policy language, and South Carolina and U.S. Supreme Court precedent—to demonstrate why the Court should reverse its Approval Order or at least stay its enforcement. USF&G should not be sanctioned for advancing well-founded arguments that were, and remain, squarely in accord with South Carolina law. *See In re Megna*, No. 2015-002054, 2018 WL 1413077, at *1 (S.C. Ct. App. Mar. 21, 2018) ("[A]s long as Respondent had good ground to support his defense—to the best of his knowledge, information, and belief—he did not violate Rule 11 by asserting the defense."); *see also A.L. v. Jackson Cty. Sch. Bd.*, 652 F. App'x 795, 797 (11th Cir. 2016) ("[T]he purpose of Rule 11 is to deter frivolous lawsuits and not to deter novel legal arguments or cases of first impression." (quoting *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998))). *See also* Ballard Aff. at 9 ("USF&G's counsel is zealously and appropriately advancing its client's positions before the trial court and in preserving issues for appeal and doing so with careful deliberation and appropriate citation to authority.").

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III. USF&G Should Not Be Sanctioned For Notifying The Court About The Recently-Discovered Dissolution Orders

The Receiver further contends that USF&G's Reconsideration Motion and Stay Motion were frivolous and deserving of sanctions because USF&G "raised, for the first time . . . an argument about the effect of a prior Covil receivership." Mot. at 5. This argument fails for at least three reasons. *First*, this argument mischaracterizes USF&G's filings. USF&G simply alerted the Court to the recently-discovered 1992 orders regarding Covil's judicial dissolution, and asked the Court to stay enforcement of the Approval Order until the implications of Covil's judicial dissolution could be briefed and resolved; it did not ask the Court to rule on the implications of this new information in the context of the Reconsideration and Stay Motions. USF&G's counsel's disclosure of this development fulfilled their duty of candor as officers of the Court. *Second*, USF&G's identification of potential impacts that might arise from the Dissolution Orders are based on sound legal analysis. And *third*, the Receiver's contention that USF&G knew years ago about Covil's *judicial* dissolution—as opposed to its *administrative* dissolution—lacks any factual basis and is legally irrelevant.

A. USF&G Appropriately Alerted The Court To An Important Development

USF&G alerted the Court to the Dissolution Orders in its Reconsideration and Stay Motions because that was USF&G's first opportunity to make the Court aware of this significant development that the parties had learned about just days earlier when Zurich produced the relevant court records in supplemental disclosures in the Middle District of North Carolina action. *See* Ex. 5 (Zurich's Second Supplemental Rule 26(a) Initial Disclosures, M.D.N.C. Action, Apr. 16, 2020); *see also* Ballard Aff. at 14–15. Zurich found the Dissolution Orders after extensive searches of microfilm images of archived court files. *See generally* Ex. 6 (Decl. of Kerith Branham filed in *Covil Corp. v. Zurich Am. Ins. Co., et. al.*, C.A. No. 7:18-cv-3291-

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BHH (D.S.C. June 4, 2020), ECF 174-1). This was after briefing closed on the Receiver's and Settling Insurers'[10] motions to approve their settlements and establish the Qualified Settlement Fund ("QSF"), and after the Court had entered the April 10, 2020 Approval Order.

USF&G did not raise these facts in the Reconsideration Motion to seek *resolution* of issues related to Covil's judicial dissolution proceedings. Rather, USF&G noted that it was only "appris[ing] the Court of these developments," and expressly asked the Court *not* to rule on their legal implications until the litigants could complete their investigation into the circumstances and consequences of these proceedings and so the issues could be addressed more fully in an appropriate context. *See* Reconsideration Mot. ¶ 4, n.3 ("These issues will be raised separately in the appropriate proceedings and with further briefing. They are noted here solely to apprise the Court of these developments and to demonstrate why a stay is necessary."); Reply Br. ¶ 1 (noting that USF&G's Reconsideration and Stay Motions "do not seek rulings from this Court as to whether any asbestos claims are barred, whether jurisdiction is lacking over any claims or parties, or whether the Receiver was properly appointed. . . . The impact of the newly-discovered facts regarding . . . judicial dissolution . . . should be adjudicated in the context of the underlying asbestos litigation against Covil."); *see also* Ballard Aff. at 17–19. USF&G also raised the Dissolution Orders in support of its Stay Motion as a reason to defer enforcement of the Approval Order until issues associated with the dissolution could be fully investigated and briefed by the parties, and resolved by the Court. *See* Stay Mot. ¶¶ 4, 11–15. Alerting the Court to this development and requesting that it stay enforcement of the Approval Order until the effect of Covil's judicial dissolution could be determined does not amount to sanctionable conduct.

[10] The "Settling Insurers" are Hartford Accident and Indemnity Company and First State Insurance Company, TIG Insurance Company, as successor to Ranger Insurance Company, and Sentry Insurance, a Mutual Company.

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See Ballard Aff. at 18 ("USF&G's counsel was obligated by virtue of its duties to the judicial process to raise the issue of the prior judicial dissolution of Covil to the Court.").

Even if the Court were to characterize USF&G's mention of this issue in its Reconsideration Motion as a request to rule on the consequences of Covil's judicial dissolution proceedings—contrary to the plain words of USF&G's Reconsideration Motion—it would not amount to sanctionable conduct for USF&G to have done so. Although a party cannot use Rule 59(e) to "present to the court an issue the party *could have raised* prior to a judgment but did not," *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (emphasis added), "[a] trial court may relieve a party from a final judgment, order, or proceeding if there is 'newly discovered evidence which by due diligence could not have been discovered'" previously, *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 636–37, 670 S.E.2d 680, 688 (Ct. App. 2008) (quoting Rule 60(b)(2), SCRCP). Evidence is "newly discovered" when it was not "known to the party . . . or in the party's possession" prior to the decision or order. *Id.* at 637; *see also Amesco Exports, Inc. v. Assoc. Aircraft Mfg. & Sales, Inc.*, 87 F.Supp.2d 1013, 1015 (C.D. Cal. 1997) (finding plaintiff's receipt of letter from tax commission advising it of conditional revival of its corporate status constituted newly discovered evidence for purposes of Rule 60(b)(2) and warranted relief from final judgment); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2859 (3d ed.) (observing that "Rule 60(b)(2) has proved useful . . . . especially [ ] when the newly discovered evidence calls into question the validity of the judgment by directly refuting the underpinnings of the theory which prevailed").[11] Here, USF&G could not have raised Covil's judicial dissolution with the Court

[11] SCRCP 60(b) is virtually identical to Fed. R. Civ. P. 60(b) and provides that, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

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before entry of the Approval Order, because, as explained in Section II.C *infra*, USF&G was not aware of Covil's judicial dissolution until after the briefing on settlement approval closed. Accordingly, it was appropriate (and certainly not sanctionable) for USF&G to promptly raise the judicial dissolution issue in its Reconsideration Motion and Stay Motion. *See* Ballard Aff. at 14.

B. There Was Nothing Frivolous About USF&G's Statements To The Court Concerning The Potential Impact Of The Dissolution Orders

As outlined in USF&G's Reconsideration Motion and Reply Brief, Covil's judicial dissolution proceedings have potential consequences as to Covil's role in the underlying asbestos cases. Reconsideration Mot. ¶¶ 1–4; Reply Br. ¶¶ 1–2, 8–22. Specifically, those briefs discuss the potential extinguishment of claims against Covil pursuant to S.C. Code § 33-14-107(c) as a result of the Dissolution Orders. *See, e.g.*, Reconsideration Mot. ¶ 3; Reply Br. ¶¶ 16–22. There is no need to repeat here the analysis in those prior filings, which USF&G incorporates by reference in their entirety. For purposes of the Receiver's sanctions motion, it simply cannot be said that USF&G's flagging of this issue for the Court was done in bad faith or lacked any legal basis—the analysis is based on the plain words of the statute and citations to relevant case law. *See* Ballard Aff. at 15–19.

The Receiver's arguments in opposition to USF&G's Reconsideration Motion did not apply settled, directly applicable South Carolina law. The Receiver relied instead on an analogy to Delaware law, which the Court subsequently adopted. *See* Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CVS Corp.*, No. 2015-CP-46-02155, at 11-12 (S.C. Ct.

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judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). . . ."

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Com. Pl., York Cty. May 6, 2020) (the "May 6, 2020 Order") (relying on *Matter of Krafft-Murphy*, 82 A.3d 696 (Del. 2013)). The Delaware General Corporation Law provision at issue in *Krafft-Murphy*, however, is materially different in relevant part from S.C. Code § 33-14-107(c). *See Krafft-Murphy* at 708–09 (distinguishing Delaware dissolution statutes from other states' dissolution statutes that "explicitly bar[ ] claims against a dissolved corporation" after a period of years, and finding that, because of this, cases construing dissolution statutes (like South Carolina's) based on the Model Business Corporation Act—"are inapposite").[12] It cannot fairly be said that "South Carolina law is crystal clear" on these issues such that USF&G's legal arguments could be found to be sanctionable. *See Ray*, 2007 WL 9734948, at *3.

It was also reasonable for USF&G to make the Court aware that Covil's judicial dissolution potentially raised questions concerning the Receiver's agreements with the Settling Insurers and the current Receivership itself. The May 11, 1992 Order judicially dissolving Covil appointed L. Winston Lee as "the permanent Receiver of Covil Corporation . . . and all of [its] respective properties" whose "responsibility and authority [had been] broadened to that of a general receiver for Covil Corporation." Mot. Ex. I (May 11, 1992 Order) at 1–2, ¶ 3. It further enjoined all persons "from instituting or prosecuting any action or proceeding against Covil Corporation . . . other than as set forth in th[e] [May 11, 1992 Order] or from levying upon, attaching, distraining, or selling . . . any of the property of Covil Corporation . . . ." *Id.* ¶ 11. Thus, the May 11, 1992 Order, on its face, suggests that anyone other than L. Winston Lee was unauthorized to dispose of Covil's property. But that is exactly what the current Receiver

[12] Similarly, the Receiver cited no authority—much less any binding South Carolina precedent—to support his arguments (both of which the Court also adopted) that the ten-year statute of repose enacted in 2004 would not have run prospectively to bar claims as of 2014, or that claims were excepted from the statute of repose to the extent judgments on those claims could be paid out of a dissolved corporation's insurance policies. *See* May 6, 2020 Order at 10, 13.

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purports to do in connection with his settlements—to sell back to the Settling Insurers the insurance policies they issued to Covil—notwithstanding the May 11, 1992 Order's directive to the contrary. *See* Reconsideration Mot. ¶ 2. In addition, because L. Winston Lee was appointed as Covil's *permanent* Receiver, the Dissolution Orders raise the possibility that the Court may have lacked jurisdiction to appoint Mr. Protopapas as Receiver in the first place in 2018 and to approve the settlements. *See* Reconsideration Mot. ¶ 4; Stay Mot. ¶ 4.[13]

USF&G promptly raised these issues in support of its Stay Motion to allow some time for the parties to assess them and make submissions to the Court. USF&G asked the Court *not* to rule upon these issues until they could be further investigated and fully briefed. *See* Stay Mot. ¶ 15; Ballard Aff. at 17–19. Given the relief sought—a stay to consider the implications of a new development—there is no basis to sanction USF&G for bringing these issues to this Court's attention. The request for a stay was far from frivolous. *See* Ballard Aff. at 15.

C. USF&G Was Unaware Of Covil's Judicial Dissolution Until The Dissolution Orders Were Recently Found And Produced by Zurich

The Receiver argues that it was "disingenuous[]" for USF&G to state in its Reconsideration Motion that it only "recently discovered Covil was judicially dissolved in the

[13] Judge Charles B. Simmons, Jr.'s recent transfer of jurisdiction of the prior receivership to this Court ("Transfer Order") does not cure any jurisdictional problem, because it only purports to prospectively transfer the prior receivership proceedings "to the Honorable Jean Toal for any and all ***further proceedings*** arising out of 2018-CP-40-04940." Transfer Order, *First Savings Bank, FSB v. Equitable Enter.*, No. 91-CP-23-04445 (S.C. Ct. Com. Pl., Greenville Cty. May 1, 2020) (emphasis added). The Transfer Order was entered on May 1, 2020, after this Court appointed Mr. Protopapas as Receiver and after this Court approved the settlements. Indeed, the fact that Mr. Protopapas immediately took action after discovery of the Dissolution Orders to obtain an order transferring the prior receivership proceedings is itself evidence that USF&G's arguments as to the potential impact of those proceedings on the current Receivership are non-frivolous. Likewise, Judge Simmons' subsequent order "finding that this matter is ***currently*** before Justice Toal" does not cure any jurisdictional problem. *First Savings Bank, FSB v. Covil Corp.*, No. 91-CP-23-04445, at 2 (S.C. Ct. Com. Pl., Greenville Cty. June 10, 2020) (emphasis added).

prior receivership." Mot. at 6. In support of this assertion, the Receiver points to numerous documents evidencing USF&G's and other insurers' awareness over the years that Covil had gone through a prior receivership in the early 1990s. But awareness of the fact that Covil had gone through a prior receivership certainly did *not* constitute notice that Covil had been *judicially dissolved* as part of that receivership—those are two entirely different things, and one does not necessarily follow from the other. *See* Ballard Aff. at 9–10. [redacted]. For example:

- A November 14, 1991 letter from Danny White, Covil's asbestos defense counsel, to insurers states:

  [redacted][14]

  Mot. Ex. B at ZUR 006414 (emphasis added).

