

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case Nos. 2019-CP-40-06956 and 2019-CP-40-02285

Appellate Case No. 2020-001437

Peter D. Protopapas, as Receiver for Covil Corporation, Plaintiff,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and
Guaranty Company; Zurich American Insurance Company, Defendants

AND

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto,
Brian Hutto, and Candace H. Youngblood, Plaintiffs,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis
Company, Inc.; Starr Davis Company of South Carolina, Inc.; United States Fidelity &
Guarantee Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong
International, Inc.; Aurora Pump Company; BW/IP, Inc.; Carboline Company; CBS Corporation;
CGR Products, Inc.; Daniel International Corporation; Fisher Controls International, L.L.C.;
Fluor Constructors International, Inc.; Fluor Enterprises, Inc.; Foster Wheeler Energy
Corporation; The Goodyear Tire And Rubber Company; Grinnell, LLC; Hajoca Corporation;
IMG Industries, Inc.; John Crane, Inc.; Metropolitan Life Insurance Company; Spirax Sarco,
Inc.; Trane U.S., Inc.; Uniroyal Holding, Inc.; Velan Valve Corporation; Viking Pump, Inc.; Weir
Valves & Controls U.S.A., Inc., Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant,

and

Covil Corporation, by and through its Receiver, Peter D. Protopapas and Peter D. Protopapas, in
his capacity as Receiver of Covil Corporation are the Respondents.

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MEMORANDUM ON APPEALABILITY

Respondents Covil Corporation, by and through its Receiver, Peter D. Protopapas; and Peter D. Protopapas, in his capacity as Receiver for Covil Corporation (collectively, “the Receiver”), by and through the undersigned counsel, hereby submit the following memorandum on the issue of appealability as requested by the Court in its November 6, 2020 letter. Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the Notices of Appeal filed by United States Fidelity and Guaranty Company (“USF&G”) on October 26, 2020, as the orders challenged by USF&G are not immediately appealable.

Background

USF&G attempts to appeal orders in which the circuit court granted the Receiver’s Motion to Clarify Status of Receivership.¹ See Sept. 25, 2020 Orders, C.A. Nos. 2019-CP-40-02285 and 2019-CP-40-06956. In these cases, the Receiver moved for the circuit court to clarify the impact, if any, of Covil’s prior receivership and dissolution on the cases pending before the court, specifically whether these events have any effect on the ability of asbestos plaintiffs to maintain personal injury claims against Covil in light of USF&G’s and Zurich American Insurance Company’s (collectively, “the Insurers”) affirmative defenses. *Id.* at 2. The Insurers claimed section 33-14-107 of the South Carolina Code—which contains a statute of repose—barred the assertion of asbestos personal injury claims against Covil. *Id.* at 4-9; see Exhibit A, Zurich’s

¹ Zurich American Insurance Company also appealed the circuit court’s orders; however, this Court granted Zurich’s motion to dismiss its own appeal. *Zurich Am. Ins. Co. v. Covil Corp.*, S.C. Ct. App. Order dated Oct. 22, 2020.

Answer, ¶¶ 90-94; Exhibit B, USF&G's Answer, at 16 ("Sixth Defense"), 35 ("Eleventh Defense"). The circuit court rejected the Insurers' arguments and found (1) there was no evidence demonstrating Covil published notice of its dissolution and (2) even if Covil published notice, section 33-14-107 did not foreclose the asbestos claims pending against Covil. Sept. 25, 2020 Orders, at 5-9. The circuit court ruled "nothing from the prior [r]eceivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil." *Id.* at 9.

Respondent notes this is not the first time the Insurers have argued to the circuit court and other courts that Covil's prior receivership bars both the institution of the current Receivership and all subsequent litigation by or against Covil. *See, e.g.*, Exhibit C, Non-Party USF&G's April 20, 2020 Motion to Reconsider; Exhibit D, Non-Party USF&G's April 20, 2020 Motion to Stay; Exhibit E, Non-Party USF&G's April 30, 2020 Reply Memorandum in Further Support of Its Motions (I) to Stay and (II) to Reconsider; Exhibit F, Zurich's May 1, 2020 Motion for Relief from Judgment under Rule 60(b)(2) and 60(b)(4), *Finch v. Covil Corp.*, C.A. No. 1:16-cv-01077 (M.D.N.C. May 1, 2020), ECF No. 538; Exhibits G and H, Zurich's May 14, 2020 Mem. of Law for Leave to Amend and Supplement Pleadings, ECF No. 156-1, and USF&G's May 21, 2020 Mem. of Law for Leave to Amend and Supplement Pleadings, ECF No. 160-1, both in *Covil Corp. v. Zurich Am. Ins. Co.*, C.A. No. 7:18-cv-3291-BHH (D.S.C. Dec. 6, 2018). The circuit court previously determined the Insurers' arguments are incorrect as a matter of South Carolina law. *See* Exhibit I, May 6, 2020 Order Denying Motions to Reconsider and Motion to Stay, at 5-15.

Specifically, USF&G's Motion to Reconsider, filed in the *Smith, Howe, Hopper, Hill*, and *Taylor* asbestos personal injury actions, argued the prior receivership orders extinguished Covil's ability to be sued. *See* Exhibit C. USF&G argued: "[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.” *Id.* at 3. USF&G also argued: “[I]t 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” *Id.* at 9 n.6. The circuit court—denying USF&G’s motion in its May 6, 2020 order—noted, “It does not matter if Covil was administratively or judicially dissolved in the early 1990s.” Exhibit I, at 9. The circuit court further noted, “USF&G’s objections are simply incorrect.”² *Id.* Further, the United States District Court for the Middle District of North Carolina recently rejected the same arguments brought by Zurich, in a motion to intervene and set aside a verdict reached in a 2018 asbestos case against Covil. See Exhibit J, Memorandum Opinion and Order, *Finch v. Covil Corp.*, C.A. No. 1:16-CV-1077 (M.D.N.C Oct. 14, 2020).

USF&G’s instant appeal of the circuit court’s September 25, 2020 orders results from the circuit court’s rejection—yet again—of USF&G’s arguments and USF&G’s attempts to delay and avoid litigating the underlying merits of the related asbestos personal injury and insurance coverage cases.

Discussion

A party’s right to appeal arises from and is governed by statute. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Traditionally, an appeal may be pursued only after the entry of final judgment. *Id.* “A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution.” *Tillman v. Tillman*, 420 S.C.

² The Receiver acknowledges USF&G was a non-party to that litigation. However, the circuit court explained: “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.” *Id.* at 9.

246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017). “An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

“The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code].” *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 6, 630 S.E.2d at 467. “Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable.” *Id.* Section 14-3-330 is “construed narrowly” with the goal of avoiding “circuitous litigation and needless appeals.” *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. To be sure, “[p]iecemeal appeals” are disfavored in South Carolina. *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709.

No specialized statute permits USF&G’s present appeal; therefore, to be immediately appealable, the circuit court’s orders must fit into one of the categories set forth in section 14-3-330. *See id.* at 195, 607 S.E.2d at 708. “Only interlocutory orders which (1) involve the merits; (2) affect a substantial right; or (3) involve certain orders regarding injunctions and appointments of receivers, can be appealed.” *Cobb v. Maccaro*, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992). An analysis of these categories reveals the circuit court’s interlocutory orders are not immediately appealable.

A. The Circuit Court’s Orders Do Not Involve Injunctions or Appointment of Receivers

Subsection 14-3-330(4) allows for immediate appeal of an interlocutory order “granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.”

The circuit court's orders plainly do not involve injunctions. Similarly, the circuit court's orders do not involve the appointment of receivers. Although the circuit court's orders mention "receivership" in the captions, the orders cannot be reasonably construed as "granting," "continuing," "modifying," or "refusing" the appointment of a receiver. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303 n.6, 705 S.E.2d 475, 478 n.6 (Ct. App. 2011) ("Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability."). In effect, the circuit court's orders simply provide clarification that nothing from the prior receivership precluded the Receiver or other asbestos claimants from filing lawsuits related to Covil.

B. The Circuit Court's Orders Do Not Involve the Merits

"An order 'involves the merits,' as that term is used in [subsection] 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467 (footnote omitted). "The phrase 'involving the merits' is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." *Id.* at 7, 630 S.E.2d at 467-68.

Here, the circuit court's orders do not involve the merits because the circuit court has not yet determined a substantial matter affecting the parties' rights in this asbestos case. Simply put, the circuit court's orders are a rejection of USF&G's unavailing arguments that have been previously raised by the Insurers and rejected in related asbestos litigation. Indeed, there is still a lot to be done at the circuit court prior to a determination of the parties' rights. The cases have not yet gone to trial, and USF&G could still potentially succeed at trial on the merits of its arguments.

See Baldwin Constr. Co. Inc. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) (“Petitioners have not ‘arrived at the end of the road’ and will be able to appeal the decision after the trial is finished.” (quoting *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993))).

These orders are therefore interlocutory orders, and USF&G may appeal once a final order has been issued in the case, if necessary. *See Hagood*, 362 S.C. at 196, 607 S.E.2d at 709 (2005) (“Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.”). These orders do not fit within the narrow and exceptional circumstances contemplated by subsection 14-3-330(1), and this Court should reject USF&G’s attempt to broaden the scope of the appealability statute. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467 (“The phrase ‘involving the merits’ is narrowly construed in modern precedent.”).

C. The Circuit Court’s Orders Do Not Affect a Substantial Right

Subsection 14-3-330(2) allows for immediate appeal of an interlocutory order whenever it affects a “substantial right” in an action which “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.” “To appeal an order affecting a substantial right, an order must not only involve a right, but it must also ‘prevent[] a judgment from which an appeal might be taken.’” *Cobb*, 310 S.C. at 305, 423 S.E.2d at 157.

The circuit court’s orders neither affect a substantial right nor prevent a judgment from which a later appeal may be taken. USF&G continues to unsuccessfully raise its statute of repose argument, causing the courts of our state, Respondent, and other litigants to expend valuable resources repeatedly litigating issues that have already been brought by the Insurers and rejected

by multiple courts, both in our state and outside of it. USF&G simply attempts to further delay these cases and avoid trial on the merits of the underlying claims. It is well-established the avoidance of trial is not a substantial right. *See Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). Further, USF&G is not prohibited from appealing this ruling, if necessary, at a later date after a final judgment in these cases. Both Respondent and USF&G have extensively argued these issues before the circuit court, and any arguments USF&G has related to the propriety of the circuit court's rulings in the September 25, 2020 orders can be determined once the circuit court issues a final judgment in these actions. The circuit court did not prevent USF&G from arguing its position to the court and, instead, the circuit court fully considered USF&G's arguments on this issue and rejected them.

Our state disfavors interlocutory appeals in order to allow our judicial system to run its course and avoid creating additional burdens that are not, and may never be, necessary. The orders USF&G attempts to appeal do not foreclose a final judgment in either of these cases, and that final order may be appealed by USF&G at a later date, if needed. Judicial economy is best served by waiting until after final judgment to consider all issues that may be raised on appeal by any party. USF&G may not appeal these interlocutory orders in order to avoid and delay the litigation of these cases. *See Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 (explaining section 14-3-330 is “construed narrowly” with the goal of avoiding “circuitous litigation and needless appeals”).

Conclusion

The circuit court orders USF&G attempts to appeal are not immediately appealable, and the Court should refuse to expand the narrow construction of section 14-3-330 and allow USF&G to frustrate the ordinary pretrial procedure below. Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the Notices of Appeal filed by USF&G on October 26, 2020. This result best promotes the policy of our state to

allow for final judgments prior to beginning the appellate process and best effectuates judicial economy by avoiding unnecessary and piecemeal appeals.

Respectfully submitted,

s/ Shanon N. Peake

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ATTORNEYS FOR RESPONDENTS

December 1, 2020.

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL DISTRICT
COUNTY OF RICHLAND	)	CIVIL ACTION NO: 2019-CP-40-02285

Peter D. Protopapas as Receiver for Covil Corporation,

Plaintiff,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity And Guaranty Company; Zurich American Insurance Company

Defendants.

**ANSWER OF ZURICH AMERICAN
INSURANCE COMPANY**

NOW COMES Zurich American Insurance Company (“Zurich”), as successor by merger to Maryland Casualty Company and Northern Insurance Company of New York, answering the Complaint of Peter D. Protopapas as Receiver for Covil Corporation (the “Receiver” or “Plaintiff”), would respectfully show the Court the following:

FOR A FIRST DEFENSE

1. Each and every allegation of the Complaint not specifically admitted herein is denied.

2. Responding to Paragraph 1, Zurich admits, upon information and belief, the Receiver maintains his principal place of business in Richland County, South Carolina. Zurich affirmatively avers, however, that Covil Corporation (“Covil”) had its principal place of business in Greenville County, South Carolina. Further responding, Zurich craves reference to the Order attached to the Receiver’s Complaint as Exhibit 1 for its specific terms and import. Zurich denies all remaining allegations of Paragraph 1 inconsistent with said exhibit.

3. Paragraph 2 is not directed at Zurich, therefore, no response is required. To the extent a response is required, upon information and belief, Zurich admits Wall, Templeton & Haldrup, P.A. (“WTH”) is a South Carolina professional association with its principal place of business in Charleston, South Carolina. Any remaining allegations of Paragraph 2 are denied.

4. Paragraph 3 is not directed at Zurich, therefore, no response is required. To the extent a response is required, Zurich is informed and believes that Sentry is an insurance company. Zurich lacks sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 3.

5. Paragraph 4 is not directed at Zurich, therefore, no response is required. To the extent a response is required, Zurich is informed and believes that USF&G is an insurance company. Zurich lacks sufficient knowledge or information to form a belief as to the remaining allegations of Paragraph 4.

6. Responding to Paragraph 5, Zurich admits that it is an insurance company organized under the laws of the State of New York with its principal place of business in the State of Illinois. Zurich admits it is successor by merger to Maryland Casualty Company and Northern Insurance Company of New York. Zurich denies it is a wholly-owned subsidiary of “Zurich Group of Insurance Companies.”

7. Paragraphs 7 and 8 state legal conclusions to which no response is required. To the extent a response is required, the same is denied.

8. Responding to Paragraph 9, Zurich admits upon information and belief that Covil was an installer of thermal insulation. Zurich lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in Paragraph 9 and therefore denies the same.

9. Upon information and belief, Zurich admits the allegations of Paragraph 10.

10. Responding to Paragraph 11, Zurich admits that it has been alleged by certain asbestos plaintiffs that Covil's operations included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials and that those operations exposed persons to asbestos who thereby suffered bodily injury. However, Zurich lacks sufficient knowledge or information to form a belief as to the underlying allegations that Covil's operations caused harm, and therefore denies the same.

11. Responding to Paragraph 12, Zurich admits that Covil has been the subject of claims and lawsuits arising from its activities. Zurich denies any remaining allegations of Paragraph 12.

12. Responding to Paragraph 13, Zurich admits that it participated in the defense of Covil pursuant to certain policies of insurance. Zurich denies the remaining allegations of Paragraph 13.

13. Responding to Paragraph 14, Zurich admits only that it issued certain insurance to Covil. Zurich specifically denies issuing policies of insurance to Covil continuously from 1964 until 1978.

14. Zurich denies the allegations of Paragraphs 15, 16, 17 and 18.

15. Zurich denies the allegations of Paragraph 19. Further responding, Zurich avers that L. Winston Lee was appointed the Receiver for Covil Corporation pursuant to Orders of the Greenville County Court of Common Pleas and the Greenville County Master-In-Equity.

16. Zurich denies the allegations of Paragraph 20.

17. Zurich admits to retaining, in conjunction with United States Fidelity & Guaranty Company ("USF&G") and Sentry Insurance a Mutual Company ("Sentry"), certain individuals

to act in defense of Covil as attorneys, as a Rule 30(b)(6) witness of Covil, and as an expert witness in claims made against Covil, all pursuant to and in strict conformance with its policy of insurance. Zurich denies all remaining allegations of Paragraph 21.

18. Paragraph 22 states a legal conclusion to which no response is required. To the extent a response is required, the same is denied. Zurich would show that it has acted in good faith and engaged in fair dealing with respect to its actions towards Covil.

19. To the extent Paragraph 23 is directed at Zurich, Zurich states that the policies of insurance issued to Covil govern its obligations to Covil. Zurich denies all allegations of Paragraph 23 inconsistent with such policies of insurance. Zurich would further show that it is not obligated to provide a defense except as set forth in its policies of insurance.

20. To the extent Paragraph 24 is directed at Zurich, Zurich admits that it, in conjunction with Sentry and USF&G, engaged certain attorneys to provide a defense in certain lawsuits in which Covil was or is a named defendant. Zurich admits to retaining, in conjunction with USF&G and Sentry and pursuant to its policies of insurance issued to Covil, WTH in conjunction with the lawsuit captioned *Hill v. Advance Auto Parts, Inc., et al.*, C.A. No. 2018-CP-40-04680 (Richland County).

21. Paragraph 25 states a conclusion of law to which a response is not required. To the extent a response is required, Zurich denies the same, except admits that when an insurer hires an attorney to represent an insured, an attorney-client relationship arises between the attorney and the insured.

22. Responding to Paragraph 26, Zurich admits that it, in conjunction with USF&G and Sentry, retained certain lawyers to protect Covil's interest pursuant to and in strict

compliance with its policies of insurance. Zurich denies all remaining allegations of Paragraph 26.

23. Paragraph 27 states a conclusion of law to which no response is required. To the extent a response is required, Zurich denies the same, except refers to the Rules referenced therein, which speak for themselves.

24. Zurich denies the allegations of Paragraph 28.

25. Responding to Paragraph 29, Zurich admits that it, in conjunction with USF&G and Sentry, retained WTH in or about April 2018 to represent and defend Covil in all cases pending against Covil in South Carolina. Any remaining allegations of Paragraph 29 are denied.

26. Responding to Paragraph 30, Zurich lacks sufficient knowledge or information to form a belief as to the allegations of the first sentence and therefore denies the same. Further responding, Zurich, in conjunction with USF&G and Sentry, hired WTH and expected WTH to comply with all ethical duties toward Covil, its client and Zurich's insured. Zurich denies the second sentence of Paragraph 30.

27. Responding to Paragraph 31, Zurich, upon information and belief, admits that WTH did not utilize S.C. Code Ann. § 15-65-10 or Rule 66, SCRCPP; however, Zurich denies that such was necessary. See South Carolina Bar Ethics Advisory Opinion 19-04. Upon information and belief, Zurich denies the remaining allegations of Paragraph 31.

28. Zurich denies the allegations of Paragraph 32.

29. Zurich denies the allegations of Paragraph 33. See South Carolina Bar Ethics Advisory Opinion 19-04.

30. Responding to Paragraph 34, Zurich denies that WTH acted improperly, but admits that WTH never advised Zurich that its representation of Covil was contrary to South

Carolina law. Zurich further responds that the representation of Covil by WTH was not contrary to South Carolina law. Any remaining allegations of Paragraph 34 are denied.

31. Zurich denies the allegations of Paragraphs 35, 36 and 37.

32. Responding to Paragraph 38, Zurich admits the *Hill* case was pending in Richland County, South Carolina. Zurich denies the legal conclusion that the *Hill* case was served on James Covil, but acknowledges that the Court in *Hill* found sufficient service.

33. Paragraph 39 fails to state when Zurich allegedly knew the *Hill* complaint had been filed. Accordingly, Zurich admits that it knows the *Hill* complaint was filed, but denies Paragraph 39 to the extent it implies Zurich knew of filing of the *Hill* complaint on a specific, unreferenced, date.

34. Paragraph 40 fails to state when Zurich allegedly knew that “service of process had been historically performed through James Covil.” Accordingly, Zurich admits that certain lawsuits against Covil were purportedly served on James Covil, but denies Paragraph 40 to the extent it implies Zurich knew that “service of process had been historically performed through James Covil” on a specific, unreferenced, date.

35. Paragraph 41 states conclusions of law to which no response is required. To the extent a response is required Zurich denies the allegations in Paragraph 41.¹ Further responding, Zurich states that if service is improper, as Zurich was informed by WTH, an answer is not required.

36. Responding to Paragraph 42, Zurich admits that the Court entered an Order attached as Exhibit 3 to the Complaint. Zurich denies the remaining allegations of Paragraph 42.

¹ Zurich acknowledges that the Court in *Hill* found that Mr. Covil was appropriate for service of process. The *Hill* matter was settled and thus no appellate review was conducted on this finding.

37. Paragraph 43 states a legal conclusion to which no response is required. To the extent a response is required, the same is denied.

38. Zurich denies the allegations of Paragraph 44.

39. Responding to Paragraph 45, Zurich lacks sufficient knowledge or information to form a belief as to the truth of whether WTH spoke to James Covil or any Covil representative and therefore denies the same. Zurich otherwise denies the remaining allegations of Paragraph 45.

40. Responding to Paragraph 46, Zurich craves reference to the emails referenced therein for their specific terms and import. Zurich denies all allegations, and any inference thereof, of Paragraph 46 inconsistent with emails referenced therein. Zurich denies the remaining allegations of Paragraph 46.

41. Zurich denies the allegations of Paragraph 47.

42. Responding to Paragraph 48, Zurich realleges the above paragraphs as if set forth verbatim herein.²

43. Responding to Paragraph 49, Zurich admits that Mr. Virzi's affidavit is attached to the Complaint as Exhibit 4. Zurich lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations of Paragraph 49 and therefore denies the same.

44. Paragraph 50 states a legal conclusion to which no response is required. To the extent a response is required, the same is denied.

45. Paragraphs 51, 52, 53, and 54 are not directed at Zurich. Therefore, no response is required. Further responding to Paragraph 54, Zurich, in conjunction with other insurers,

² In responding to the allegations against WTH, Zurich's admissions and denials shall not be seen as a waiver of any rights against WTH including, but not limited to those afforded Zurich pursuant to *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, ___ S.C. ___, 826 S.E.2d 270 (2019). Zurich specifically reserves all rights and causes of action against WTH.

settled the *Hill* case pursuant to the applicable policies of insurance and with the approval of the Plaintiff, thereby precluding any damages from accruing to Covil.

46. Responding to Paragraph 55, Zurich realleges the above paragraphs as if set forth verbatim herein.

47. Zurich admits the allegations of Paragraph 56.

48. Paragraph 57 is not directed to Zurich, and so no response is required. To the extent any response is required, Paragraph 57 states legal conclusions to which no response is required. Zurich denies such allegations to the extent inconsistent with applicable law.

49. Responding to Paragraph 58, Zurich, in conjunction with other insurers, settled the *Hill* case pursuant to the applicable policies of insurance, and with the approval of the Receiver, thereby precluding any damages from accruing to Covil. Zurich therefore denies the allegations of Paragraph 58.

50. Responding to Paragraph 59, Zurich realleges the above paragraphs as if set forth verbatim herein.

51. Paragraph 60 states a legal conclusion to which no response is required. Zurich denies such allegations to the extent inconsistent with applicable law.

52. Zurich denies the allegations of Paragraphs 61.

53. Responding to Paragraph 62, Zurich denies that WTH's "notice" of the *Hill* complaint is in any way pertinent. Therefore, Zurich denies the allegations of Paragraph 62. Responding further to Paragraph 62, Zurich admits that it communicated with WTH regarding the *Hill* lawsuit. Zurich otherwise denies any remaining allegations of Paragraph 62.

54. Zurich denies the allegations of Paragraphs 63 and 64.

55. Responding to Paragraph 65, Zurich realleges the above paragraphs as if set forth verbatim herein.

56. Responding to Paragraph 66, Zurich craves reference to the policies of insurance issued to Covil and denies all allegations of Paragraph 66 inconsistent therewith.

57. Responding to Paragraph 67, Zurich admits that certain policy materials are attached to the Complaint as Exhibit 6.

58. Zurich lacks sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraphs 68 and 69 and therefore denies the same.

59. Responding to Paragraph 70, Zurich craves reference to the policies of insurance issued to Covil and denies all allegations of Paragraph 70 inconsistent therewith.

60. Zurich denies the allegations of Paragraphs 71, 72 and 73.

61. Responding to Paragraph 74, Zurich realleges the above paragraphs as if set forth verbatim herein.

62. Responding to Paragraph 75, Zurich admits it issued certain policies of insurance to Covil. Zurich denies all remaining allegations of Paragraph 75.

63. Paragraph 76 states a legal conclusion to which no response is required. To the extent a response is required, the same is denied.

64. Zurich denies the allegations of Paragraphs 77, 78, 79 and 80.

65. Responding to Paragraph 81, Zurich realleges the above paragraphs as if set forth verbatim herein.

66. Zurich denies the allegations of Paragraphs 82, 83 and 84.

67. Responding to Paragraph 85, Zurich realleges the above paragraphs as if set forth verbatim herein.

68. Zurich denies the allegations of Paragraphs 86 and 87.

69. Zurich denies the allegations of Paragraph 88, including all subparagraphs.

70. Zurich denies the allegations of Paragraph 89, including all subparagraphs.

71. Zurich denies the allegations of Paragraph 90, including all subparagraphs.

72. Zurich denies the allegations of Paragraphs 91 and 92.

73. Responding to Paragraph 93, Zurich realleges the above paragraphs as if set forth verbatim herein.

74. Zurich denies the allegations of Paragraphs 94.

75. Responding to Paragraph 95, Zurich admits WTH should have taken steps to avoid any default. To the extent directed at Zurich, Zurich denies the allegations of Paragraph 95 that imply Zurich acted improperly.

76. Zurich denies the allegations of Paragraphs 96, 97 and 98.

77. Responding to Paragraph 99, Zurich realleges the above paragraphs as if set forth verbatim herein.

78. Zurich denies the allegations of Paragraphs 100, including all subparagraphs, including all legal conclusions therein which do not require a response.

79. Paragraph 101 states a legal conclusion to which no response is required. To the extent a controversy exists, such is the subject of a first-filed action in the Middle District of North Carolina and therefore this court must dismiss the Complaint pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as set forth more fully hereinafter.

80. Responding to Paragraph 102, Zurich respectfully denies that declarations from this Court are necessary or appropriate. Zurich denies the remaining allegations of Paragraph 102.

81. To the extent a response is required to the paragraph beginning WHEREFORE (Prayer for relief), Zurich denies that Plaintiff is entitled to any recovery of Zurich.

FOR A SECOND DEFENSE

82. Plaintiff's Complaint fails to state claims upon which relief can be granted. Therefore the Complaint must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

83. There are multiple other actions pending between Zurich and Plaintiff, including, but not limited to *Covil Corporation By Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich American Insurance Company, et al.*, No.: 7:18-cv-03291-BHH (D.S.C.) (a still-pending federal case in which an injunction was issued prohibiting the Receiver from seeking coverage determinations in state court); *Zurich American Insurance Company v. Covil Corporation, et. al.*, No. 1:18-cv-932 (M.D.N.C.). Accordingly, this action should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

84. Zurich has not exerted total dominance and control over Covil, nor has Zurich misused any control of Covil which has resulted in injustices or inequitable consequences to Plaintiff. Accordingly, Plaintiff's claims against Zurich are without merit and should be dismissed.

FOR A FIFTH DEFENSE

85. Plaintiff's claims against Zurich are barred by the equitable doctrines of laches, estoppel, and waiver.

FOR A SIXTH DEFENSE

86. The actions alleged in the Complaint and the injuries caused thereby, if any (it being denied that Plaintiff suffered any injuries), were caused by the acts or omissions of third parties which acted as a direct and proximate cause of Plaintiff's injuries, if any, in such a way as to constitute a supervening or intervening cause ending all liability on the part of Zurich.

FOR A SEVENTH DEFENSE

87. The Receiver has been enjoined from seeking coverage determinations in state court. *See Covil Corp. v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2020 U.S. Dist. LEXIS 33140, at *42-43 (D.S.C. Feb. 27, 2020) ("Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin 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 (Zurich)."). This action has not been remanded by Judge Hendricks, thus the injunction remains in place. Accordingly, the Receiver lacks standing to assert his causes of action in this Court.

FOR AN EIGHTH DEFENSE

88. The *Hill* case has been settled pursuant to certain payments by Zurich and other insurers on behalf of Covil. Accordingly, Plaintiff has not been damaged and therefore lacks standing to assert any causes of action against Zurich.

FOR A NINTH DEFENSE

89. To the extent Plaintiff has received payment in satisfaction of any of the alleged injuries and/or claims against Zurich or any other insurer, Plaintiff is barred by the defense of

payment and accord and satisfaction. Alternatively, Zurich is entitled to a set-off for any and all such payments.

FOR A TENTH DEFENSE

90. Pursuant to Order dated May 11, 1992 (the “May 11, 1992 Order”), the Honorable Charles B. Simmons, Jr. appointed L. Winston Lee the “permanent Receiver for Covil Corporation” and granted Mr. Lee “all of the usual and normal statutory powers and authority of a Receiver, including, but not limited to, those set forth in §§ 33-14-105 and 33-14-320” of the South Carolina Code of Laws of South Carolina. Order, *The First Savings Bank, FSB v. Covil Corp, et al.* (Greenville Ct. Com. Pleas May 11, 1992), at 2. Judge Simmons further decreed Covil Corporation to be judicially dissolved. *Id.*

91. In accordance with his decree of judicial dissolution and the South Carolina Business Corporation Act of 1988, the May 11, 1992 Order required Mr. Lee to provide notice to known creditors pursuant to S.C. Code Ann § 33-14-106 and to publish notice to unknown creditors pursuant to S. C. Code Ann. § 33-14-107. *Id.* at 5. The Order further restrained and enjoined all creditors and other persons, pursuant to the Court’s power under S.C. Code Ann. § 33-13-310 “from instituting or prosecuting any action or proceeding against Covil . . . other than as set forth in this Order or from levying upon, attaching, distraining, or selling, or attempting to levy upon, attach, distrain, or sell any property of Covil” *Id.* at 6.

92. On November 12, 1992, Judge Simmons found that Mr. Lee had “fully complied with the previous Orders of this Court in liquidating the assets of the his [sic] Defendants, that his accounting is in order and that the relief sought by him should be approved.” Order, *The First Savings Bank, FSB v. Covil Corp, et al.* (Greenville Ct. Com. Pleas Nov. 12, 1992), at 2.

This Order included a finding that Mr. Lee published notice to unknown creditors as required by S.C. Code Ann. §§ 33-14-106 and 33-14-107 to bar future claimants against Covil.

93. When offered in evidence, the Orders of Judge Simmons may not be impugned upon matters within his jurisdiction, such as the Covil Receivership, by counter evidence. *Long v. McMillian*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955).

94. Accordingly, pursuant to S.C. Code Ann. §§ 33-14-106 and 33-14-107, underlying asbestos claims against Covil Corporation are barred. Plaintiffs' claims against Zurich are necessarily barred as well because Plaintiff's alleged claims against Zurich are derivative of underlying asbestos claims against Covil.

FOR AN ELEVENTH DEFENSE

95. Zurich is entitled to and pleads the benefits of the provisions of S.C. Code Ann. § 15-38-15 et seq.

FOR A TWELFTH DEFENSE

96. Zurich, in all respects, operated in good faith reliance upon the provisions of the contract of insurance issued to Covil.

FOR A THIRTEENTH DEFENSE

97. Upon information and belief, Plaintiff has failed to join a necessary party. Accordingly, Plaintiff's complaint should be dismissed pursuant to Rule 12(b)(7), or Plaintiff should be required to join such party(ies).

FOR A FOURTEENTH DEFENSE

98. Zurich pleads the doctrine of setoff as a complete or total bar to the allegations set forth in the Complaint.

FOR A FIFTHTEENTH DEFENSE

99. Plaintiff's claims for punitive damages violates Zurich's rights under the applicable Constitutions (including, but not limited to, the Fifth and Fourteenth Amendments of the Constitution of the United States of America).

FOR A SIXTEENTH DEFENSE

100. Zurich pleads the applicable provisions of the South Carolina Noneconomic Damages Awards Act of 2005 (§ 15-32-200, et. seq.) and § 15-38-15. Zurich affirmatively includes within this defense the recovery limits of S.C. Code Ann § 15-32-530 and any other limitation on punitive damages allowed by Federal or State law.