- A February 14, 1992 letter from Danny White to insurers states:

  [redacted]

[14] The Receiver partially misquotes the text in his motion. Mot. at 6.

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[redacted]

Mot. Ex. D at ZUR 006367 (emphasis added).

- A June 24, 1992 letter from Danny White to another law firm, blind copying insurers, states:

[redacted]

Mot. Ex. J at TRAV_ST_0169098 (emphasis added).

Rather than supporting the Receiver's arguments that USF&G and other insurers knew about Covil's judicial dissolution all along, these documents, two of which pre-date and one of which *post-dates* the May 11, 1992 Dissolution Order, demonstrate that [redacted] Ex. 7 at 1 (Letter from P. Protopapas to P. Dworjanyn, Nov. 4, 2019, filed under seal) (emphasis added); *see* Ballard Aff. at 10–11 ("[redacted]").

The fact that this information now appears to be incorrect does not in any way suggest that USF&G *knew* that was the case. To the contrary, promptly after Zurich found and produced the Dissolution Orders, USF&G responsibly brought that development to this Court's attention

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in a request to stay the Approval Order so the parties could evaluate the facts and determine how best to proceed. Doing so was far from frivolous or sanctionable. *See* Ballard Aff. at 10 ("[T]he revelation of the 1992 judicial dissolution for Covil Corporation is of utmost importance to any case in which Covil Corporation and/or its insurers such as USF&G is or will be named as a party, and accordingly it was appropriate for USF&G's counsel to flag this issue for the Court."), 15, 17–19.

Moreover, as USF&G explained in support of its Reconsideration Motion, the Receiver's waiver arguments fail because under South Carolina law, "'[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right.'" *Singh v. Singh*, 429 S.C. 10, 29, 837 S.E.2d 651, 662 (Ct. App. 2019) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). *See also* Reply Br. ¶¶ 4–8. Given the absence of evidence that USF&G was previously aware of Covil's judicial dissolution or the Master-in-Equity's accompanying Dissolution Orders, USF&G could not have waived defenses relating to the judicial dissolution or the Dissolution Orders. Additionally (and as also explained previously), USF&G cannot waive defenses to liability that belong to *Covil*. And finally, § 33-14-107 "provid[es] a period of repose." S.C. Code § 33-14-107, Official Comment; *see also Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1150 (N.D. Fla. 1994) (describing S.C. Code § 33-14-107 as a "statute of repose"). Under South Carolina law, a statute of repose is non-waivable. *See Langley v. Pierce*, 313 S.C. 401, 403–05, 438 S.E.2d 242, 243–44 (1993) (holding that a statute of repose is substantive, not procedural, and thus is not subject to any tolling doctrine); *G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc*., 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003) (finding that a statute of repose is not "subject to certain counter-assertions, such as waiver,

tolling, and estoppel"). For these reasons as well, the Receiver's waiver arguments were not only factually unsupportable, they were legally irrelevant.

CONCLUSION

For all of the foregoing reasons, USF&G respectfully requests that the Court deny the Receiver's motion in its entirety and decline to sanction USF&G and/or its counsel.

Respectfully submitted this 17th day of June, 2020.

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EXHIBIT 41

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932

ZURICH AMERICAN INSURANCE COMPANY, *Plaintiff,* vs. COVIL CORPORATION, *et al.*, *Defendants*.	**COVIL CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Covil Corporation (hereinafter "Covil"), by and through its duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), moves this Court for summary judgment as to Covil's action for declaratory judgment asserted in its counterclaim against Zurich American Insurance Company ("Zurich"), successor to Maryland Casualty Company, and in its crossclaim against United States Fidelity and Guaranty Company ("USF&G" or "Travelers") (collectively, "Insurers") (hereinafter, Covil's "Claims") (ECF No. 155). In support of its motion for summary judgment (the "Motion"), Covil demonstrates as follows:

Stipulation of Dismissal as to Weir Valves Controls USA, Inc

NATURE OF CASE

Covil Corporation began business operations as an insulation contractor in 1954 in South Carolina. Over the next thirty years, the company grew to become a major regional insulation contractor – installing, removing and repairing asbestos-containing insulation in a variety of heavy industrial facilities throughout the southeastern United States. Over the course of the company's existence, Covil paid premiums to purchase significant amounts

of liability insurance from Zurich, USF&G, and Penn National, among other insurers.[1] Beginning in 1976, and continuing to the present, Covil has relied upon the coverage available under those policies to defend and resolve underlying asbestos bodily injury claims.

As a result of a series of decisions made by Covil's Insurers in the defense of Covil, former Chief Justice of the South Carolina Supreme Court Jean H. Toal (sitting as the trial judge responsible for all asbestos litigation in South Carolina) appointed Peter Protopapas as the Receiver of Covil Corporation (the "Receiver") on November 2, 2018. Chief Justice Toal vested the Receiver with the "power and authority to fully administer all assets of Covil Corporation," which is "inclusive of, the right and obligation to administer any insurance assets of Covil as well as any claims related to the actions or failure to act of Covil's insurance carriers."[2]

Just four days after the Receiver's appointment, on November 6, 2018, Zurich instituted this action, asking this Court to make certain declarations regarding the lack of available funds under the Zurich policies.[3] Covil responded by asserting Claims against the Insurers in this action, requesting that this Court declare the existence of Covil's

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[1] As this Court is aware, Covil also brought declaratory judgment action claims against settled parties Sentry, Hartford, and TIG. Pursuant to this Court's order of February 4, 2020 suspending the briefing as to those parties, Covil has not briefed its claims regarding their insurance coverage herein. *See* ECF 200.

[2] *See* ECF 8-1, Order Appointing Receiver. Chief Justice Toal clarified, in an order on March 1, 2019, that the Receiver's appointment was as to all asbestos related cases and in all asbestos related matters and included the "right and obligation to administer any insurance assets of Covil as well as any claims related to the actions or failure to act of Covil's insurance carriers." *See* Exhibit 1, Order Clarifying Receiver Order.

[3] *See* ECF 1.

coverage and determine the nature, scope, type and amount of coverage available to Covil for the defense and resolution, by settlement or judgment, of the underlying asbestos personal injury actions.[4]

Zurich and Covil filed a stipulation on February 7, 2020 establishing the existence of primary and umbrella coverage Zurich issued to Covil between 1970 and 1976, and agreeing to the terms and conditions of those policies that might be relevant to the parties' respective summary judgment motions.[5] USF&G and Covil filed a similar stipulation as to a primary policy issued to Covil by USF&G's predecessor for the 1976 to 1978 policy periods.[6] These particular factual issues are now conclusively resolved.

Additionally, in her role as the Receivership Court for Covil, Chief Justice Toal considered the *same* insurance issues regarding USF&G and Zurich and unequivocally determined that South Carolina law—not Fourth Circuit law derived from an *Erie* guess of how a federal court in Maryland would apply and interpret Maryland law—governs the novel issues of South Carolina insurance law giving rise to this matter. Chief Justice Toal also held that USF&G issued general liability coverage to Covil for the 1954 to 1964 period. Under basic principles of federalism, and deference to a state court judge's view on the application of state law, Covil respectfully asks this Court to recognize the state law of South Carolina on these issues of first impression in South Carolina insurance law and enter a declaration consistent with Chief Justice Toal's expression of South Carolina law

[4] *See* ECF 155.
[5] *See* ECF 204
[6] *See* ECF 205

as follows:

- USF&G issued general liability insurance coverage to Covil on an annual basis, including products and completed operations coverage, and premises operations coverage, between 1954 and 1964, without an aggregate limit of liability for damages paid for bodily injury or property damage;

- All of Covil's liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy;

- The "completed operations hazard" described in the Insurers' policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Covil completed its installation or removal operations or work at a particular jobsite;

- As to any individual asbestos lawsuit, it is the Insurers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability applicable to the "completed operations" provisions in their policies;

- The asbestos insulation contracting, or "operations," claims against Covil have resulted from multiple "occurrences" under the Insurers' policies, thus entitling Covil to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities; and

- As to the asbestos "operations" claims against Covil, the Insurers are obligated independently to pay those claims "in full" up to their "per occurrence" limits of liability subject to their right to allocate responsibility equitably amongst themselves, but not to Covil.

Based on the stipulated existence of insurance coverage written by USF&G and Zurich and based on the clear pronouncement of South Carolina law by Chief Justice Toal in her January 8, 2020 Order, Covil respectfully requests that this Court enter summary judgment in its favor on these issues.

I. Factual Background

A. Covil purchased a program of insurance coverage which now should be available to cover its underlying asbestos claims.

Covil was formed in South Carolina in 1954 and engaged in the installation, removal and repair of insulation in various facilities across South Carolina until its business ceased operations in 1991. *See* Exhibit 2, January 8, 2020 Order for Rule to Show Cause ("Order"), p. 2. Covil's operations involved the installation, removal, and disturbance of insulation materials, typically supplied, required, or acquired by other parties. *Id.* At pertinent times insulation materials contained asbestos and Covil's operations allegedly resulted in bodily injury to South Carolina citizens. *Id.* The State of South Carolina rescinded Covil's corporate charter in 1993 for failing to file the appropriate documentation with the Secretary of State. *Id.* Covil's Insurers have always been and continue to be aware of the nature of Covil's prior operations. Covil's Insurers also understand the widely known fact that most of the asbestos contracting claims against Covil invoke the "operations" coverage portion of their policies because the claims did not result from Covil's "completed operations," as discussed in detail below.

Insurers admit that they (and other insurance companies) issued insurance policies to Covil between 1964 and 1988. These insurers include Zurich, USF&G, and Penn National.[7]

[7] A copy of a chart setting forth the Covil insurance program as identified in Chief Justice Toal's order is attached hereto as Exhibit 3.

However, despite clear evidence to the contrary, including the company's statement that evidence establishes an "insuring relationship" between the parties during the period in question,[8] USF&G disputes that it issued comprehensive general liability coverage to Covil between 1954 and April 20, 1964. As established below, actual policies demonstrating the 1954 to 1964 coverage are not available because USF&G made a conscious decision no later than 1984 systematically to destroy "millions and millions and millions" of pages of documentation at its Baltimore Home Office, including historical policy documents because these were not deemed to be the company's "vital" corporate records. This willful destruction of documents occurred after Covil put USF&G on notice of potential claims for coverage due to asbestos lawsuits filed against Covil as early as 1976.

USF&G was also plainly on notice of asbestos-related claims and the scope of coverage for these claims because of numerous judicial decisions defining both the underlying liability and insurers' responsibility for these claims. *See, e.g.*, *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973). In a 1978 decision in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1240 (E.D. Mich. 1978), Judge Feikens held that coverage under general liability insurance policies for asbestos injury claims was triggered by exposure to asbestos fibers during the policy, and

[8] *See* Exhibit 4, Deposition of Craig Johnson, at 71-72. Mr. Johnson, as USF&G's corporate designee, agreed that USF&G's evidence demonstrated the existence of *several* insuring relationships between USF&G and Covil between 1954 and 1964, including relationships concerning boiler and machinery claims, worker's compensation claims, automobile liability claims and claims relating to what USF&G's documentation called "property damage – general liability" claims. More on that, later.

that policies issued several decades before the filing of the litigation would necessarily cover the resulting claims:

> [u]nder *Borel* and similar cases Forty-Eight may be held liable for asbestos-caused injuries occurring during the period from 1923 until 1970 when it discontinued the sale of asbestos products. If the manifestation theory is adopted, Forty-Eight would be effectively deprived of coverage it paid for and might be unable to secure coverage for liability in future cases where manifestation occurs after coverage is not available.

See also Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (adopting a "continuous" or "triple" trigger of coverage for asbestos bodily injury, including policies issued during the time in which the plaintiff was first exposed injuriously to asbestos), *cert. denied*, 455 U.S. 1007, *reh'g denied*, 456 U.S. 951 (1982). Based on these undisputed facts, and recently produced USF&G documentation located on reels of old microfilm,[9] Chief Justice Toal recently held that USF&G issued comprehensive general liability coverage to Covil, on an annual basis, between 1954 and 1964. *See* Exhibit 2, Order, at 14.

B. The Insurers are aware that Covil was both an installer and a distributor of asbestos-containing insulation products.

During its operating years, between 1954 and 1991, Covil was both a contractor and a distributor of insulation products. Because a large portion of Covil's business involved installing, removing and repairing insulation products at large industrial facilities, many of

[9] Recently produced USF&G documentation, previously "donated" to a business museum in Baltimore, states that USF&G started a microfilm program in approximately 1955. *See* Exhibit 5. Despite defending Covil against the asbestos litigation for the past forty-three years, USF&G did not search its microfilm until November 2019 after Chief Justice Toal issued a "show cause" order finding that USF&G had violated a prior order she issued. See Exhibit 6, Deposition of Mark Esposito, at 37-38.

the claims brought by underlying asbestos personal injury plaintiffs arise out of alleged exposure to asbestos from Covil's ongoing operations.

In her Order, Chief Justice Toal explained Covil's operations as follows: "From the time of its original formation in or about 1954, Covil Corporation was engaged in the installation and removal of insulation in various industrial facilities across South Carolina. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At pertinent times insulation materials contained asbestos and Covil's operations are alleged to have resulted in bodily injury to South Carolina citizens." *See* Exhibit 2 at 2. The Insurers thus have known for decades that most of the asbestos claimants suing Covil generally allege exposure from the installation and removal of asbestos-containing products from the 1950s through the 1980s.

An evaluation of the nature and terms of the coverage available to Covil under its primary comprehensive general liability and excess policies issued by Zurich and USF&G necessarily must take into account that some of the underlying asbestos bodily injury claims arise from Covil's ongoing operations.

C. The Receiver was appointed to marshal Covil's assets – its insurance policies – and the Receivership Court has supervised the Receiver in carrying out his duties.

In response to numerous asbestos suits initiated against Covil, Chief Justice Toal of the South Carolina Court of Common Pleas for the Fifth Judicial Circuit (hereinafter, the "South Carolina Court") appointed the Receiver on November 2, 2018, to locate and evaluate Covil's assets, which consist principally of its general liability insurance. *See*

Exhibit 2 at 1. During a Status Conference on July 11, 2019, the Receiver informed the South Carolina Court of the limited progress he had made in marshaling the assets of the Receivership due to Insurers' refusal to provide meaningful information, such as information regarding their coverage years, policy limits, terms and conditions, and claims paid history. Following a second hearing on September 19, 2019, addressing the same issues, the South Carolina Court entered a Rule to Show Cause order setting forth 24 specific areas of inquiry to which the Insurers were required to respond by September 30, 2019. *Id.* at 5. Neither Insurer fully responded to the areas of inquiry by the September 30, 2019 deadline. *Id.* The South Carolina Court again ordered Insurers to provide complete policy limits and settlement authority information to Receiver in a show cause hearing on November 12, 2019. *Id.*

On January 8, 2020, the South Carolina Court held that "[b]ased on the evidence established by Covil's Receiver regarding the existence of Covil insurance coverage issued by USF&G, and based on the evidence demonstrating USF&G's spoliation of evidence regarding the existence of coverage, this Court holds that [USF&G] issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, *between 1954 and 1964*, without an aggregate limit of liability for damages paid for bodily injury or property damage." *Id.* at 14 (emphasis added). The South Carolina Court made additional findings regarding the scope of coverage Insurers provided to Covil, which are discussed in detail below.

III. QUESTIONS PRESENTED

1. During what timeframe, in addition to 1976 through 1978, did USF&G provide general liability insurance policies to Covil?

2. What are the coverage scopes and limits, if any, of such policies?

3. What is the scope of coverage under South Carolina law for the policies issued to Covil by the Insurers?

IV. ARGUMENT AND AUTHORITIES

Summary judgment is proper when, as here, "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Small v. WellDyne, Inc.*, 927 F.3d 169, 173 (4th Cir. 2019) (citing FED. R. CIV. P. 56(a)). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Jefferies v. UNC Reg'l Physicians Pediatrics*, 392 F. Supp. 3d 620, 624 (M.D.N.C. 2019). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Royster v. Costco Wholesale Corp.*, 378 F. Supp. 2d 595, 602 (M.D.N.C. 2005). The burden then shifts to the nonmoving party to come forward with specific facts and competent summary judgment evidence showing a genuine dispute exists for trial. *Id.* To sustain this burden, the nonmoving party cannot rest on the mere allegations of the pleading. FED. R. CIV. P. 56(e).

In a case where there is an actual controversy between the parties, as there is here, the Federal Declaratory Judgment Act allows federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a)(2012). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R.

CIV. P. 57. In determining whether to entertain a request for declaratory relief, the Fourth Circuit has instructed district courts to consider whether the request "will serve a useful purpose in clarifying and settling the legal relations [at] issue" and "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Ketner v. Branch Banking & Trust Co.*, 143 F. Supp. 3d 370, 385 (M.D.N.C. 2015) (quoting *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 594 (4th Cir. 2004)).

Insurers do not dispute the existence of an actual controversy between themselves and Covil (by and through its Receiver). The South Carolina Court *already* determined the insurance issues of first impression in this matter. This Court's recognition of the law of South Carolina on these specific issues would "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this proceeding." *See id.* Therefore, Covil respectfully requests that this Court acknowledge the South Carolina Court's holdings within its January 8, 2020 order and enter the declarations sought within this Motion in a manner consistent with the law of South Carolina as was recently delineated by one of its own state courts.

A. Insurers Provided Coverage to Covil since its Inception in 1954.

The parties have filed stipulations regarding the existence of coverage for Zurich annually for the period March 31, 1971 through March 31, 1976, and for USF&G annually for the period March 31, 1976 to March 31, 1978.[10]

[10] *See* ECF 204 for stipulation as to Zurich, and ECF 205 for stipulation as to USF&G.

1. Testimony and Documents Conclusively Show Coverage between 1954 and March 1964.

USF&G has not admitted the existence of USF&G comprehensive general liability coverage between 1954 and 1964, despite significant evidence establishing the existence of coverage during those prior years, and despite Chief Justice Toal's finding that USF&G issued the coverage. *See* Exhibit 2 at 14. Chief Justice Toal's ruling is well-supported since the overwhelming evidence demonstrates that USF&G issued comprehensive general liability coverage to Covil on an annual basis between 1954 and 1964.

a. Claims Register documents from USF&G show that USF&G paid Covil claims between 1955 and 1964.

As USF&G's own corporate representative testified, "There is evidence of an insuring relationship during [the 1954 to 1964] time frame." *See* Exhibit 4, Deposition of Craig Johnson, at 71-72.[11] Mr. Johnson's statement was based on the existence of historical Claims Registers. These historical registers logged each claim brought against USF&G insureds, separated by claim type. As Mr. Johnson explained, the "key" associated with these Claims Registers provides an explanation for the type of claim presented by each claimant. *See* Exhibit 4, Deposition of Craig Johnson, at 37-38; *see also* Exhibit 7, Claims Register Key.

Claims Registers produced in this case to date demonstrate unequivocally that

[11] As noted above, however, Mr. Johnson agreed that there were at least four separate insuring relationships between the companies during this time period.

USF&G logged insurance claims on Covil policies between at least 1955 and 1964.[12] *See* Exhibit 8. These claims included workers' compensation claims, boiler and machinery claims, automobile liability claims and property damage claims. *See* Exhibit 4, Deposition of Craig Johnson, at 40-41.

Specifically as to the property damage claims, certain of the Claims Register pages include the symbol "MP." *See* Exhibit 8. On review of these documents, Mr. Johnson agreed that the "MP" symbol indicated that the claim presented was for "general liability property damage." *See* Exhibit 4 at 41. As to the first claim listed at Bates label "TRAV_ST_0037260," dated April 1955, Mr. Johnson agreed that USF&G understood the claim entry to mean that Acousti Engineering Company made a claim against Covil for property damage under a general liability policy. *See id*. at 43. General liability insurance policies do not only insure against the policyholder's liability to pay damages for claims of third-party property damage. They also insure against the policyholder's liability to pay damages for third-party bodily injury, such as asbestos injury and death claims.[13] *Harleysville Mut. Ins. Co. v. South Carolina*, 401 S.C. 15, 29 (2012) (Toal, CJ) (discussing

[12] USF&G corporate representative Mark Esposito testified in his deposition on January 30, 2020 that the review of the microfilm containing the Claim Register documents with possible Covil references was still not complete. There is no estimated time of completion.

[13] In an earlier action for declaratory judgment, breach of contract and bad faith, USF&G agreed it issued general liability insurance coverage, including coverage for asbestos bodily injury claims, to a regional insulation contractor named Western Asbestos between 1948 and 1960 after it produced dozens of nearly identical Claims Register pages containing the identical "MP" symbol in connection with claims made against the insured by third-parties. *See* Exhibit 9, settlement agreement in the Western MacArthur case, including a stipulation that USF&G issued liability insurance coverage to Western Asbestos between 1948 and 1960; *see also* Exhibit 10, pages from USF&G's claims registers showing "MP" claims against Western Asbestos in the 1950s.

a South Carolina statute requiring commercial general liability insurance policies to contain or be deemed to contain a definition of "occurrence" that includes "property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself"); *see generally B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529 (1999) (discussing a general liability insurance policy providing coverage for claims involving property damage and bodily injury).

An April 1947 booklet entitled "Claim Department Clerical Instructions" detailed USF&G's instructions to clerical staff to confirm coverage under a policy before entry of claims in the Claims Register: "After the clerk has checked the policy or bond information to determine if there is coverage for the loss, she enters it on the claim register as provided on that form. She assigns the number next in order to the last one used. A separate sheet is used on each class of claims for each month. A carbon copy of the claim register is sent to the Home Office on the first of each month on AL [Automobile Bodily Injury], L [Other Bodily Injury], C [Compensation], and MP [Miscellaneous Property Damage] claims." *See* Exhibit 11. Mr. Johnson agreed that USF&G is not in possession of any information that would indicate that those procedures were not in place in 1964. *See* Exhibit 4 at 48.

b. *A 1985 USF&G memorandum further supports that underwriting files establishing coverage once existed, but had been destroyed.*

Additional support for the earlier policy periods of USF&G coverage can be found in an internal handwritten memorandum dated March 28, 1985. *See* Exhibit 12, document Bates labeled TRAV_ST_0169360. The document reads in relevant part, "We had coverage for an earlier policy period but our u/w records have been destroyed." *See id.*

Craig Johnson clarified that "u/w" referred to "underwriting records." *See* Exhibit 4 at 24. Mr. Johnson did not know, however, when the underwriting records were destroyed. *See id.* Other evidence shows, however, that they were likely destroyed during USF&G's massive purge of "millions and millions and millions" of pages of documents in its Baltimore Home Office a year earlier.

To that end, another USF&G corporate representative witness, David Nanzig, provided testimony regarding USF&G's historical document destruction practices. Mr. Nanzig was aware of historical document retention "guidelines," but could not provide any evidence to demonstrate that USF&G employees or officers complied fully with those policies. *See* Exhibit 13, Deposition of David Nanzig, at 51-52 ("I don't know that USF&G retained records of – of compliance other than administering the program and having management undertake what they need to do to implement the very guidelines that were in place."). The "guidelines" were likely aspirational in nature. Mr. Nanzig also was familiar with a well-documented internal effort in the spring of 1984 to purge all "obsolete and unnecessary" documents from the USF&G files. *See id.* at 87.

The 1984 USF&G Purge is well-documented. In a letter dated March 14, 1984, Karl Doerre, a USF&G Executive Vice President, outlined the program "to purge your files of unneeded material." *See* Exhibit 14. Further, a March 16, 1984 Department Circular detailing the implementation of the program noted: "All existing departmental files are to be in full compliance with the newly established program prior to May 15, including having been completely purged of all obsolete and duplicate material." *See* Exhibit 15.