FOR AN SEVENTEENTH DEFENSE

101. Plaintiff has suffered no damages as the *Hill* case was settled. Covil was not responsible for any amount of the settlement, nor any of the costs incurred in defending the *Hill* case. Therefore, it has suffered no damages.

FOR A EIGHTEENTH DEFENSE

102. Receiver's alter-ego claims are barred by the Noerr Pennington Doctrine.

WHEREFORE, having fully answered the Complaint herein, Zurich prays unto the Court for the following relief:

- A. That the Complaint be dismissed with prejudice as to Zurich;
- B. That the Plaintiff have and recover nothing from Zurich;

- C. That the costs of this action be taxed against some person or entity other than Zurich;
- D. FOR TRIAL BY JURY on all issues so triable; and
- E. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.

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ATTORNEYS FOR DEFENDANT ZURICH
AMERICAN INSURANCE COMPANY

June 15, 2020
Charleston, SC

EXHIBIT B

**UNITED STATES FIDELITY AND GUARANTY COMPANY'S ANSWER TO
PLAINTIFFS' ORIGINAL COMPLAINT AND COVIL'S CROSS-CLAIMS**

Comes now Defendant, United States Fidelity and Guaranty Company (hereinafter "USF&G"), by and through its undersigned counsel, to answer the Complaint filed by Plaintiffs in the above-captioned case.

GENERAL ALLEGATIONS

Each and every allegation in the complaint not hereinafter specifically admitted, qualified or explained is denied.

1. Paragraph 1 constitutes a characterization of the Plaintiffs' claims to which no response is required.

2. Paragraph 2 states legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 2 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 insofar as they relate to other parties.

3-4. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 3 and 4.

5-6. Paragraphs 5 and 6 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraphs 5 and 6 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 5 and 6 insofar as they relate to other parties.

7. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7. To the extent a response is required, USF&G denies those allegations.

8. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8. To the extent a response is required, USF&G denies those allegations.

9. Paragraph 9 states legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 9 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 insofar as they relate to other parties.

10. USF&G admits that it is authorized to conduct business in South Carolina and has, at times, conducted business therein. USF&G denies that it has “regularly” conducted business in South Carolina, and states that it has no employees in South Carolina, does not rent or own office space in South Carolina, and is not writing any new business in South Carolina. USF&G denies the remaining allegations contained in Paragraph 10 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 insofar as they relate to other parties.

11. Paragraph 11 does not contain any allegations to which a response is required. To the extent a response is required, USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11.

12-14. Paragraphs 12 through 14 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations

contained in Paragraphs 12 through 14 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 12 through 14 insofar as they relate to other parties.

15. Paragraph 15 states legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 15 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 insofar as they relate to other parties.

THE PARTIES

16. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16.

17-21. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 17 through 21, which relate to parties other than USF&G.

22. USF&G admits that it is incorporated in Connecticut and principally operates therein. The allegations remaining in Paragraph 22 constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies those allegations, and denies that it is or was the alter-ego of Covil Corporation.

23-50. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 23 through 50, which relate to parties other than USF&G.

BACKGROUND FACTS

51-57. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 51 through 57.

58. Paragraph 58 states legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 58 to the extent such allegations are directed against USF&G and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 58 insofar as they relate to other parties.

59. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 59.

60. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 60.

61. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 61. To the extent that Paragraph 61 contains legal conclusions, no response is required.

62. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 62. To the extent that Paragraph 62 contains legal conclusions, no response is required.

63. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 63. To the extent that Paragraph 63 contains legal conclusions, no response is required.

FACTUAL BACKGROUND AS TO COVIL

64. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 64.

65-66. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 65 and 66. USF&G admits upon information and belief that Covil sold and in some cases installed insulation products at various

times between 1964 and 1991 and that Covil was judicially dissolved as a result of an order of the Greenville County Court of Common Pleas, dated November 30, 1992.

67. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 67, except admits that it is aware of certain lawsuits that have been filed against Covil alleging bodily injury resulting from asbestos exposure.

68. To the extent the allegations of Paragraph 68 are directed at USF&G, USF&G denies all of the allegations, except admits that USF&G fulfilled its defense obligation under the policy of insurance agreed to by Covil and USF&G by providing a defense to Covil in connection with certain lawsuits pursuant to the terms and conditions of the USF&G Policy. USF&G, otherwise, denies the allegations in Paragraph 68, including the allegation that it conducted all of Covil's affairs, including after Covil was dissolved, or that lawyers retained by USF&G to defend Covil exerted control and domination of Covil. To the extent the allegations of Paragraph 68 are directed at entities other than USF&G, USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 68.

69. USF&G admits that Fidelity and Guaranty Insurance Underwriters, Inc. issued policy number SMP 490049 to Covil Corporation for the period March 31, 1976 to March 31, 1978 (the "USF&G Policy"). USF&G denies that it issued any other insurance policy to Covil, and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 69 insofar as they relate to other parties.

70. To the extent the allegations of Paragraph 70 are directed at USF&G, USF&G denies those allegations, and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 70 insofar as they relate to other parties.

71. To the extent the allegations of Paragraph 71 are directed at USF&G, USF&G denies those allegations, except admits that it fulfilled defense obligation under the USF&G Policy by providing a defense to Covil in connection with certain lawsuits pursuant to the terms and conditions of the USF&G Policy. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 71 insofar as they relate to other parties.

72. To the extent the allegations of Paragraph 72 are directed at USF&G, USF&G denies those allegations, and denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 72 insofar as they relate to other parties.

73. To the extent the allegations of Paragraph 73 are directed at USF&G, USF&G denies those allegations, and USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 73 insofar as they relate to other parties.

74. To the extent the allegations of Paragraph 74 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 74 insofar as they relate to other parties.

75. To the extent the allegations of Paragraph 75 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 75 insofar as they relate to other parties.

76. To the extent the allegations of Paragraph 76 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 76 insofar as they relate to other parties.

77. To the extent the allegations of Paragraph 77 are directed at USF&G, USF&G denies those allegations, USF&G fulfilled its defense obligation under the policy of insurance agreed to by Covil and USF&G by providing a defense to Covil in connection with certain lawsuits pursuant to the terms and conditions of the USF&G Policy. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 77 insofar as they relate to other parties.

78. Paragraph 78 states legal conclusions as to which no response is required.

79-84. To the extent the allegations of Paragraphs 79 through 84 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 79 through 84 insofar as they relate to other parties. Further, Paragraphs 79 through 84 state legal conclusions as to which no response is required.

85. To the extent the allegations of Paragraph 85 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 85 insofar as they relate to other parties.

86. To the extent the allegations of Paragraph 86 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 86 insofar as they relate to other parties. Additionally, Paragraph 86 is an incomplete and/or unintelligible sentence, and USF&G denies its allegations on the basis that it is vague and/or ambiguous.

87. Paragraph 87 does not contain any allegations against USF&G as to which a response is required. To the extent a response is required, USF&G denies those allegations.

88. USF&G denies the allegations in Paragraph 88 to the extent they are directed at USF&G, except admits that USF&G fulfilled its defense obligation under the policy of insurance agreed to by Covil and USF&G by providing a defense to Covil in connection with certain lawsuits pursuant to the terms and conditions of the USF&G Policy, and communicated with other insurers who were also involved in Covil's defense.

89. To the extent the allegations of Paragraph 89 are directed at USF&G, they constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 89.

90-91. Paragraphs 90 and 91 contain legal conclusions to which no response is required. To the extent a response is required, USF&G denies those allegations.

92. To the extent the allegations of Paragraph 92 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 92 insofar as they relate to other parties.

93. To the extent the allegations of Paragraph 93 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 93 insofar as they relate to other parties.

94. The allegations of Paragraph 94 constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies those allegations.

95-96. To the extent the allegations of Paragraphs 95 and 96 are directed at USF&G, USF&G denies those allegations. USF&G denies knowledge or information sufficient

to form a belief as to the truth of the allegations of Paragraphs 95 and 96 insofar as they relate to other parties.

97. The allegations of Paragraph 97 constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies those allegations.

98. To the extent the allegations of Paragraph 98 are directed at USF&G, they constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 98. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 98 insofar as they relate to other parties.

99. To the extent the allegations of Paragraph 99 are directed at USF&G, USF&G denies the allegations of Paragraph 99. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 99 insofar as they relate to other parties.

100. To the extent the allegations of Paragraph 100 are directed at USF&G, USF&G denies the allegations of Paragraph 100. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 100 insofar as they relate to other parties.

101. Paragraph 101 consists of a description of the relief sought by Plaintiffs, to which no response is required. To the extent that a response is required, USF&G denies that the Plaintiffs are entitled to any relief against USF&G.

FIRST CAUSE OF ACTION
(Product Liability: Negligence)

102. USF&G incorporates by reference its responses to Paragraphs 1 through 101.

103-115. To the extent the allegations of Paragraphs 103 through 115 are directed at USF&G, USF&G denies the allegations of Paragraphs 103 through 115. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 103 through 115 insofar as they relate to other parties.

116-117. To the extent the allegations of Paragraphs 116 and 117 are directed at USF&G, they constitute legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraphs 116 and 117.

SECOND CAUSE OF ACTION
(Product Liability: Strict Liability – S.C. Code Ann. Sec. 15-73-10, et seq.)

118. USF&G incorporates by reference its responses to Paragraphs 1 through 117.

119. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 119.

120-122. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 120 through 122 insofar as they relate to other parties. To the extent the allegations of Paragraphs 120 through 122 are directed at USF&G, USF&G denies the allegations of Paragraphs 120 through 122.

123. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 123.

124-134. To the extent the allegations of Paragraphs 124 through 134 are directed at USF&G, USF&G denies the allegations of Paragraphs 124 through 134. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 124 through 134 insofar as they relate to other parties.

THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based upon Respondeat Superior)

135. USF&G incorporates by reference its responses to Paragraphs 1 through 134.

136-151. To the extent the allegations of Paragraphs 136 through 151 are directed at USF&G, USF&G denies the allegations of Paragraphs 136 through 151. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 136 through 151 insofar as they relate to other parties.

FOURTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties- S.C. Code Ann. 36-2-314)

152. USF&G incorporates by reference its responses to Paragraphs 1 through 151.

153-155. To the extent the allegations of Paragraphs 153 through 155 are directed at USF&G, USF&G denies the allegations of Paragraphs 153 through 155. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 153 through 155 insofar as they relate to other parties.

FIFTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

156. USF&G incorporates by reference its responses to Paragraphs 1 through 155.

157-159. To the extent the allegations of Paragraphs 157 through 159 are directed at USF&G, USF&G denies the allegations of Paragraphs 157 through 159. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 157 through 159 insofar as they relate to other parties.

SIXTH CAUSE OF ACTION**(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)**

160. USF&G incorporates by reference its responses to Paragraphs 1 through 159.

161-174. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 161-174, which relate to parties other than USF&G.

SEVENTH CAUSE OF ACTION**(Wrongful Death Action, S.C. Code Ann. § 15-51-10 et seq.)**

175. USF&G incorporates by reference its responses to Paragraphs 1 through 174.

176. The allegations contained in Paragraph 176 of Plaintiff's Complaint are statements and/or conclusions as to which no response is required.

177. To the extent the allegations of Paragraph 177 are directed at USF&G, USF&G denies the allegations of Paragraph 177. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 177 insofar as they relate to other parties.

EIGHTH CAUSE OF ACTION**(Loss of Consortium)**

178. USF&G incorporates by reference its responses to Paragraphs 1 through 177.

179-181. To the extent the allegations of Paragraphs 179 through 181 are directed at USF&G, USF&G denies the allegations of Paragraphs 179 through 181. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 179 through 181 insofar as they relate to other parties.

NINTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90)

182. USF&G incorporates by reference its responses to Paragraphs 1 through 181.

183. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 183.

184. The allegations contained in Paragraph 184 of Plaintiff's Complaint are statements and/or conclusions as to which no response is required.

185. To the extent the allegations of Paragraph 185 are directed at USF&G, USF&G denies the allegations of Paragraph 185. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 185 insofar as they relate to other parties.

TENTH CAUSE OF ACTION
(Alter Ego As to Sentry Insurance A Mutual Company, United States Fidelity And Guaranty Company, and Zurich American Insurance Company)

186. To the extent the allegations of Paragraph 186 are directed at USF&G, USF&G denies the allegations, except admits that USF&G fulfilled its defense obligation under the policy of insurance agreed to by Covil and USF&G by providing a defense to Covil in connection with certain lawsuits pursuant to the terms and conditions of the USF&G Policy. To the extent the allegation of Paragraph 186 are directed at entities other than USF&G, USF&G lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 186, and therefore denies the same.

187. USF&G denies the allegations of Paragraph 187.

RESPONSE TO PRAYER FOR RELIEF

As to the allegations in Plaintiffs' Prayer for Relief, USF&G denies that it is liable to Plaintiffs under any theory or cause of action for the damages and/or other relief requested therein.

AFFIRMATIVE DEFENSES

USF&G hereby asserts the following affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in the Complaint.

FOR A FIRST DEFENSE

The Complaint fails to allege facts sufficient to state a cause of action against USF&G and, accordingly, should be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

This Court lacks both general and specific personal jurisdiction over USF&G. There are not sufficient minimum contacts with the State of South Carolina to bring USF&G within the Court's jurisdiction pursuant to *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d (1992); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 66 S. Ct. 154 (1945) and their progeny, S.C. Code Ann. § 36-2-803, the Constitutions of the State of South Carolina and the United States of America and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

USF&G's obligations to Plaintiffs, if any, are limited by the terms of the USF&G Policy with Covil, including, without limitation, conditions, exclusions, declarations, endorsements, limits of liability, per occurrence and aggregate limits, definitions, deductibles, self-insured retentions, policy periods, requirements of exhaustion of other insurance, and notice

requirements. USF&G expressly reserves, and does not waive, its rights under all of the terms of the USF&G Policy.

FOR A FOURTH DEFENSE

Plaintiffs' claims against USF&G may be barred by the applicable statute of limitations and/or repose.

FOR A FIFTH DEFENSE

If USF&G is determined to be Covil's "alter ego", which USF&G specifically denies, then USF&G stands in Covil's shoes and is entitled to assert all claims and defenses that Covil would be entitled to assert.

FOR A SIXTH DEFENSE

Covil is a dissolved corporation and claims against it, including against any entity alleged to be Covil's "alter ego" are barred under S.C. Code Ann. § 33-14-106 and 33-14-107. Plaintiffs' claims against USF&G are necessarily barred also because Plaintiffs' claims against USF&G are derivative of underlying asbestos claims against Covil.

FOR A SEVENTH DEFENSE

Plaintiffs were not in privity with USF&G or any of its predecessors, affiliates or subsidiaries and Plaintiffs may not rely upon any warranties which may have been implied or imposed by law upon USF&G, which affirmatively states that it breached no warranty.

FOR AN EIGHTH DEFENSE

USF&G alleges upon information and belief that Plaintiffs' claim for punitive damages violates: the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause as USF&G could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause because USF&G could be compelled to give testimony against itself in

a penalty situation such as punitive damages; the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; USF&G's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills USF&G's exercise of that right; the Eighth Amendment's guarantee that excessive fines shall not be imposed; the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, Plaintiffs' claim for punitive damages should be dismissed.

FOR A NINTH DEFENSE

USF&G requests, pursuant to S.C. Code Ann. §15-32-520, that any proceeding to determine punitive damages be bifurcated from any trial to determine liability and compensatory damages.

FOR A TENTH DEFENSE

Any award of punitive damages should not exceed the limits provided for in S.C. Code Ann. §15-32-530.

FOR AN ELEVENTH DEFENSE

USF&G would show that, among other things, Plaintiffs' claim for punitive damages is barred, reduced, bifurcated, capped, or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

FOR A TWELFTH DEFENSE

To the extent that the Complaint asserts a demand for punitive damages, USF&G specifically incorporates by reference any and all standards and limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1966); *Cooper Industries, Inc. v.*

Leatherman Tool Group, Inc., 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

FOR A THIRTEENTH DEFENSE

USF&G alleges that Plaintiffs' damages are the direct and proximate result of the negligent and/or reckless conduct of Decedent Donald L. Hutto, which combined and concurred with any negligence or recklessness on the part of USF&G—which is specifically denied and is raised solely for the purpose of this defense and no other—and that Plaintiffs' alleged damages would not have occurred if Decedent Donald L. Hutto had not engaged in such negligence or recklessness. The Complaint is barred to the extent that Decedent Donald L. Hutto's contributory negligence and recklessness is more than 50% of the total alleged negligence in this case. To the extent that Decedent Donald L. Hutto's contributory negligence and recklessness is 50% or less of the total alleged negligence in this case, which is denied and raised solely for the purpose of this defense, Plaintiffs' recovery should be reduced by the percentage of Decedent Donald L. Hutto's contributory negligence and recklessness.

FOR A FOURTEENTH DEFENSE

Upon information and belief, the Complaint should be dismissed and/or is not subject to trial for its failure to comply with the requirements of Section 44-135-10 et seq., of the South Carolina Code of Laws, also known as the Asbestos and Silica Claims Procedure Act of 2006.

FOR A FIFTEENTH DEFENSE

Upon information and belief, Plaintiffs' claims are barred or reduced by the doctrines of res judicata, waiver, release, laches, collateral estoppel, and/or conditions precedent or subsequent.

FOR A SIXTEENTH DEFENSE

Plaintiffs' claims are barred or reduced by the applicable provisions of the Worker's Compensation Act, whether of this state or another.

FOR A SEVENTEENTH DEFENSE

Plaintiffs' alleged injuries are barred by S.C. Code Ann. § 15-73-10 et seq.; therefore, Plaintiffs are prohibited by law from asserting a cause of action based on strict liability for either actual or punitive damages.

FOR A EIGHTEENTH DEFENSE

USF&G would show that any product allegedly distributed by Covil, or for which USF&G and/or Covil is alleged to have been liable, was altered or changed in some manner after it left the custody and possession of Covil.

FOR A NINETEENTH DEFENSE

There has been no concert of action between USF&G and any of the other named defendants. The defendants are not joint tortfeasors, and USF&G therefore may not be held jointly and severally liable with the other named defendants. Accordingly, USF&G asserts that it is entitled to the benefit of the provisions set forth in S.C. Code Ann. § 15-38-15 in this action.

FOR A TWENTIETH DEFENSE

To the extent that Plaintiffs have received payment in satisfaction of any of the alleged injuries and/or claims against USF&G, the Complaint in each and every count and cause of action alleged therein is barred or reduced by the defenses of payment and accord and satisfaction.

FOR A TWENTY-FIRST DEFENSE

There are no allegations against USF&G stated with sufficient particularity to constitute a cause of action for fraud, fraudulent concealment, concert of action, conspiracy, or the like to satisfy the requirements of Rule 9(b) of the South Carolina Rules of Civil Procedure

FOR A TWENTY-SECOND DEFENSE

Plaintiffs' claims are barred to the extent that any products for which USF&G is or may be responsible were sold by Covil to a "learned intermediary" and/or "sophisticated user" or other similar purchaser and/or defendant as a "bulk supplier."

FOR A TWENTY-THIRD DEFENSE

Any oral warranties upon which Plaintiffs allege to have relied are inadmissible and unavailable because of the provisions of the applicable statute of frauds.

FOR A TWENTY-FOURTH DEFENSE

USF&G alleges that, upon information and belief, Decedent Donald L. Hutto had actual knowledge of and voluntarily assumed the risk incident to his use and exposure to asbestos or the products and processes involving the use of asbestos or asbestos-containing materials that were known to him to be dangerous.

FOR A TWENTY-FIFTH DEFENSE

USF&G alleges that, upon information and belief, Decedent Donald L. Hutto failed to properly use the product or products in question, abused the product or products, and/or subjected them to abnormal use at the times and places alleged in the Complaint.

FOR A TWENTY-SIXTH DEFENSE

USF&G alleges that if Decedent Donald L. Hutto used the product or products for which USF&G is alleged to be responsible, upon information and belief, the same was used for a

purpose not intended by USF&G and/or Covil, and contrary to any instructions or normal method of using the same.

FOR A TWENTY-SEVENTH DEFENSE

USF&G alleges that if Decedent Donald L. Hutto sustained any injuries or damages as set forth in the Complaint, which is denied, the same were due to and caused by the negligence, recklessness, willfulness, and wantonness of others, and not USF&G.

FOR A TWENTY-EIGHTH DEFENSE

USF&G would show that even if Plaintiffs have suffered injuries as described in the Complaint, which USF&G denies, then said injuries were caused by the acts or omissions of third parties, including but not limited to the actions of unions, employers, manufacturers, distributors, and others, and that these acts or omissions of third parties acted as a direct and proximate cause of Plaintiffs' injuries in such a way as to constitute a supervening or intervening cause, ending all liability on the part of USF&G.

FOR A TWENTY-NINTH DEFENSE

If Plaintiffs sustained the injuries and/or damages alleged, which is specifically denied, then, upon information and belief, such injuries and/or damages were proximately caused by the acts and/or omissions of Decedent Donald L. Hutto's employers with respect to the maintenance of healthy and safe work sites and environments, which were under the exclusive control and possession of the employer(s).

FOR A THIRTIETH DEFENSE

USF&G alleges that if Decedent Donald L. Hutto sustained injuries as a result of exposure to asbestos or asbestos-containing products, which is denied, then such injuries were or may have been due to exposures to products of manufacturers not named as defendants in this

action, including but not limited to product manufacturers that have taken advantage of the protections of the bankruptcy provisions of the United States Code.

FOR A THIRTY-FIRST DEFENSE

If Decedent Donald L. Hutto was exposed to any products for which USF&G is alleged to have been responsible, said products at the time were manufactured in conformity with applicable federal and state regulations, standards, specifications, and laws; consequently, recovery by Plaintiffs herein is barred.

FOR A THIRTY-SECOND DEFENSE

If it should be proven that Decedent Donald L. Hutto, while working for or otherwise associated with the United States Government, worked with or around asbestos-containing products for which USF&G is alleged to have been responsible, such materials, upon information and belief, were made in compliance with military specifications and contract requirements for a specific intended use by the United States Government.

FOR A THIRTY-THIRD DEFENSE

If any products for which USF&G is alleged to have been responsible and which give rise to Plaintiffs' claims herein were designed and manufactured pursuant to and in accordance with the standards of, or specifications mandated by, the United States Government and its agencies, the knowledge of the United States Government and its agencies of any possible health hazards from use of such products was equal or superior to that of USF&G, and by reason thereof USF&G is entitled to assume any immunity from liability which exists in favor of the United States Government or its agencies and/or to assert the government contractor defense.

FOR A THIRTY- FOURTH DEFENSE

In the event that it is determined that any product for which USF&G is alleged to have been responsible was dangerous, which danger is specifically denied, USF&G was unaware

of such danger as it would apply in any conceivable use of such products by Decedent Donald L. Hutto; further, the discovery of such danger was beyond the state of the art at the time such product or products were manufactured, distributed, sold, used, and/or warnings provided. Moreover, such products were manufactured, distributed, sold, and used in conformity with the state of the art and/or prevailing industry standards at the time.

FOR A THIRTY-FIFTH DEFENSE

Upon information and belief, Plaintiffs have received payments from and granted releases to other parties, including but not limited to other parties to this action and other non-parties against whom Plaintiffs have claimed liability in tort for the same injury for which Plaintiffs claim that USF&G is liable. USF&G is entitled to setoff of the greater of the amount stipulated to in such release or the amount of consideration paid for such a release.

FOR A THIRTY-SIXTH DEFENSE

Upon information and belief, Plaintiffs have failed, neglected, and/or refused to mitigate their damages, if any, and therefore, Plaintiffs are barred from recovery of those damages that could have been avoided by the exercise of due diligence.

FOR A THIRTY-SEVENTH DEFENSE

The products for which USF&G is alleged to have been responsible and/or which were sold and/or distributed by USF&G and/or Covil were at all times reasonably fit and suitable for the purposes for which they were sold, and USF&G denies that such products were in any way defective for the use for which they were sold.

FOR A THIRTY-EIGHTH DEFENSE

Upon information and belief, Decedent Donald L. Hutto was employed by a knowledgeable and sophisticated user/employer, and any duty that USF&G may have had to

warn him of any potential dangers incident to the use of Covil's products, which duty is denied, was discharged by the employer's intervening duty to warn Decedent Donald L. Hutto.

FOR A THIRTY-NINTH DEFENSE

USF&G reserves the right to allege additional facts and circumstances in support of its defenses as these facts become available

FOR A FORTIETH DEFENSE

USF&G reserves the right to assert additional affirmative defenses based on information it may receive during the course of this litigation.

FOR A FORTY-FIRST DEFENSE

USF&G incorporates by reference herein, as if fully set forth, all defenses, both affirmative and otherwise, raised, pleaded, or asserted by all other answering defendants.

FOR A FORTY-SECOND DEFENSE

Upon information and belief, this action has been brought in an improper venue in that no Defendant resides in Richland County and the most substantial part of the alleged act or omission giving rise to the action occurred in a county(ies) other than Richland County.

FOR A FORTY-THIRD DEFENSE

The Complaint fails to join as parties persons in whose absence complete relief cannot be afforded among those already parties, and/or persons who have an interest relating to the subject matter of this action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest or leave the persons already parties subject to a substantial risk of incurring double, multiple, or inconsistent obligations. The joinder of said persons is compulsory under South Carolina Rule of Civil Procedure 19 and, therefore, this action should be dismissed unless said persons are joined.

FOR A FORTY-FOURTH DEFENSE

USF&G pleads the provisions of the South Carolina Door Closing Statute, S.C. Code Ann. § 15-5-150. Plaintiffs alleges that they are residents of North Carolina, and upon information and belief, Plaintiffs' claims are or may be barred by the Door Closing Statute.

FOR A FORTY-FIFTH DEFENSE

USF&G has not exerted total dominance and control over Covil, nor has USF&G misused any control of Covil which has resulted in injustices or inequitable consequences to Plaintiffs. Accordingly, all of Plaintiffs' claims against USF&G are without merit and should be dismissed.

JURY TRIAL DEMAND

USF&G requests a trial by jury on all issues so triable.

WHEREFORE, USF&G prays the Court for the following relief:

1. That the Second Amended Complaint be dismissed with prejudice as to USF&G;
2. That any and all cross-claims against USF&G be dismissed with prejudice;
3. That Plaintiffs and other defendants and/or third-party defendants have and recover nothing from USF&G;
4. That the costs of this action be taxed against Plaintiffs and/or other defendants and/or third-party defendants;
5. That any judgment against USF&G be reduced by any amount that any employer of Plaintiff, their successors, or assigns would be entitled to receive therefrom by way of subrogation;
6. That there be a trial by jury on all issues of fact; and
7. For such other and further relief as the Court deems just and proper.

FURTHER ANSWERING USF&G ALLEGES:**UNITED STATES FIDELITY AND GUARANTY COMPANY'S ANSWER TO COVIL CORPORATION BY AND THROUGH ITS RECEIVER'S CROSS-CLAIM**

United States Guaranty and Fidelity Company ("USF&G") answering the Cross-claim of Covil Corporation By and Through its Receiver ("Covil") would respectfully show unto the Court the following:

PARTIES

Each and every allegation in the complaint not hereinafter specifically admitted, qualified or explained is denied.¹

1. USF&G admits, upon information and belief, that Peter Protopapas (the "Receiver") maintains his principal place of business in Richland County, South Carolina. USF&G affirmatively avers, however, that Covil Corporation ("Covil") had its principal place of business in Greenville County, South Carolina. Further responding, USF&G states that the Order attached to the Complaint as Exhibit 1 speaks for itself. USF&G denies all remaining allegations of Paragraph 1 inconsistent with said exhibit.

2. In response to Paragraph 2, USF&G admits that it is an insurance company organized and existing under the laws of the State of Connecticut with its principal place of business therein. USF&G denies that it is a "wholly-owned subsidiary of Travelers Group of Insurance Companies," as, upon information and belief, no such legal entity exists.

¹ By answering Covil's cross-claims, USF&G does not waive, and expressly reserves, its right to enforce the order enjoining Covil from seeking insurance coverage determinations in state court. *See Covil Corp. v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2020 U.S. Dist. LEXIS 33140, at *42-43 (D.S.C. Feb. 27, 2020) ("Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin 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," including USF&G.).

3. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of to the extent they are directed at entities other than USF&G.

4. Paragraph 4 is a definitional paragraph to which no response is required. To the extent a response is required, the same is denied.

JURISDICTION AND VENUE

5. Paragraph 5 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies that this Court has jurisdiction over USF&G or Covil's Cross-claims.

FACTUAL BACKGROUND

6. As to Paragraph 6, USF&G admits upon information and belief that Covil installed thermal insulation, among other business operations. USF&G lacks sufficient knowledge or information necessary to form an opinion or belief as to the truth of the remaining allegations set forth in Paragraph 6 and therefore denies the same.

7. Upon information and belief, USF&G admits that Covil conducted business operations until 1991 and that Covil's charter was purportedly administratively revoked, and further states that Covil was judicially dissolved in 1992.

8. Upon information and belief, USF&G admits that it has been *alleged* by individuals asserting claims and lawsuits against Covil that Covil's operations at certain times included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials, and that it has been alleged that those operations exposed persons to asbestos. USF&G denies any remaining allegations or inferences to be drawn from Paragraph 8.

9. USF&G admits that Covil has been the subject of claims and lawsuits arising from its activities. USF&G denies the remaining allegations of Paragraph 9.

10. USF&G admits only that it fulfilled all its defense obligation to Covil under the USF&G Policy by providing a defense to Covil for certain lawsuits pursuant to the terms and conditions of its insurance contract with Covil. USF&G denies the remaining allegations of Paragraph 10.

11. USF&G admits only that Fidelity and Guaranty Insurance Underwriters, Inc. issued policy number SMP 490049 to Covil Corporation for the period March 31, 1976 to March 31, 1978 (referred to herein as the "USF&G Policy"). USF&G denies issuing policies providing liability insurance to Covil continuously from in or about 1954 until approximately 1978.

12-17. USF&G denies the allegations of Paragraphs 12 through 17.

18. USF&G admits certain individuals were retained to act in defense of Covil as attorneys, as a Rule 30(b)(6) witness of Covil, and as an expert witness in claims made against Covil, all pursuant to and in strict conformance with the USF&G Policy. USF&G denies the remaining allegations of Paragraph 18.

19. Paragraph 19 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 19, except admits that the USF&G Policy imposed on USF&G and Covil mutual contractual obligations of good faith and fair dealing.

20. To the extent Paragraph 20 is directed at USF&G, USF&G states that the USF&G Policy governs its obligations to Covil. USF&G denies all allegations of Paragraph 20 inconsistent with the USF&G Policy and further states that it is not obligated to provide a defense to Covil except as set forth in that policy.

21. To the extent Paragraph 21 is directed at USF&G, USF&G admits that it, pursuant to and in strict conformance with the USF&G Policy, engaged certain attorneys, in conjunction with Sentry and Zurich, to provide a defense in certain lawsuits in which Covil was or is a named defendant.

22. Paragraph 22 states legal conclusions to which no response is required. To the extent a response is required, USF&G denies the allegations of Paragraph 22, except it admits that when an insurer hires an attorney to represent an insured, an attorney-client relationship arises between the attorney and the insured and that a common interest exists as between the insured and the insurer in connection with the insured's defense.

23. USF&G admits that it, in conjunction with Sentry and Zurich, retained lawyers to protect Covil's interest pursuant to and in strict conformance with the USF&G Policy. USF&G denies the remaining allegations of Paragraph 23.

24-26. USF&G denies the allegations of Paragraphs 24 through 26.

27. To the extent the allegations of Paragraph 27 are directed at USF&G, USF&G refers to the contents of the alleged communications for their specific terms and import. USF&G denies all allegations, and any inference thereof, of Paragraph 27 inconsistent with the communications referenced therein. USF&G denies the remaining allegations of Paragraph 27.