USF&G's head of claims in the mid-1980s testified in a prior matter that the

company had "millions and millions and millions" of pages of paper at its Baltimore Home Office as of 1984 that it deemed to be "obsolete," some of which had been with the company since its founding in the late-19th century:

> [T]here were buildings in USF&G's control where paper records were stored, and there were millions and millions and millions of records. And I know that when Baltimore went through its rehabilitation and revitalization, suddenly a lot of this real estate that you could get for practically nothing became very valuable real estate . . . . And I think at that point – maybe this is what you've heard from others – somewhere along that time someone, not the Claim Department, decided that all these paper records that we'd been keeping back to the birth of the world were really of little or no value. And that, I think, coupled with the advent of the modern-day computer, where they began to keep, started keeping records on the computer, they took some of these ancient records and sent them to the landfill.

Exhibit 16, Deposition of Robert Schaller, at 162.

It is therefore clear that USF&G's earlier document retention "guidelines" were routinely ignored by company employees. Indeed, one USF&G document from 1984 said that a purpose of the "purge" was to maintain and organize the company's vital records in a coherent manner. Old policy documentation undoubtedly was not deemed to be a "vital" company record at USF&G in the mid-1980s. To the contrary, with respect to USF&G's document destruction program, Randolph Rorbaugh, a former Vice President at USF&G, testified that, at a meeting among USF&G management and attorneys in 1984, there was a discussion as to whether USF&G should retain in its records information regarding insureds' policies in light of outstanding long tail liabilities, particularly "as information on these kind of cases would develop or knowledge of the industry's liability would be determined." *See* Exhibit 17, Deposition of Randolph Rohrbaugh, at 65, 103.

A couple of years after the purge, USF&G recognized the negative impact of the

destruction on its ability to establish defenses to coverage in long tail liability claims like the asbestos personal injury litigation. In an internal memorandum to all Branch Office managers and claims superintendents, Kenneth Ford, a USF&G Assistant Vice President, announced the reversal of the policy, noting, "The purpose of this record retention effort is to enable us to secure coverage information when presented with a long tail claim." *See* Exhibit 18. Ford testified that USF&G decided to "stop the destruction" when policyholders began to prove coverage for long-tail claims with "partial information concerning a policy" and "the burden was pushed to the company, the insurer, to prove that there wasn't a policy or at least to prove the other terms [such as a policy limit] and [USF&G was not] able to really rebut some of that information." Exhibit 19 at 40. USF&G thus realized the obvious: without the now-destroyed policies, it was unable to establish policy limits on these policies. Insureds were undoubtedly obtaining rulings that USF&G issued unlimited coverage to them in the past.

The existing evidence definitively establishes that USF&G issued coverage to Covil during the 1954–1964 timeframe, and destroyed evidence of the coverage with long tail asbestos litigation on file against its insured. The South Carolina Receivership Court concurred, holding that USF&G "issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, between 1954 and 1964, without any aggregate limit of liability for damages paid for bodily injury or property damage." Exhibit 2, Order, at 14. Covil therefore respectfully requests that this Court acknowledge the South Carolina ruling, and find that USF&G issued comprehensive general liability insurance coverage to Covil on an annual basis, including

products and completed operations coverage between 1954 and 1964, without any aggregate limit of liability for damages paid for bodily injury or property damage.

B. South Carolina Law Establishes the Scope of These Insurers' Coverage to Covil.

In seeking to limit their obligations to Covil, Insurers predictably rely on the Fourth Circuit's decision in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), which decided issues of insurance law based on an *Erie* guess of how a state court in Maryland would apply and interpret undecided issues of Maryland state law. More specifically, the *In re Wallace & Gale* court adopted the view that general liability claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *In re Wallace & Gale*, 385 F.3d at 833-34.

If Maryland law governed this case, *Wallace & Gale* would perhaps have some relevance. But this is a South Carolina case, and the law of Maryland is not the law of South Carolina. Because *Wallace & Gale* interpreted only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The unique insurance issues present here turn only on the interpretation of South Carolina law, which requires a wholly independent analysis. As the South Carolina Court's recent order unambiguously shows, after undertaking that analysis, the outcome must be different.

The South Carolina Court made clear that *Wallace & Gale* "is not the law of South Carolina." Exhibit 2, Order, at 16. Therefore, the South Carolina Court "reconstruct[ed] the nature and scope of Covil's historic insurance program (without the cooperation of the

Insurers) so as to facilitate the management of the South Carolina asbestos docket." *Id.* at 14. In doing so, the South Carolina Court applied and made the findings and holdings described below based on principles of South Carolina insurance law, which Receiver asks this Court to acknowledge and apply in deciding this case.

1. *Trigger of Coverage*.

The South Carolina Court ruled that Covil's liability insurance policies in effect from a person's *first* exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy. Specifically, the South Carolina Court held:

> The policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the "continuous trigger of coverage" and the "injury in fact trigger of coverage" yield the same result such that the court need not choose between these conceptually similar approaches.

Exhibit 2, Order, at 14–15 (citing *Armstrong World Indus., Inc., v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996)). Based on this holding, this Court should hold that all of Covil's policies in effect from a person's first exposure to asbestos through death cover the asbestos claims against Covil unless coverage is otherwise excluded, which it is not.

2. The Distinction between "Operations" and "Completed Operations."

The *Wallace & Gale* court adopted the view that general liability claims somehow

change into completed operations claims where there is continuing injury post-dating completion of the installation. No insurance coverage decision prior to *Wallace & Gale* ever reached such a conclusion because it is antithetical to the nature of a "hazard" against which insurance policies cover insureds. At issue here is the construction of the "completed operations hazard" in Covil's general liability insurance policies.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.'" *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 418 (Mass. 1941)); *see also Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617 (6th Cir. 1962) ("The word 'hazard' as used in the policy must mean 'the source of a risk.' . . . Thus, a 'hazard' is a danger or risk lurking in a situation or place."). "Along with other meanings, the standard dictionary defines the noun 'hazard' as exposure to the chance of loss or injury." *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines "hazard" to include "a source of danger." *Hazard*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/hazard (last visited Jan. 17, 2020); *see also Travelers Cas. & Sur. Co. v. Emp'rs Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) ("Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress."). Or, in other words, the "completed operations

hazard" protects Covil from the risk of loss caused by its *completed* operations. The source of the "danger" against which the coverage protects Covil is its *completed* insulation work, not its ongoing insulation work.

The South Carolina Court properly declined to adhere to the Fourth Circuit's decision, holding that that the "completed operations hazard" described in the insurers' policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite. In so holding, the South Carolina Court noted:

> The insurers contend that aggregate limits of liability apply to any third party's claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the inception date of a policy. The Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to "guess" the view the Maryland Court of Appeals would take if the issue of interpreting the "completed operations" provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has "spoken" definitively on this issue. However, this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

Exhibit 2, Order, at 15–16. The South Carolina Court further held that "[n]o aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite." *Id.*

3. *Burden of Proof*.

The South Carolina Court held that "[i]nsurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits." *See* Exhibit 2, Order, at 17. Insurers have not met their burden. Moreover, the Order makes clear that aggregate limits do not apply to the relevant insurance policies. *See id.* at 19.

4. *Occurrences*.

The policies at issue provide coverage for legal liabilities resulting from an "occurrence." An "occurrence" is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. *See* Exhibit 2, Order, at 18. The South Carolina Court held that Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death "occurrences" have resulted from its "operations," entitling Covil to multiple "per occurrence" limits of liability to resolve the asbestos suits. *See id.*

The South Carolina Court reasoned that "[t]he asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil's operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple 'occurrences' under the standard definition of 'occurrence' used during the time of the insurers' policies." *Id.* (citing *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005)).

5. ***Allocation of Losses to Covil's Policies.***

The South Carolina Court noted that "the language of the policies typically requires the insurers to pay 'all sums'—meaning everything—for which the insure[r] is legally obligated to pay if a claimant sustains bodily injury during the period of the policy." *See* Exhibit 2, Order, at 18. The South Carolina Court further held that "each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach 'ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy's limits, but apportions liability among all insurers whose policies were triggered by the claimant's asbestos-related bodily injury." *Id.* at 19 (citing *Armstrong*, 45 Cal. App. 4th at 55). Covil is a defunct company in receivership. It lacks the funds necessary for it to absorb a portion of the company's asbestos liability in conjunction with the insurers as part of a "pro rata" allegation regime. *Id.*

Finally, after significant document productions by the Insurers, the South Carolina Court found that "no aggregate limit of liability for product liability or completed operations claims has been proven or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists" for the Covil insurance policies in effect between April 21, 1964 and March 31, 1978. *Id.* at 1920.

V. CONCLUSION

For the foregoing reasons, Covil, by and through its duly appointed Receiver, requests that this Court hold that the law of South Carolina applies to Insurers' policies, and that this law applies as set forth in Chief Justice Toal's January 8, 2020 order; grant Covil's motion for summary judgment on its action for declaratory judgment against Zurich and USF&G; and grant Covil all relief at law or equity to which it is justly entitled.

February 10, 2020

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on February 10, 2020. A copy of the foregoing document with a full set of exhibits also has been served on counsel for Insurers via electronic mail.

/s/ *Brady Edwards*

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EXHIBIT 42

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Zurich American Insurance Company, *Plaintiff* Plaintiff, vs. Covil Corporation, Sentry Casualty Company, United States Fidelity and Guaranty Company, TIG Insurance Company As Successor in Interest to Fairmont Specialty Insurance Company, F/K/A Ranger Insurance Company, Hartford Accident And Indemnity Company, Ann Finch, as Executrix of the Estate of Franklin Delenor Finch, Darrell A. Connor, as Executrix of the Estate of Charles Franklin Connor, Robert A. Mullinax as Executor of the Estate of Jack Junior Waugh, Robert J. Ellis, and Sharon Whitehead as Executrix of the Estate of James T. Whitehead, Defendants.	**CASE NUMBER: 1:18-cv-932**

INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Ann Finch, as Executrix of the Estate of Franklin Delenor Finch ("Finch"), Darrell A. Connor, as Executrix of the Estate of Charles Franklin Connor ("Connor"), Robert J. Ellis ("Ellis) and Sharon Whitehead as Executrix of the Estate of James T. Whitehead ("Whitehead" and together with Finch, Connor and Ellis, the "Individual Defendants") move this Court for summary judgment against Zurich American Insurance Company's claim for declaratory judgment and as to the Crossclaims asserted against the Individual defendants by United

States Fidelity and Guaranty Company ("USF&G" or "Travelers") (collectively, "Insurers").

The Individual Defendants request that this motion be granted for the reasons set forth in the Memorandum in Support filed by Covil (Doc. 210) in support of its motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent via the Middle District of North Carolina's electronic case e-filing system on February 10, 2018 to all counsel of record in

the above-captioned case.

/s/ Charles W. Branham, III
Charles W. Branham, III

EXHIBIT 43

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

v.

COVIL CORPORATION, by and through its duly appointed receiver, Peter D. Protopapas, *et al.*,

Defendants.

COVIL CORPORATION'S MOTION TO TAKE JUDICIAL NOTICE OF STATE COURT ORDER AND MEMORANDUM IN SUPPORT

Pursuant to Rule 201(b) of the Federal Rules of Evidence, Covil Corporation, by and through its Receiver Peter D. Protopapas (hereinafter "Covil"), respectfully requests that this Court take judicial notice of the entry of a South Carolina court order relevant to this declaratory judgment action. *See* Order for Rule to Show Cause, *Roxanne Falls, et al. v. CBS Corp. et al.*, No. 2015-CP-02155 (S.C. Cir. Ct. Jan. 8, 2020) (the "Order"), attached as Exhibit A.

Rule 201(b) of the Federal Rules of Evidence allows a court to take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice can be taken at any stage of the proceeding. Fed. R. Evid. 201(d).

Federal courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (citing *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). A court "may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). Put another way, "a court may take judicial notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994); *Poston v. Smurfit-Stone*, No. 1:13-cv-00206-MOC-DLH, 2015 WL 2131638, at *1 n.1 (W.D.N.C. May 6, 2015). Entry of the Order is therefore a proper subject of judicial notice under Rule 201(b).

The Order is directly related to matters at issue in this declaratory judgment case. The parties have requested that this Court apply the law of South Carolina to interpret certain insurance policy provisions and declare the parties' rights and obligations thereunder. Before entry of the Order, South Carolina law had been silent on a key issue in this case: whether the "completed operations" provision of a policy applies only when a plaintiff is exposed to asbestos after the installer's work is completed, or whether it applies to continuing injuries post-dating completion of the installation. The Order addresses this issue head on, finding the former interpretation to be the law of South Carolina ("This Court find that the 'completed operations hazard' described in the insurers' policies . . .

appl[ies] *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite."). Order at 16. The South Carolina court also specifically found that a related Fourth Circuit decision attempting to interpret similar provisions under Maryland law, *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), "is not the law of South Carolina." Order at 16. Because the Parties in the present case take opposing sides on this key issue, the Order is directly related—and highly relevant—to matters at issue before this Court.

For the foregoing reasons, Covil respectfully requests that the Court take judicial notice of the entry of the Order for Rule to Show Cause.

February 11, 2020

/s/ *Brady Edwards*

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on February 11, 2020. A copy of the foregoing document with a full set of exhibits also has been served on counsel for Insurers via electronic mail.

/s/ Brady Edwards
Brady Edwards

EXHIBIT 44

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932

ZURICH AMERICAN INSURANCE COMPANY, *Plaintiff,* vs. COVIL CORPORATION, *et al.*, *Defendants*.	**COVIL CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR STAY OF CERTAIN DECLARATORY JUDGMENT ISSUES**

Peter D. Protopapas, the Receiver for Covil Corporation ("Covil"), an administratively-revoked South Carolina corporation, files this memorandum in support of its motion for a partial stay. Covil asks this Court to stay further briefing and consideration of the issues involved in the declaratory judgment aspects of this case so that South Carolina state courts can determine these issues of South Carolina law. Specifically as outlined in more detail below, there are three issues of South Carolina insurance law that are central to this case:

- The application of the "products/completed operations" coverage part versus the "premises/operations" coverage part to asbestos-related bodily injury allegedly caused by the installation, removal, repair or disturbance of asbestos-containing materials by an insulation contractor;
- Which parties bear the burden of proving the application of a policy limitation or exclusion, here an alleged aggregate limit applicable to asbestos claims arising out

of the installation, removal, repair or disturbance of asbestos-containing materials; and

- The rule for allocation of loss for asbestos claims covered under the "premises/operations" coverage part brought against a non-operating, administratively-revoked South Carolina corporation.

These issues are currently before state courts in South Carolina. These issues have been decided by a South Carolina state trial court. The insurers in this case have brought an appeal in a South Carolina state appellate court. *See* ECF 216 at 1-2; ECF 216.1; ECF 216.2. While there are various procedural matters at issue in these South Carolina courts, it remains that South Carolina state courts are in the midst of determining these key issues. Thus, rather than bring a motion to certify these questions to the South Carolina Supreme Court, the Receiver respectfully submits that the requested partial stay *pendente lite* in deference to the South Carolina state courts already adjudicating these issues will achieve the same purpose.[1]

The requested stay as to these three issues of South Carolina insurance law should not delay or cause the deferral of other aspects of this case, including particularly the bad-faith coverage dispute pertinent to the *Finch* case. *Finch* is currently on appeal, and the *Finch* judgment has not been bonded. None of the three key issues outlined above is pertinent to *Finch* or the coverage disputes involving *Finch*. The *Finch* case involves only the products/completed operations coverage part and, accordingly, neither the burden nor

[1] The Receiver of Covil will, of course, seek certification of these issues if this Court determines that this procedure is either required or appropriate.

allocation of loss issues outlined above will affect the dispute between Covil on the one hand, and Zurich and USF&G on the other hand, as to which party must pay for the *Finch* judgment. This Court may, thus, move forward to consider the *Finch*-related aspects of this case.

INTRODUCTION AND BACKGROUND

Zurich American Insurance ("Zurich") brought this action for declaratory judgment relating to the insurance policies it had issued to Covil. As this Court is aware, Covil has been a defendant in the underlying asbestos litigation for many years, and Covil continues to be an active defendant in that asbestos litigation. The insurers agree with Covil that South Carolina law applies to the interpretation of the insurance policies at issue.[2]

The summary judgment briefing has highlighted the "disconnect" between the insurers and Covil with regard to what "South Carolina law applies" means in this case. As detailed in Covil's motion for summary judgment, Covil points to Chief Justice Toal's Order of January 8, 2020, as providing a clear statement of the law of South Carolina on every substantive legal point at issue between the parties in this case.[3] The insurers, however, look to case law addressing the interpretation of Maryland, California, Pennsylvania, and Kansas law in asking this Court to determine the law of South Carolina.[4]

[2] ECF 69 at 12, Joint Brief by the Insurers in Opposition to Transfer.

[3] *See* ECF 210 at 19-23; Exhibit 1. For a federal court sitting in diversity seeking to determine South Carolina law, the Order of January 8, 2020 certainly speaks directly to the legal issues before this Court.

[4] *See* ECF 213.

In their joint motion for partial summary judgment, USF&G and Zurich raise three issues that they seek this Court to decide as a matter of South Carolina law. Covil agrees that these are appropriate issues, and that they have been addressed directly by a South Carolina state court. In her Order of January 8, 2020, Chief Justice Toal held against the insurers on the three propositions that the insurers now present to this Court.[5]

First, the insurers ask this Court to decide that the manner in which "the policies' aggregate limits for 'products' and 'completed operations' apply" to the asbestos injury and wrongful death actions against Covil.[6] Chief Justice Toal held unequivocally against the insurers on this point:

> [T]he insurers contend that aggregate limits of liability apply to any third party's claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the inception date of a policy.
>
> The Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to 'guess' the view the Maryland Court of Appeals would take if the issue of interpreting the 'completed operations' provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has 'spoken' definitively on this issue. However, this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

Exhibit 1, January 8, 2020 Order for Rule to Show Cause ("Order"), at 15-16. As to the issue of applicable limits for products and completed operations, Chief Justice Toal held that "[t]he operations coverage part for each one of the policies at issue in this case responds

[5] Zurich filed a separate motion on the interpretation of a provision that is unique to its primary policies and which is not discussed in Chief Justice Toal's January 8, 2020 order.

[6] ECF 213 at 4.

repeatedly to each and every 'occurrence' without a total 'cap' on the insurers' liability to pay, subject only to a 'per occurrence' limit of liability." *Id.* at 15.

Second, on the issue of burden of proof, the insurers ask this Court to find, "The insured bears the burden as to aggregate limits."[7] To the contrary, Chief Justice Toal held: "The insurers bear the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the 'exhaustion' of the aggregate limits of liability in their policies." *See* Exhibit 1 at 17.

As to their third issue, the insurers ask this Court to find, "Allocation of loss is based on 'time on the risk.'"[8] Chief Justice Toal directly addressed this proposition, which was announced in a decision that she authored as a South Carolina Supreme Court Justice, *Crossman Communities of N.C. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). In her Order of January 8, however, she explained that "the Court will apply the rule of *Crossman Communities of N.C., Inc.*, except in the case of operations claims where the policies in effect during the conduct of operations will apply on an 'all sums' basis." *See* Exhibit 1 at 19. She also held that the insurers are free to allocate Covil's asbestos losses among themselves based on "time on the risk," but cannot seek to allocate portions of the loss to Covil, which lacks the funds to absorb asbestos losses.

The ultimate resolution of these questions of law will determine how Covil's insurance policies respond to pertinent asbestos personal injury claims filed against it. Should the Court conclude that South Carolina insurance law is not settled on these issues,

[7] *Id.* at 5.

[8] ECF 213 at 5.

and knowing that these issues are currently before several South Carolina state courts, it would be appropriate for the Court to enter a partial stay of the litigation until South Carolina courts have fully and finally spoken.[9]

LAW AND ARGUMENT

A. The Court should stay the briefing and resolution of these three key issues involved in the declaratory judgment claims.

The insurers seek declaratory relief regarding Covil's insurance coverage.[10] In a very similar case, *Wilton v. Seven Falls Co.*, the Supreme Court of the United States held that the district court properly exercised its discretion to stay the federal declaratory action because a state-court suit "encompassed the same coverage issues raised in the declaratory judgment action." 515 U.S. 277, 280 (1995). The court held that "a stay was warranted in order to avoid piecemeal litigation." *Id.* The court further noted that, under the Declaratory Judgment Act, courts have "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton*, 515 U.S. at 286; *see also Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494–95 (1942). "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288. Thus, this Court may "stay . . . an action seeking a declaratory judgment before trial or [even] after all arguments have drawn to a close." *Id.*

[9] In ruling on an earlier motion to stay, this court indicated a willingness to reconsider the question that "a partial stay as to some issues might be practical and promote judicial economy." ECF 84 at 8.

[10] ECF 1 at ¶¶ 44–64.

In a case decided in the United States Court of Appeals for the Fourth Circuit since the Court last addressed the issue of a stay in this case, *Trustgard Insurance Co. v. Collins*, 942 F.3d 195, 197–98 (4th Cir. 2019), the Fourth Circuit held that "the district court abused its discretion when it assumed jurisdiction under the Declaratory Judgment Act." *Id.* at 197. The court began its discussion by noting "[t]his case involves an attempt to have the federal courts resolve an insurance dispute." *Id.* The insurance dispute arose under South Carolina law, as does the dispute in this case. The underlying tort litigation was filed in the South Carolina Court of Common Pleas, as is a majority of the tort litigation against Covil.

The following four factors considered by the *Trustgard* court show that this Court, too, should stay the insurers' declaratory judgment claims:

First, the court considers "[t]he state's interest in having its own courts decide the issue." *Id.* at 202. Here, "[t]he South Carolina Supreme court appointed [Chief Justice Toal] to serve as the Chief Judge of Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system." One of her duties is to supervise the Covil receivership.[11] The Receiver is vested with the "power and authority to fully administer all assets of Covil Corporation," which is "inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." Exhibit 2, Order

[11] *See* ECF 210–2, Chief Justice Toal's January 8, 2020 Order at 3.

Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, No. 2018-CP-40-04940, at 1 (S.C. Cir. Ct. Nov. 2, 2018).

As the Fourth Circuit explained in *New Wellington Financial Corp. v. Flagship Resort Development Corp.*, "[t]here exists an interest in having the most authoritative voice speak on the meaning of applicable law, and that voice belongs to the state courts when state law controls the resolution of the case." 416 F.3d 290, 297 (4th Cir. 2005) (quoting *Mitcheson v. Harris*, 955 F.2d 235, 237 (4th Cir. 1992)).

South Carolina and its courts have a strong interest in interpreting the South Carolina insurance law that applies to this dispute. The rulings on the declaratory judgment claims will affect plaintiffs, defendants, and insurers in countless asbestos cases in South Carolina because interpretation of these insurance provisions will come up again and again in South Carolina asbestos cases. *See Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 211 (4th Cir. 2006) (district courts may decline jurisdiction where there is an "unsettled" state-law question); *Wilton*, 515 U.S. at 288 n.2 ("[w]e note that where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy"). Consistent South Carolina law—made by South Carolina courts—will yield more efficient and complete justice overall. Thus, these matters should be resolved by South Carolina state courts.

Second, the Court considers "the state courts' ability to resolve the issues more efficiently than the federal courts." *Trustgard*, 942 F.3d at 202. In this case, there are undoubtedly "practical benefits to the parties in the state-court litigation of knowing the

extent of the available money to satisfy any judgment." *Id.* at 204. As the United States Court of Appeals for the Second Circuit noted in an abstention analysis, "The experience of our own federal bankruptcy courts evidences the importance of consolidating all of the assets of an insolvent company and gathering all those who have claims against those assets in a single forum." *Levy v. Lewis*, 635 F.2d 960, 964 (2nd Cir. 1980). That is true here, too. Chief Justice Toal has already issued rulings about the meaning of the insurance policies at issue and how they apply to the asbestos litigation against Covil. The state court will be focused on assessing the extent of the coverage issued by the insurers so that their value can be determined and ultimately distributed to injured plaintiffs and their families. The state court will not adjudicate the non-declaratory (bad faith) relief claims that are before this Court. It will be more efficient—and, therefore, more fair to all parties involved—to allow the assessment of the policies to occur in the "single forum" of the receivership.

Third, the Court considers "the potential for unnecessary entanglement between the state and federal courts based on overlapping issues of fact or law." *Trustgard*, 942 F.3d at 202. Similar to the recent *Trustgard* decision, "[t]rying to resolve [insurers'] responsibility under the [policies in this action] would lead to confusion and unnecessary entanglement with the state-court lawsuit." 942 F.3d at 202. For example, the South Carolina state court will assess the parameters of each policy. If this Court's rulings regarding policy interpretation are inapplicable to that assessment, this Court's rulings will be "the epitome of an advisory opinion." *Id.* at 202. Even if they are applicable, they could have "a serious potential to interfere with ongoing state proceedings." *Id.* at 204; *see also*

Alfa Laval, Inc. v. Travelers Cas. & Sur. Co., Civ. A. No. 3:09CV733-HEH, 2010 WL 2293195, at *4, (E.D. Va. June 3, 2010) (staying case because "[t]he potential exists for conflicting decisions with respect to not only scope of coverage and indemnity liability under the Travelers policy, but also the percentage of allocated obligation on the part of the other insurance carriers, individually and collectively"). This factor is especially important here because the insurers ask this Court for rulings that are the exact opposite of the state court's rulings.