FIRST CROSS-CLAIM
(Alter Ego, Agency or Instrumentality Claim against USF&G and Zurich)

28. USF&G incorporates by reference its responses to Paragraphs 1 through 27.

29-35. The allegations of Paragraphs 29 through 35 constitute legal conclusions or characterizations of the Covil's claims to which no response is required. To the

extent a response is required, USF&G denies the allegations of Paragraphs 29 through 35 to the extent directed at USF&G.

SECOND CROSS-CLAIM
(Declaratory Judgment Against USF&G)

36. USF&G incorporates by reference its responses to Paragraphs 1 through 35.

37. USF&G admits that certain policyholders have at times, including in the late 1970s, submitted notice of lawsuits concerning asbestos exposure. USF&G denies the remaining allegations of Paragraph 37.

38. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 38 to the extent they are directed at entities other than USF&G, and therefore denies the same.

39. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 39 to the extent they are directed at entities other than USF&G. To the extent that the allegations of Paragraph 39 are directed at USF&G, USF&G admits only that it was aware of the existence of asbestos litigation in approximately 1981 and 1982, and denies the remaining allegations of Paragraph 39.

40. USF&G denies knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 40.

41. USF&G refers to the alleged publication cited in Paragraph 41 for a true and accurate accounting of its contents.

42-50. USF&G denies the allegations of Paragraphs 42 through 50.

51-52. The allegations contained in Paragraphs 51 and 52 characterize Covil's claims and therefore no response is required. To the extent a response is required, USF&G denies the allegations of Paragraphs 51 and 52.

THIRD CROSS-CLAIM
(Declaratory Judgment Against USF&G and Zurich)

53. USF&G incorporates by reference its responses to Paragraphs 1 through 52.

54-62. Paragraphs 54 through 62 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraphs 54 through 62.

FOURTH CROSS-CLAIM
(Bad Faith Failure to Defend Against USF&G and Zurich)

63. USF&G incorporates by reference its responses to Paragraphs 1 through 62.

64. Paragraph 64 states legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations contained in Paragraph 64, except admits that contracts contained implied mutual covenants of good faith and fair dealing.

65. USF&G states that the USF&G Policy issued to Covil governs its obligations to Covil. USF&G denies all allegations of Paragraph 65 inconsistent with the USF&G Policy except admits that USF&G has had a duty to defend Covil in connection with certain claims against Covil. USF&G would further show that it is not obligated to provide a defense except as set forth in its policies of insurance.

66-68. Paragraphs 66 through 68 state legal conclusions as to which no response is required. To the extent a response is required, USF&G denies the allegations in

Paragraphs 66 through 68. In addition, the end of Paragraph 68 appears to be missing and USF&G denies it on the basis that it is vague and/or incomplete.

PRAYER FOR RELIEF

As to the allegations in Covil's Prayer for Relief, USF&G denies that it is liable to Covil under any theory or cause of action for the damages and/or other relief requested therein.

AFFIRMATIVE DEFENSES TO COVIL'S CROSS-CLAIMS

USF&G hereby asserts the following defenses and affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in the Cross-claim of Covil Corporation by and through its Receiver. By including the following defenses or affirmative defenses USF&G does not assume the burden of proof where such burden lies with Covil or parties other than USF&G.

FOR A FIRST DEFENSE

Covil's Cross-claims fail to allege facts sufficient to state a cause of action against USF&G and, accordingly, should be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. In particular, there are no facts alleged sufficient to constitute a cause of action for alter ego, and as a matter of law, USF&G is entitled to dismissal from this action.

FOR A SECOND DEFENSE

This Court lacks both general and specific personal jurisdiction over USF&G. There are not sufficient minimum contacts with the State of South Carolina to bring USF&G within the Court's jurisdiction pursuant to *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d (1992); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 66 S. Ct. 154 (1945) and their progeny, S.C. Code Ann. § 36-2-803, the Constitutions of the State of South Carolina and the United States of America and Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

Covil has been enjoined “from pursuing judicial determinations in underlying state tort suits regarding insurance coverage issued or allegedly issued to Covil by the Insurers.” See Opinion and Order, *Covil Corporation By and Through Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich American Insurance Company et al.*, 7:18-3291-BHH (D.S.C. February 27, 2020), p. 25 (the “Opinion and Order”). This Court should dismiss the Cross-claims as a matter of comity for the Federal courts.

FOR A FOURTH DEFENSE

Another action is pending between the same parties for the same claim; therefore, the Cross-claims should be dismissed pursuant to Rule 12(b)(8), SCRCP. USF&G and Covil are parties to numerous pending actions, including but not limited to *Zurich American Insurance Company v. Covil Corporation, et al.*, No. 1:18-CV-932-CCE-LPA (M.D.N.C.) (the “MDNC Action”); *Covil Corporation By and Through Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich American Insurance Company et al.*, No. 7:18-3291-BHH (D.S.C.); and others. In certain other actions, the parties are litigating the same insurance-coverage issues that Covil now asserts in the Cross-claims. Indeed, Covil has been enjoined from raising these coverage-related issues in the state court. See Opinion and Order.

FOR A FIFTH DEFENSE

Covil’s Cross-claims were compulsory counterclaims in the MDNC Action, but Covil failed to present them by the deadline for amending pleadings. Accordingly, Covil is barred from asserting them in this action.

FOR A SIXTH DEFENSE

Covil’s Cross-claims are barred by Rule 13(g), SCRCP, which provides, “[a] pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a

counterclaim therein or relating to any property that is the subject matter of the original action.” Covil’s Cross-claims exceed the permissible scope of Rule 13(g), including because there is no property involved in Covil’s claims against USF&G, and USF&G was not alleged to be involved in the transaction or occurrence that is the subject matter of the original action filed by Plaintiffs.

FOR A SEVENTH DEFENSE

Upon information and belief, Covil’s claims are barred or reduced by the doctrines of res judicata, waiver, release, laches, collateral estoppel, and/or conditions precedent or subsequent.

FOR AN EIGHTH DEFENSE

USF&G has not exerted total dominance and control over Covil, nor has USF&G misused any control of Covil which has resulted in injustices or inequitable consequences to Covil. Accordingly, all of Covil’s claims against USF&G are without merit and should be dismissed.

FOR A NINTH DEFENSE

To the extent that Covil has received payment in satisfaction of any of the alleged injuries and/or claims against USF&G, Covil’s claims are barred by the defense of payment and accord and satisfaction. Alternatively, USF&G is entitled to a set-off for any and all such payments.

FOR A TENTH DEFENSE

The Receiver has been enjoined from seeking coverage determinations in state court. *See Covil Corp. v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2020 U.S. Dist. LEXIS 33140, at *42-43 (D.S.C. Feb. 27, 2020) (“Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin 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,” including USF&G.). This injunction remains in place. Accordingly, the Receiver lacks standing to assert his causes of action in this Court.

FOR AN ELEVENTH DEFENSE

Covil is a dissolved corporation and claims against it, including against any entity alleged to be Covil’s “alter ego” are barred under S.C. Code Ann. § 33-14-106 and 33-14-107. Covil’s claims against USF&G are necessarily barred also because Covil’s alleged claims against USF&G are derivative of underlying asbestos claims against Covil.

FOR A TWELFTH DEFENSE

USF&G asserts that it is entitled to the benefit of the provisions set forth in S.C. Code Ann. § 15-38-15 in this action.

FOR A THIRTEENTH DEFENSE

Upon information and belief, Covil has failed to join as parties persons in whose absence complete relief cannot be afforded among those already parties, and/or persons who have an interest relating to the subject matter of this action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect that interest or leave the persons already parties subject to a substantial risk of incurring double, multiple, or inconsistent obligations. The joinder of said persons is compulsory under South Carolina Rule of Civil Procedure 19 and, therefore, Covil’s Cross-claims should be dismissed unless said persons are joined.

FOR A FOURTEENTH DEFENSE

USF&G pleads the doctrine of setoff as a complete or partial bar to the allegations set forth in the Cross-claim.

FOR AN FIFTEENTH DEFENSE

USF&G alleges upon information and belief that Covil's claim for punitive damages violates: the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause as USF&G could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause because USF&G could be compelled to give testimony against itself in a penalty situation such as punitive damages; the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; USF&G's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills USF&G's exercise of that right; the Eighth Amendment's guarantee that excessive fines shall not be imposed; the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, Covil's claim for punitive damages should be dismissed.

FOR A SIXTEENTH DEFENSE

USF&G requests, pursuant to S.C. Code Ann. §15-32-520, that any proceeding to determine punitive damages be bifurcated from any trial to determine liability and compensatory damages.

FOR A SEVENTEENTH DEFENSE

USF&G pleads the applicable provisions of the South Carolina Noneconomic Damages Awards Act of 2005, § 15-32-200, et. seq., and § 15-38-15. Any award of punitive damages should not exceed the limits provided for in S.C. Code Ann. §15-32-530.

FOR AN EIGHTEENTH DEFENSE

USF&G would show that, among other things, Covil's claim for punitive damages is barred, reduced, bifurcated, capped, or otherwise impacted by the South Carolina Fairness in Civil Justice Act of 2011 and/or similar and/or related state statutes and limitations.

FOR A NINETEENTH DEFENSE

To the extent that the Cross-claims assert a demand for punitive damages, USF&G specifically incorporates by reference any and all standards and limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1966); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

FOR A TWENTIETH DEFENSE

Covil's alter-ego and bad faith claims are barred by the *Noerr Pennington* Doctrine.

FOR A TWENTY-FIRST DEFENSE

Covil has failed to fulfill conditions precedent to bringing its Cross-claims pursuant to the USF&G Policy. USF&G further avers that the USF&G Policy contains the following provision: "No action shall lie against the Company [referring to the insurer] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the Company." Insofar as no liability has been established against Covil in this action, Covil has failed to satisfy conditions precedent to pursue its Cross-claims. USF&G further avers that Covil's non-compliance with its policies of insurance further prevents it from

maintaining the Cross-claims in this action. Accordingly, Covil's Cross-claims must be dismissed.

FOR A TWENTY-SECOND DEFENSE

By failing to cooperate in the defense of claims against it, Covil has failed to mitigate its alleged damages.

FOR A TWENTY-THIRD DEFENSE

To the extent Covil or the Receiver engaged in any improper, wrongful or inequitable conduct, Covil's Cross-claims are barred under the doctrine of unclean hands.

FOR A TWENTY-FOURTH DEFENSE

To the extent the Receiver was not appointed in accordance with law or was appointed in contravention of USF&G's due process rights, or the appointment of Peter Protopapas as Receiver of Covil Corporation was improper in light of L. Winston Lee having been appointed as Covil's permanent receiver and/or in light of Covil's assets having been previously abandoned, the Receiver lacks standing to assert the Cross-claims on Covil's behalf.

FOR A TWENTY-FIFTH DEFENSE

USF&G hereby incorporates by reference the affirmative defenses asserted in its Answer to Plaintiffs' Complaint, insofar as success on those would extinguish any Cross-claim in this action.

JURY TRIAL DEMAND

USF&G requests a trial by jury on all issues so triable.

WHEREFORE, USF&G prays the Court for the following relief:

1. That the Complaint be dismissed with prejudice as to USF&G;
2. That Covil have and recover nothing from USF&G;

3. That the costs of this action be taxed against some other person or entity other than USF&G;
4. That there be a trial by jury on all issues of fact; and
5. For such other and further relief as the Court deems just and proper.

Respectfully submitted:

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*Attorneys for United States Fidelity and Guaranty
Company*

July 13, 2020

EXHIBIT C

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,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CBS Corporation, et al.,	)	
	)	
Defendant.	)	
	)	
In Re:	)	
	)	
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,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its	)	
Receiver Peter D. Protopapas	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2019-CP-40-00076
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	)	
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04680
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	)	

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 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), 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 Qualified Settlement Fund (the "QSF"), and (ii) to approve the settlements agreements (the "Settlement Agreements") between the Receiver and each of the Settling Insurers.

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 Qualified 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 Quash 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, avoidance, specificity, legal justification, and similar relief.

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

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).

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 QSF with an unknown amount of funds, and by approving a QSF operating agreement ("QSF Operating Agreement") that would render the Settling Insurers' policies excess to the QSF, 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 QSF 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

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 QSF 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 QSF 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”).

14. To the extent the QSF has insufficient funds for USF&G to seek contribution for indemnity from the QSF, 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 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." 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 QSF Operating Agreement purport to alter USF&G's rights vis-à-vis Covil and the Settling Insurers. Moreover, the finding in the Approval Order that the QSF steps in the shoes of the Settling Insurers' policies is inconsistent with the provisions of the QSF Operating Agreement that purport to make the QSF 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,

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 certification⁵ 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.

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.

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 QSF 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 QSF 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 QSF.

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 Cmty. 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 Cmty., Inc.*, 803 S.E.2d 288 (S.C. 2017) (same)). Thus, if

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 QSF. *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.

26. USF&G seeks reconsideration on the basis that the Court did not address USF&G's argument asserted in the Motion to Quash 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 QSF 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.

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:

/s/William P. Davis

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(Forshaw Pro Hac Vice admitted –Hopper, 2019-CP-40-00076)

(Frankel Pro Hac Vice admitted - Roxanne Falls, 2015-CP-46-02155)

Attorneys for Defendant United States Fidelity and Guaranty Company

Date: April [20], 2020

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

The First Savings Bank, FSB,

Plaintiff,

vs.

Covil Corporation, Oxytherm, Inc.
and Equitable Enterprises, a South
Carolina General Partnership,

Defendants.

ORDER

91-CP-23-4445

CLERK OF COURT
JULIE A. HARRIS
APR 20 2020 10:03 AM

This matter was referred to my by Order of the Honorable Larry R. Patterson for the purpose of filing and hearing matters, taking any necessary testimony and receiving any evidence and determining all issues of law and fact with full authority to enter final judgment and orders without further order of the Circuit Court.

This matter now comes before me pursuant to the Motion of the Receiver for the relief as herein after recited.

It appears and I find that L. Winston Lee is the duly appointed Receiver of the property of Covil Corporation and Oxytherm, Inc. The Receiver now seeks to have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation and Oxytherm, Inc. At the request of the Defendants, he also requests that these two corporations be judicially dissolved. It appears and I find that this appointment as a general receiver is necessary just and proper for the

purpose of liquidating the assets of Covil Corporation and Oxytherm, Inc. and that the judicial dissolution of these two corporations is appropriate. Based upon the foregoing, and with the consent of Counsel for the above named Plaintiff and Defendants, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That Covil Corporation and Oxytherm, Inc. be, and the same hereby are decreed to be judicially dissolved effective as of the date of the filing of this Order, and the Clerk of this Court is hereby directed to deliver a certified copy of this decree to the South Carolina Secretary of State, and the Secretary of State is hereby directed to file this decree without charge.

2. That the continued dissolution of Covil Corporation and Oxytherm, Inc. shall be continued under this Court's supervision.

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3. That L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation and Oxytherm, Inc. and all of their respective properties including, but not limited to, all real and personal property, inventory, funds and deposits and accounts receivable, for the purpose of marshalling and liquidating such assets.

4. That the Receiver shall have all of the usual and normal statutory powers and authority of a Receiver, including, but not limited to, those set forth in §§ 33-14-105 and 33-14-320 of the Code of Laws of the State of South Carolina, 1976 as amended, and

he shall, as rapidly as circumstances shall permit, proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation and Oxytherm, Inc., with said Receiver to have the full discretion and authority to sell the corporate assets thereof in any commercially reasonable manner, at such price(s) as he finds attainable, including, but not limited to, full authority to sell goods in bulk and/or auction and in this regard, the Receiver is authorized and directed, pursuant to § 40-6-20(3) of the Code of Laws of the State of South Carolina, 1976 as amended, to himself conduct any auction he may deem necessary or appropriate without the services of a licensed auctioneer. The Receiver shall be, and he hereby is, authorized to compromise and/or settle any claim(s) of Covil Corporation and/or Oxytherm, Inc. against any of their respective creditors, without further order of this Court. The Receiver shall be, and he hereby is, further authorized without further order of this Court to incur and pay such reasonable expenses as may be necessary in carrying out his duties as herein described, including, but not limited to, the expense of the premium for any bond now or hereafter ordered, the cost of litigation, including the cost of labor, including sales and/or other employees, and attorney's and accountant's fees, with all such expenses and costs to be regarded as an expense of the Receivership which shall be a preferred lien on the assets coming into the Receiver's hands, and shall be paid together with the receiver's fee as hereinafter set forth, as a first priority before any other claims of creditors.

5. The Receiver is hereby authorized to abandon any of the property of Covil Corporation and/or Oxytherm, Inc. which he, in his sole discretion, shall deem burdensome and without value. However, the records of any employee's representatives, customers or clients (hereinafter collectively referred to "Customers") of Covil Corporation and/or Oxytherm, Inc. which the Receiver in his sole discretion shall deem to be of a confidential nature, shall not be disposed of until the receiver has given thirty (30) days written notice to such Customers that they may make claim to such records. Upon receiving any such claim, the Receiver shall turn over such records to each claiming customer, and all such records not claimed by any such customer shall be disposed of in such manner as the Receiver, in his sole discretion, deems appropriate under the circumstances.

6. Covil Corporation and Oxytherm, Inc. and their respective officers, directors, employees, representatives, agents and all other persons upon presentation of a certified copy of this Order shall deliver to the Receiver all records property and assets of said corporations of every kind and nature whatsoever which may be in their possession and/or their control.

7. That upon presentation of a certified copy of this Order, all banking institutions shall turn over and deliver to the Receiver all bank accounts and funds held by them in the account, or for the benefit of, Covil Corporation and/or Oxytherm, Inc. and they shall further turn over to the Receiver any and all banking or other records pertaining to any account whatsoever, opened or closed, indi-

vidually or jointly, in the name of said Corporations.

8. The Receiver is fully authorized to receive, open and act upon all mail received at the addresses of Covil Corporation and/or Oxytherm, Inc. and to divert same to such address or adreses as he may determine necessary.

9. To the extent not already accomplished, the Receiver shall provide the claimants of Covil Corporation and/or Oxytherm, Inc. known to him with the Notice as required by § 33-14-106 of the Code of Laws of the State of South Carolina, 1976 as amended. In addition to the foregoing, and to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina, 1976 as amended.

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10. As to any claim filed by a claimant of Covil Corporation or Oxytherm, Inc., the Receiver shall reject any claim which he deems unjustified. If the Receiver rejects in whole or in part a claim filed pursuant to the requirements hereunder, the Receiver shall mail notice of the rejection to the creditor whose claim has been rejected, setting forth in such notice the amount of the claim so rejected. This notice shall further state the "Effective Date" of the rejection and advise the claimant that a proceeding to enforce the claim must be commenced within ninety (90) days of the Effective Date. A claim against the Petitioner shall be barred if the claimant whose claim was rejected by the Receiver does not commence a proceeding to enforce the claim within ninety (90) from the Effective Date.

11. All creditors and other persons are hereby restrained and enjoined pursuant to this Court's power to grant injunctive relief as set forth in § 33-13-310 of the Code of Laws of the State of South

Carolina, 1976 as amended, from instituting or prosecuting any action or proceeding against Covil Corporation and/or Oxytherm, Inc. other than as set forth in this Order or from levying upon, attaching, distraining, or selling, or attempting to levy upon, attach, distrain or sell any of the property of Covil Corporation and/or Oxytherm, Inc.

12. The Receiver's fee shall be seven and a half percent (7.5%) of all monies received by him as Receiver provided, however, should the Receiver sell the real estate owned by Covil Corporation within this Receivership proceeding, then in such event the Receiver's fee shall be three percent (3%) of all monies received by him as Receiver, and the Receiver is hereby authorized from time to time to disburse from the receivership funds said receivership fees and any costs and/or expenses advanced and/or incurred by him hereunder, to himself and/or those retained or employed by him hereunder without further order of this Court, provided, however, that he shall clearly set forth in his final accounting all such fees and costs so disbursed.

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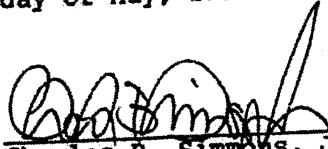
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

14. All law enforcement agencies of this state shall render unto this Court's duly appointed Receiver, L. Winston Lee, whatsoever assistance he may require to carry out the order of this Court, and to prevent a breach of the peace.

15. That upon liquidation of Covil Corporation and Oxytherm, Inc., the Receiver shall submit an accounting to this Court

and petition for authority to make final disbursement of the proceeds from such liquidation.

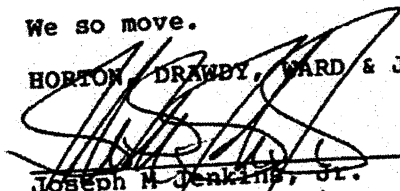
IT IS SO ORDERED this 11 day of May, 1992.

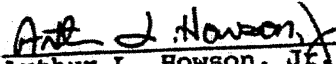

Charles B. Simmons, Jr.
Master-In-Equity

I Consent.

We so move.

HORTON, DRAWDY, WARD & JOHNSON


Joseph M. Jenkins, Jr.
307 Pettigru Street
Greenville, SC 29603
Attorney for the Receiver


Arthur L. Howson, Jr.
Attorney for the Plaintiff

We Consent.

Love, Thornton, Arnold & Thomason

By: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants.

EXHIBIT D

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,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CBS Corporation, et al.,	)	
	)	
Defendant.	)	
	)	
In Re:	)	
	)	
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,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its	)	
Receiver Peter D. Protopapas	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
CHARLES T. HOPPER and REBECCA HOPPER,	)	C/A NO.: 2019-CP-40-00076
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its)	)	
Receiver Peter D. Protopapas	)	
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
JAMES MICHAEL HILL,	)	C/A NO.: 2018-CP-40-04680
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Advance Auto Parts, Inc., et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and through its)	)	
Receiver Peter D. Protopapas	)	

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 MOTION TO STAY

This Motion to Stay Enforcement incorporates herein the arguments United States Fidelity and Guaranty Company ("USF&G") submitted in its Memorandum in Support of its Motion to Reconsider, Alter or Amend the Court's Approval Order, pursuant to SCRCP 6(a), 52(b), 59(e), and 60(b) (the "Reconsideration Motion"). The Approval Order granted joint motions ("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 Qualified Settlement Fund (the "QSF"), and (ii) to approve the settlements agreements between the Receiver and each of the Settling Insurers.

For the reasons stated in the Reconsideration Motion, and those listed below, USF&G respectfully requests that this Court stay enforcement of its Approval Order until the Court rules on the Reconsideration Motion and until the Approval Order is not subject to further appellate review.

REASONS TO GRANT MOTION TO STAY ENFORCEMENT

This Court should grant USF&G's Motion to Stay Enforcement for at least the following reasons:

1. SCRCP 62(b) allows a court to "stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60."

2. The Approval Order raises significant legal issues related to the contractual and equitable rights and obligations of USF&G, Covil, and Settling Insurers. These rights and obligations should not be impacted until this Court has had the opportunity to fully consider the Reconsideration Motion and, if necessary, these issues are decided on appeal.

3. Because the Court granted Covil's Motion to Seal, USF&G is not privy to the terms and conditions of the Settlement Agreements between Covil and Settling Insurers. USF&G thus does not know when the Settling Insurers are required to fund the QSF or whether the settlements may become effective prior to entry of a final, non-appealable order. The Receiver and Settling Insurers face no harm whatsoever if a stay is put in place. By contrast, USF&G will suffer irreparable harm if settlement proceeds are deposited into the QSF and USF&G is enjoined from pursuing its rights of contribution, subrogation, and/or indemnification pursuant to the Approval Order prior to a ruling on the Reconsideration Motion and, if necessary, any appeals.

4. A stay of the Approval Order is also warranted in view of information USF&G has become aware of since the close of briefing on the Joint Motions that indicates Covil was *judicially* dissolved in 1992 following the appointment of L. 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). As discussed below, the Dissolution

Order 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. *See also* Reconsideration Motion, at ¶¶ 1–7.¹

A. A Stay Would Not Harm The Receiver or Settling Insurers

5. USF&G and Zurich are continuing to defend and indemnify Covil in the underlying tort actions, as they have done both before and after the appointment of the Receiver. Accordingly, the Receiver and the other Settling Insurers would suffer no harm from a stay of enforcement. A limited stay would simply maintain the status quo.

6. Indeed, neither the Receiver nor Covil has been required to expend any money for the defense or settlement of any asbestos-related action against Covil to date, either before or after appointment of the Receiver. Rather, from the 1970s through the present, USF&G and Covil's other insurers have borne virtually all of the costs of defending and resolving those claims while the coverage issues are being decided. There is no immediate need for the proceeds of the insurance policy "buy back" to defend underlying asbestos suits or pay underlying asbestos claimants. *See* Approval Order at ¶10.

7. Although the court "may stay the execution of or any proceedings to enforce a judgment" on "such conditions for the security of the adverse party are proper," SCR 62(b), no such security is necessary or appropriate here. A stay of enforcement would maintain the status quo in terms of USF&G's contractual obligations, prevent a misapplication of the law, and make

¹ 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.

clear that rights and obligations impacted by the Approval Order remain subject to this Court's further review.

B. USF&G's Rights Will Be Prejudiced Absent A Stay

8. The Approval Order abridges USF&G's contribution, indemnification, and subrogation rights by preventing USF&G and other non-settling insurers from asserting such claims against the Settling Insurers. Instead, without authority – statutory or otherwise – the Approval Order diverts such claims, enjoining their assertion against Settling Insurers and directing them solely to the QSF, with no assurance that the QSF will have sufficient funds to pay such claims. USF&G's contribution rights are legally cognizable property rights under South Carolina law that should not be abridged or extinguished without due process.

9. The Approval Order bars USF&G's contribution claims against Settling Insurers without compensation, credit or any other consideration. Covil and the Settling Insurers purport to assign contribution claims to the QSF. The Settling Insurers all "agree" that contribution claims against them by other Covil insurers are "barred" and must be directed to the QSF. Approval Order ¶¶ 4, 8, 14. The Approval Order fails to guarantee that the QSF will be able to pay Settling Insurers' pro-rata shares of indemnity, and fails to provide a mechanism by which to compensate non-settling insurers should the funds in the QSF be inadequate. The QSF purports to relieve Covil of its obligations to abide by the terms of its insurance policies and South Carolina law on pro rata allocation. The establishment of the QSF should be stayed subject to this Court's and appellate courts' further review.

10. The Proposed Approval Order references an operating agreement ("Operating Agreement") submitted by the Receiver. The Operating Agreement includes language which purports to convert the Settling Insurers' primary policies into excess policies, thereby directly impacting the contribution rights of the non-settling insurers who issued primary policies to Covil,

which is at odds with the Court’s assertion that “the Receiver and the Settling Insurers proposed that the QSF stand in the shoes of the Settling Insurers in all respects.” Approval Order at 12. Furthermore, the Operating Agreement also appears to omit text in Schedule 3 to the Operating Agreement, entitled “Claims Handling Criteria and Guidelines.” This text is necessary to determine the extent to which USF&G’s rights and obligations are impacted.

C. The Effect of Covil’s Prior Judicial Dissolution on the Approval Order

11. Separate and apart from the foregoing, the Dissolution Order provides an independent and sufficient basis to stay enforcement of the Approval Order. Pursuant to the Dissolution Order entered May 11, 1992 in the Greenville County Court of Common Pleas, Covil was judicially dissolved following the appointment of L. Winston Lee as Covil’s general receiver, *See* Ex. A. *See also* Reconsideration Motion, at ¶¶ 1–7 (“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’”).

12. 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 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

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.”).

on the understanding that Covil's management had determined not to formally dissolve and that Covil had only been administratively dissolved.

13. The Dissolution Order expressly 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. It appears, therefore, that the Receiver lacked authority to sell the Settling Insurers' policies back to the Settling Insurers.

14. Further, as a result of the Dissolution Order, it appears that Covil's underlying liabilities, in both the asbestos lawsuits currently pending against Covil and lawsuits that may be filed in the future, have been extinguished by operation of law pursuant to S.C. Code § 33-14-107(c), which bars claims against a judicially dissolved entity that are asserted more than ten years following the entity's publication of notice of dissolution.

15. As stated above, USF&G only recently became aware of the existence of the Dissolution Order. As such, USF&G is still investigating the full import of the order and how it may affect the proceedings in which Covil and USF&G have asserted claims against each other, as well as other cases, including the above-captioned actions. This new information raises significant concerns that should be fully investigated and resolved prior to enforcement of the Approval Order on a more complete record and with full briefing.

CONCLUSION

For all of the reasons set forth above and in USF&G's prior submissions, USF&G respectfully requests that the Court stay enforcement of its Approval Order pending a ruling on the Reconsideration Motion and any further appeal of the Approval Order.

Respectfully submitted:

/s/William P. Davis

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AND

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(Forshaw Pro Hac Vice admitted –Hopper, 2019-CP-40-00076)

(Frankel Pro Hac Vice admitted - Roxanne Falls, 2015-CP-46-02155)

Attorneys for United States Fidelity and Guaranty Company

Dated: April 20, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

The First Savings Bank, FSB,

Plaintiff,

vs.

Covil Corporation, Oxytherm, Inc.
and Equitable Enterprises, a South
Carolina General Partnership,

Defendants.

ORDER

91-CP-23-4445

CBS
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 This matter was referred to my by Order of the Honorable Larry R. Patterson for the purpose of filing and hearing matters, taking any necessary testimony and receiving any evidence and determining all issues of law and fact with full authority to enter final judgment and orders without further order of the Circuit Court.

This matter now comes before me pursuant to the Motion of the Receiver for the relief as herein after recited.

It appears and I find that L. Winston Lee is the duly appointed Receiver of the property of Covil Corporation and Oxytherm, Inc. The Receiver now seeks to have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation and Oxytherm, Inc. At the request of the Defendants, he also requests that these two corporations be judicially dissolved. It appears and I find that this appointment as a general receiver is necessary just and proper for the

purpose of liquidating the assets of Covil Corporation and Oxytherm, Inc. and that the judicial dissolution of these two corporations is appropriate. Based upon the foregoing, and with the consent of Counsel for the above named Plaintiff and Defendants, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That Covil Corporation and Oxytherm, Inc. be, and the same hereby are decreed to be judicially dissolved effective as of the date of the filing of this Order, and the Clerk of this Court is hereby directed to deliver a certified copy of this decree to the South Carolina Secretary of State, and the Secretary of State is hereby directed to file this decree without charge.

2. That the continued dissolution of Covil Corporation and Oxytherm, Inc. shall be continued under this Court's supervision.

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3. That L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation and Oxytherm, Inc. and all of their respective properties including, but not limited to, all real and personal property, inventory, funds and deposits and accounts receivable, for the purpose of marshalling and liquidating such assets.

4. That the Receiver shall have all of the usual and normal statutory powers and authority of a Receiver, including, but not limited to, those set forth in §§ 33-14-105 and 33-14-320 of the Code of Laws of the State of South Carolina, 1976 as amended, and

he shall, as rapidly as circumstances shall permit, proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation and Oxytherm, Inc., with said Receiver to have the full discretion and authority to sell the corporate assets thereof in any commercially reasonable manner, at such price(s) as he finds attainable, including, but not limited to, full authority to sell goods in bulk and/or auction and in this regard, the Receiver is authorized and directed, pursuant to § 40-6-20(3) of the Code of Laws of the State of South Carolina, 1976 as amended, to himself conduct any auction he may deem necessary or appropriate without the services of a licensed auctioneer. The Receiver shall be, and he hereby is, authorized to compromise and/or settle any claim(s) of Covil Corporation and/or Oxytherm, Inc. against any of their respective creditors, without further order of this Court. The Receiver shall be, and he hereby is, further authorized without further order of this Court to incur and pay such reasonable expenses as may be necessary in carrying out his duties as herein described, including, but not limited to, the expense of the premium for any bond now or hereafter ordered, the cost of litigation, including the cost of labor, including sales and/or other employees, and attorney's and accountant's fees, with all such expenses and costs to be regarded as an expense of the Receivership which shall be a preferred lien on the assets coming into the Receiver's hands, and shall be paid together with the receiver's fee as hereinafter set forth, as a first priority before any other claims of creditors.