Fourth, the Court considers "whether the federal action is mere forum-shopping." *Trustgard*, 942 F.3d at 202. While Covil will not re-litigate this topic at this juncture, there are no federal questions of law at issue. *See, e.g., Saint Paul Fire & Marine Ins. Co. v. Lumber Liquidators, Inc.*, No. 1:18-cv-2820, 2018 WL 6075486, at *3 (abstaining where there are no federal questions of law at issue). And, as the Fourth Circuit noted in *Trustgard*, the uncertainties in this case and the "likelihood of entanglement with the state-court lawsuit" are sufficient for the Court to stay litigation of the declaratory judgment claims in favor of resolution by the South Carolina state courts, particularly since Chief Justice Toal has already issued substantive rulings on contract interpretation and application. *Trustgard*, 942 F.3d at 204 ("[W]hile we have no reason to think that Trustgard brought this suit to shop for a friendlier forum, the factual uncertainties in the record before us and the likelihood of entanglement with the state-court lawsuit compel us to dismiss the case.").

At least three of the four factors favor a stay here as to the three issues in the declaratory judgment aspect of this case identified by the insurers in their motion for partial

summary judgment. And this Court need not find that all four factors favor a stay in order to implement one. *See, e.g.*, *New Wellington Fin. Corp.*, 416 F.3d at 297–98 (affirming decision to decline jurisdiction based on two of the four factors); *Mitcheson*, 955 F.2d at 237. For these reasons, this Court should exercise its substantial discretion to stay the declaratory judgment claims in this action until the South Carolina state courts finally resolve the outstanding South Carolina legal issues.

B. Alternatively, the Court should stay the briefing and resolution of the declaratory judgment claims based on its inherent power to control its cases.

If the Court does not stay the declaratory judgment issues for the reasons above, it should do so based on its own inherent power to control this case. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 452 (M.D.N.C. 2015) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)) (alteration in original). In determining whether to grant a stay, a court considers "the interests of judicial economy, the hardship and inequity to the moving party in the absence of a stay, and the potential prejudice to the non-moving party in the event of a stay." *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 452. All three factors weigh in favor of a stay here.

First, a stay of all claims for declaratory judgment would be practical and promote judicial economy because it would permit South Carolina state courts fully and finally to address these unsettled questions of South Carolina law. These same questions are currently pending before South Carolina courts in multiple matters. As discussed above,

and previously by Covil, the South Carolina court managing the receivership of Covil recently issued a ruling with findings of fact and conclusions of law applicable to the facts of this case.[12] Chief Justice Toal's order addresses specific issues underlying the insurers' assertions on summary judgment. The insurers addressed in that order—also parties to this action—have already moved for reconsideration of this order, and have now appealed *five separate orders* issued by Judge Toal, including her January 8, 2020 Order on the substantive insurance law issues discussed in this motion, to the South Carolina Court of Appeals. Covil has moved to dismiss the insurers' appeal of Judge Toal's January 8, 2020 Order because the insurers' motions for reconsideration are still under consideration.[13] Zurich has asked Judge Toal to recuse herself from hearing another matter that raises some of the same issues determined in the January 8, 2020 Order. Thus, the insurers themselves are actively litigating—in South Carolina state courts—the issues raised in their partial summary judgment motions. Each of these actions will require additional briefing and additional time to reach a decision. Furthermore, there are several other cases currently pending in the South Carolina trial courts that raise the same legal issues, and the South Carolina courts will address these questions in adjudicating those matters.

Second, preempting South Carolina courts' opportunity to declare South Carolina law could result in conflicting decisions on that state's law. Such a split would require the

[12] *See* ECF 210–2.

[13] Exhibit 3, Covil's February 12, 2020 Motion to Dismiss the Insurers' Appeal in the South Carolina Court of Appeals.

parties to expend additional time and would, therefore, utilize additional judicial resources. This conflict would present a hardship and could result in inequity to the parties.

Third, a stay would not prejudice the non-moving parties. The insurers are presently seeking relief from Judge Toal's orders in several South Carolina courts. It only makes sense that the insurers exhaust all of their potential remedies in South Carolina before seeking potentially conflicting rulings on insurance contract interpretation from this Court.

CONCLUSION

Accordingly, the Receiver respectfully requests that this Court stay all declaratory judgment claims in this matter until such time as South Carolina courts can fully and finally address these important issues of South Carolina law, while moving forward expeditiously to adjudicate all other disputed issues in this case.

Dated: February 14, 2020

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WORD COUNT CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), I hereby certify that the foregoing memorandum of law is less than 6,250 words (excluding caption and certificates of counsel) as reported by the word-processing software.

/s/ Brady Edwards
Brady Edwards

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing motion via the Court's electronic filing system, pursuant to the Electronic Filing Procedures, on all attorneys of record who have entered an appearance by ECF in this matter.

This the 14th day of February, 2020.

/s/ Brady Edwards
Brady Edwards

EXHIBIT 45

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932

ZURICH AMERICAN INSURANCE COMPANY, *Plaintiff,* vs. COVIL CORPORATION, *et al.*, *Defendants*.	**COVIL CORPORATION'S REPLY IN SUPPORT OF ITS MOTION TO STAY**

Peter D. Protopapas, the Receiver for Covil Corporation ("Covil"), an administratively-revoked South Carolina corporation, files this reply to Zurich American Insurance Company's and United States Fidelity and Guaranty Company's (together, the "Insurers") Opposition to Covil Corporation's Motion to Stay. *See* ECF 247.

This Court is currently considering whether it has, and to what extent it should exercise, subject matter jurisdiction over the declaratory judgment claims, including whether it should dismiss those claims. *See* ECF 225. If it reaches Covil's motion to stay, Covil requests that this Court grant its motion because:

- The subject matter of the declaratory judgment claims already has been resolved in South Carolina;
- The Insurers claim Chief Justice Toal's order is flawed for a variety of reasons, but it is not this Court's province to agree or disagree; and
- The Insurers have filed motions for reconsideration and a placeholder appeal in South Carolina, where this battle should be fought. This Court does not sit as a South Carolina appellate court and should not be asked by the Insurers to rule as if it does. As such, this Court need not predict South Carolina law when the process is already underway in South Carolina.

I. Argument and Authorities

A. This Court should stay or dismiss the parties' declaratory judgment claims.

With the exception of *Finch*, this case involves South Carolina law, South Carolina lawsuits, a South Carolina Receivership for an administratively-revoked South Carolina corporation, and a South Carolina Receiver. The Receivership court has issued rulings on the declaratory relief issues presently before this Court. Whether these rulings were based on a trial, motions for summary judgment, or because the Insurers committed repeated discovery abuses (or violated court orders), or because USF&G spoliated policy evidence, is of no moment. Substantive discovery sanctions, such as the type of sanctions issued by Chief Justice Toal in South Carolina, are recognized by courts throughout the United States, including in the Fourth Circuit. *See Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, 155 F.3d 500, 505 (4th Cir. 1998); *see also Felman Prod., Inc. v. Indus. Risk Insurers*, No. 3:09-0481, 2011 WL 4547012, at *17 (S.D. W. Va. Sept. 29, 2011) (partial dismissal granted in light of plaintiff's spoliation of evidence and violation of discovery orders).

It is not the province of this Court to determine whether the sanctions imposed upon the Insurers were appropriate under the procedural law of South Carolina. *Cf. D.C. Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983) ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings"). The appropriate fora for this argument by the Insurers are the higher state courts in South Carolina, and not a federal district court in North Carolina.

Indeed, the South Carolina state courts have by far the strongest interest in (1) resolving South Carolina asbestos claims; (2) distributing insurance proceeds fairly and efficiently; and (3) developing South Carolina's own law on critical issues of insurance policy interpretation. And the Insurers have no argument to show otherwise.

Further, as shown below, if this Court does not dismiss the declaratory judgment claims, the traditional stay analysis favors granting a partial stay.

1. "The interests of judicial economy" favor resolution by South Carolina state courts.

"In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and judicial administration." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 201 (4th Cir. 2019). And "the most authoritative voice . . . belongs to the state courts when state law controls the resolution . . . ." ECF 222 at 8 (quoting *New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 297 (4th Cir. 2005)). Here, practical considerations of judicial economy require that a stay or dismissal be granted.

The South Carolina Receivership court has already ruled on the pertinent South Carolina law at issue. The Receivership court has the unique role of assessing the value of the insurance assets and distributing those assets in a fair and efficient manner. This process, even if it continues into the future, will be efficient and consistent. *See Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980) ("The experience of our own federal bankruptcy courts evidences the importance of consolidating all of the assets of an insolvent company and gathering all those who have claims against those assets in a single forum.").

The Insurers make multiple objections to a stay, but none of them are persuasive.

First, the Insurers cannot insist that these claims are "ripe for resolution" because they involve "purely legal questions and unambiguous contract language." ECF 247 at 7. This is not correct. Indeed, Covil is not "in complete agreement" with the Insurers regarding the resolution of Covil's motion to stay. *See* ECF 247 at 3. The declaratory relief issues posited by the Insurers are not ripe for resolution as a matter of law simply because Covil also moved for summary judgment. Covil's motion for summary judgment is based *entirely* on the fact that Chief Justice Toal's order resolves those issues between the parties. Covil has not simply filed a "competing" motion for summary judgment on the same issues as the Insurers based on different arguments arising from the same and supposedly unambiguous policy language. The Insurers' opposition treats Covil's motion as if it were a "garden variety" summary judgment when it is instead based on the fact that Covil has already prevailed on the issues.

Second, the Insurers complain that there will be no relief in South Carolina "in the foreseeable future." ECF 247 at 6. The Insurers cite no factual basis for this statement, and even if it were true, that would not convert this Court's role into sitting as a South Carolina appellate court. Indeed, Chief Justice Toal's order has resolved the pertinent South Carolina legal issues. The fact that the Insurers are filing motions for reconsideration and filing placeholder appeals is to be expected and should not affect this Court's analysis. To the contrary, the Insurers' conduct in light of Chief Justice Toal's orders shows that they acknowledge that these issues must be taken up by the South Carolina state court.

In addition, as the Insurers explained (ECF 247 at 2), on February 27, 2020, the South Carolina district court prospectively enjoined "the Receiver from *further pursuing judicial determinations* in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers." *See* ECF 235 Ex. 1. Chief Justice Toal, however, issued the order upon which Covil moved for summary judgment on January 8, 2020, *prior to* the district court's order. Further, Covil filed a motion for reconsideration of the South Carolina district court's order and opinion on March 11, 2020. *See* Dkt. 109, *Covil Corp. v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH (D.S.C. Mar. 11, 2020). The effect and propriety of the federal injunction is therefore in question. Nevertheless, this is just one more issue that needs to play itself out in the court in which it arose, and not in this Court as part of satellite litigation. Contrary to the Insurers' claims, the issue is hardly moot. *See* ECF 247 at 9.

Third, in an effort to "look behind a state court order," the Insurers collaterally attack the findings contained in Chief Justice Toal's Order. But neither the stay nor the dismissal analyses require this Court to second-guess that Order. The propriety of Chief Justice Toal's order is a matter for the South Carolina state courts to assess based upon the record before those courts. As a practical matter, it would be extremely burdensome for this Court and the parties to engage in satellite litigation here to evaluate the underlying merits of this valid state court order.[1]

[1] Also, to the extent that the Insurers claim their position was not considered by the Receivership court, the Insurers and Covil extensively briefed the issues before that Court.

Fourth, the Insurers point out (at least twice) that this Court has already denied a motion to stay. ECF 247 at 4 n.2, 8 n.3. This Court, however, denied Covil's first motion to stay in favor of a South Carolina district court lawsuit based, at least in part, on the first-to-file rule. ECF 84 at 1. The first-to-file rule is not part of the stay analysis, particularly in light of the changed circumstances engendered by Chief Justice Toal's order. Those changed circumstances, along with the Fourth Circuit's guidance in *Trustgard*, form the basis of Covil's present stay motion. The Insurers make a similar argument regarding this Court's prior abstention ruling. ECF 247 at 4. However, this Court has now determined that it should consider whether it should exercise jurisdiction over the declaratory judgment claims, pursuant to the *Trustgard* opinion.