5. The Receiver is hereby authorized to abandon any of the property of Covil Corporation and/or Oxytherm, Inc. which he, in his sole discretion, shall deem burdensome and without value. However, the records of any employee's representatives, customers or clients (hereinafter collectively referred to "Customers") of Covil Corporation and/or Oxytherm, Inc. which the Receiver in his sole discretion shall deem to be of a confidential nature, shall not be disposed of until the receiver has given thirty (30) days written notice to such Customers that they may make claim to such records. Upon receiving any such claim, the Receiver shall turn over such records to each claiming customer, and all such records not claimed by any such customer shall be disposed of in such manner as the Receiver, in his sole discretion, deems appropriate under the circumstances.

6. Covil Corporation and Oxytherm, Inc. and their respective officers, directors, employees, representatives, agents and all other persons upon presentation of a certified copy of this Order shall deliver to the Receiver all records property and assets of said corporations of every kind and nature whatsoever which may be in their possession and/or their control.

7. That upon presentation of a certified copy of this Order, all banking institutions shall turn over and deliver to the Receiver all bank accounts and funds held by them in the account, or for the benefit of, Covil Corporation and/or Oxytherm, Inc. and they shall further turn over to the Receiver any and all banking or other records pertaining to any account whatsoever, opened or closed, indi-

vidually or jointly, in the name of said Corporations.

8. The Receiver is fully authorized to receive, open and act upon all mail received at the addresses of Covil Corporation and/or Oxytherm, Inc. and to divert same to such address or adreses as he may determine necessary.

9. To the extent not already accomplished, the Receiver shall provide the claimants of Covil Corporation and/or Oxytherm, Inc. known to him with the Notice as required by § 33-14-106 of the Code of Laws of the State of South Carolina, 1976 as amended. In addition to the foregoing, and to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina, 1976 as amended.

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10. As to any claim filed by a claimant of Covil Corporation or Oxytherm, Inc., the Receiver shall reject any claim which he deems unjustified. If the Receiver rejects in whole or in part a claim filed pursuant to the requirements hereunder, the Receiver shall mail notice of the rejection to the creditor whose claim has been rejected, setting forth in such notice the amount of the claim so rejected. This notice shall further state the "Effective Date" of the rejection and advise the claimant that a proceeding to enforce the claim must be commenced within ninety (90) days of the Effective Date. A claim against the Petitioner shall be barred if the claimant whose claim was rejected by the Receiver does not commence a proceeding to enforce the claim within ninety (90) from the Effective Date.

11. All creditors and other persons are hereby restrained and enjoined pursuant to this Court's power to grant injunctive relief as set forth in § 33-13-310 of the Code of Laws of the State of South

Carolina, 1976 as amended, from instituting or prosecuting any action or proceeding against Covil Corporation and/or Oxytherm, Inc. other than as set forth in this Order or from levying upon, attaching, distraining, or selling, or attempting to levy upon, attach, distrain or sell any of the property of Covil Corporation and/or Oxytherm, Inc.

12. The Receiver's fee shall be seven and a half percent (7.5%) of all monies received by him as Receiver provided, however, should the Receiver sell the real estate owned by Covil Corporation within this Receivership proceeding, then in such event the Receiver's fee shall be three percent (3%) of all monies received by him as Receiver, and the Receiver is hereby authorized from time to time to disburse from the receivership funds said receivership fees and any costs and/or expenses advanced and/or incurred by him hereunder, to himself and/or those retained or employed by him hereunder without further order of this Court, provided, however, that he shall clearly set forth in his final accounting all such fees and costs so disbursed.

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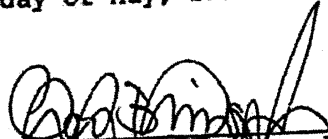
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

14. All law enforcement agencies of this state shall render unto this Court's duly appointed Receiver, L. Winston Lee, whatsoever assistance he may require to carry out the order of this Court, and to prevent a breach of the peace.

15. That upon liquidation of Covil Corporation and Oxytherm, Inc., the Receiver shall submit an accounting to this Court

and petition for authority to make final disbursement of the proceeds from such liquidation.

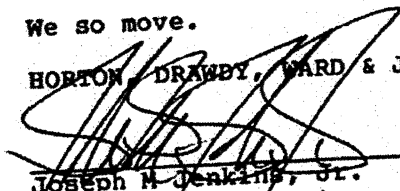
IT IS SO ORDERED this 11 day of May, 1992.

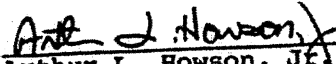

Charles B. Simmons, Jr.
Master-In-Equity

I Consent.

We so move.

HORTON, DRAWDY, WARD & JOHNSON


Joseph M. Jenkins, Jr.
307 Pettigru Street
Greenville, SC 29603
Attorney for the Receiver


Arthur L. Howson, Jr.
Attorney for the Plaintiff

We Consent.

Love, Thornton, Arnold & Thomason

By: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants.

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiff,

V.

CBS Corporation, et al.,

Defendant.

In Re:

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

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-46-02155

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-03456

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

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.: 2019-CP-40-00076

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) C/A NO.: 2018-CP-40-04680

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 REPLY MEMORANDUM IN
FURTHER SUPPORT OF ITS MOTIONS (I) TO STAY AND (II)
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), United States Fidelity and Guaranty Company (“USF&G”) respectfully submits this Reply Memorandum in Further Support of its Motions (i) to Stay and (ii) to Reconsider, Alter or Amend the Approval Order entered by this Court on April 10, 2020 (the “Approval Order”).¹

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 Motion to Reconsider, Alter or Amend Approval Order of April 10, 2020, filed on April 20, 2020 (“USF&G Mot. To Reconsider”);

USF&G’s Limited Objection to Joint Motions to (i) Establish and Approve Qualified 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 Quash and to Seal, filed on April 8, 2020 (“USF&G Opposition”) and Certification of Craig Johnson (“Johnson Cert.”) dated April 8, 2020.

ARGUMENT

1. Contrary to the Receiver's recent submissions, USF&G's motions to stay ("Mot. to Stay") and to reconsider, alter, or amend (Mot. to Reconsider") (collectively, "Motions" or "Mots.") 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.² USF&G's objections to the Receiver's settlement and the Approval Order are based on the limited issue of the Approval Order's impairment of USF&G's contractual rights and rights to contribution, indemnification, and subrogation, including through the injunction contained in the Approval Order. The impact of the newly-discovered facts regarding L. Winston Lee's prior receivership, Covil Corporation's ("Covil") judicial dissolution, and the court orders entered in connection therewith on asbestos claims against Covil should be adjudicated in the context of the underlying asbestos litigation against Covil. The Court need not, and should not, issue any declaration of the legal impact of these issues on the rights of Covil, the Receiver, any insurer, or any asbestos claimant on the current, incomplete record. The substantial questions raised by these

By submitting this Memorandum, USF&G does not intend to waive any of its objections, including those not specifically addressed in this Reply Memorandum in Further Support of its Motion for Reconsideration and Motion to Stay. As used herein, "reconsider" or "reconsideration" includes clarification, correction, modification, amendment, avoidance, specificity, legal justification, and similar relief.

² Although the Court has ruled that USF&G lacks standing to object to the Approval Order because it is not a party and has not intervened (despite the fact that the Order contains an injunction directed to USF&G), *see* Approval Order at 11-12, as USF&G pointed out previously, 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. Cir. March 1, 2019). USF&G, in fact, is a party defendant in some of those actions, and presumably the Court intended the injunction and other relief contained in the Approval Order to apply more broadly than the five captioned lawsuits. Thus, USF&G has the same standing to object to the Receiver's proposed relief as any other party, and would have such standing regardless for reasons previously discussed.

newly discovered orders, however, do present good cause for a stay of the Approval Order so that the status quo can be maintained while these issues are investigated and resolved and to allow the appellate courts to weigh in on the substantive objections to the Approval Order to the extent it affects other insurers' rights of contribution, indemnification, or subrogation.

2. USF&G only recently learned of several historical orders involving Covil for the first time and raised these issues immediately thereafter to avoid any claims of waiver or improper delay by its litigation adversaries. Based on the Receiver's response to USF&G's Motions (the "Response"), those concerns were well-founded. Not only does the Receiver incorrectly claim that USF&G somehow already knew of Covil's judicial dissolution, the Receiver also marshals a series of legally meritless arguments in order to seek an improper ruling that Covil cannot avail itself of a statute of repose defense, or other potentially valuable defenses, that may arise from Covil's judicial dissolution and the prior receivership court's orders. The Receiver's gambit is procedurally improper, substantively wrong, and flatly inconsistent with the Receiver's obligations to cooperate with Covil's insurers in the defense of asbestos claims, rather than to advocate for legal positions that seek to maximize Covil's liability.

3. Finally, beyond a cursory assertion that this Court has already rejected those arguments (Response at 1-2), the Receiver does not address USF&G's meritorious arguments for reconsideration, and only superficially addresses USF&G's motion to stay. For the reasons set forth in USF&G's opening briefs, those motions should be granted.

I. USF&G Has Not Waived Any Issue Or Argument

4. The Receiver does not contest that the recently-produced document annexed to USF&G's Motions demonstrates that Covil, contrary to the Receiver's prior representations to the Court, was judicially dissolved in 1992. The Receiver claims that USF&G knew about this prior receivership, but presents no evidence whatsoever that USF&G had any knowledge that after the

initial, limited receivership was commenced at the request of the First Savings Bank, the prior receiver, L. Winston Lee, moved to “have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation” and requested that Covil (and an unrelated corporation) “be judicially dissolved.” Mots. Ex. A at 1. That motion was granted on May 11, 1992. The order granting the motion also provided that “[t]o the extent not already accomplished, [Receiver Lee] shall provide the claimants of Covil Corporation ... known to him with the Notice as required by § 33-14-106 of the [South Carolina Code],” and “shall publish the Notice required by § 33-14-107 of the [Code].” *Id.* ¶ 9. Then, on November 11, 1992, the Master-in-Equity overseeing the receivership issued an order finding that Receiver Lee “has fully complied with the previous Orders of this Court.” *First Savings Bank, FSB v. Covil Corp., et al.*, No. 91-CP-23-4445, at 2 (Greenville Cty. Common Pleas Nov. 11, 1992).

5. The Receiver presents no basis for the Court to conclude that USF&G knew that Mr. Lee had been appointed as Covil’s general receiver, or that Covil had been judicially dissolved, all of which post-dated the relevant correspondence cited in the Receiver’s Response. The Receiver points to no documents evidencing insurers’ knowledge of a judicial dissolution, involvement in the dissolution itself, or receipt of any judicial orders concerning the dissolution. To the contrary, the privileged correspondence submitted by the Receiver confirms that USF&G’s attorneys’ understanding was that “Covil does not intend to dissolve as a corporation.” Response at 3. As one of Covil’s insurers, USF&G had no contractual basis to be involved in Covil’s corporate dissolution, and, as this correspondence confirms, USF&G and its counsel understood that decisions about whether Covil should be dissolved rested with Covil’s officers, directors, and creditors, not its insurers. See Response Ex. 1. To USF&G’s knowledge, insurer-appointed defense counsel played no part in Covil’s dissolution, the appointment of the prior Receiver, or

the winding down of Covil's affairs. Rather, Covil's own counsel, James Cassidy, consented to the appointment of the prior Receiver and the judicial dissolution. *See* Ex. 1 at 5; Ex. 2 at 7. The Receiver's contention that USF&G was "advised of the Receivership and its status" (Response at 4) makes no sense as it is based solely on events pre-dating Covil's judicial dissolution.

6. The Receiver's assertion that Covil's prior receivership and judicial dissolution were somehow known prior to their recent discovery is also belied by the Receiver's prior representations to Covil's insurers. On November 4, 2019, in response to correspondence from Zurich's counsel, the Receiver represented that Covil was not dissolved, and that instead, Covil's corporate status was administratively revoked. *See* Ex. 3 at 1.

7. Notwithstanding the clearly contrary factual record, the Receiver asserts that USF&G has "waived its arguments." Response at 10. Not so. 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 (Ct. App. 2019), quoting *Parker v. Parker*, 313 S.C. 482, 487 (1994). There is no evidence that USF&G was aware of Covil's judicial dissolution or the Master-in-Equity's accompanying orders, much less that USF&G then "voluntar[ily] and intentional[ly] relinquish[ed]" any rights related thereto.

8. Moreover, what the Receiver characterizes as "[USF&G's] arguments" are in large part substantial, newly-discovered defenses to liability that belong to **Covil**. USF&G cannot waive those defenses. If anything, it is the Receiver who should now be precluded from disavowing the consequences of Covil's prior receivership—particularly where those consequences only serve to minimize Covil's potential asbestos liabilities. And in any event, § 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 § 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 (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 (Ct. App. 2003) (holding that a statute of repose is not “subject to certain counter-assertions, such as waiver, tolling, and estoppel”). The Receiver’s waiver arguments fail.

II. Covil’s Prior Judicial Dissolution Is Not Irrelevant To The Receivership

9. The Receiver argues that the judicial dissolution of Covil is irrelevant to the current Receivership because § 15-65-10(4) of the South Carolina Code states that a receiver may be appointed when a corporation has been dissolved. Response at 6. The statute, however, does not state that a receiver *should* be appointed for *all* dissolved corporations. Covil’s judicial dissolution, and the orders entered in connection therewith, are highly relevant to whether the current Receivership is appropriate, because they call into question (i) whether asbestos claims pending against Covil remain viable, or whether those claims have been extinguished under the statute of repose set forth in § 33-14-107 of the Code and (ii) whether this Court may properly assert jurisdiction, in light of the Master-in-Equity’s injunction barring claims against Covil except as set forth in his Order. While the Receiver notes that the Lee Receivership was concluded in 1992, the Receiver completely ignores the Master-in-Equity’s injunction (*see* USF&G Mot. to Reconsider, at ¶¶ 1-3), which the Receiver does not contend was ever lifted, or the court’s determination that the Greenville County Court maintained exclusive jurisdiction over Covil’s dissolution and property.

III. The Receiver’s Improper Arguments Regarding Covil’s Dissolution Should Be Rejected

10. The balance of the Receiver’s Response, and the entirety of the “Notice of Supplemental Authority” filed by the Receiver on April 29, takes positions that one would expect

to see from counsel for asbestos plaintiffs, not from a court-appointed receiver obligated to minimize Covil's liabilities and to cooperate with its insurers to **defend** against claims seeking to impose liability on Covil. In any event, while the Court need not and should not reach the merits of the Receiver's arguments, each argument is legally meritless for the reasons set forth below.

11. First, the Receiver claims that USF&G "misleadingly" failed to cite subsection (d) of § 33-14-107, which provides: "A claim³ may be enforced under this section (1) against the dissolved corporation to the extent of its undistributed assets; or (2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation" See Response at 6. Yet subsection (d) is plainly subject to and must be read together with subsection (c), which provides that any claim of the categories of claimants identified in the section—including claimants with claims that accrue post-dissolution—"is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within ten years" after publication of the notice described in the Master-in-Equity's Order. The only reasonable reading of subsection (d) is that it governs enforcement of covered claims before those claims become "barred." Under the Receiver's reading, subsection (c)'s clear command that any such claim "**is barred**" after ten years would be nonsensical. See § 33-14-107, Official Comment (once the statutory period runs, the statute "provid[es] a **period of repose** after which dissolved corporations may distribute remaining assets free of all claims and shareholders may receive them **secure in the knowledge that they may not be reclaimed**") (emphases added).

12. Moreover, even if the Receiver's reading of the statute were correct (it is not), Covil's insurance policies are not "undistributed assets." While there is no South Carolina

³ The Receiver's quotation of subsection (d)(1) erroneously inserts the word "unknown" before the word "claim." See Response at 6. That word is not present in the statute.

precedent on point, the Receiver's position was considered and rejected in *Gilliam v. Hi-Temp Products Inc.*, 677 N.W.2d 856 (Mich. Ct. App. 2003), another case involving asbestos claims asserted against a dissolved corporation. *Gilliam* construed the similar repose provisions of Michigan's Business Corporation Act—a statute, like South Carolina's, based on the 1984 Model Business Corporation Act (the “Model Act”)—and concluded that “[a]n insurance liability policy is not an asset that a corporation could distribute in the process of winding up its affairs after distribution.” *Id.* at 866.⁴ The Michigan statute (like S.C. Code § 33-1-400) defined “distribution” to mean “a direct or indirect transfer of money or other property, except the corporation's shares,” and the court found no “authority for the proposition that an expired third-party liability policy is property that [the insured] could transfer in the process of liquidating its assets.” 677 N.W.2d at 870. The court also found no “support for the contention that an insurance policy remained an asset of the corporation after existing claims were satisfied during liquidation and the deadline for filing future claims had expired.” *Id.* The same is true here.

13. Next, the Receiver argues that the Delaware Supreme Court's decision in *Matter of Krafft-Murphy*, 82 A.3d 696 (Del. 2013), should control. *Krafft-Murphy*, however, construed a specific provision of the Delaware General Corporation Law (“DGCL”). That provision is materially different from the relevant provisions of the South Carolina Business Corporation Act, which is based not on the DGCL but rather on the Model Act. See Dooley & Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 Business Lawyer 737, 738 (2001) (“Corporation statutes in only Kansas,

⁴ This issue arose in *Gilliam* because the Michigan statute contains a provision (without a South Carolina equivalent) that permits claimants to enforce claims against undistributed assets of dissolved corporations even after the statutory repose period “for good cause shown.” See 677 N.W.2d at 869 (discussing Mich. Comp. Laws § 450.1851(2)).

Oklahoma, Nevada, and Puerto Rico are clearly modeled on the DGCL. In contrast, the Model Act is the dominant model for state corporation statutes.”). The DGCL, unlike statutes based on the Model Act, does not contain a repose provision analogous to § 33-14-107. Indeed, the *Krafft-Murphy* court explicitly distinguished such provisions, reasoning that decisions cited by the corporation in support of repose “interpret statutes that are dissimilar to Delaware’s”—i.e., statutes based on the Model Act—that “explicitly barred claims against a dissolved corporation filed more than five years after dissolution.” 82 A.3d at 708–09.⁵ Because “the Delaware dissolution statutes impose no such time bar,” the court found that cases construing Model Act-based statutes “are inapposite.” *Id.* at 709.⁶ That logic applies reciprocally here. The Receiver’s blatant distortion of precedent so as to **maximize** Covil’s prospective liability is deeply concerning.

14. By contrast, courts applying Model Act-based statutes have applied statutes that track § 33-14-107 as statutes of repose. *Gilliam* “reject[ed] the reasoning that § 842a is not intended to bar latent claims or claims that could not reasonably be brought within one year of notice of corporate dissolution.” 677 N.W.2d at 868. It held that “[t]he unambiguous language of the statute ... plainly bars claims that are ‘contingent or based on an event occurring after the effective date of dissolution’” and that “the intent of the Legislature to bar claims that are both unknown and that arise after the dissolution of the corporation” was further demonstrated by Michigan’s equivalent to § 33-14-107(c)(1), which bars a claim by a “claimant who did not receive written notice under” Michigan’s equivalent to § 33-14-106. *Id.* Other courts have reached the

⁵ The repose period in South Carolina was changed from five years (the default length in the 1984 Model Act) to ten years by a 2004 amendment to the statute.

⁶ *United States v. Marmon Holdings, Inc.*, Civ. No. 2:10-cv-00526-EJL-CWD, 2015 WL 5822620, at *12 (D. Idaho Sept. 30, 2015), cited by the Receiver (Response at 9), merely construes the DGCL consistent with *Krafft-Murphy* in a case involving Delaware corporations. It is just as inapplicable as *Krafft-Murphy* for the same reasons.

same conclusions. *See, e.g., Lilliquist v. Copes-Vulcan, Inc.*, 21 A.3d 1233, 1235 (Pa. Super. 2011) (“[T]he law of Alabama provides that all claims filed more than two years after published notice of corporate dissolution are forever barred, and [] the trial court properly refused to appoint a receiver since Lilliquist did not assert any legally cognizable right to a remedy.”); *Williams v. Clark Sand Co.*, 212 So.3d 804, 806, 813 (Miss. 2015) (affirming dismissal of claims against dissolved corporation based upon the claim bar in Florida’s Model-Act based survival statute, which barred claims based on latent injuries); *OXY USA Inc. v. Quintana Prod. Co.*, 79 So. 3d 366, 385 (La. Ct. App. 2011) (“[A]ll existing claims against [the dissolved corporations] were extinguished as a result of their respective dissolutions under Texas law. OXY clearly failed to institute suit ... within the three-year survival period[.]”).

15. The Receiver contends USF&G “may not rely on” *All Cases Against Sager Corp.*, 967 N.E.2d 1203 (Ohio 2012), because *Pielet v. Pielet*, 942 N.E.2d 606 (Ill. App. Ct. 2010), which *Sager* cited for a statement of Illinois law, was subsequently reversed in part. Response at 8. This is misleading at best. *Sager* cited *Pielet* for the proposition that under Illinois law, “once the survival period has ended, the corporation ceases to exist” and “can no longer be subject to any claim, and any claims not raised against or by the corporation become forfeited.” *Sager*, 967 N.E.2d at 1210, citing *Pielet*, 942 N.E.2d at 496. That statement remains correct. *See, e.g., Michigan Indiana Condominium Ass’n v. Michigan Place, LLC*, 8 N.E.3d 1246, 1255 (Ill. App. Ct. 2014) (“The plain language of section 12.80 prohibits Optima’s claims ... because the claims were filed more than five years after the corporations were dissolved Since Optima did not file its third-party action within the five-year statutory time period, there is no longer an entity that can sue or be sued.”). The Illinois Supreme Court’s ruling in *Pielet* reversed in part on the basis that the Illinois statute acted as a *broad*er bar. *Pielet v. Pielet*, 978 N.E. 2d 1000, 1011 (Ill. 2012)

(“[B]ecause the cause of action ... did not accrue until well after the company dissolved, it cannot survive Illinois precedent has consistently held that only causes of action against a corporation which have actually accrued prior to the corporation’s dissolution are preserved[.]); *see also McGinley Partners, LLC v. Royalty Props., LLC*, 117 N.E.3d 1207, 1220 (Ill. Ct. App. 2018) (In *Pielet*, “[t]he supreme court found that the statute did not allow actions to be brought against a corporation for a claim accruing after the corporation’s dissolution, even if based on its predissolution obligations”). The Illinois statute is harsher in this regard than South Carolina’s, which permits post-dissolution claims within its ten-year repose period. But this, of course, has absolutely no bearing on *Sager*’s holding regarding post-dissolution receiverships, and in any event the details of Illinois corporate law are not relevant here. The Receiver’s contentions to the contrary are wholly without merit.

16. The final paragraph of the Response asserts in conclusory fashion that “[t]he truth is that ‘[s]uits by or against [Covil] corporation are not affected *in any way*’ by the prior Receivership.” Response at 10, quoting *Hudson v. New Idea Corp.*, 5:15-CV-04314-JMC, 2016 WL 1693306, at *3 (D.S.C. Apr. 28, 2016) (brackets and emphasis added by Receiver’s counsel). *Hudson* is wholly inapposite—it stands only for the uncontroversial proposition that, under § 33-14-105(c), dissolution does not automatically abate suits against a corporation or prevent a dissolved corporation from suing or being sued in its own name. *See* 2016 WL 1693306, at *3. But neither *Hudson* nor § 33-14-105(c) speak to (i) the legal effect of the Master-in-Equity’s injunction, (ii) the impact of § 33-14-107 on claims filed after the statute’s ten-year repose period or (iii) the propriety of the current Receivership in light of these newly-uncovered issues.

17. The Receiver’s “Notice of Supplemental Legal Authority” (filed April 29) goes even further in needlessly endorsing positions that plainly undermine the Receiver’s defenses to

pending and future asbestos claims against Covil. In that Notice, the Receiver asserts that Covil has no right of repose as a result of its prior judicial dissolution because subsection (c)(3) of § 33-14-107 was not enacted until 2004, and that USF&G should have apprised the Court of the 2004 amendment. These arguments are not only prejudicial to Covil's defenses in asbestos litigation and inconsistent with Covil's duty of cooperation – they are also wrong as a matter of law, for the following reasons.

18. First, the pre-2004 version of the South Carolina Business Corporation Act barred claims without regard to whether they accrued before or after dissolution. Rather, the statute divided all claims into “known claims” subject to § 33-14-106 and “unknown claims” subject to § 33-14-107. Section 106 governed provision of notice to claimants holding known claims at the time of dissolution. Importantly, subsection (d) of Section 106 provided that “[f]or purposes of this section, ‘claim’ does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.” No comparable exclusion of contingent liabilities or post-dissolution claims is found in the text of Section 107, which governs “unknown claims.” And, subsection (c)(1) of pre-2004 Section 107 by its plain terms bars the claims of all “claimants who did not receive written notice under § 33-14-106.” Because Section 106 applies to claimants with “known claims” and, unlike Section 107, expressly excludes contingent and post-dissolution claims, a claimant with an unknown claim (such as a contingent or post-dissolution claim) is, by definition, one who did not receive notice under Section 106. *See, e.g., Gilliam*, 677 N.W.2d at 868 (holding that “the intent of the Legislature to bar claims that are both unknown and that arise after the dissolution of the corporation is shown by subsection 842a(3)(a)” (Michigan’s version of § 33-14-107(c)(1)) “which bars a claim by a ‘claimant who did not receive written notice under section 841a’” (Michigan’s version of § 33-14-106)).

19. The text of the statute is unambiguous. There is no evidence that the addition of subsection (c)(3) in the 2004 amendment was anything more than a clarification of existing law, and the plain meaning of statutory text cannot be rendered ambiguous by the statute's subsequent legislative history or by its annotations. *See Vaughn v. Bernhardt*, 345 S.C. 196, 198 (2001) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning."); *Gasque v. Eagle Mach. Co.*, 270 S.C. 499, 504 (1978) (refusing to consider "alleged Reporter's comments as to the statute's meaning" where the statutory text is clear).

20. Second, even if contingent or post-dissolution claims were not covered by the pre-2004 version of § 33-14-107, the statute, as amended, provides a substantial defense without any need to address whether the Legislature "intended for the amendment to apply retroactively." Notice at 4. Purely prospective application of the amendment results in the repose period running from the effective date of the amendment in 2004 and then expiring in 2014, which provides Covil with a very substantial repose defense against the asbestos claims it now faces. This is how courts prospectively apply newly-passed statutes of limitations or repose. *See Unruh v. Cacciotti*, 172 Wash. 2d 98, 116 (Wash. 2011) (newly-passed statute of repose begins to run on the date the statute was enacted); *Redmon v. LeFevre*, 503 S.W. 2d 97, 99 (Tenn. 1973) (statute providing for shortened limitations period applied to actions accruing prior to effective date, but began running from effective date of the amended statute); *Quintana v. Los Alamos Med. Center, Inc.*, 889 P.2d 1234, 1236–37 (N.M. Ct. App. 1994) (corporate dissolution claim bar statute applied prospectively to claims against corporations dissolved prior to its enactment). There is no logical reason not to apply the current version of section 33-14-107 to claims currently brought against Covil; "the legislature would have intended the same time limitation to apply to ... corporations dissolved

prior to the [amendment] as those dissolved subsequently,” and “[i]ndeed, the reasons for repose would be stronger for pre-1975 dissolutions.” *Quintana*, 889 P.2d at 1236.

21. Nothing in the South Carolina statute limits the claim bar to dissolutions occurring after the date of the 2004 amendments, and the Receiver’s contrary argument is demonstrably wrong. Any claimant whose claim accrued between the date of the 2004 amendment and 2014 could have brought a claim within the 10-year period of repose (assuming such claims were not otherwise time-barred). Applying the statute of repose to extinguish claims filed *after* expiration of the 10-year period has nothing to do with retroactivity; it just involves the normal operation of a statute of repose, which by definition can extinguish claims even before accrual. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (“A statute of repose is a statute barring any suit that is brought after a specified time since the defendant acted even if this period ends before the plaintiff has suffered a resulting injury.”). *See also Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142 (2006) (“A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time.”).

22. In short, applying section 33-14-107(c)(3) to bar claims not asserted by 2014 (at the latest) would simply give effect to the operative statute of repose, which applies both to the pending underlying asbestos lawsuits as well as future claims. Such application of the statute does not constitute retroactive application of law, nor does it deprive either Covil or any individual asbestos claimants of constitutionally protected rights. Rather, this interpretation is consistent with the plain language of the statute and the South Carolina legislature’s interest in creating a statute of repose under the South Carolina Business Corporation Act.

23. Although USF&G raises these issues to respond to the erroneous assertions in the Receiver’s latest filings, as noted at the outset, the proper forum for resolution of these issues is in

connection with underlying lawsuits against Covil on full briefing, and not in connection with approval of settlements. As noted previously, and as discussed further below, these issues illustrate why the Court, at a minimum, should stay enforcement of its approval order.

IV. USF&G's Motion To Stay Should Be Granted

24. The Receiver contends, with no explanation, that a stay would prejudice Covil by preventing it from “addressing” its asbestos liabilities. Response at 9. This is not the case. Neither the Receiver nor Covil has been required to expend any money to resolve an asbestos-related action. As described in USF&G’s Motion to Stay, USF&G and Covil’s other insurers have borne virtually all the costs of defending and settling asbestos claims brought against Covil, even as coverage issues are being decided. Mot. to Stay at ¶ 6. The Receiver has offered no argument as to why settlement proceeds are immediately necessary, except to point to the judgment rendered in *Finch*, which is currently on appeal. However, Covil does not state that it intends to commit the funds deposited into the QSF to satisfy any final judgment in *Finch*. And, since Covil is judgment-proof but for its recovery of insurance proceeds, Covil is at no risk that a judgment would be executed against a valuable asset if insurance proceeds are not immediately available.

25. To the contrary, it is USF&G that will be significantly prejudiced absent a stay. USF&G’s harm is not “inexplicable” as the Receiver contends. Response at 9. As discussed in USF&G’s Motion to Stay, (¶¶ 8–10), USF&G’s contribution, indemnification, and subrogation rights would be severely impacted absent a stay, by preventing USF&G and other non-settling insurers from asserting such claims against the settling insurers. A stay would preserve these rights and maintain the status quo as the important issues addressed herein are resolved.

CONCLUSION

26. For all of the reasons set forth above and in USF&G's prior submissions, USF&G respectfully requests that the Court grant its motions to stay and to reconsider, alter or amend its Approval Order.

Respectfully submitted:

/s/ William P. Davis

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Mariel D. Norton, S.C. Bar No.: 100198
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AND

Mary Beth Forshaw
Andrew T. Frankel
SIMPSON THACHER & BARTLETT LLP
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(212) 455-2000

(Forshaw Pro Hac Vice admitted –Hopper, 2019-CP-40-00076)

(Frankel Pro Hac Vice admitted - Roxanne Falls, 2015-CP-46-02155)

Attorneys for Defendant United States Fidelity and Guaranty Company

Date: April 30, 2020

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

The First Savings Bank,
F.S.B.,
Plaintiff,

v.

Covil Corporation,
Oxytherm, Inc., and
Equitable Enterprises, a
South Carolina general
partnership,

Defendants.

CONSENT ORDER
FOR APPOINTMENT OF RECEIVER

C.A. No.: 91-CP-23-4445

01 04 PM '91
COURT

ENTERED COMPUTER

This matter comes before me upon motion of Arthur L. Howson, Jr., attorney for the plaintiff. It appears that the defendants are indebted to the plaintiff ("The First") by virtue of the following instruments:

a. Commercial Note from Covil Corporation ("Covil") to the plaintiff, dated October 17, 1988, in an original amount of Eight Hundred Eighty-six Thousand Nine Hundred Eighty-one and 00/100 (\$886,981.00) Dollars, modified by that certain Commercial Loan Modification Agreement between the parties dated March 28, 1991. ("First Covil Note");

b. Commercial Note executed by Covil to The First dated December 21, 1990, in an original amount of One Hundred Seventy-five Thousand and 00/100 (\$175,000.00) Dollars, ("Second Covil Note");

c. Commercial Note executed by Oxytherm, Inc. ("Oxytherm") to The First dated April 5, 1990, in an original

amount of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars, ("Oxytherm Note");

d. Commercial Note executed by Equitable Enterprises to The First dated February 27, 1989, in an original amount of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars, modified by that certain Commercial Loan Modification Agreement between the parties dated March 28, 1991 ("Equitable Enterprises Note"); and

WHEREAS, payment of the First Covil Note and Second Covil Note is secured by a security interest granted by Covil to the First in all of the equipment, inventory, and accounts receivable of Covil ("Covil Personal Property"); and

WHEREAS, payment of the First Covil Note is also secured by that certain Commercial Mortgage executed by Covil to the First dated October 17, 1988, recorded October 18, 1988 in Mortgage Book with 1967 of page 265 in the RMC office for Greenville County, which mortgage covers that certain real property more particularly described in Exhibit A, attached hereto and incorporated herein by reference ("Covil Real Property"); and

WHEREAS, payment of the Oxytherm Note is secured by a security interest granted by Oxytherm to The First in all of the equipment, inventory, and accounts receivable of Oxytherm ("Oxytherm"); and

WHEREAS, payment of the Equitable Enterprises Note is secured by a Commercial Mortgage executed by Equitable Enterprises to The First dated December 13, 1988, recorded December 21, 1988 Mortgage Book 1979 at page 380 in the RMC office for Greenville

County, covering that certain real property more particularly described in Exhibit B, attached hereto and incorporated herein by reference ("Equitable Enterprises Real Property"); and

WHEREAS, The First Covil Note, Second Covil Note, Oxytherm Note, and Equitable Enterprises Note are all in default, and Covil, Oxytherm, and Equitable Enterprises have agreed to surrender the collateral to The First for liquidation and payment to The First of the net proceeds of the sale thereof; and

WHEREAS, the parties hereto have agreed that to assure the orderly liquidation of the collateral and the security thereof pending liquidation, the property should be placed in the control of a receiver,

NOW, THEREFORE, upon motion of Arthur L. Howson Jr., attorney for The First, by and with the consent of James H. Cassidy, attorney for Covil, Oxytherm, and Equitable Enterprises, it is

ORDERED, ADJUDGED AND DECREED:

1. That L. Winston Lee be appointed as receiver of the Covil Personal Property and Oxytherm Personal Property to take and have complete and exclusive management and control of said property. Said receiver may sell said property at public or private sale, pursuant to the security interests of The First in said property and the South Carolina Uniform Commercial Code. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper for the preservation of said property; provided, however, that in the event the receiver

deems it necessary, he may expend up to One Thousand and 00/100 (\$1,000.00) Dollars for extraordinary expenses, provided he has the prior written consent of the plaintiff or the court.

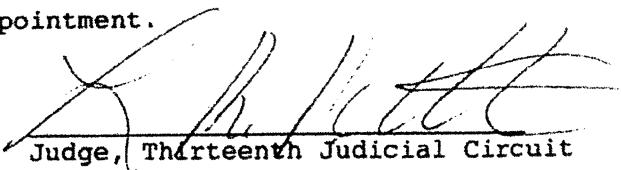
2. That L. Winston Lee be appointed as receiver of the Covil Real Property and Equitable Enterprises Real Property, to take and have complete and exclusive management and control of said property. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper for the operation and preservation of said real properties; provided, however, that in the event the receiver deems it necessary, he may expend up to One Thousand and 00/100 (\$1,000.00) Dollars for extraordinary expenses, provided he has the prior written consent of the plaintiff or the court.

3. From funds received from the sale of the Covil Personal Property and Oxytherm Personal Property the receiver shall pay all costs and expenses of the receivership including, but not limited to the receiver's fee as receiver and the cost and expense of the bond hereinafter required, and the net funds shall be paid to The First for application to the debts to The First of Covil, Oxytherm, and Equitable Enterprises, as applicable.

4. The plaintiff shall file a cash bond with the Office of the Clerk of Court for Greenville County in the amount of Five Hundred and 00/100 (\$500.00) Dollars.

5. The plaintiff and the receiver shall provide a full and complete accounting to this court of all sums collected by the receiver from the date of appointment.

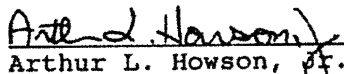
IT IS SO ORDERED.


Judge, Thirteenth Judicial Circuit

Greenville, SC

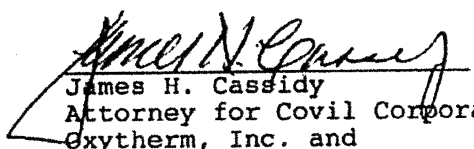
October 11, 1991

I SO MOVE:


Arthur L. Howson, Jr.

Attorney for the Plaintiff

I CONSENT:


James H. Cassidy
Attorney for Covil Corporation
Oxytherm, Inc. and
Equitable Enterprises

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

The First Savings Bank, FSB,

Plaintiff,

vs.

Covil Corporation, Oxytherm, Inc.
and Equitable Enterprises, a South
Carolina General Partnership,

Defendants.

ORDER

91-CP-23-4445

CB
#1

This matter was referred to my by Order of the Honorable Larry R. Patterson for the purpose of filing and hearing matters, taking any necessary testimony and receiving any evidence and determining all issues of law and fact with full authority to enter final judgment and orders without further order of the Circuit Court.

This matter now comes before me pursuant to the Motion of the Receiver for the relief as herein after recited.

It appears and I find that L. Winston Lee is the duly appointed Receiver of the property of Covil Corporation and Oxytherm, Inc. The Receiver now seeks to have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation and Oxytherm, Inc. At the request of the Defendants, he also requests that these two corporations be judicially dissolved. It appears and I find that this appointment as a general receiver is necessary just and proper for the

purpose of liquidating the assets of Covil Corporation and Oxytherm, Inc. and that the judicial dissolution of these two corporations is appropriate. Based upon the foregoing, and with the consent of Counsel for the above named Plaintiff and Defendants, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That Covil Corporation and Oxytherm, Inc. be, and the same hereby are decreed to be judicially dissolved effective as of the date of the filing of this Order, and the Clerk of this Court is hereby directed to deliver a certified copy of this decree to the South Carolina Secretary of State, and the Secretary of State is hereby directed to file this decree without charge.

2. That the continued dissolution of Covil Corporation and Oxytherm, Inc. shall be continued under this Court's supervision.

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#2
3. That L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation and Oxytherm, Inc. and all of their respective properties including, but not limited to, all real and personal property, inventory, funds and deposits and accounts receivable, for the purpose of marshalling and liquidating such assets.

4. That the Receiver shall have all of the usual and normal statutory powers and authority of a Receiver, including, but not limited to, those set forth in §§ 33-14-105 and 33-14-320 of the Code of Laws of the State of South Carolina, 1976 as amended, and

he shall, as rapidly as circumstances shall permit, proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation and Oxytherm, Inc., with said Receiver to have the full discretion and authority to sell the corporate assets thereof in any commercially reasonable manner, at such price(s) as he finds attainable, including, but not limited to, full authority to sell goods in bulk and/or auction and in this regard, the Receiver is authorized and directed, pursuant to § 40-6-20(3) of the Code of Laws of the State of South Carolina, 1976 as amended, to himself conduct any auction he may deem necessary or appropriate without the services of a licensed auctioneer. The Receiver shall be, and he hereby is, authorized to compromise and/or settle any claim(s) of Covil Corporation and/or Oxytherm, Inc. against any of their respective creditors, without further order of this Court. The Receiver shall be, and he hereby is, further authorized without further order of this Court to incur and pay such reasonable expenses as may be necessary in carrying out his duties as herein described, including, but not limited to, the expense of the premium for any bond now or hereafter ordered, the cost of litigation, including the cost of labor, including sales and/or other employees, and attorney's and accountant's fees, with all such expenses and costs to be regarded as an expense of the Receivership which shall be a preferred lien on the assets coming into the Receiver's hands, and shall be paid together with the receiver's fee as hereinafter set forth, as a first priority before any other claims of creditors.

5. The Receiver is hereby authorized to abandon any of the property of Covil Corporation and/or Oxytherm, Inc. which he, in his sole discretion, shall deem burdensome and without value. However, the records of any employee's representatives, customers or clients (hereinafter collectively referred to "Customers") of Covil Corporation and/or Oxytherm, Inc. which the Receiver in his sole discretion shall deem to be of a confidential nature, shall not be disposed of until the receiver has given thirty (30) days written notice to such Customers that they may make claim to such records. Upon receiving any such claim, the Receiver shall turn over such records to each claiming customer, and all such records not claimed by any such customer shall be disposed of in such manner as the Receiver, in his sole discretion, deems appropriate under the circumstances.

6. Covil Corporation and Oxytherm, Inc. and their respective officers, directors, employees, representatives, agents and all other persons upon presentation of a certified copy of this Order shall deliver to the Receiver all records property and assets of said corporations of every kind and nature whatsoever which may be in their possession and/or their control.

7. That upon presentation of a certified copy of this Order, all banking institutions shall turn over and deliver to the Receiver all bank accounts and funds held by them in the account, or for the benefit of, Covil Corporation and/or Oxytherm, Inc. and they shall further turn over to the Receiver any and all banking or other records pertaining to any account whatsoever, opened or closed, indi-

vidually or jointly, in the name of said Corporations.

8. The Receiver is fully authorized to receive, open and act upon all mail received at the addresses of Covil Corporation and/or Oxytherm, Inc. and to divert same to such address or adreses as he may determine necessary.

9. To the extent not already accomplished, the Receiver shall provide the claimants of Covil Corporation and/or Oxytherm, Inc. known to him with the Notice as required by § 33-14-106 of the Code of Laws of the State of South Carolina, 1976 as amended. In addition to the foregoing, and to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina, 1976 as amended.

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10. As to any claim filed by a claimant of Covil Corporation or Oxytherm, Inc., the Receiver shall reject any claim which he deems unjustified. If the Receiver rejects in whole or in part a claim filed pursuant to the requirements hereunder, the Receiver shall mail notice of the rejection to the creditor whose claim has been rejected, setting forth in such notice the amount of the claim so rejected. This notice shall further state the "Effective Date" of the rejection and advise the claimant that a proceeding to enforce the claim must be commenced within ninety (90) days of the Effective Date. A claim against the Petitioner shall be barred if the claimant whose claim was rejected by the Receiver does not commence a proceeding to enforce the claim within ninety (90) from the Effective Date.

11. All creditors and other persons are hereby restrained and enjoined pursuant to this Court's power to grant injunctive relief as set forth in § 33-13-310 of the Code of Laws of the State of South

Carolina, 1976 as amended, from instituting or prosecuting any action or proceeding against Covil Corporation and/or Oxytherm, Inc. other than as set forth in this Order or from levying upon, attaching, distraining, or selling, or attempting to levy upon, attach, distrain or sell any of the property of Covil Corporation and/or Oxytherm, Inc.

12. The Receiver's fee shall be seven and a half percent (7.5%) of all monies received by him as Receiver provided, however, should the Receiver sell the real estate owned by Covil Corporation within this Receivership proceeding, then in such event the Receiver's fee shall be three percent (3%) of all monies received by him as Receiver, and the Receiver is hereby authorized from time to time to disburse from the receivership funds said receivership fees and any costs and/or expenses advanced and/or incurred by him hereunder, to himself and/or those retained or employed by him hereunder without further order of this Court, provided, however, that he shall clearly set forth in his final accounting all such fees and costs so disbursed.

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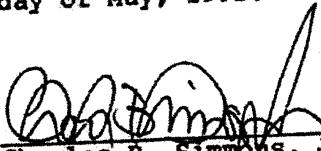
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

14. All law enforcement agencies of this state shall render unto this Court's duly appointed Receiver, L. Winston Lee, whatsoever assistance he may require to carry out the order of this Court, and to prevent a breach of the peace.

15. That upon liquidation of Covil Corporation and Oxytherm, Inc., the Receiver shall submit an accounting to this Court

and petition for authority to make final disbursement of the proceeds from such liquidation.

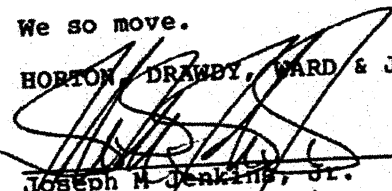
IT IS SO ORDERED this 11 day of May, 1992.

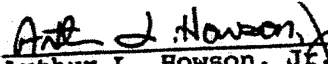

Charles B. Simmons, Jr.
Master-In-Equity

I Consent.

We so move.

HORTON, DRAWDY, WARD & JOHNSON


Joseph M. Jenkins, Jr.
307 Pettigru Street
Greenville, SC 29603
Attorney for the Receiver


Arthur L. Howson, Jr.
Attorney for the Plaintiff

We Consent.

Love, Thornton, Arnold & Thomason

By: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants.

EXHIBIT 3

FILED UNDER SEAL WITH THE COURT

EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:16-CV-01077**

ANN FINCH, Individually, and as	)	
Executrix of the Estate of Franklin	)	
Delenor Finch,	)	
	)	INTERVENOR ZURICH AMERICAN
Plaintiff,	)	INSURANCE COMPANY’S MOTION
	)	FOR RELIEF FROM JUDGMENT
v.	)	<u>UNDER RULE 60(b)(2) AND 60(b)(4)</u>
	)	
COVIL CORPORATION,	)	
	)	
Defendant.	)	

Intervenor Zurich American Insurance Company (“Zurich”) respectfully moves for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(2) on the basis of newly discovered evidence, and Rule 60(b)(4) because that evidence demonstrates that the judgment entered in this case is void.

INTRODUCTION

Plaintiff brought this mesothelioma suit against Covil Corporation (“Covil”) in 2016, and this Court entered a Final Amended Judgment against Covil on May 1, 2019. Only two weeks ago counsel for Intervenor Zurich—one of Covil’s insurers—unearthed newly discovered evidence demonstrating that Plaintiff’s suit was foreclosed by South Carolina’s statutory bar on suits against dissolved corporations, S.C. Code Ann. § 33-14-107(c). That statutory bar operates as a statute of repose that extinguished Plaintiff’s claim before it ever arose. As a result, this Court lacked subject-matter jurisdiction due to the absence of an actual case or controversy in this suit.

The newly discovered evidence consists of court orders from the early 1990s establishing that a receiver was appointed to take control of Covil's affairs and liquidate its remaining assets. As part of that receivership proceeding, the Master-in-Equity for Greenville County, South Carolina judicially dissolved Covil, directed the receiver to publish a notice of Covil's dissolution, and found that the receiver had complied with all of the court's orders (including its direction to publish a notice of dissolution). This newly discovered evidence— [REDACTED]

[REDACTED] requires vacating the judgment against Covil under Rule 60(b)(2) and 60(b)(4).

STATEMENT OF THE CASE

1. This mesothelioma wrongful-death case is one of dozens brought by plaintiffs against Covil, an insulation-supply company that ceased operations in 1991 and was judicially dissolved in 1992. Plaintiff Ann Finch, on behalf of herself and her late husband, Franklin Delenor Finch, alleged that Mr. Finch was diagnosed with mesothelioma in 2016 as a result of breathing asbestos dust, which ultimately led to his death the following year. Plaintiff initially sued nineteen defendants, but proceeded to trial against Covil alone, pursuing negligence and failure-to-warn theories. After a five-day trial, a jury awarded Plaintiff \$32.7 million in compensatory damages. Covil appealed and the case is currently pending before the Fourth Circuit Court of Appeals. *See Finch v. Covil Corp.*, No. 19-1594 (4th Cir.).

Founded in 1947, Covil was an insulation supplier based in Greenville, South Carolina. ECF No. 497, at 107 (James Covil Testimony). Covil ceased operations in 1991 and, as the newly discovered evidence establishes, was judicially dissolved the following year. Nevertheless, plaintiffs continued to sue Covil throughout the 1990s and up to the present day, alleging that they were harmed by asbestos-containing insulation supplied by Covil. Most of these suits have been brought in South Carolina state court.

One month after the trial in this case, the Honorable Jean Hoefer Toal—the Retired Chief Justice of the Supreme Court of South Carolina presiding over South Carolina’s asbestos docket—appointed Peter D. Protopapas as Covil’s Receiver pursuant to S.C. Code Ann. § 15-65-10. *See* Order Appointing Receiver, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Ct. Com. Pl. (Richland County) Nov. 2, 2018). Since then, Mr. Protopapas has acted on behalf of Covil in all matters pending in state and federal court, including in this case.

2. Since Mr. Protopapas’s appointment in November 2018, lawyers representing and advising Zurich have diligently worked to secure a more comprehensive understanding of Covil’s history—particularly the nature of its dissolution in the early 1990s—by scouring South Carolina archives for documents relating to Covil. In September 2019, lawyers at Gibson, Dunn & Crutcher LLP (“Gibson Dunn”)—retained in connection with the asbestos-related litigation filed against Covil Corporation—learned that Mr. L. Winston Lee had served as the receiver for Covil in the early 1990s. *See* McCormac Decl. ¶ 5. Gibson Dunn immediately hired a court-research firm, Court Express, to search, on an

expedited basis, judicial records in Greenville County, South Carolina, for all documents associated with Mr. Lee's tenure as Covil's receiver. *See id.* ¶ 6.

On September 16, 2019, Court Express informed Gibson Dunn that it had found one relevant court order dated June 23, 1992, and captioned: *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445. McCormac Decl. ¶ 8. The court order referred to L. Winston Lee as receiver for Covil but did not provide any information regarding the nature of his appointment. *Id.* Gibson Dunn thereafter ordered a search of the entire case file for additional information on Covil or Mr. Lee. *Id.* ¶ 9. After weeks of searching, however, on October 16, 2019, Court Express informed Gibson Dunn that no other relevant documents existed. *Id.* ¶¶ 10–14. Court Express explained that the court records were “a mess.” *Id.* ¶ 15. Some files had been consolidated; others had been destroyed. *Id.* ¶ 13. According to Court Express, there would be no way to confirm if files specifically relating to Mr. Lee were removed or destroyed because the remaining dockets were not sufficiently descriptive. *Id.* ¶ 15.

Zurich wrote to Mr. Protopapas's counsel on October 31, 2019, explaining that

[REDACTED]

[REDACTED] See Letter from Peter H.

Dworjanyn to Paul A. Zevnik (Oct. 31, 2019) at 1 (attached as Ex. 1). Among other things,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Letter from Peter D. Protopapas to Peter H. Dworjanyn (Nov. 4, 2019)

at 1 (attached as Ex. 2). He stated that he [REDACTED]

[REDACTED] *Id.* Mr. Protopapas

also asserted that [REDACTED]

[REDACTED] *Id.* at 1–2. Mr. Protopapas

then reiterated that [REDACTED]

[REDACTED] *Id.* Mr. Protopapas also

represented to Zurich that [REDACTED]

[REDACTED] *Id.*

In January 2020, Zurich retained the firm of Turner Padget Graham & Laney, P.A. (“Turner Padget”) to represent it in Covil-related litigation. Mangum Decl. ¶ 2. Robert Mangum, an attorney at Turner Padget, and a member of Turner Padget’s staff travelled to the Greenville County Courthouse on March 11, 2020, to review Covil-related documents that the court had retrieved from storage. *Id.* ¶ 6. After requesting the full file from case No. 91-CP-23-4445, it became clear that the court had not placed the other documents pertaining to this case number in that file. *Id.* ¶ 6. In early April 2020, Turner Padget discovered a reference to Greenville County Judgment Roll No. 91-5988 in a document that was part of a voluminous production of files from Covil’s prior law firm, Gallivan, White, and Boyd, P.A. *Id.* ¶ 7. Turner Padget then coordinated with the courthouse to retrieve all documents related to that Judgment Roll. *Id.* ¶ 7.

3. On April 14, 2020, while searching through the microfilm court records contained within Judgment Roll No. 91-5988, Turner Padget discovered documents from the early 1990s demonstrating that Covil was judicially dissolved in 1992 during a prior

receivership. Mangum Decl. ¶ 8. The court records show that on October 11, 1991, the Greenville County Court of Common Pleas appointed a prior receiver, Mr. L. Winston Lee, to take control of Covil’s property. See Consent Order for Appointment of Receiver, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Oct. 11, 1991) (attached as Ex. 3). Mr. Lee was vested with “all of the usual and normal statutory powers and authority of a receiver,” and was directed “as rapidly as circumstances shall permit” to “proceed with the collection of accounts and marshaling of assets.” Amended Order for Appointment of Receiver 2–3, ¶ 2, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Nov. 27, 1991) (attached as Ex. 4); see also *id.* ¶¶ 1–2 (“Said Receivership shall cover all of the personal property of Covil Corporation” and “[t]he Receiver shall have complete and exclusive management and control of the real property of Covil Corporation”).

The Presiding Judge later referred the matter to the Master-in-Equity for Greenville County, South Carolina, granting him “full authority to enter final judgments and orders without further order of this Court.” Order of Reference 1, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) May 5, 1992) (attached as Ex. 5). The Master-in-Equity then expanded Mr. Lee’s appointment to that of “permanent Receiver of Covil Corporation . . . and all of [its] respective properties, including, but not limited to, all real and personal property, inventory, funds and deposits and accounts receivable, for the purpose of marshalling and liquidating such assets.” Order 1, ¶ 3, *The First Savings Bank, FSB v.*

Covil Corp., C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) May 12, 1992) (attached as Ex. 6). The Master-in-Equity also “judicially dissolved” Covil, effective as of May 12, 1992, and directed Mr. Lee to “publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina.”¹ *Id.* at 2, ¶ 1; 5, ¶ 9 (underlining in original). The Master-in-Equity then ordered that “[a]ll creditors and other persons are hereby restrained and enjoined pursuant to this Court’s power to grant injunctive relief . . . from instituting or prosecuting any action or proceeding against Covil Corporation.” *Id.* at 5–6, ¶ 11.

Six months later, the Master-in-Equity issued an Order stating: “I find that [the Receiver] has fully complied with the previous Orders of this Court in liquidating [Covil’s] assets.” Order 2, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Nov. 12, 1992) (attached as Ex. 7). The Master-in-Equity then issued his Final Order, approving “the abandonment by the Receiver of all remaining assets” of Covil and discharging Mr. Lee as receiver. Final Order 3, ¶¶ 7–8, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Dec. 7, 1992) (attached as Ex. 8).

¹ S.C. Code Ann. § 33-14-107 states that if a dissolved corporation publishes a notice of dissolution in a newspaper of general circulation in the county of the dissolved corporation’s last principal office, then unknown claims against the dissolved corporation are barred if not brought within a specified period of years. S.C. Code Ann. § 33-14-107(a)–(c).

Zurich immediately produced certified copies of all these orders to Mr. Protopapas as a supplemental discovery disclosure in *Zurich American Insurance Corp. v. Covil Corporation*, No. 1:18-CV-932 (M.D.N.C.), a declaratory-judgment insurance-coverage action also pending in this District. See Plaintiff’s Second Supplemental Disclosures, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C.) (Apr. 16, 2020).

After these new documents were discovered and provided to Mr. Protopapas, Zurich sent a letter to Mr. Protopapas [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 9. Despite his contractual obligation to cooperate with Zurich in Covil’s defense and his fiduciary obligations to Covil, [REDACTED]

[REDACTED]. Immediately thereafter, Zurich moved to intervene in this case for purposes of filing this Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b)(2) and 60(b)(4).

ARGUMENT

The judgment against Covil should be set aside under both Rule 60(b)(2) and Rule 60(b)(4).²

² This Court has jurisdiction to entertain this Rule 60(b) Motion even though its final judgment is currently pending on appeal. As the Fourth Circuit has explained, “when a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly.” *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (4th Cir. 1999). “If the district court is inclined to grant the motion, it should issue a short memorandum so stating,” and “[t]he movant can then request a limited remand from [the Fourth Circuit] for that purpose.” *Id.*; see also Fed. R. Civ. P. 62.1 (authorizing indicative rulings by a district court while a case is on appeal).

Federal Rule of Civil Procedure 60(b)(2) empowers district courts to relieve a party from a final judgment on the basis of “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” Just over two weeks ago, Zurich discovered evidence showing that: Covil was judicially dissolved by an order of the Greenville County Master-in-Equity in 1992; the Master-in-Equity appointed a permanent receiver for Covil, L. Winston Lee; the Master-in-Equity enjoined all persons from instituting or prosecuting any action against Covil except pursuant to that court’s order; the Master-in-Equity ordered that Covil’s receiver publish a newspaper notice of Covil’s dissolution; and the Master-in-Equity thereafter found that Covil’s receiver had fully complied with the court’s previous orders in liquidating the assets of Covil.

This newly discovered evidence—which, with reasonable diligence, could not have been discovered by Zurich any earlier and, indeed, [REDACTED] [REDACTED]—establishes that Plaintiff’s claims against Covil were foreclosed by South Carolina’s statutory bar on suits against dissolved corporations, S.C. Code Ann. § 33-14-107(c). The current version of Section 33-14-107(c)(3) bars claims “based on an event occurring after the effective date of the dissolution”—such as a subsequent medical diagnosis—if the claims are not filed within ten years of publication of the notice of dissolution. And, at the time of Covil’s dissolution, Section 33-14-107(c) gave claimants who were unknown to the dissolved corporation only five years after publication of the notice of dissolution in which to file suit. Either way, Plaintiff’s claims against Covil—which were based on Mr. Finch’s 2016 diagnosis of mesothelioma—were

barred because they were filed 24 years after the publication of Covil's notice of dissolution.

The judgment should also be set aside under Rule 60(b)(4). Because Covil is a judicially dissolved corporation that is shielded from Plaintiff's suit by South Carolina's dissolution statute, Plaintiff's claim was extinguished before it ever arose. Thus, there was no actual case or controversy that could give rise to subject-matter jurisdiction in this Court. The judgment is therefore void and should be vacated.

I. The Newly Discovered Evidence Demonstrates That Plaintiff's Claims Were Foreclosed By South Carolina's Statutory Bar On Claims Against Dissolved Corporations.

The newly discovered orders from Covil's dissolution proceedings nearly three decades ago demonstrate that South Carolina's dissolution statute barred Plaintiff's claims against Covil and that this Court lacked subject-matter jurisdiction over those claims.³

At the time of Covil's dissolution in 1992, South Carolina's statutory bar on claims against dissolved corporations provided that "[i]f the dissolved corporation publishes a newspaper notice" of its dissolution, then:

the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved

³ South Carolina law governs the extent to which causes of action survive and are capable of assertion against a South Carolina corporation following its dissolution, not the law where suit is filed. See *Daniel Grp. v. Serv. Performance Grp., Inc.*, 753 F. Supp. 2d 541, 547 (E.D.N.C. 2010) ("Whether there is such statutory 'promulgation' of corporate life in a particular case, so as to permit a 'partial continuation of the existence of a corporation after dissolution for purposes of a suit, is determinable by reference to the laws of the state of incorporation of the dissolved corporation.'") (quoting *Johnson v. RAC Corp.*, 491 F.2d 510, 511 n. 3 (4th Cir. 1974)).

corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice pursuant to Section 33-14-106;⁴

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.

S.C. Code Ann. § 33-14-107(c)(1)–(2) (1988).

In 2004, the South Carolina legislature amended Section 33-14-107(c) to expand the ability of litigants with claims that were not known to the corporation at the time of dissolution to bring suit against dissolved corporations. First, the amendment “increase[d] the time for enforcing the claim” from five years “to ten years after publication of notice of dissolution.” 2004 South Carolina Laws Act 221 (H.B. 4650) (ratified title) (capitalization altered); *see also* S.C. Code Ann. § 33-14-107(c) (“If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within *ten* years after the publication date of the newspaper notice” (emphasis added)). Second, the amendment made clear (even if not clear already) that the statute “provide[d] for a claim arising after dissolution,” which, until then, Section 33-14-107(c) had not expressly addressed. 2004 South Carolina Laws Act 221 (H.B. 4650) (ratified title) (capitalization altered); *see also* S.C. Code Ann. § 33-14-107(c)(3) (allowing “a claimant whose claim is contingent or based on an event

⁴ Section 33-14-106 governs known claims against dissolved corporations.

occurring after the effective date of the dissolution” to commence a proceeding against the dissolved corporation within ten years of the publication of the newspaper notice).

The newly discovered evidence establishes that Mr. Lee, Covil’s prior receiver, published a notice of Covil’s dissolution in 1992 that triggered the statutory bar on claims against Covil. On May 12, 1992, the Master-in-Equity directed Mr. Lee to “publish the Notice required by § 33-14-107.” Order 5, ¶ 9, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) May 12, 1992) (attached as Ex. 6). Six months later, the Master-in-Equity issued an Order “find[ing] that [the Receiver] has fully complied with the previous Orders of this Court in liquidating [Covil’s] assets.” Order 2, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Nov. 12, 1992) (“Nov. 12, 1992 Order”) (attached as Ex. 7). And the Master-in-Equity thereafter approved “the abandonment by the Receiver of all remaining assets” of Covil, finalized Covil’s dissolution, and discharged Mr. Lee as receiver. Final Order 3, ¶¶ 7–8, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Dec. 7, 1992) (attached as Ex. 8).

Exactly when and where that notice was published is not known. However, the Master-in-Equity’s orders conclusively establish that Mr. Lee published a notice of Covil’s dissolution no later than November 12, 1992, when the Master-in-Equity found that Mr. Lee “ha[d] fully complied with the previous Orders of this Court.” Nov. 12, 1992 Order at 2. That finding is controlling as a matter of South Carolina law. *See Long v. McMillan*, 86 S.E.2d 477, 482 (S.C. 1955) (the “records of a court cannot be impugned upon matters

within its jurisdiction, when offered in evidence, by counter evidence” (internal quotation marks omitted)).

In addition, South Carolina law presumes that receivers comply with court orders and with their fiduciary obligations. As the South Carolina Supreme Court has long held, a receiver is presumed to have complied with court orders because “the presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption.” *Whitcomb v. Manderville*, 73 S.E. 775, 777 (S.C. 1912) (internal quotation marks omitted); *see also, e.g., Womack v. State*, 507 S.E.2d 425, 428 (Ga. 1998) (noting “the presumption that the . . . receiver ha[s] faithfully discharged [his] duties”); *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 146 n.28 (Del. Ch. 2017) (“The Receiver shall be presumed to have acted in good faith, reasonably, and in compliance with his fiduciary duties.” (internal quotation marks omitted)). The November 12, 1992 Order here goes beyond the presumption accorded by law that a receiver has correctly performed his duties by judicially determining that Mr. Lee in fact did what he was ordered to do. Accordingly, both the Master-in-Equity’s findings and settled principles of South Carolina law establish that Mr. Lee published a notice of Covil’s dissolution.

The publication of the notice of dissolution in 1992 barred Plaintiff’s claims against Covil, which were not filed until 2016. The current version of Section 33-14-107(c) applies here because Plaintiff’s claims accrued after the enactment of the 2004 amendments to the statutory bar. *See, e.g., Bergstrom v. Palmetto Health All.*, 596 S.E.2d 42, 46–47 (S.C. 2004) (“In South Carolina, the law in effect at the time the cause of action accrued controls

the parties' legal relationships and rights.” (internal quotation marks omitted)); *see also Robinson v. Bridgestone/Firestone N. Am. Tire, LLC*, 703 S.E.2d 883, 886 (N.C. App. 2011) (amended statute of repose “applies to causes of action that accrue on or after th[e] [effective] date”). The current version of Section 33-14-107(c) bars “a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution” from filing suit more than ten years after publication of the notice of dissolution. S.C. Code Ann. § 33-14-107(c)(3). Because Plaintiff’s claims accrued in 2016 and she filed suit that same year, those claims are barred by the publication of Covil’s notice of dissolution 24 years earlier.