Finally, if this Court chooses to adjudicate the declaratory judgment claims, its rulings will only be persuasive authority in light of the prior decision of Chief Justice Toal. If this Court chooses to conserve its judicial resources by staying or dismissing the claims, the South Carolina courts will be able to issue controlling authority.[2]

2. Covil and its Receiver will suffer hardship and unnecessary expense if a stay is not granted.

Covil and its Receiver will suffer hardship and unnecessary expense if multiple courts in different jurisdictions continue to adjudicate insurance coverage disputes in piecemeal fashion. Specifically, the Receiver will not be able to perform its duties. The Receiver must "administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." ECF 26 Ex. 3, Order

[2] Another option is certification of these issues to the South Carolina Supreme Court.

Appointing a Receiver for Covil Corporation. The Receiver cannot complete his duties in a timely or efficient fashion if these matters remain subject to the rulings of multiple courts in different jurisdictions. If this Court opines as to hypothetical future judgments, this Court's rulings may not apply to future asbestos cases with different underlying facts in different jurisdictions. Thus, if this Court stays or dismisses the declaratory judgment claims, it will allow the Receiver to perform more efficiently the duties imposed upon him by Chief Justice Toal in her appointment order of November 2, 2018.

3. Any prejudice to the Insurers in the event of a stay is, at best, minimal.

The Insurers will not suffer any prejudice if this Court stays the declaratory relief issues while the matters proceed through the state court system in South Carolina. If the Insurers prevail on some, or all, of their many motions for reconsideration and appeals in South Carolina, the Insurers can return to this Court and seek the adjudication of declaratory relief issues. The Insurers' arguments to the contrary lack merit.

First, the Insurers describe Chief Justice Toal's order as a "purported *discovery sanction*." ECF 247 at 14. This argument is of no moment. As noted above, substantive discovery sanctions are a well-established punishment when a party spoliates relevant evidence and violates discovery orders. Sanctions are permissible in South Carolina "in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield County*, 665 S.E.2d 830, 832 (S.C. Ct. App. 2008). "[S]anctions for discovery abuse are left to the sound discretion of the trial court." *Id.* Discovery sanctions are binding upon the parties against whom they are imposed. The

Insurers cite no authority for their suggestion that this Court can ignore Chief Justice Toal's order. The Insurers engaged in repeated discovery abuses before Chief Justice Toal issued the January 8, 2020 order.[3] In any event, a stay analysis does not include satellite litigation designed to re-evaluate the merits of the state court's order. It certainly does not require that this Court predict how the South Carolina appellate courts will rule on the relevant issues.

The Insurers also protest because this case was filed long before Covil filed suit in South Carolina. ECF 247 at 7. This point is exaggerated (the Insurers filed this case only five days before Covil filed its case in South Carolina), but it also is irrelevant—the order of filing is not part of the stay analysis in light of the changed circumstances resulting from Chief Justice Toal's January 8, 2020 order. To the extent the Insurers complain that Covil is litigating these issues in South Carolina asbestos suits, the Receiver is simply doing his

[3] The Insurers' condemnation of Chief Justice Toal's Order is undeserved. ECF 247 at 14 n.8. In a November hearing, Chief Justice Toal requested proposed orders from all parties. Exhibit 1, Nov. 12, 2019 Hrg. Tr., at 54. The Insurers and Covil submitted proposed orders. *See* Exhibits 2–3**.** The Insurers filed responses to Covil's order. *See* Exhibit 4. Based on these submissions, the court revised Covil's proposed order and issued its Order. The Insurers repeatedly assert that "[t]his procedure has been condemned by the South Carolina Supreme Court." ECF 247 at 14, n.8; 254 at 5, n. 4. The Insurers, however, mischaracterize *Burgess v. Stern*, 428 S.E.2d 880 (1993). In *Burgess*, only one party submitted a proposed order to the trial court. *Id.* at 882. The *Burgess* court relies on *Herring v. Retail Credit Co.*, 224 S.E.2d 663 (1976), but there, too, all parties were not asked to submit competing orders. *Herring*, 224 S.E.2d at 665. The *Burgess* court also relies on a 1988 opinion from the South Carolina Advisory Committee on Standards of Judicial Conduct. *See Burgess*, 224 S.E.2d at 883 n.1. Considering the "[p]ropriety of a judge requesting one counsel to draft the required order in a particular case," the Advisory Committee opined, "a judge may direct both counsel to prepare and serve on the other side a proposed order. He may then select the version, altered or unaltered, which he prefers." Exhibit 5, Opin. No. 2-1988, Advisory Committee on Standards of Judicial Conduct (filed January 4, 1988), at 2. This routine practice is exactly what happened here.

duty. Covil must now raise its declaratory judgment claims in the state courts because the plaintiffs are bringing claims directly against Covil's insurers in underlying asbestos cases. Given this background, Covil's Receiver has no choice but to protect Covil's interests until the law of South Carolina is made clear. It strains credulity for the insurers to suggest that they would protect Covil's interests if Covil did not file its own crossclaims.

The Insurers further argue that a stay could impact the remaining *Finch* claims because this Court may need to determine remaining policy limits under the coverage at issue. ECF 247 at 6. There is no dispute, however, that *Finch* involves the "completed operations hazard" of the Insurers' policies and thus invokes only the aggregate limits of liability in their policies—not the policy interpretation issues raised by the Insurers' motions for summary judgment. *Finch* thus raises no declaratory relief issues for any court to decide, and Covil believes that this Court is best situated to resolve the *Finch* claims.

The Insurers do not point to authority that supports denial of a motion to stay under analogous circumstances. In fact, many of their authorities are not analogous at all. *See, e.g.*, *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 375 (4th Cir. 2013) (not a declaratory judgment case); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475, 480 (7th Cir. 2012) (does not involve a stay); *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (declining certification to a Kentucky supreme court where requesting party had failed to ask for certification at the district court level, and there was sufficient *state* caselaw to guide the federal court in deciding the issue itself); *Millington Homes Inv'rs, Ltd. v. City of Millington*, No. 94-5482, 1995 WL 394143, at *4 (6th Cir. July 3,1995) (not a declaratory judgment case); *United States v. Ga. Pac. Corp.*,

562 F.2d 294, 296 (4th Cir. 1977) (not a declaratory judgment case); *Town of Lockport v. Citizens for Cmty. Action at Local Level*, 430 U.S. 259, 264 n.8 (1977) (not a declaratory judgment action; also does not *prohibit* a federal court from staying or dismissing a case when a similar suit is later filed in a state court).

Worse, the Insurers misrepresent the legal standard for abstention in a declaratory judgment case. Relying on *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 592 F. Supp. 948 (W.D.N.C. 1984) and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Insurers assert that "exceptional circumstances" must be present to abstain. ECF 247 at 4. But the *Wilton* court (also cited by the Insurers) expressly held that district courts have "greater discretion in declaratory judgment actions than that permitted under the 'exceptional circumstances' test set forth in *Colorado River* and *Moses H. Cone*, neither of which dealt with declaratory judgments." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). It is within the Court's sound discretion, subject to the guidance of *Trustgard*, whether to hear declaratory relief claims at all, even if subject matter jurisdiction otherwise exists.

B. Covil's *Trustgard* analysis only supports Covil's request for a stay.

The Insurers emphasize that Covil relied on *Trustgard* in its motion for stay. ECF 247 at 2–4. Covil brought *Trustgard* to this Court's attention because it was new authority and is clearly material to this case. Indeed, the factors in the dismissal analysis and the stay analysis overlap. The Fourth Circuit elected to analyze only the third factor in *Trustgard*. 942 F.3d at 202. That factor, "the potential for unnecessary entanglement

between the state and federal courts, based on overlapping issues of fact or law," overlaps with the second and third factors of the stay analysis, which deal with harm to the parties.

Covil believes that *Trustgard's* holdings impact the rulings this Court must make, and it refers this Court to Covil's briefing on *Trustgard* issues. ECF 256.

II. Conclusion

For the reasons stated above and in Covil's Motion, Covil requests that, if this Court determines it has subject matter jurisdiction over the parties' declaratory judgment claims, it either stay or dismiss those claims.

March 13, 2020

/s/ *Brady Edwards*

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on March 13, 2020. A copy of the foregoing document with a full set of exhibits also has been served on counsel for the Insurers via electronic mail.

/s/ Brady Edwards
Brady Edwards

EXHIBIT 46

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:18-CV-932

ZURICH AMERICAN INSURANCE COMPANY, *Plaintiff,* vs. COVIL CORPORATION, *et al.*, *Defendants*.	**COVIL CORPORATION'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Covil's Motion is based on the undisputed fact that Justice Toal resolved the issues Covil's motion raised, and accordingly pronounced South Carolina law, in her January 8, 2020 order (the "Order").

The Insurers reject the Order as a "sanctions order." This is misdirection. Courts throughout the United States, including those within the Fourth Circuit, are empowered to issue a host of substantive sanctions, including dismissals, defaults, and other terminating orders, when a party violates orders. *See, e,g,. Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, 155 F.3d 500 (4th Cir. 1998); *see also Felman Production, Inc. v. Indus. Risk Insurers*, 2011 WL 4547012, at *17 (S.D. W. Va. Sept. 29, 2011) (partial dismissal granted because of plaintiff's evidence spoliation *and* discovery orders violation).

Justice Toal found that the Insurers violated her orders, and concluded that USF&G spoliated evidence. *See* ECF 176 Ex. 1 at 12. South Carolina permits sanctions "in cases

involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield Cnty.*, 665 S.E.2d 830, 832 (S.C. App.2008). "[S]anctions for discovery abuse are left to the sound discretion of the trial court." *Id.*

This Court should either grant Covil's motion or, as Covil has requested elsewhere, stay or dismiss the declaratory relief issues under *Trustgard Insurance Co. v. Collins*, 942 F.3d 195 (4th Cir. 2019).

ARGUMENT

I. Justice Toal's Order Followed Proper Procedure.

The Insurers assert that this Court should ignore Justice Toal's Order because: (1) it is based on the order the Receiver submitted, and (2) it "remains subject to pending motions to stay and for reconsideration and has yet to be reviewed by the appellate courts." ECF 254 at 5-6. These arguments lack merit.

First, the Receiver submitted a proposed order to Justice Toal as part of a routine, accepted practice in South Carolina. In the hearing precipitating the Order, Justice Toal requested proposed orders from *all* parties: "Each party shall simultaneously submit additional factual material by November 22 and a proposed order." ECF 262 Ex. 1, Transcript of November 12 Hearing, at 54. The parties submitted their proposed orders. Justice Toal revised, and then signed, the order Covil submitted.

The Insurers assert that "[t]his procedure has been condemned by the South Carolina Supreme Court." ECF 254 at 5, n. 4. To the contrary, the court in *Burgess v. Stern*, 428 S.E.2d 880 (S.C. 1993) (in which Justice Toal concurred as a member of the court), condemned *one-sided requests* for orders from a trial judge to a litigant. *See id.* at 883.

The court relied on an opinion from the state Advisory Committee on Standards of Judicial Conduct: "a judge may direct both counsel to prepare and serve on the other side a proposed order. He may then select the version, altered or unaltered, which he prefers." ECF 262 Ex. 5, Opinion No. 2-1988, at 2. That is precisely what occurred in Justice Toal's court.

Second, the Insurers argue this Court should ignore the Order because it "remains subject to pending motions to stay and for reconsideration and has yet to be reviewed by the appellate courts." ECF 254 at 5-6. But state law cannot be ignored until all possible appeals are resolved. Indeed, this argument supports Covil's Motion to Stay. Covil continues to believe that a stay is prudent.

II. Justice Toal's Order is Correct.

Contrary to USF&G and Zurich's argument, the Order adopts accepted law.

A. The Insurers' Interpretation of the "Completed Operations Hazard" and the "Products Hazard" is At Odds With the Undisputed Historical Purpose and Function of the Coverages

The Insurers assert that an asbestos claim can be an operations claim against one policy, but a completed operations against another based on the inception dates of the policies. Their argument on the application of the "completed operations hazard" and the "products hazard" is a syllogism:

- The "completed operations hazard" and the "products hazard" apply if a claimant's "bodily injury" happens after Covil's operations are completed, or after Covil relinquishes possession of a product.

- Some of the policies define "bodily injury" to be "injury during the policy period," which the Insurers interpret as the policy in place during a products or completed operations hazard, not during premises-operations.

- Consequently, the "completed operations hazard" and the "products hazard" apply if the "injury during the policy period" happens after Covil's operations are completed or after Covil relinquishes possession of a product.