It is irrelevant that Covil published its notice of dissolution prior to the 2004 amendments that added Section 33-14-107(c)(3). There is nothing in the plain language of that provision that limits its application to companies that dissolve after its date of enactment. The broad and unequivocal language of Section 33-14-107(c)(3) provides a complete defense against liability to any “dissolved corporation [that] publishes a newspaper notice” of its dissolution and that is sued by a claimant more than ten years later “based on an event occurring after the effective date of the dissolution”—whether that dissolution took place before or after the 2004 amendments.

Plaintiff’s claims would also be barred under the version of Section 33-14-107(c) in force at the time of Covil’s dissolution in 1992. Under that version of Section 33-14-107(c), “claimant[s] who did not receive written notice pursuant to Section 33-14-106” were barred from filing suit against a dissolved corporation more than five years after publication of the notice dissolution. S.C. Code Ann. § 33-14-107(c)(1) (1988). Section

33-14-106 provides the procedure for a dissolved corporation to “notify its known claimants in writing of the dissolution at any time after its effective date.” *Id.* § 33-14-106(b). Because Plaintiff’s claim against Covil did not accrue until 2016, she did not have a known claim against the company in 1992 and therefore “did not receive written notice pursuant to Section 33-14-106.” *Id.* § 33-14-107(c)(1). Accordingly, she had only five years after the publication of Covil’s notice of dissolution in 1992 to file suit against the company.⁵

In sum, whether this case is governed by the version of Section 33-14-107 in force in 1992 or the version in force today, Plaintiff’s claims were foreclosed by South Carolina’s statutory bar on claims against dissolved corporations. As explained below, that statutory bar to suit requires setting aside the judgment under Rule 60(b)(2) and also means that the Court lacked subject-matter jurisdiction and entered a void judgment that must be set aside under Rule 60(b)(4).

⁵ The pre-2004 version of the statute barred claims whether they accrued before or after dissolution. It divided all claims into “known claims” subject to Section 106 and “unknown claims” subject to Section 107. Importantly, under Section 106(d), “‘claim’ does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.” The pre-2004 Section 107, however, contained no such exclusion; rather, it barred all “claimants who did not receive written notice under § 33-14-106.” Because Section 106 expressly excludes contingent and post-dissolution claims, a claimant with a contingent or post-dissolution claim necessarily did not receive notice under Section 106. Thus, the addition of subsection (c)(3) in 2004 was a clarification of existing law, and the plain meaning of the statutory text cannot be rendered ambiguous by the statute’s subsequent legislative history or by its annotations. *See Vaughn v. Bernhardt*, 547 S.E.2d 869, 870 (S.C. 2001) (“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning.”).

II. The Newly Discovered Evidence Constitutes Grounds To Set Aside The Judgment.

This Court should vacate its judgment because the newly discovered evidence regarding Covil's judicial dissolution satisfies the requirements of Rule 60(b)(2) and 60(b)(4) and makes clear that the judgment against Covil cannot stand.

A. To obtain relief under Rule 60(b)(2), the movant first must make the threshold showing that its "motion is timely, that [it] has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside." *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264 (4th Cir. 1993) (internal quotation marks omitted). Once this threshold showing has been met, relief under Rule 60(b)(2) is warranted if: "(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended." *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (internal quotation marks omitted). Here, every factor is satisfied.

Beginning with the threshold issues, this motion is timely. A motion under Rule 60(b)(2) is timely if it is made "within a reasonable time" and "no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1). This Court entered its final judgment

on May 1, 2019, *see* Final Amended Judgment, ECF No. 525 (May 1, 2019), and this Motion therefore was filed “no more than a year” later.⁶

This Motion was also filed “within a reasonable time.” The reasonableness of any delay is generally determined from the time that the movant discovered the grounds for the Rule 60(b) motion. *See Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984) (holding that a Rule 60(b) motion filed “eleven weeks after the” discovery of the grounds for the motion was “clearly within a reasonable time”). Here, after many months of diligent searching, Zurich’s counsel discovered the evidence from the prior receivership on April 14, 2020, and Zurich filed this Motion based on that newly discovered evidence within two-and-a-half weeks. Zurich therefore filed the Motion within a reasonable time.

Second, as explained above, the newly discovered evidence demonstrates that Covil should have prevailed in this suit. That evidence establishes that Covil’s prior receiver filed a notice of Covil’s dissolution in 1992 and that Plaintiff’s suit—which was filed 24 years after the publication of that notice—is thus barred under Section 33-14-107(c). *See Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir. 1987) (explaining that a showing that a party “cannot be held liable” is the quintessential “meritorious defense”);

⁶ Rule 60(c)(1)’s one-year deadline did not begin running until this Court issued the Final Amended Judgment on May 1, 2019. Covil had timely moved to amend the original Final Judgment pursuant to Rule 59(e), *see* ECF No. 495 (Nov. 16, 2018), which tolled the date of final judgment for the purposes of Rule 60, *see Int’l Ctr. for Tech. Assessment v. Leavitt*, 468 F. Supp. 2d 200, 206 (D.D.C. 2007) (holding that “a timely filed Rule 59(e) motion suspends the finality of a judgment” for purposes of Rule 60(b)); *see also Horowitz v. Fed. Ins. Co.*, No. 15-cv-1959, 2017 WL 5624789, at *1 (D. Md. Nov. 22, 2017) (calling the *Leavitt* ruling “logical and persuasive”), *aff’d*, 733 F. App’x 105 (4th Cir. 2018).

Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988) (a “meritorious defense requires a proffer of evidence which would permit a finding for the [moving party]”). Accordingly, the second threshold factor is satisfied.

Finally, vacatur under Rule 60(b) would not prejudice Plaintiff because her claims were barred from the outset of this case. As the Fourth Circuit has explained, “[o]ne cannot be prejudiced by the loss of that to which [s]he was not entitled.” *Compton v. Alton S.S. Co.*, 608 F.2d 96, 103 (4th Cir. 1979); *see also J & J Sports Prods., Inc. v. Argueta*, No. 1:12-CV-1329, 2013 WL 5960859, at *3 (M.D.N.C. Nov. 7, 2013) (“Nor can the plaintiff be said to be prejudiced by the vacation of his judgment for statutory penalty wages, to which he is not legally entitled.” (quoting *Compton*, 608 F.2d at 103)).

Additionally, all five of the Rule 60(b)(2) factors are met here. The evidence from Covil’s prior receivership was newly discovered after this Court’s “judgment was entered,” *Boryan*, 884 F.2d at 771—indeed, it was discovered only two-and-a-half weeks ago. Moreover, counsel for Zurich exercised due diligence to discover the new evidence. As described above, two separate law firms advising Zurich searched for months for relevant documents related to Covil’s prior receivership. *See supra* at pp. 3–5. The firms encountered court records that were “a mess,” destroyed, consolidated, or misfiled. *Id.* It was only through months of diligent searching that Zurich was able to unearth these documents, which were not available at the time of trial and which [REDACTED]. *Id.*; *see also Bain v. MJJ Prods., Inc.*, 751 F.3d 642, 647 (D.C. Cir. 2014) (“evidence that was lost, hidden, or unavailable during trial could qualify as ‘newly discovered evidence’ when later found”).

Zurich’s general awareness that Covil had dissolved in the 1990s does not call into question Zurich’s diligence. The court orders detailing the responsibilities of the prior receiver, requiring him to publish a notice of dissolution, finding that he had complied with the Master-in-Equity’s orders, and ordering the judicial dissolution of Covil were all previously unknown to Zurich. *See supra* at pp. 3–5. Yet, [REDACTED], Zurich continued to search exhaustively for that potential evidence until Zurich was ultimately successful on April 14, 2020. Zurich therefore demonstrated due diligence in continuing to search for these documents until they were discovered. *See United States v. Walus*, 616 F.2d 283, 303 (7th Cir. 1980) (holding that Rule 60(b)(2) relief was warranted in light of the new discovery of documents in a “State Archive”); *Fain v. USA Techs., Inc.*, 707 F. App’x 91, 99 (3d Cir. 2017) (suggesting that “public record searches” and “legal database searches” constitute due diligence).

Further, the new evidence of the prior receivership is “not merely cumulative or impeaching.” *Boryan*, 884 F.2d at 771. Until now, there has been no evidence that Covil was *judicially* dissolved. The record previously available to Zurich (and other parties) suggested only that Covil had been “*administratively* dissolved” under South Carolina law, *see* S.C. Code Ann. § 33-14-200 *et seq.*, a status that, while still allowing the corporation to bar future claims with newspaper notice (*id.* § 33-14-210(d)), potentially could allow the corporation to be reinstated “at any time” (*id.* § 33-14-220(a)). “Judicial dissolution,” however, cannot be undone. *Id.* § 33-14-330 (“judicial dissolution” statute: “After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation’s business and affairs”). The new evidence—which shows, conclusively,

that Covil was permanently dissolved as of 1992—serves as a complete bar to Plaintiff’s claims.

Moreover, until now, there has been no evidence that the publication of a notice of dissolution barred Plaintiff’s claims under Section 33-14-107(c). The court records establishing the prior receiver’s publication of the notice of dissolution are entirely new to these proceedings.

Finally, the new evidence is material and outcome-altering. Indeed, it would result in vacatur of the final judgment and dismissal of Plaintiff’s claims altogether. The newly discovered evidence from the prior receivership demonstrates that Covil was judicially dissolved in 1992, that its prior receiver complied with the Master-in-Equity’s directive to publish a notice of Covil’s dissolution, and that, as a result, Section 33-14-107(c) bars this suit against Covil. And for the same reason, as explained below, this new evidence makes clear that the Court lacked subject-matter jurisdiction over Plaintiff’s claims. If this newly discovered evidence had been available before trial, Plaintiff would have been barred from recovering a judgment against Covil. *See, e.g., Callow v. Riverview Marina, Inc.*, No. CIV 03-129-S-BLW, 2005 WL 8165404, at *6 (D. Idaho Sept. 15, 2005) (“the evidence would likely have changed the outcome of the case because the evidence has a direct bearing on . . . liability”); *Nehara v. California*, No. 1:10-CV-00491 JLT, 2013 WL 3968173, at *6 (E.D. Cal. July 31, 2013) (newly discovered evidence is outcome-changing if it “would have likely eliminated” damages award), *aff’d sub nom. Nehara v. Cal. Dep’t of Corr. & Rehab.*, 650 F. App’x 495 (9th Cir. 2016).

Accordingly, the newly discovered evidence requires vacatur of the final judgment under Rule 60(b)(2).

B. Vacatur is also warranted under Rule 60(b)(4), which empowers a court to relieve a party from a final judgment on the grounds that “the judgment is void.” As the Fourth Circuit has explained, “[a]n order is ‘void’ for purposes of Rule 60(b)(4)” if “there is no arguable basis” for the court to have exercised “subject matter jurisdiction.” *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005) (internal quotation marks omitted); *see also*, e.g., *Scott v. White*, 126 F. Supp. 3d 665, 679 (E.D. Va. 2014) (granting Rule 60(b)(4) motion because court lacked subject-matter jurisdiction over removed claim); *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 221 (D.D.C. 2012) (granting Rule 60(b)(4) motion and dismissing default judgment for lack of subject-matter jurisdiction because Iran did not waive its sovereign immunity under the FSIA); *Corsair Special Situations Fund, L.P. v. Engineered Framing Sys., Inc.*, No. 06-cv-2081, 2009 WL 10682046, at *2–3 (D. Md. Apr. 16, 2009) (granting Rule 60(b)(4) motion because court lacked jurisdiction to grant summary judgment following settlement that terminated the controversy between the parties).

Here, as the newly discovered evidence reveals, there was no basis for subject-matter jurisdiction over Plaintiff’s claim because Covil had been judicially dissolved and Section 33-14-107(c) extinguished Plaintiff’s claim before it ever arose.⁷ Because

⁷ Thus, the absence of subject matter jurisdiction in this case is not a function of Covil’s continued post-dissolution existence or capacity to sue or be sued. Instead, subject matter jurisdiction is lacking because of the nonexistence of a justiciable case or controversy in

Plaintiff's suit against Covil was expressly barred by South Carolina's dissolution statute, there was no case or controversy that could give rise to subject-matter jurisdiction in this Court. *See Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) ("federal court jurisdiction . . . extends only to actual cases or controversies" (internal quotation marks omitted)).

The absence of subject-matter jurisdiction is confirmed by the fact that Section 33-14-107(c) bears the hallmarks of, and has been described as, a "statute of repose," S.C. Code Ann. § 33-14-107, Reporters' Comments—*i.e.*, a provision that creates "a substantive right in those protected to be free from liability after a legislatively determined period of time," *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 628 S.E.2d 38, 41 (S.C. 2006). There are numerous decisions holding that "a statute of repose" acts "jurisdictionally to bar untimely suits." *Nat'l Credit Union Admin. Bd. v. Barclays Capital Inc.*, 785 F.3d 387, 394 (10th Cir. 2015); *see also, e.g., Gilbert v. Synagro Cent., LLC*, 131 A.3d 1, 15 (Pa. 2015) ("generally, statutes of repose are jurisdictional"); *Trudel v. SunTrust Bank*, 288 F. Supp. 3d 239, 250 (D.D.C. 2018) (noting that, under Florida state law, "a statute of repose is an absolute jurisdictional bar to a tardily filed claim" (internal quotation marks omitted)).

Because Section 33-14-107(c) extinguished any actual case or controversy between Plaintiff and Covil—and operates as a jurisdictional statute of repose that provides dissolved corporations with a substantive right to be free from liability—this Court's judgment in favor of Plaintiff is void and should be set aside under Rule 60(b)(4).

this action, because Plaintiff's claim became barred by Section 33-14-107(c) prior to its accrual, and thus never arose.

CONCLUSION

The Court should vacate the final judgment against Covil under Federal Rule of Civil Procedure 60(b)(2) and 60(b)(4).

Respectfully submitted this 1st day of May, 2020.

**ZURICH AMERICAN INSURANCE COMPANY, by
TEAGUE CAMPBELL DENNIS & GORHAM, LLP**

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*Attorneys for Intervenor Zurich American
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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing **MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)(2) AND 60(b)(4)** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all known counsel of record.

TEAGUE CAMPBELL DENNIS & GORHAM, LLP

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), I certify that the body of this brief, including headings and footnotes but excluding the caption, signature lines, certificates, and any cover pages or indices, does not exceed 6,243 words.

Date: May 1, 2020

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EXHIBIT 1

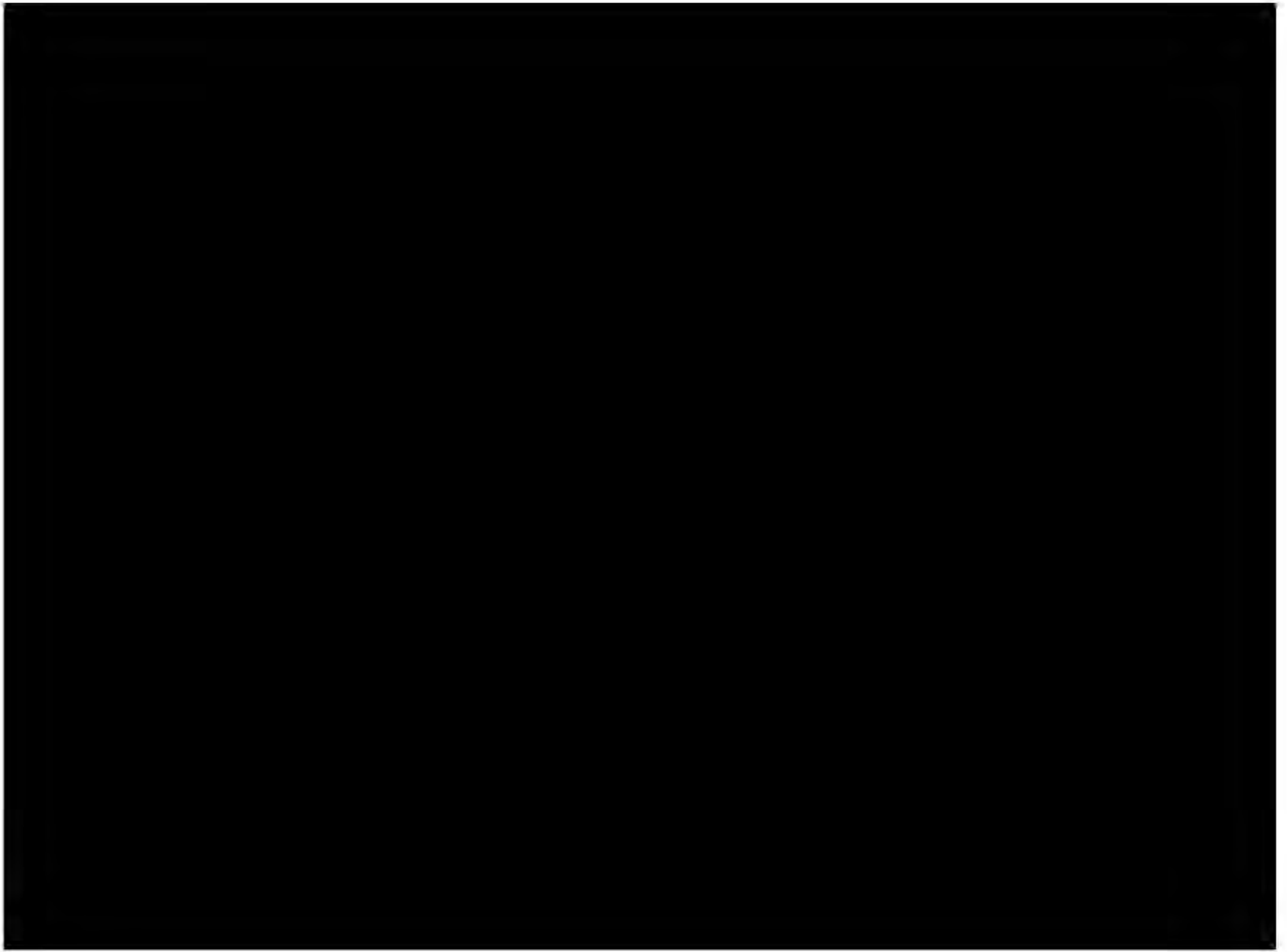
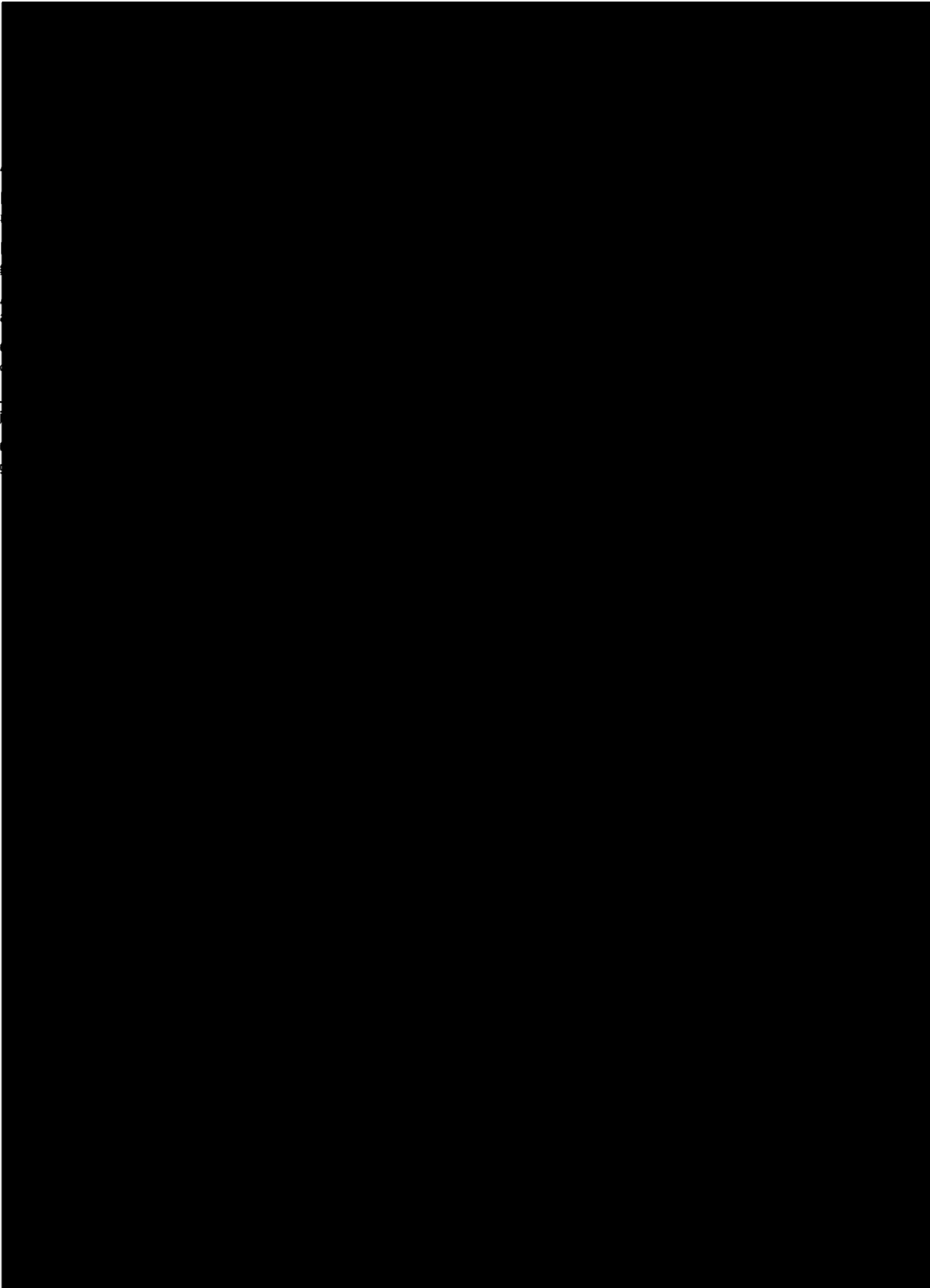


EXHIBIT 2



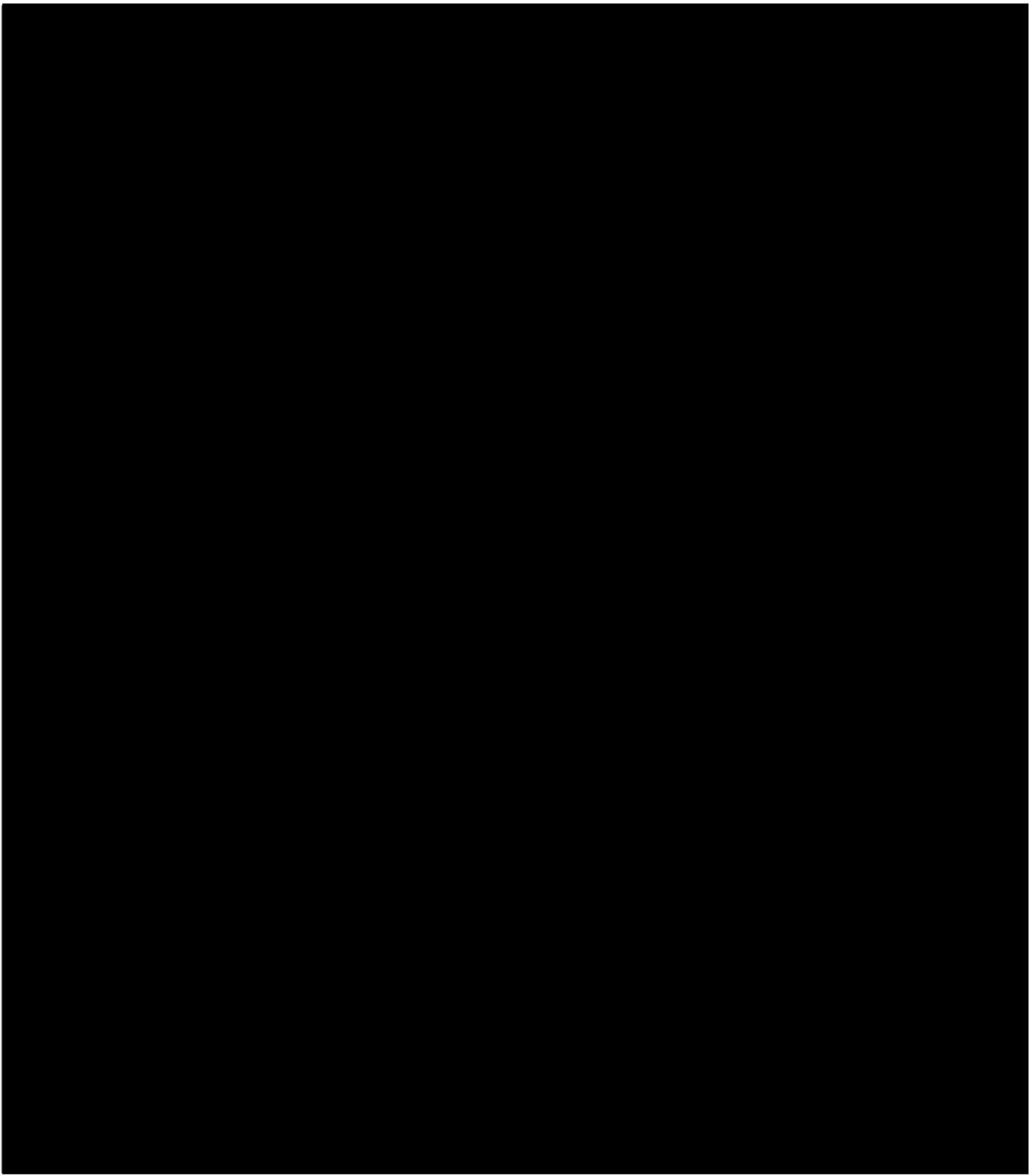


EXHIBIT 3

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

The First Savings Bank,
F.S.B.,
Plaintiff,

v.

Covil Corporation,
Oxytherm, Inc., and
Equitable Enterprises, a
South Carolina general
partnership,

Defendants.

CONSENT ORDER
FOR APPOINTMENT OF RECEIVER

C.A. No.: 91-CP-23-4445

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COURT

ENTERED COMPUTER

This matter comes before me upon motion of Arthur L. Howson, Jr., attorney for the plaintiff. It appears that the defendants are indebted to the plaintiff ("The First") by virtue of the following instruments:

a. Commercial Note from Covil Corporation ("Covil") to the plaintiff, dated October 17, 1988, in an original amount of Eight Hundred Eighty-six Thousand Nine Hundred Eighty-one and 00/100 (\$886,981.00) Dollars, modified by that certain Commercial Loan Modification Agreement between the parties dated March 28, 1991. ("First Covil Note");

b. Commercial Note executed by Covil to The First dated December 21, 1990, in an original amount of One Hundred Seventy-five Thousand and 00/100 (\$175,000.00) Dollars, ("Second Covil Note");

c. Commercial Note executed by Oxytherm, Inc. ("Oxytherm") to The First dated April 5, 1990, in an original

amount of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars,
("Oxytherm Note");

d. Commercial Note executed by Equitable Enterprises to
The First dated February 27, 1989, in an original amount of Three
Hundred Thousand and 00/100 (\$300,000.00) Dollars, modified by that
certain Commercial Loan Modification Agreement between the parties
dated March 28, 1991 ("Equitable Enterprises Note"); and

WHEREAS, payment of the First Covil Note and Second Covil
Note is secured by a security interest granted by Covil to the
First in all of the equipment, inventory, and accounts receivable
of Covil ("Covil Personal Property"); and

WHEREAS, payment of the First Covil Note is also secured
by that certain Commercial Mortgage executed by Covil to the First
dated October 17, 1988, recorded October 18, 1988 in Mortgage Book
with 1967 of page 265 in the RMC office for Greenville County,
which mortgage covers that certain real property more particularly
described in Exhibit A, attached hereto and incorporated herein by
reference ("Covil Real Property"); and

WHEREAS, payment of the Oxytherm Note is secured by a
security interest granted by Oxytherm to The First in all of the
equipment, inventory, and accounts receivable of Oxytherm
("Oxytherm"); and

WHEREAS, payment of the Equitable Enterprises Note is
secured by a Commercial Mortgage executed by Equitable Enterprises
to The First dated December 13, 1988, recorded December 21, 1988
Mortgage Book 1979 at page 380 in the RMC office for Greenville

County, covering that certain real property more particularly described in Exhibit B, attached hereto and incorporated herein by reference ("Equitable Enterprises Real Property"); and

WHEREAS, The First Covil Note, Second Covil Note, Oxytherm Note, and Equitable Enterprises Note are all in default, and Covil, Oxytherm, and Equitable Enterprises have agreed to surrender the collateral to The First for liquidation and payment to The First of the net proceeds of the sale thereof; and

WHEREAS, the parties hereto have agreed that to assure the orderly liquidation of the collateral and the security thereof pending liquidation, the property should be placed in the control of a receiver,

NOW, THEREFORE, upon motion of Arthur L. Howson Jr., attorney for The First, by and with the consent of James H. Cassidy, attorney for Covil, Oxytherm, and Equitable Enterprises, it is

ORDERED, ADJUDGED AND DECREED:

1. That L. Winston Lee be appointed as receiver of the Covil Personal Property and Oxytherm Personal Property to take and have complete and exclusive management and control of said property. Said receiver may sell said property at public or private sale, pursuant to the security interests of The First in said property and the South Carolina Uniform Commercial Code. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper for the preservation of said property; provided, however, that in the event the receiver

deems it necessary, he may expend up to One Thousand and 00/100 (\$1,000.00) Dollars for extraordinary expenses, provided he has the prior written consent of the plaintiff or the court.

2. That L. Winston Lee be appointed as receiver of the Covil Real Property and Equitable Enterprises Real Property, to take and have complete and exclusive management and control of said property. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper for the operation and preservation of said real properties; provided, however, that in the event the receiver deems it necessary, he may expend up to One Thousand and 00/100 (\$1,000.00) Dollars for extraordinary expenses, provided he has the prior written consent of the plaintiff or the court.

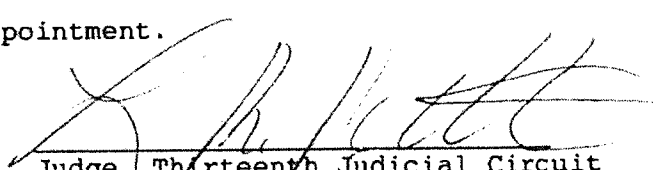
3. From funds received from the sale of the Covil Personal Property and Oxytherm Personal Property the receiver shall pay all costs and expenses of the receivership including, but not limited to the receiver's fee as receiver and the cost and expense of the bond hereinafter required, and the net funds shall be paid to The First for application to the debts to The First of Covil, Oxytherm, and Equitable Enterprises, as applicable.

4. The plaintiff shall file a cash bond with the Office of the Clerk of Court for Greenville County in the amount of Five Hundred and 00/100 (\$500.00) Dollars.

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5. The plaintiff and the receiver shall provide a full and complete accounting to this court of all sums collected by the receiver from the date of appointment.

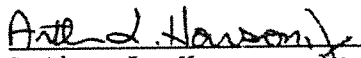
IT IS SO ORDERED.


Judge, Thirteenth Judicial Circuit

Greenville, SC

October 11, 1991

I SO MOVE:


Arthur L. Howson, Jr.

Attorney for the Plaintiff

I CONSENT:

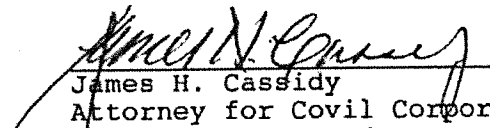

James H. Cassidy
Attorney for Covil Corporation
Oxytherm, Inc. and
Equitable Enterprises

EXHIBIT 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

The First Savings Bank,
F.S.B.,

Plaintiff,

v.

Covil Corporation,
Oxytherm, Inc., and
Equitable Enterprises, a
South Carolina general
partnership,

Defendants.

AMENDED ORDER FOR
APPOINTMENT OF RECEIVER

C.A. No.: 91-CP-23-4445
Judgment Roll No. 91-5988

Dec 4 9 57 AM '91

This matter comes before me upon motion of the parties for amendment of that certain Consent Order for Appointment of Receiver filed in this Court on October 14, 1991.

It appears and I find that the relief sought by the Plaintiff is in accord with the law and should be granted. It further appears and I find that by and through the consent of counsel for the defendants that they have agreed and consented to the relief as hereinafter ordered, and thereby waived hearing.

It further appears and I find that this court has exclusive jurisdiction and venue of this matter pursuant to Section 15-65-10 et. seq. of the South Carolina Code of Laws, 1976, as amended.

It further appears and I find that L. Winston Lee is a United States Federal Bankruptcy Trustee who has served this Court many times as a Receiver, and this Court takes judicial notice that he is fully qualified to act as Receiver in this matter.



Based on the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED:

(1) That L. Winston Lee become and he hereby is, appointed Receiver of the defendants Covil Corporation, Oxytherm, Inc., and Equitable Enterprises, a South Carolina general partnership. Said Receivership shall cover all of the personal property of Covil Corporation and Oxytherm, Inc. including, but not limited to equipment, inventory, accounts receivable, furniture, fixtures, funds and deposits. The Receivership shall also apply to the real property of Covil Corporation more particularly described in Exhibit A, attached hereto and incorporated herein by reference, and the real property of Equitable Enterprises, more particularly described in Exhibit B, attached hereto and incorporated hereto by reference.

(2) That the Receiver shall have all of the usual and normal statutory powers and authority of a receiver, including, not limited to those set forth in Section 15-65-10, et. seq. of the South Carolina Code of Laws, 1976, as amended, and he shall, as rapidly as circumstances shall permit, proceed with the collection of accounts and marshaling of assets, and the orderly liquidation of the personal property of Covil Corporation and Oxytherm, Inc., with said Receiver to have the full discretion and authority to sell the personal property in any commercially reasonable manner, at such prices as he finds attainable, including, but not limited to full authority to sell goods in bulk and/or auction, and, in this regard, the Receiver is authorized and directed, pursuant to

Section 40-6-20(3) of the South Carolina Code of Laws, 1976, as amended, to himself conduct any auction he may deem necessary or appropriate without the services of a licensed auctioneer to liquidate the personal property. The Receiver shall have complete and exclusive management and control of the real property of Covil Corporation and Equitable Enterprises, subject to the right of the Plaintiff to foreclose said real property pursuant to any mortgages it owns on said real property. The Receiver shall not be authorized to compromise and/or settle any claims of the defendants against any of their debtors without the consent of secured creditors. The Receiver shall be, and he hereby is, further authorized without further Order of this Court, to incur and pay such reasonable expenses as may be necessary in carrying out his duties as herein described, including, but not limited to the expense of the premium for any bond now or hereafter ordered, the cost of litigation, including the cost of labor, including sales and/or other employees, and attorneys' and accountants' fees, with all such expenses and costs to be regarded as an expense of the receivership which shall be a preferred lien on the assets coming into the Receiver's hands, and shall be paid together with the Receiver's fee as hereinafter set forth, as a first priority before any other claims or creditors.

(3) The defendants and all of their officers, directors, employees, representatives, agents, and all other persons, upon presentation of a certified copy of this Order, shall deliver to the Receiver all records, property, and assets of the defendants

of every kind and nature whatsoever, which may be in their possession or under their control.

(4) That upon presentation of a certified copy of this Order, all banking institutions shall turn over and deliver to the Receiver all bank accounts and funds held by them in the account, or for the benefit of, the defendants, and they shall further turn over to the Receiver any and all banking or other records pertaining to any account whatsoever, opened or closed, individually or jointly, in the name of the defendants.

(5) The Receiver is fully authorized to receive, open and act upon all mail received at the defendants' addresses and to divert the same to such addresses as he may determine to be necessary. The Receiver shall notify all the defendants' claimants known to him of the foregoing receivership.

(6) The Receiver's fee shall be Seven and one-half (7.5%) percent of all monies received by him as Receiver, or One Thousand Five Hundred and 00/100 (\$1,500.00) Dollars, whichever is greater, and the Receiver is hereby authorized from time to time to disburse from the Receivership funds said Receivership fees and any costs and/or expenses and/or incurred by him hereunder, to himself and/or those retained or employed by him hereunder without further Order of this Court, provided, however, that he shall clearly set forth in his final accounting all such fees and costs so disbursed.

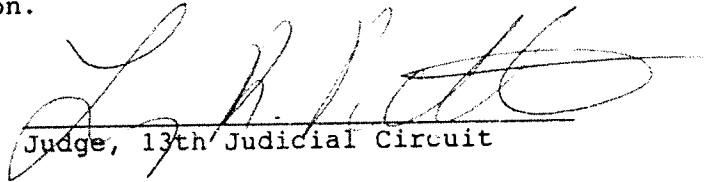
(7) The Receiver is hereby required to post a bond in the amount of Five Thousand and 00/100 (\$5,000.00) immediately upon

receiving sufficient Receivership funds to pay the premium for same, and said bond shall be filed with the Clerk of Court for Greenville County.

(8) All law enforcement agencies of this State shall render unto the Receiver whatever assistance he may require to carry out the Order of this Court and to prevent a breach of the peace.

(9) Upon final liquidation of the personal property of the defendants, the Receiver shall submit an accounting to this Court and petition for authority to make final disbursement of the proceeds from such liquidation.

IT IS SO ORDERED.


Judge, 13th Judicial Circuit

Greenville, SC

November 22, 1991

"EXHIBIT A"

TRACT 1

ALL that certain piece, parcel or tract of land located to the south of Sulphur Springs Road in Greenville County, South Carolina, being shown and designated as a 2.76 acre tract on revised plat of Berea Industrial Park Area by Carolina Engineering & Surveying Co., dated May 3, 1960 and revised November 19, 1965 and recorded on December 17, 1965 in Plat Book LLL at Page 71, RMC Office for Greenville County, South Carolina, and having, according to said plat, the following metes and bounds, to-wit:

BEGINNING at a point on the eastern side of Duke Power Company right-of-way, which point is approximately 646.95 feet south of Sulphur Springs Road, and running thence N. 89-09 E., 452.0 feet to a point in the line of property now or formerly owned by the E. E. Dorr Estate; thence with said property line S. 0-59 E., 324.7 feet to a point; thence S. 89-20 W., 364.45 feet to a point on the eastern side of Duke Power Company right-of-way; thence with the eastern side of said right-of-way N. 15-46 W., 341.45 feet to the point of beginning.

TRACT 2

ALL that certain piece, parcel or strip of land situate, lying and being in the County of Greenville, State of South Carolina and shown and designated as a strip of land on the southern boundary of Tract 1, said strip being approximately 15 feet in width, and having the following metes and bounds, according to the plat referred to in Tract 1, to-wit:

BEGINNING at the southeastern corner of the 2.76 acre tract described above in the line of property now or formerly owned by E. E. Dorr Estate and running thence with the line of said Dorr Estate Property S. 0-59 E., 15 feet to a point in the line of property now or formerly owned by Union Bleachery; thence with the line of said Union Bleachery property S. 89-20 W., 360.5 feet to a point on the eastern right-of-way of Duke Power Company thence with the Power Company right-of-way N. 15-46 W. 15.4 feet to a point at the southwestern corner of the 2.76 acre tract now owned by G & C Realty Company; thence with the line of said 2.76 acre tract, N. 89-20 E., 364.45 feet to the point of beginning.

TRACT 3

ALL that certain piece, parcel or strip of and, situate, lying and being on the southern side of Pinsley Circle in the County of Greenville, State of South Carolina, and shown and designated as a strip of land on the northeastern boundary of

Tract 1, said strip being 10 feet in width and 98 feet in length, and having the following metes and bounds according to the plat referred to in Tract 1. to-wit:

BEGINNING at a point at the northeastern corner of Tract 1 described herein and running thence with the northern boundary line of Tract 1 S. 89-09 W., 98 feet to a point; thence turning and running N. 0-59 W., 10 feet to a point on the southern right-of-way of Pinsley Circle; thence with the southern right-of-way of Pinsley Circle N. 89-09 E., 98 feet to a point; thence turning and leaving Pinsley Circle and running S. 0-59 E., 10 feet to the point of beginning.

This is the same property conveyed to the Mortgagor herein by General Warranty Deed dated February 28, 1988 and recorded in the Greenville County RMC Office in Deed Book 1207 at Page 160.

EXHIBIT B

All that certain piece, parcel or tract of land, with any and all improvements thereon, lying, being and situate in Greenville County, South Carolina, containing 8.02 acres, more or less, and being shown on a plat entitled "Composite Plat for Equitable Enterprises" by Webb Surveying & Mapping Group, dated March, 1988, recorded in Plat Book 15-F at Page 75 in the RMC Office for Greenville County, and having such courses and distances, metes and bounds as will be shown by reference to said plat, which plat is incorporated herein by reference.

LESS, HOWEVER, All that certain piece, parcel or tract of land, containing 1.23 acres, more or less, lying, being and situate on the southern side of White Horse Road, in Greenville County, South Carolina, having according to a survey for Equitable Enterprises by Webb Surveying & Mapping Group, dated July, 1991, the following metes and bounds, to-wit:

BEGINNING at an iron pin on the southern side of the right-of-way of White Horse Road at the corner of property now or formerly of Stone and Stone Associates, which iron pin is approximately 901 feet east of the intersection thereof with Dixie Circle, and running thence along the southern side of the right-of-way of White Horse Road S. 77-10 E. 133.79 feet to an iron pin; thence continuing with said right-of-way S. 77-02 E. 46.63 feet to an iron pin; thence S. 13-30 W. 305.04 feet to an iron pin; thence N. 75-32 W. 172.72 feet to an iron pin; thence along property now or formerly of Stone and Stone Associates N. 12-00 E. 300 feet to an iron pin, the point of beginning.

EXHIBIT 5

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

The First Savings Bank, FSB,
Plaintiff,

vs.

Covil Corporation, Oxytherm, Inc.
and Equitable Enterprises, a South
Carolina General Partnership,
Defendants.

ENTERED COMPUTER

ORDER OF REFERENCE

91-CP-23-4445

FILE # 2484

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CLERK
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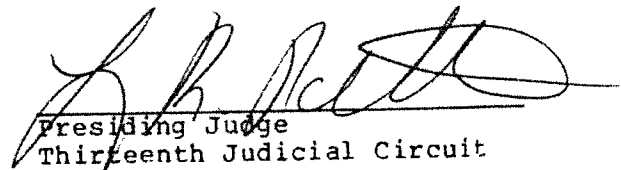
It appears and I find that all issues in this case require continued judicial supervision of the liquidation of the property of Covil Corporation and Oxytherm, Inc. for which L. Winton Lee was appointed Receiver by Order of this Court dated October 11, 1991 and, based upon the foregoing, and pursuant to Rule 53(b) of the Rules of Practice for the Circuit Courts for the State of South Carolina, and upon Motion of Counsel for the Receiver and with the consent of Counsel for the Plaintiff and the Defendants affixed to the foot of this Order,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above matter be, and the same hereby is, referred to the Honorable Charles B. Simmons, Jr., Master-In-Equity for Greenville County, South Carolina for the purposes of filing and hearing all matters, taking any necessary testimony and receiving any evidence, and determining all issues of law and fact, with full authority to enter final judgments and orders without further order of this Court. *Any appeal from the Master's Order shall be directly to the SC. Supreme Court.*

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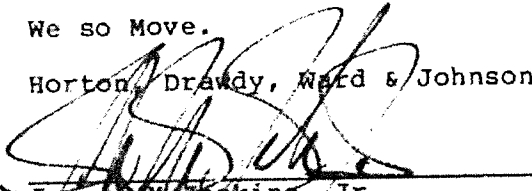
DEPOSIT MADE
MASTER IN EQUITY
GREENVILLE COUNTY
AMT. \$100 DATE 4/24/92
50

IT IS SO ORDERED this 5 day of ^{May} April, 1992.


Presiding Judge
Thirteenth Judicial Circuit

We so Move.

Horton, Drawdy, Ward & Johnson


Joseph H. Jenkins, Jr.
307 Pettigru Street
Greenville, SC 29603
Attorney for L. Winston Lee,
Receiver

I consent.


Arthur L. Housen, Jr.
Attorney for the Plaintiff

We consent.

Love, Thornton, Arnold & Thomason

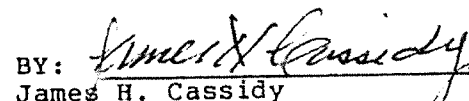
BY: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants

EXHIBIT 6

STATE OF SOUTH CAROLINA)
) EXEMPLIFIED COPY OF RECORD
COUNTY OF GREENVILLE)

I, Paul B. Wickensimer, Clerk of the Court of Common Pleas, General Sessions and Family Courts in and for the County of Greenville, State of South Carolina, having by law the custody of the seal and all the records, books, documents and papers of, or appertaining to said Court, do hereby certify that the foregoing papers are true copies of papers appertaining to said Court, and on file or of record in the office of said Court, all of which we have caused by these presents to be exemplified, and the seal of our said Court to be hereunto affixed.

In Witness Whereof, I have hereunto set my hand and affixed the official Seal of said Court, on the 16th day of February April, 2020.

Paul B. Wickensimer

Paul B. Wickensimer
Clerk of the Court of Common Pleas,
General Sessions and Family Courts,
for Greenville County, South Carolina

I, Letitia Vendin Judge of the Thirteenth Judicial Circuit in and for the County of Greenville, State of South Carolina, do hereby certify that Paul B. Wickensimer, whose signature is subscribed to the preceding exemplification, is the Clerk of said Court of Common Pleas, General Sessions and Family Courts of the County of Greenville, State of South Carolina, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Courts, and that the attestation is in due form, and according to the form of attestation used in this State.

Dated at Greenville, South Carolina, this 16th day of April, 2020.

[Signature]

Judge of the Thirteenth Judicial Circuit Court
for Greenville County, South Carolina

I, Paul B. Wickensimer, Clerk of the Court of Common Pleas, General Sessions, and Family Courts in and for the County of Greenville, State of South Carolina, do hereby certify that HONORABLE Paul B. Wickensimer whose name is subscribed to the preceding certificate, is the presiding Judge of said Court, duly elected, sworn and qualified, and that the signature of said Judge to said certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the official Seal of said Court, on the 16th day of April, 2020.

Paul B. Wickensimer

Paul B. Wickensimer
Clerk of the Court of Common Pleas,
General Sessions and Family Courts,
for Greenville County, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS

The First Savings Bank, FSB,
Plaintiff,

vs.

Covil Corporation, Oxytherm, Inc.
and Equitable Enterprises, a South
Carolina General Partnership,
Defendants.

ORDER

91-CP-23-4445

CBS
#1

This matter was referred to my by Order of the Honorable Larry R. Patterson for the purpose of filing and hearing matters, taking any necessary testimony and receiving any evidence and determining all issues of law and fact with full authority to enter final judgment and orders without further order of the Circuit Court.

This matter now comes before me pursuant to the Motion of the Receiver for the relief as herein after recited.

It appears and I find that L. Winston Lee is the duly appointed Receiver of the property of Covil Corporation and Oxytherm, Inc. The Receiver now seeks to have his appointment responsibility and authority broadened to that of a general receiver for Covil Corporation and Oxytherm, Inc. At the request of the Defendants, he also requests that these two corporations be judicially dissolved. It appears and I find that this appointment as a general receiver is necessary just and proper for the

purpose of liquidating the assets of Covil Corporation and Oxytherm, Inc. and that the judicial dissolution of these two corporations is appropriate. Based upon the foregoing, and with the consent of Counsel for the above named Plaintiff and Defendants, it is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That Covil Corporation and Oxytherm, Inc. be, and the same hereby are decreed to be judicially dissolved effective as of the date of the filing of this Order, and the Clerk of this Court is hereby directed to deliver a certified copy of this decree to the South Carolina Secretary of State, and the Secretary of State is hereby directed to file this decree without charge.

2. That the continued dissolution of Covil Corporation and Oxytherm, Inc. shall be continued under this Court's supervision.

OS #2
3. That L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation and Oxytherm, Inc. and all of their respective properties including, but not limited to, all real and personal property, inventory, funds and deposits and accounts receivable, for the purpose of marshalling and liquidating such assets.

4. That the Receiver shall have all of the usual and normal statutory powers and authority of a Receiver, including, but not limited to, those set forth in §§ 33-14-105 and 33-14-320 of the Code of Laws of the State of South Carolina, 1976 as amended, and

he shall, as rapidly as circumstances shall permit, proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation and Oxytherm, Inc., with said Receiver to have the full discretion and authority to sell the corporate assets thereof in any commercially reasonable manner, at such price(s) as he finds attainable, including, but not limited to, full authority to sell goods in bulk and/or auction and in this regard, the Receiver is authorized and directed, pursuant to § 40-6-20(3) of the Code of Laws of the State of South Carolina, 1976 as amended, to himself conduct any auction he may deem necessary or appropriate without the services of a licensed auctioneer. The Receiver shall be, and he hereby is, authorized to compromise and/or settle any claim(s) of Covil Corporation and/or Oxytherm, Inc. against any of their respective creditors, without further order of this Court. The Receiver shall be, and he hereby is, further authorized without further order of this Court to incur and pay such reasonable expenses as may be necessary in carrying out his duties as herein described, including, but not limited to, the expense of the premium for any bond now or hereafter ordered, the cost of litigation, including the cost of labor, including sales and/or other employees, and attorney's and accountant's fees, with all such expenses and costs to be regarded as an expense of the Receivership which shall be a preferred lien on the assets coming into the Receiver's hands, and shall be paid together with the receiver's fee as hereinafter set forth, as a first priority before any other claims of creditors.

5. The Receiver is hereby authorized to abandon any of the property of Covil Corporation and/or Oxytherm, Inc. which he, in his sole discretion, shall deem burdensome and without value. However, the records of any employee's representatives, customers or clients (hereinafter collectively referred to "Customers") of Covil Corporation and/or Oxytherm, Inc. which the Receiver in his sole discretion shall deem to be of a confidential nature, shall not be disposed of until the receiver has given thirty (30) days written notice to such Customers that they may make claim to such records. Upon receiving any such claim, the Receiver shall turn over such records to each claiming customer, and all such records not claimed by any such customer shall be disposed of in such manner as the Receiver, in his sole discretion, deems appropriate under the circumstances.

CS
#4

6. Covil Corporation and Oxytherm, Inc. and their respective officers, directors, employees, representatives, agents and all other persons upon presentation of a certified copy of this Order shall deliver to the Receiver all records property and assets of said corporations of every kind and nature whatsoever which may be in their possession and/or their control.

7. That upon presentation of a certified copy of this Order, all banking institutions shall turn over and deliver to the Receiver all bank accounts and funds held by them in the account, or for the benefit of, Covil Corporation and/or Oxytherm, Inc. and they shall further turn over to the Receiver any and all banking or other records pertaining to any account whatsoever, opened or closed, indi-

vidually or jointly, in the name of said Corporations.

8. The Receiver is fully authorized to receive, open and act upon all mail received at the addresses of Covil Corporation and/or Oxytherm, Inc. and to divert same to such address or adreses as he may determine necessary.

9. To the extent not already accomplished, the Receiver shall provide the claimants of Covil Corporation and/or Oxytherm, Inc. known to him with the Notice as required by § 33-14-106 of the Code of Laws of the State of South Carolina, 1976 as amended. In addition to the foregoing, and to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina, 1976 as amended.

CS
#5

10. As to any claim filed by a claimant of Covil Corporation or Oxytherm, Inc., the Receiver shall reject any claim which he deems unjustified. If the Receiver rejects in whole or in part a claim filed pursuant to the requirements hereunder, the Receiver shall mail notice of the rejection to the creditor whose claim has been rejected, setting forth in such notice the amount of the claim so rejected. This notice shall further state the "Effective Date" of the rejection and advise the claimant that a proceeding to enforce the claim must be commenced within ninety (90) days of the Effective Date. A claim against the Petitioner shall be barred if the claimant whose claim was rejected by the Receiver does not commence a proceeding to enforce the claim within ninety (90) from the Effective Date.

11. All creditors and other persons are hereby restrained and enjoined pursuant to this Court's power to grant injunctive relief as set forth in § 33-13-310 of the Code of Laws of the State of South

Carolina, 1976 as amended, from instituting or prosecuting any action or proceeding against Covil Corporation and/or Oxytherm, Inc. other than as set forth in this Order or from levying upon, attaching, distraining, or selling, or attempting to levy upon, attach, distrain or sell any of the property of Covil Corporation and/or Oxytherm, Inc.

12. The Receiver's fee shall be seven and a half percent (7.5%) of all monies received by him as Receiver provided, however, should the Receiver sell the real estate owned by Covil Corporation within this Receivership proceeding, then in such event the Receiver's fee shall be three percent (3%) of all monies received by him as Receiver, and the Receiver is hereby authorized from time to time to disburse from the receivership funds said receivership fees and any costs and/or expenses advanced and/or incurred by him hereunder, to himself and/or those retained or employed by him hereunder without further order of this Court, provided, however, that he shall clearly set forth in his final accounting all such fees and costs so disbursed.

CB
#6

13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

14. All law enforcement agencies of this state shall render unto this Court's duly appointed Receiver, L. Winston Lee, whatsoever assistance he may require to carry out the order of this Court, and to prevent a breach of the peace.

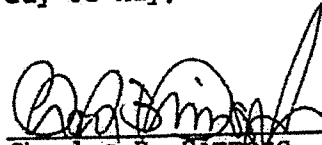
15. That upon liquidation of Covil Corporation and Oxytherm, Inc., the Receiver shall submit an accounting to this Court

Greenville County, SC

Dated _____

and petition for authority to make final disbursement of the proceeds from such liquidation.

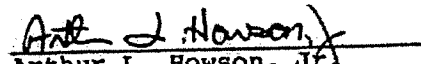
IT IS SO ORDERED this 11 day of May, 1992.


Charles B. Simmons, Jr.
Master-In-Equity
I Consent.

We so move.

HORTON, DRAWBY, WARD & JOHNSON


Joseph M. Jenkins, Jr.
307 Pettigru Street
Greenville, SC 29603
Attorney for the Receiver


Arthur L. Howson, Jr.
Attorney for the Plaintiff
We Consent.

Love, Thornton, Arnold & Thomason

By: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants.

A Certified Copy

Clerk of Court C.P. & G.S.
Greenville County, SC
Dated April 16, 2002

EXHIBIT 7

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN RE:

The First Savings Bank,
FSB,

Plaintiff,

vs.

Covil Corporation,
Oxytherm, Inc. and Equitable
Enterprises, a South Carolina
General Partnership,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. NO. 91-CP-23-4445

) JR# 91-5988

) ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
CAROLINE W. MATOS
NOV 12 8 52 AM '92

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#1
TO ALL CLAIMANTS AGAINST THE ABOVE-NAMED DEFENDANTS:

Pursuant to the Orders of Receivership filed in this matter, L. Winston Lee was appointed Receiver for the purposes as recited therein and, pursuant to the Order of Reference filed in this matter, this case was referred to the Master-in-Equity for Greenville County, South Carolina for the purposes set forth in said Order, including authority to enter a final Judgment in the cause.

The Receiver has now filed a Petition wherein he has made his final report and seeks the following relief:

A. That this Court approve the Receiver Accounting attached hereto as Exhibit A including all disbursements heretofore made by the Receiver.

B. That this Court authorize the payment of the Receivership fees and costs and attorneys' fees and costs as set forth in Exhibit A. The Receiver has reserved the right to seek additional attorneys' fees and costs should further hearings and proceedings be required in this matter.

C. That this Court authorize the Receiver to pay four thousand five hundred dollars (\$4,500.00) to Environmental Protection Associates, Inc. for the removal of hazardous materials unknowingly sold by him at public auction to Shelnutt Heating & Air Conditioning Company, Inc.

D. That, as set forth in Exhibit A, the Receiver be authorized to pay all other

Receivership funds to First Savings Bank, FSB in accordance with its priority claims and also any such additional funds, less a 3 percent (3%) Receivership fee, received by the Receiver between October 30, 1992 and his discharge as Receiver in this proceeding.

E. That this Court authorize the Receiver to assign all accounts receivable of any of the above-named Defendants to First Bank in accordance with First Bank's priority claim.

F. That the Receiver be authorized to abandon all remaining assets of the Defendants and to otherwise dispose of the books and records of the Defendants held by him subject to any claims for same by their respective shareholders and partners and the Internal Revenue Service.

G. That the Receiver be automatically discharged when he has made all disbursements as authorized by this Court.

From the foregoing Petition of the Receiver, it appears and I find that he has fully complied with the previous Orders of this Court in liquidating the assets of the his Defendants, that his accounting is in order and that the relief sought by him should be approved.

BASED UPON THE FOREGOING, IT IS ORDERED AS FOLLOWS:

1. The Receiver is hereby ordered to serve, by First Class Mail, a copy of this Order upon all Claimants whose names and addresses are known to the Receiver.

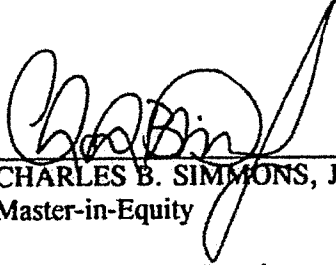
2. All Claimants are hereby ordered to file any Objections they may have to the above-referenced relief sought by the Receiver both with this Court and the Receiver. All Objections must be filed with and received by this Court and the Receiver on or before the 27th day of November, 1992 at the addresses listed below. All such Objections shall be in writing and bear the above caption and shall set forth the reasons for the Objections citing applicable statutes, rules and controlling law.

3. In the event any Objections to the relief sought by the Receiver are filed with this Court and the Receiver, a hearing shall be scheduled and noticed to all Claimants filing Objection. In the event no such objections are filed by the date hereinabove set forth, this Court shall, without further notice or hearing, enter its Final Order granting the relief sought by the Receiver.

IT IS SO ORDERED.

Greenville, S.C.
November 11, 1992

Honorable Charles B. Simmons, Jr.
Master-in-Equity
Greenville County Courthouse
Suite 207
Greenville, South Carolina 29601



CHARLES B. SIMMONS, JR.
Master-in-Equity

L. Winston Lee, Receiver
10 Brookside Circle
Greenville, SC 29609

A Certified Copy
Paul B. Wickerman
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated April 16, 2020

EXHIBIT A
RECEIVER'S ACCOUNTING
COVIL CORPORATION

Receipts:

Sale of Real Estate	\$562,500.00
Auction Proceeds	26,755.27
New York life Cash Surrender Values	80,209.24
Accounts Receivable	13,245.88
Bank Accounts	141.51
Utility Deposit Refunds	618.92
Interest through 10/30/92	906.88
Total Receipts	684,377.70

<u>Disbursements:</u>	<u>Disbursed</u>	<u>Proposed Disbursements</u>	<u>Total</u>
S.C. Tax Commission	\$76.00		\$76.00
1991 County Taxes	11,434.63		11,434.63
1992 Prorated Co. Taxes	5,955.00		5,955.00
Attorney Fees	5,563.00	\$4,912.50	10,475.50
Attorney Costs		100.00	100.00
Recording Fees	19.00		19.00
Deed Stamps	2,081.25		2,081.25
Duke Power Company	2,724.20		2,724.20
Greenville Water System	265.90		265.90
Accountant's Fees	800.00		800.00
IRS 1991 940 Forms	18.72		18.72
W-2 Forms	22.54		22.54
Payroll Clerk	565.00		565.00
Incinerator Disposal Charge	500.00		500.00
Mini Warehouse Charge	540.00		540.00
Receiver Fees	16,875.00	3,656.33	20,531.33
Receiver Expense		1,576.50	1,576.50
Environmental Protection Agy.		4,500.00	4,500.00
First Savings Bank	520,496.12	101,696.01	622,392.13
Total Disbursements:			684,377.70

RECEIVER'S ACCOUNTING

OXYTHERM, INC.

Receipts:	
Auction Proceeds	\$8,915.13
Accounts Receivable	1,369.50
Bank Account	10,309.47
Life Ins. Premium Refund	626.00
New York Life Cash Surrender Value	8,975.51
Total Receipts	30,195.61

Proposed Disbursements:	
Receiver Fees	\$905.87
Attorney's Fees	237.50
First Savings Bank	29,052.24
Total Proposed Disbursements	30,195.61

(B)

RECEIVER'S ACCOUNTING

EQUITABLE ENTERPRISES

Receipts:	
Bank Account	3,143.80
Total Receipts	3,143.80

Proposed Disbursements:	
Receiver's Fee	94.31
Attorney's Fee	312.50
First Savings Bank, FSB	2,736.99
Total Disbursements	3,143.80

EXHIBIT 8

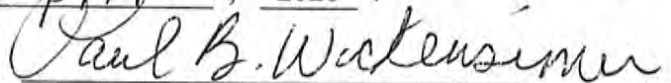
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

) EXEMPLIFIED COPY OF RECORD
)

I, Paul B. Wickensimer, Clerk of the Court of Common Pleas, General Sessions and Family Courts in and for the County of Greenville, State of South Carolina, having by law the custody of the seal and all the records, books, documents and papers of, or appertaining to said Court, do hereby certify that the foregoing papers are true copies of papers appertaining to said Court, and on file or of record in the office of said Court, all of which we have caused by these presents to be exemplified, and the seal of our said Court to be hereunto affixed.

In Witness Whereof, I have hereunto set my hand and affixed the official Seal of said Court, on the 16th day of April, 2020.



Paul B. Wickensimer
Clerk of the Court of Common Pleas,
General Sessions and Family Courts,
for Greenville County, South Carolina

I, Letitia H. Verdin Judge of the Thirteenth Judicial Circuit in and for the County of Greenville, State of South Carolina, do hereby certify that Paul B. Wickensimer, whose signature is subscribed to the preceding exemplification, is the Clerk of said Court of Common Pleas, General Sessions and Family Courts of the County of Greenville, State of South Carolina, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Courts, and that the attestation is in due form, and according to the form of attestation used in this State.

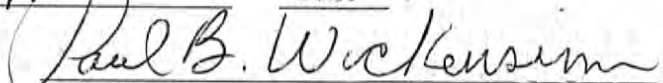
Dated at Greenville, South Carolina, this 16th day of April, 2020.



Judge of the Thirteenth Judicial Circuit Court
for Greenville County, South Carolina

I, Paul B. Wickensimer, Clerk of the Court of Common Pleas, General Sessions, and Family Courts in and for the County of Greenville, State of South Carolina, do hereby certify that HONORABLE Paul B. Wickensimer whose name is subscribed to the preceding certificate, is the presiding Judge of said Court, duly elected, sworn and qualified, and that the signature of said Judge to said certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the official Seal of said Court, on the 16th day of April, 2020.



Paul B. Wickensimer
Clerk of the Court of Common Pleas,
General Sessions and Family Courts,
for Greenville County, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN RE:

The First Savings Bank,
FSB,

Plaintiff,

vs.

Covil Corporation,
Oxytherm, Inc. and Equitable
Enterprises, a South Carolina
General Partnership,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. NO. 91-CP-23-4445

FINAL ORDER

Dec 7 4 29 PM '92

FILED-CLERK OF COURT
GREENVILLE, S.C.
RECEIVED BY MAIL



Pursuant to the Orders of Receivership filed in this matter, L. Winston Lee was appointed Receiver for the purposes as recited therein and pursuant to the Order of reference likewise filed in this matter, this case was referred to the Master-in-Equity for Greenville County, South Carolina for the purposes set forth in said Order, including authority to enter a final Judgment in the cause.

This matter is now before this Court pursuant to the Petition of the Receiver for final relief and in accordance with the Order issued in this case on November 11, 1992 and filed on November 12, 1992.

As more fully appears in the Affidavit of the Receiver filed in this case, all Claimants of the above Defendants whose names and addresses were known to the Receiver were served with a copy of the aforesaid Order of October 11, 1992 and no such Claimants have objected

in accordance with the terms of said Order to the relief sought by the Receiver in his Petition.