This assertion of textualism over all else ignores the accepted, industry-wide understanding of the purpose and function of the "completed operations hazard" and the "products hazard" in the 1970s, and beyond.[1]

In 1971, a year after Zurich first insured Covil, Dean Roger C. Henderson, an authority in insurance law, published the seminal law review article on the "completed operations hazard," the "products hazard," and the "premises-operations hazard." The article explains that the question of which of the hazards applies to a loss should be "self-evident": "Where an insured begins an operation and the evidence shows it is still in progress" when an injury or damage occurs, the applicable hazard is "premises-operations" and not "completed operations." ECF 251 Ex. 12. Consequently, the risk that the "products hazard" and the "completed operations hazard" insure is "the possibility that the goods, products or work of the insured, *once relinquished or completed, will cause bodily injury* or damage to property other than the product or completed work itself . . . ." *Id.* at 441 (Exhibit 1) (emphasis added).

Courts have relied frequently on Henderson's article, citing it more than 150 times. For example, in *Boyer Metal Fab, Inc. v. Maryland Casualty Co.*, 750 P.2d 1195, 1197 n. 2 (Or. Ct. App. 1988), the court cited Henderson's article for the proposition, "the purpose of the product hazard and completed operations hazard coverage is to insure against the

[1] The Order holds that the 1954-1964 USF&G policies have no aggregate limit. Covil thus limits its discussion of the USF&G coverage to the 1976-1978 policy.

risk that the product or work, if defective, will *cause bodily injury* or damage to property of others *after it leaves the insured's hands*." (emphases added); *see also W. Emp'rs Ins. Co. v. Arciero & Sons, Inc*., 146 Cal.App.3d 1027, 1031 (1983) (quoting Henderson directly).

Given the uniform understanding of the "completed operations hazard" in the 1970s and 1980s, it is unsurprising that a 1985 decision concluded that "[c]ommentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by* defective workmanship which arise *after completion of work by the insured* on construction or service contracts." *CPS Chemical Co. v. Cont'l Ins. Co*., 489 A.2d 1265, 1270 (N.J. Super. T. Law Div. 1984) (reversed on other grounds, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985)) (emphases added). Subsequent academic commentary agrees. *See* ECF 251 Ex. 13, Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 387 (2006).

Nothing in the Zurich or USF&G policies suggests divergence from these uniformly accepted concepts. No interpretative rule applies one approach to claims of instantaneous injury resulting from an accident, and a different approach to claims of long-term injury resulting from injurious exposures to toxic conditions. The "completed operations hazard" is so named because it protects the insured against liability "caused by" or "arising out" of its *completed* operations—not its un-completed operations.

The Insurers' assertion that "where the inception date of a policy post-dates the completion of Covil's relevant operation, any injury from that operations can only be covered within the completed operation hazard" (ECF 254 at 7) misconstrues the uniformly

understood purpose of the "completed operations hazard." The "completed operations hazard" covers injury "caused by" Covil's work "after it leaves" Covil's "hands."[2] *Boyer Metal Fab*, 750 P.2d at 1197 n. 2. Neither the "products hazard" nor the "completed operations hazard" says anything about the policy inception date. The timing at issue in both provisions concerns whether the injured person came into contact with the insured's products after the insured relinquished possession of the product; and whether the injured person came into contact with the insured's work before or after the work was completed.

That some of the Covil policies define bodily injury as "bodily injury during the policy period" is merely a function of the "occurrence-based" nature of the policies. Coverage is triggered under "occurrence" policies by "injury during the policy period," not by an accident or other event during the policy period.

"Trigger of coverage" – a term not in the policies, shorthand for the event that potentially forces an insurer to respond to a lawsuit – and scope of coverage, however, involve different analyses:

> Trigger involves merely the question of when actual injury takes place. Actual injury may take place in one or more policy years. Actual injury may be sui generis, or may be continuous and indivisible. In contrast to trigger, which depends on the date of injury, the question of the appropriate classification of a CGL claim as covered, uncovered, general liability, products, or completed operations depends upon the nature of the event or activity giving rise to the triggering injury.

[2] Likewise, the "products hazard" covers injury "caused by" Covil's product after it leaves Covil's hands.

Stempel at 382; *see also Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 919 n. 10 (Cal. 1997) ("[T]he event which triggers an insurance policy's coverage does not define the extent of the coverage.").

That the Insurers' policies are "triggered" by bodily injury during the policy period is therefore distinct from the type of coverage available to Covil *after* the policy has been "triggered." If injury first occurs during operations, any related claim is an operations claim. Zurich agrees, regardless of the definition of "bodily injury" in the policies. *See* ECF 251-6, Zurich's Response to Receiver's Requests for Admission No. 3 and No. 8. Justice Toal issued this exact ruling in the Order.

B. The Party Seeking to Satisfy a Definition in an Insurance Policy has the Burden of Showing That the Definition has been Satisfied.

The Insurers assert that it is "Covil's burden to prove that a particular plaintiff's injury is not subject to the aggregate policy limits." ECF 254 at 10. If that sounds odd, it should. The Insurers want the Court to rule that, if Covil does not want to be subject to an aggregate limit of liability, Covil has the burden to prove two negatives: that an asbestos claim is (1) not a completed operations claim and (2) not a products claim. The Order rejects this formulation and imposes the burden on *the Insurers* to show that any particular asbestos claim is subject to the aggregate limit of liability in their policies.

This makes sense in the context of the Zurich and USF&G policies. The policies do not define a "premises-operations hazard" or an "operations hazard." They define the "products hazard" and the "completed operations hazard." Consequently, claims seeking the recovery of damages for bodily injury are "operations" claims *unless they are shown*

to satisfy the definition of the "products hazard" or the "completed operations hazard." The "products hazard" and the "completed operations hazard" therefore establish *exceptions* to the general orientation of the policies that covered claims are "operations" claims.

A party seeking to show that an asbestos claim falls within the "products hazard" or the "completed operations hazard" (as here, where Insurers seek to impose aggregate limits of liability onto Covil) should have the burden of proving that the definition of the "products hazard" or the "completed operations hazard" has been satisfied. Otherwise, the Court would place Covil in the unenviable position of "proving" negatives.

C. The Order Says Nothing About "Pick and Choose" for Allocation of Risk.

The Insurers' "allocation of loss" discussion is a good example of their "straw man" advocacy. The Insurers say:

> Covil argues – contrary to well-settled South Carolina law – that because the "all sums" policy triggers multiple policies, the policyholder can "pick and choose" any one policy to pay the entire settlement or judgment, including the bodily injury that occurred before policy issuance or after expiration, up to that policy's per-occurrence limit.

ECF 254, at 10-11.

Covil argued no such thing. The Order recognized that the South Carolina Supreme Court decision in *Crossmann Communities. of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 717 S.E.2d 589 (S.C. 2011) (which Justice Toal signed), is embedded with flexibility to respond to the needs of a particular case.

The Order recognized that a "strict application" of *Crossman's* "default formula" would be "inappropriate under the circumstances" because Covil, in receivership, lacks the

funds to absorb loss allocations. This does not implement a "joint and several" regime. Rather, an insurer can protect itself against the possibility that it overpaid on a particular asbestos claim by seeking contribution from another insurer whose policy also is triggered by the same case against Covil. This approach will yield a "reasonable approximation" of the amount of bodily injury that occurred during the insurer's policy period, without allocating these costs to Covil, which lacks resources to pay them.

D. The Order Establishes Multiple "Operations" Occurrences

The Insurers assert that Covil has "not made a showing that it is entitled to multiple 'occurrences' in the policies." ECF 254 at 13. The Order, however, establishes the opposite:

> Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death "occurrences" have resulted from its asbestos "operations." Covil is therefore entitled to multiple "per occurrence" limits of liability to resolve each of the asbestos suits.

Against this result, the Insurers rely on inapposite "number of occurrence" cases involving repetitive products liability suits alleging exposure to asbestos from the same defective product the insured placed into the stream of commerce. *See id.* at p. 14

The Insurers and Covil, however, have different views on coverage for cases arising from the installation, disturbance and/or removal of asbestos-containing materials. These are not cases involving strict liability simply for placing defective products into the "stream of commerce." These are cases arising from Covil's alleged negligence and its failure to warn and protect bystanders of harm arising from its insulation contracting work. The

Insurers' reliance on insurance coverage decisions concerning manufacturers of asbestos products – not at issue here – is misplaced.

E. USF&G's Position Regarding the 1954 to 1964 Documents Lacks Merit

Covil requests that this Court acknowledge Justice Toal's finding that USF&G issued comprehensive general liability insurance coverage to Covil between 1954 and 1964. *See* ECF 210 at 17-18.

USF&G attempts to inject ambiguity into its own documents through an affidavit of its *rebuttal expert*, James Robertson. *See* ECF 254 at 16-17; ECF 254-3. Robertson urges the Court to make determinations beyond the face of the USF&G documents. For instance, Robertson argues that the 1947 Claim Department Clerical Instructions do not show that USF&G logged Covil general liability claims against Covil policies issued by USF&G. *See* ECF 254-3 at 5. Covil questions why an insurance company would repeatedly log "miscellaneous property damage" "general liability" claims into its claims register system if it never issued "general liability" coverage to the supposed insured – Covil – identified over-and-over in its system.

USF&G objects to this Court acknowledging Justice Toal's finding that it issued the 1954 to 1964 coverage even despite that USF&G, on its own, agreed that it issued general liability coverage to a similarly situated insulation contractor, Western MacArthur, when presented with similar evidence. In that case, USF&G claims register documents evidenced the identical "MP" claims against Western Asbestos in the 1950s. *See* ECF 210 Ex. 10. The settlement agreement between USF&G and Western MacArthur specifically

stipulated that "USF&G issued comprehensive general liability insurance policies to Western Asbestos Company from 1948 to 1960." ECF 210 Ex. 9 at 41.

At the same time, USF&G requests that this Court strike as inadmissible two of Covil's exhibits, which were taken directly from documents Justice Toal ordered USF&G to produce. *See* ECF 254 at 24 n.9. Specifically, Justice Toal's Order states: "USF&G is hereby ORDERED to produce ALL documents related to these issues, including all transcripts, from the Western Asbestos litigation . . . to Covil's Receiver by January 13, 2020." *See* ECF 210 Ex. 2 at 16.

USF&G's argument – that the evidence is inadmissible because the versions submitted by Covil are incomplete and unsigned –demonstrates that they have, once again, defied Justice Toal's orders by not producing full copies of the deposition transcripts. USF&G's self-serving argument therefore must fail.

III. USF&G's Manufactures an Alleged Fact Issue to Delay Summary Judgment.

Attempting to forestall summary judgment, USF&G presents a novel alleged discovery dispute regarding the historical files of Covil's asbestos defense firm.[3] *See* ECF 254 at 25-27. USF&G's characterization of the "outstanding discovery" should be clarified. First, USF&G refers to "over 230 boxes . . . maintained by Covil's prior counsel, Gallivan White & Boyd." ECF 254 at 26. USF&G enjoyed unfettered access to those

[3] USF&G raises this issue even though it still has failed to comply with Justice Toal's order of September 19, 2019, requiring production of its Covil-related files. On January 30, 2020, a USF&G corporate representative testified that the review of the microfilm containing the Claim Register documents with Covil references was not complete. *See* Exhibit 2 at 14. USF&G still has not produced the remaining Claims Registers.

documents for decades before the Receiver was appointed. Covil's insurer-appointed defense counsel, Wall Templeton, then blocked the Receiver's access to review those files. Justice Toal held a hearing on this issue, and required that the Receiver have access to the documents. *See* Exhibit 3, Hearing transcript, February 21, 2019, at 77-85. The Receiver accessed a portion of those documents on March 20, 2019, but was not given the opportunity to review the remaining records until last week. *See* ECF 254-2 at 51-55. The Insurers will have these documents this week. *See* Exhibit 4. The Receiver offered to seek an extension of the deadlines for this motion because of the document production issues described. *See id.*

Second, USF&G refers to 24,000 pages of records produced by Ellis & Winters, Covil's current defense counsel. ECF 254 at 26. USF&G neglects to inform this Court that Ellis & Winters could not produce the documents to USF&G because until recently, USF&G had not shared in the defense costs for the Covil cases. *See* ECF 254 Ex.2 at 72-73. Zurich further complicated production when it argued that production to USF&G may jeopardize the joint defense privilege. *See id.* USF&G's own actions and a dispute among the insurers slowed the Ellis & Winters production, not any action by the Receiver.

CONCLUSION

For these reasons, Covil respectfully requests that this Court grant its Motion for Summary Judgment.

March 17, 2020

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WORD COUNT CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), I hereby certify that the foregoing memorandum of law is less than 3,125 words (excluding caption and certificates of counsel) as reported by the word-processing software.

/s/ Brady Edwards
Brady Edwards

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on March 17, 2020. A copy of the foregoing document with a full set of exhibits also has been served on counsel for Insurers via electronic mail.

/s/ Brady Edwards
Brady Edwards