Based upon the foregoing, the Petition of the Receiver and the exhibits attached thereto, and the aforesaid Orders previously issued in this matter, it appears and I find that the final relief sought by the Receiver should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

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#2
1. That the Receivership accounting attached hereto as Exhibit A, including all previous disbursements made by the Receiver as recited therein, be and the same hereby are approved.
 2. That the Receiver be, and he hereby is authorized to pay the Receivership fees and costs as set forth on Exhibit A.
 3. That the Receiver be, and he hereby is authorized to pay the attorneys's fees and costs as set forth in Exhibit A.
 4. That the Receiver be, and he hereby is authorized to accept the proposal of Environmental Protection Associates as set forth on Exhibit B attached to his Petition, to pay the four thousand five hundred dollar (\$4,500.00) fee relating thereto from Covil Receivership assets, and to assign his rights under said proposal to Shelnutt Heating & Air Conditioning Company, Inc. provided Shelnutt Heating & Air Conditioning Company, Inc. enters into the release and assignment as set forth on Exhibit C attached to the Receiver's Petition.
 5. That the Receiver be, and he hereby is authorized to pay all remaining Receivership funds as set forth in Exhibit A over to First Savings Bank, FSB and also any

and all such additional funds he shall have received between October 30, 1992 and the date of such disbursement less, however, a 3% Receivership fee which the Receiver is authorized to pay from such additional funds to himself.

6. That the Receiver be, and he hereby is authorized to execute the assignment attached to his Petition as Exhibit D whereby all accounts receivable of any of the above-named Defendants shall be assigned to First Savings Bank, FSB.

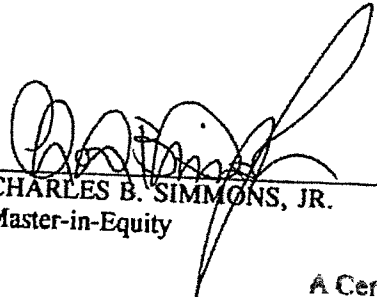
7. That the abandonment by the Receiver of all remaining assets of the above-named Defendants is hereby approved, and the Receiver is otherwise authorized to return any books and records of any of the Defendants held by him to the shareholders and/or partners of the Defendants upon written demand for same provided, however, that if said books and records are not so demanded and picked up from the Receiver by said shareholders or partners or their authorized representatives within 30 days of the date of this Order, the Receiver is authorized to destroy said books and records at such time or times, and in such fashion or fashions as he, in his sole discretion, deems most advisable under the circumstances, provided further, however, should the Internal Revenue Service object to such disposal, the Receiver is hereby authorized to turn over all such books and records to the Internal Revenue Service as may be requested by it.

8. That upon the Receiver filing with this Court his Affidavit that he has made all of the foregoing disbursements and that all checks have cleared and the Receivership bank accounts have a zero (0) balance, he shall be automatically discharged as Receiver in this matter. Provided, however notwithstanding the foregoing, should any such check not be negotiated by the drawee thereof within 90 days after the date of same, the Receiver is

hereby authorized to recite such circumstances in his foregoing Affidavit to be filed with this Court and upon filing such Affidavit with such additional circumstances described therein, he shall likewise be automatically discharged and in accordance with the provisions of *Title 27, Chapter 18 of the Code of Laws of the State of South Carolina, 1976 as amended*, L. Winston Lee then acting as Agent of this Court, shall hold open the Receivership account from which said check was issued, the funds therein being deemed to be intangible property held for the owner by this Court in accordance with §27-18-140 of the *Code of Laws of the State of South Carolina, 1976 as amended*, with L. Winston Lee as Agent of this Court being authorized to dispose of said funds in accordance with the provisions of *Title 27, Chapter 18 of the Code of Laws of the State of South Carolina, 1976 as amended*.

IT IS SO ORDERED.

Greenville, S.C.
November 30, 1992


CHARLES B. SIMMONS, JR.
Master-in-Equity

A Certified Copy
Paul B. Winkler
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated April 16, 2020

EXHIBIT A

RECEIVER'S ACCOUNTING
COVIL CORPORATION**Receipts:**

Sale of Real Estate	\$562,500.00
Auction Proceeds	26,755.27
New York life Cash Surrender Values	80,209.24
Accounts Receivable	13,245.88
Bank Accounts	141.51
Utility Deposit Refunds	618.92
Interest through 10/30/92	906.88
Total Receipts	684,377.70

Disbursements:	Disbursed	Proposed Disbursements	Total
S.C. Tax Commission	\$76.00		\$76.00
1991 County Taxes	11,434.63		11,434.63
1992 Prorated Co. Taxes	5,955.00		5,955.00
Attorney Fees	5,563.00	\$4,912.50	10,475.50
Attorney Costs		100.00	100.00
Recording Fees	19.00		19.00
Deed Stamps	2,081.25		2,081.25
Duke Power Company	2,724.20		2,724.20
Greenville Water System	265.90		265.90
Accountant's Fees	800.00		800.00
IRS 1991 940 Forms	18.72		18.72
W-2 Forms	22.54		22.54
Payroll Clerk	565.00		565.00
Incinerator Disposal Charge	500.00		500.00
Mini Warehouse Charge	540.00		540.00
Receiver Fees	16,875.00	3,656.33	20,531.33
Receiver Expense		1,576.50	1,576.50
Environmental Protection Agy.		4,500.00	4,500.00
First Savings Bank	520,496.12	101,696.01	622,392.13
Total Disbursements:			684,377.70

RECEIVER'S ACCOUNTING**OXYTHERM, INC.****Receipts:**

Auction Proceeds	\$8,915.13
Accounts Receivable	1,369.50
Bank Account	10,309.47
Life Ins. Premium Refund	626.00
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Proposed Disbursements:

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Attorney's Fees	237.50
First Savings Bank	29,052.24
Total Proposed Disbursements	30,195.61

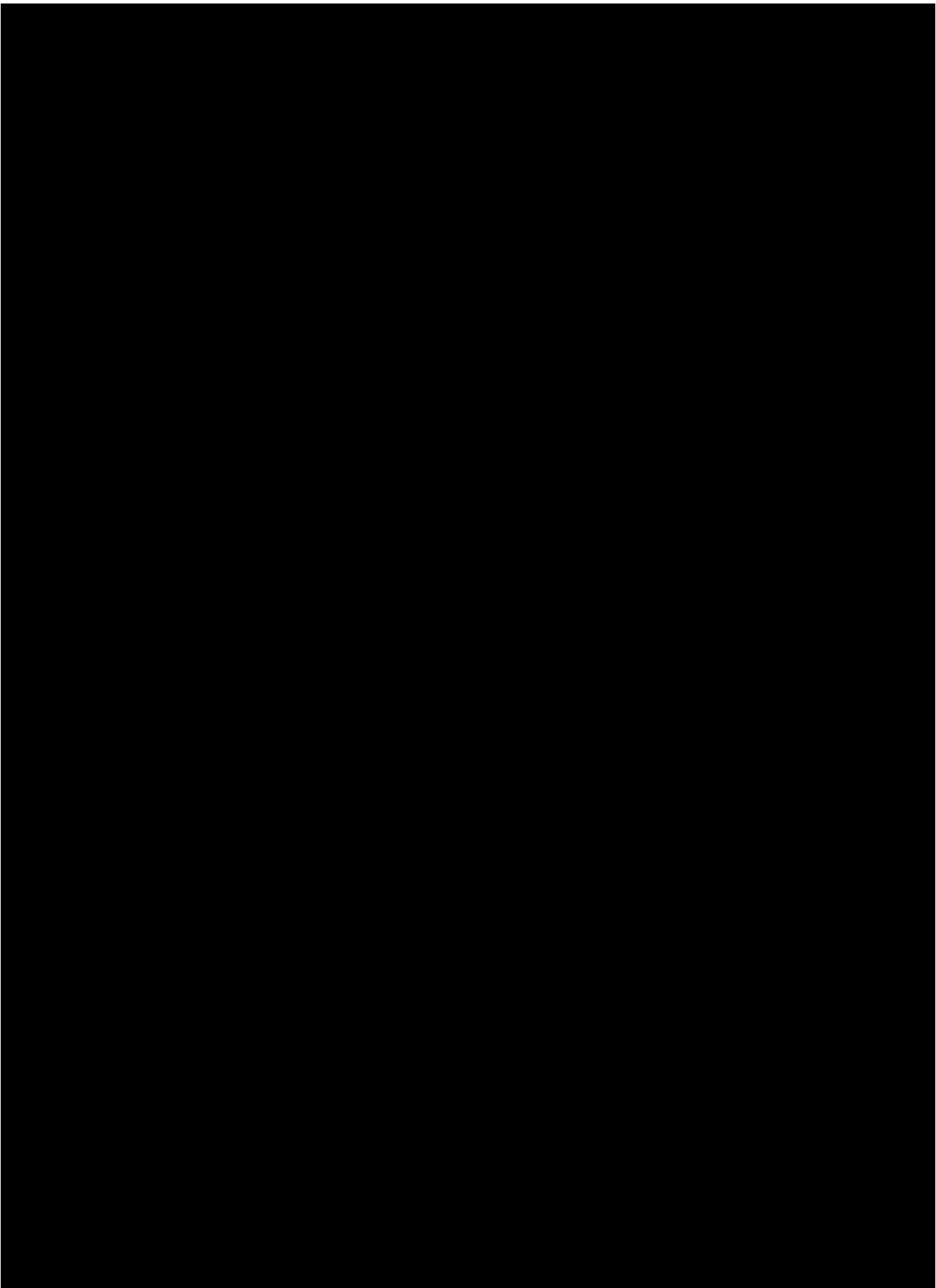
RECEIVER'S ACCOUNTING**EQUITABLE ENTERPRISES****Receipts:**

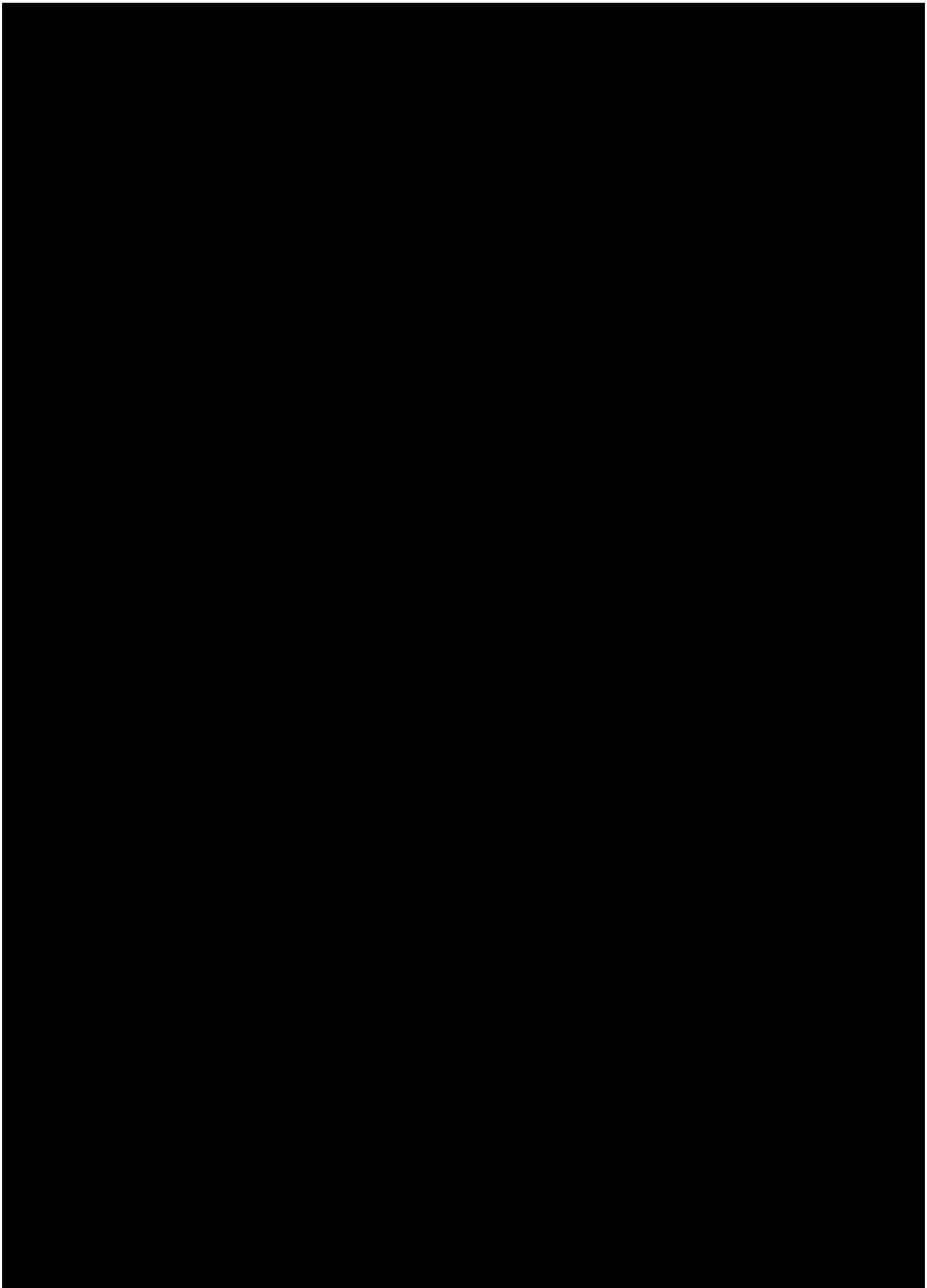
Bank Account	3,143.80
Total Receipts	3,143.80

Proposed Disbursements:

Receiver's Fee	94.31
Attorney's Fee	312.50
First Savings Bank, FSB	2,736.99
Total Disbursements	3,143.80

EXHIBIT 9





DECLARATIONS

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:16-CV-01077**

ANN FINCH, Individually, and as
Executrix of the Estate of Franklin
Delenor Finch,

Plaintiff,

v.

COVIL CORPORATION,

Defendant.

**DECLARATION OF
ROBERT P. MANGUM**

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. My name is Robert P. Mangum, and I am an associate attorney at the Law Firm of Turner, Padgett, Graham and Laney, P.A. ("TPGL"), licensed to practice law in South Carolina and Georgia.

2. TPGL was first engaged to represent Zurich American Insurance Company ("Zurich") in January 2020 in connection with certain matters pertaining to Covil Corporation ("Covil"). The firm's engagement involves appearing as counsel of record in cases pending in South Carolina State and Federal courts in which Zurich is a named party.

3. Since early in TPGL's engagement, attorneys and staff employed by the firm have devoted considerable time to searching for records related to the prior receivership of Covil. I am informed and believe that at the time of our engagement, the only court record provided to TPGL relating to this prior receivership was an Order of the Master-In-Equity of Greenville County South Carolina in Civil Action number 91-CP-23-4445 dated June 23, 1992, which states that L. Winston Lee had been appointed Receiver for Covil. (Attached as Exhibit 1). I am further informed and believe that others had attempted to find the related orders and other materials related to the prior receivership to no avail.

4. I was requested by other TPGL lawyers on or about March 3, 2020 to conduct an additional search for any documents related to the prior receivership. I was assisted in this effort by members of the TPGL administrative staff.

5. With the assistance of the administrative staff, we were able to compile a list of known cases in Greenville County involving Covil and requested all of those case files be made available for our review by the Greenville County Clerk of Court. Due to the age of the files, only physical file materials were maintained, and they had been stored by the Clerk's office in offsite storage.

6. On March 11, 2020, assisted by a member of TPGL staff, I personally reviewed the documents made available to us by the Greenville County Clerk of Court. In our review of 12-15 physical files, we were unable to find any relevant documents other than the Order of June 23, 1992 (of which we had been previously aware), and in a later review of physical files and microfilm by staff confirmed that the Order of June 23, 1992 was the only relevant document found in the Clerk's file for civil action number 91-CP-23-4445. Subsequent review of additional files (physical and microfilm) revealed no additional relevant documents.

7. I am informed and believe that in March and April 2020, a large volume of old case files from Gallivan, White, and Boyd, P.A., the attorneys previously representing Covil, were made available for copying and inspection ("GWB production"). On or about April 7, 2020, several documents from the GWB production were identified that contained information potentially relevant to the prior receivership for Covil. One of these documents referenced Greenville County Judgment Roll No. 91-5988. I directed TPGL staff to request this judgment roll record from the Greenville County Clerk of Court.

8. On April 14, I was informed that this staff member had reviewed microfilm records contained in this Judgment Roll and discovered, for the first time, a large number of previously unknown documents. Several of those documents are attached as exhibits to the Rule 60(b) Motion.

9. I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 30th day of April 2020.


Robert P. Mangum

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CASE NUMBER: 1:16-CV-01077**

ANN FINCH, Individually, and as
Executrix of the Estate of Franklin
Delenor Finch,

Plaintiff,

v.

COVIL CORPORATION,

Defendant.

**DECLARATION OF THOMAS J.
MCCORMAC IN SUPPORT OF
INTERVENOR ZURICH AMERICAN
INSURANCE COMPANY’S MOTION
FOR RELIEF FROM JUDGMENT
UNDER RULE 60(b)(2) AND 60(b)(4)**

1. I, Thomas J. McCormac, declare and state as follows.

2. I am an attorney at the law firm of Gibson, Dunn & Crutcher LLP (“Gibson Dunn”).

I am part of a Gibson Dunn team that was retained in connection with asbestos-related litigation filed against Covil Corporation (“Covil”).

3. I am admitted to practice law in the Commonwealth of Pennsylvania and the District of Columbia.

4. I respectfully submit this declaration in support of the Motion for Relief from Judgment under Rule 60(b)(2) and 60(b)(4) filed by Zurich American Insurance Company (“Zurich”).

5. On September 10, 2019, Gibson Dunn learned of a 1994 internal memorandum from the Maryland Insurance Group that made reference to a receiver for Covil named L. Winston Lee. On information and belief, that memorandum was located by Zurich personnel in connection with obtaining and preparing historical claim file information and documents for production in court proceedings.

6. On September 13, 2019, Gibson Dunn contracted with a court research firm, Thompson Reuters Court Express (“Court Express”), to search—on an expedited basis—court

records in Greenville County, South Carolina, for all documents associated with Mr. Lee's service as Covil's receiver.

7. Also on September 13, 2019, Court Express informed Gibson Dunn that potentially relevant records from the early 1990s were in storage, which would delay the search.

8. On September 16, 2019, Court Express informed Gibson Dunn that it had found one relevant court order dated June 23, 1992, and captioned: *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445. The court order referred to L. Winston Lee as receiver for Covil but did not provide any additional information about his appointment and tenure as receiver.

9. That same day, Gibson Dunn directed Court Express to search for any pleading or order in Case No. 91-CP-23-4445 that referred to Mr. Lee.

10. On September 18, 2019, Court Express informed Gibson Dunn that the file for Case No. 91-CP-23-4445 and the cases referred to therein did not contain information about Mr. Lee's appointment or removal as receiver. Court Express speculated that Mr. Lee may have been appointed in an earlier case. Gibson Dunn asked Court Express to review relevant case files that were earlier in time than Case No. 91-CP-23-4445 to find the case in which Mr. Lee was appointed receiver of Covil.

11. After a delay due to the court's retrieval of additional files from storage, Court Express resumed its search. On September 24, 2019, Court Express informed Gibson Dunn that it was unable to find any additional relevant cases or documents, though it still had some files to search. Court Express also noted that some case files appeared to have been consolidated while others appeared to be only partial files.

12. On September 27, 2019, additional files arrived from storage, but Court Express still did not find any relevant documents.

13. On October 2, 2019, Court Express informed Gibson Dunn that it had learned that a number of the potentially relevant case files had been destroyed or consolidated with previous case files that Court Express had already reviewed.

14. On October 16, 2019, Court Express informed Gibson Dunn that it was able to search the remaining potentially relevant case files in storage, but its researcher found nothing related to Mr. Lee. Court Express reiterated the disorganized nature of the files.

15. Also on October 16, 2019, Court Express explained that its researcher on the ground in South Carolina said that most of the files were “a mess.” Accordingly, if there was documentation pertaining to Mr. Lee that had been removed from a case file or destroyed, Court Express said there would be no way to confirm that fact because the dockets are not sufficiently descriptive.

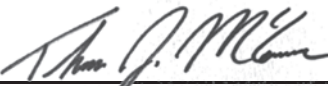
16. Shortly thereafter, Gibson Dunn concluded that there were no relevant court documents pertaining to Mr. Lee’s receivership in the Greenville County court records.

17. Based on my involvement with the search described above, I have personal knowledge of the matters stated herein, and, if called as a witness, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 30, 2020

BY:



Thomas J. McCormac

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No.: 7:18-cv-3291-BHH

COVIL CORPORATION, by its duly
appointed Receiver, Peter D. Protopapas,

Plaintiff,

vs.

ZURICH AMERICAN INSURANCE
COMPANY; 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; FIRST STATE
INSURANCE COMPANY; TIMOTHY W.
HOWE, Personal Representative of Wayne
Erwin Howe; JEANNETTE HOWE; JERRY
CRAWFORD; DENVER TAYLOR and
JANICE TAYLOR; and JAMES COLEMAN
SIZEMORE, Personal Representative of
James Calvin Sizemore,

Defendants.

**ZURICH AMERICAN INSURANCE
COMPANY’S MEMORANDUM
OF LAW IN SUPPORT OF ITS
MOTION FOR LEAVE TO AMEND
AND SUPPLEMENT PLEADINGS**

Defendant Zurich American Insurance Company (“Zurich”) has moved pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure for leave to amend and supplement its Answer [ECF 37] to assert a counterclaim against Plaintiff. For the reasons set forth herein, the Motion should be granted. A proposed Amended Answer and Counterclaim is attached hereto as **Exhibit A.**

INTRODUCTION AND BACKGROUND

The Motion for Leave to Amend and Supplement Zurich’s Answer arises out of the discovery of evidence and the subsequent responsive actions of the Receiver for Plaintiff Covil Corporation (“Receiver”).

Since Mr. Protopapas’ appointment as Receiver in November 2018, lawyers representing and advising Zurich have diligently worked to secure a more comprehensive understanding of Covil Corporation’s (“Covil”) history—particularly the nature of its dissolution in the early 1990s—by scouring South Carolina archives for documents relating to Covil. In September 2019, lawyers at Gibson, Dunn & Crutcher LLP (“Gibson Dunn”)—retained in connection with the asbestos-related litigation filed against Covil Corporation—learned that Mr. L. Winston Lee had served as the receiver for Covil in the early 1990s. *See Exhibit B*, McCormac Decl. ¶ 5. Gibson Dunn immediately hired a court-research firm, Court Express, to search, on an expedited basis, judicial records in Greenville County, South Carolina, for all documents associated with Mr. Lee’s tenure as Covil’s receiver. *See id.* ¶ 6.

On September 16, 2019, Court Express informed Gibson Dunn that it had found one relevant court order dated June 23, 1992, and captioned: *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445. McCormac Decl. ¶ 8. The court order referred to L. Winston Lee as receiver for Covil but did not provide any information regarding the nature of his appointment. *Id.* Gibson Dunn thereafter ordered a search of the entire case file for additional information on Covil or Mr. Lee. *Id.* ¶ 9. After weeks of searching, however, on October 16, 2019, Court Express informed Gibson Dunn that no other relevant documents existed. *Id.* ¶¶ 10–14. Court Express explained that the court records were “a mess.” *Id.* ¶ 15. Some files had been consolidated; others had been destroyed. *Id.* ¶ 13. According to Court Express, there would be

no way to confirm if files specifically relating to Mr. Lee were removed or destroyed because the remaining dockets were not sufficiently descriptive. *Id.* ¶ 15.

Zurich wrote to Mr. Protopapas' counsel on October 31, 2019, explaining that Zurich [REDACTED]

[REDACTED] See Letter from Peter H. Dworjanyn to Paul A. Zevnik at 1 (Oct. 31, 2019), attached as **Exhibit C** (submitted under seal herewith). Among other things, [REDACTED]

[REDACTED]. *Id.* In response, [REDACTED]

[REDACTED] Letter from Peter D. Protopapas to Peter H. Dworjanyn at 1 (Nov. 4, 2019), attached as **Exhibit D** (submitted under seal herewith). He stated that he [REDACTED]

Id. Mr. Protopapas also asserted that he [REDACTED]

[REDACTED]. *Id.* at 1–2. Mr. Protopapas then [REDACTED]

[REDACTED] *Id.* at 1. Mr. Protopapas also represented to Zurich that [REDACTED]

[REDACTED] *Id.*

In January 2020, Zurich retained the firm of Turner Padget Graham & Laney, P.A. (“Turner Padget”) to represent it in Covil-related litigation. Mangum Decl. ¶ 2, attached as **Exhibit E**. Thereafter, Turner Padget conducted a review of the Covil-related Greenville County Clerk files that had been retrieved from storage. This review confirmed that the files were in disarray and incomplete. In March and early April 2020, however, Covil’s prior law firm, Gallivan White and Boyd, produced to Zurich a large number of files from their earlier

representation of Covil that has not previously been disclosed to Zurich. Discovered within those approximately 236 boxes of files was a document referencing Greenville County Judgment Roll No. 91-5988. *Id.* ¶ 7. A review of documents recorded within this Judgment Roll on April 14, 2020 revealed a number of important documents that were not contained in the Clerk’s Civil Action file. *Id.* These newly-discovered documents included a May 12, 1992 Order by which the Master-in-Equity of Greenville County appointed L. Winston Lee the permanent receiver for Covil Corporation. Order 1, ¶ 3, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) May 12, 1992), attached as **Exhibit F**. This order is significant because the Master-in-Equity also judicially dissolved Covil Corporation and directed L. Winston Lee to “publish the Notice required by § 33-14-107 of the Code of Laws of the State of South Carolina.” *Id.* at 2, ¶ 1; 5, ¶ 9.¹

In an order dated six months later, the Master-in-Equity found the receiver “ha[d] fully complied with the previous Orders of this Court in liquidating [Covil’s] assets.” Order 2, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Nov. 12, 1992), attached as **Exhibit G**. The Master-in-Equity later entered a Final Order, approving the abandonment of all of Covil’s remaining assets and discharging the receivership. Final Order 3, *The First Savings Bank, FSB v. Covil Corporation* C.A., No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) Dec. 7, 1992), attached as **Exhibit H**.

¹ The current version of S.C. Code Ann. § 33-14-107—which was last amended in 2004—states that if a dissolved corporation publishes notice of dissolution in a newspaper of general circulation in the county of the dissolved corporation’s last principal office, then unknown claims against the dissolved corporation are barred if not brought within ten years. If leave to amend is granted, Zurich will demonstrate in further briefing that Covil’s liability for the asbestos claims currently pending against it is barred under both the version of S.C. Code Ann. § 33-14-107 in effect as of 1992 and the current version in force after the 2004 amendments.

Zurich immediately produced certified copies of all these orders to Mr. Protopapas, Covil's current Receiver, as a supplemental discovery disclosure in *Zurich American Insurance Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C.). See Plaintiff's Second Supplemental Disclosures, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C.) (Apr. 16, 2020), attached as **Exhibit I**. [REDACTED]

[REDACTED] See Letter from William A. Bulfer to Brady Edwards (April 28, 2020), attached as **Exhibit J** (filed under seal). Through a series of letters, Counsel for the Receiver made clear the Receiver would not comply with this request. This objection from the Receiver culminated in a public letter from counsel for the Receiver to Zurich in which he stated "the Receiver explicitly instructed Zurich not to file the proposed motions, noting that (1) the factual assertions underlying Zurich's proposed Rule 60(b) motion are false; [and] (2) Zurich's analysis of South Carolina law is incorrect..." Letter from Brady Edwards to Matt Little (May 4, 2020), at 1, attached hereto as **Exhibit K**.

[REDACTED] Declaration of Amanu Nwaomah ¶ 5, attached hereto as **Exhibit L** (submitted under seal herewith). [REDACTED]

² The insurer has the right to direct the litigation under South Carolina law if it is paying the costs of the defense. See, e.g., *Tyger River Pine Co. v. Md. Casualty Co.*, 161 S.E. 491, 493 (S.C. 1931); *Crook v. State Farm Mut. Ins. Co.*, 112 S.E.2d 241, 248 (S.C. 1960); *Harleysville Group Ins. v. Heritage Cmty., Inc.*, 803 S.E.2d 288, 297 (S.C. 2017).

██████████ Rather, the Receiver took the remarkable step of actively opposing the defense, going so far as to affirmatively disavow it and seek orders from Justice Toal that the defense was supposedly frivolous. See Covil’s Response to Non-Party USF&G’s Motion to Reconsider, Alter or Amend Approval Order of April 10, 2020, Non-Party USF&G’s Motion to Stay, and Non-Party Zurich American Insurance Company’s Motion to Reconsider, Alter or Amend Approval Order of April 10, 2020, *Taylor v. Air & Liquid Systems Corp.*, C.A. No. 2018-CP-40-02940 (April 27, 2020) (the “*Taylor Action*”), attached hereto as **Exhibit M**; Covil’s Notice of Supplemental Legal Authority, *Taylor Action*, attached hereto as **Exhibit N**. Justice Toal thereafter entered an order—drafted by the Receiver—stating that Section 33-14-107 does not bar asbestos claims against Covil and that the Receiver is “under no obligation” to advance that argument on behalf of Covil. Order Denying Motions to Reconsider and Motion to Stay, *Taylor Action*, attached hereto as **Exhibit O**.

As a result of disavowing and seeking judicial determinations as to the invalidity of this statutory defense, the Receiver has breached his contractual duty to cooperate with Zurich in Covil’s defense.³ This Court should allow amendment to Zurich’s pleading to reflect the breach of cooperation that occurred subsequent to Zurich’s pleading and to permit Zurich to assert a counterclaim based on the Receiver’s actions.

³ The policies issued by Zurich to Covil each contain the following (or substantially similar) Cooperation Clause:

The insured shall cooperate with [Zurich] and, upon [Zurich’s] request, assist in making settlements, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than first aid to others at the time of accident.

ARGUMENT

Rules 13 and 15 of the Federal Rules of Civil Procedure govern amended and supplemental pleadings. Rule 15(a)(2) provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Rule 15(d) governs supplemental pleadings and provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Rule 13(e) further provides that “[t]he court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.”

“[T]he standards used by a district court in ruling on a motion to amend or on a motion to supplement are nearly identical. In either situation, leave should be freely granted, and should be denied only where good reason exists, such as prejudice to the defendants.” *Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002) (internal quotation marks and ellipsis omitted). It is inconsistent with the federal rules to require a party to go through the “needless formality and expense of instituting a new action when the events occurring after the original filing indicated he had a right to relief.” *Id.* at 198 (internal quotations marks omitted). Amendments and supplements are “well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.” *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 227 (1964).

The liberal rules for amendment and supplementation give effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities. *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). Motions to supplement pleadings are “[s]o useful . . . and of such service in the efficient administration of justice that they ought to be allowed as course, unless some particular reason for disallowing them appears.” *New Amsterdam Cas. Co.*

v. Waller, 323 F.2d 20, 28-29 (4th Cir. 1963). Supplemental pleadings should be permitted by courts in the interest of efficiency to “enabl[e] a court to award complete relief, or more nearly complete relief, in one action.” *Id.* at 28. “Leave to amend a pleading should be denied *only* when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 409 (4th Cir. 2013) (internal quotation marks and alteration omitted).

It is appropriate for a court to grant a motion to amend or supplement proceedings when a defendant seeks to add counterclaims. In *Beaumont v. Federal National Mortgage Corp.*, for example, the Court permitted the defendant to supplement its pleadings to add counterclaims when the counterclaims were “directly related to [the] Plaintiff’s claims against Defendants.” *Beaumont v. Fed. Nat’l Mortg. Corp.*, No. 918-CV-03142-BHH-MGB, 2019 WL 5856268, at *3 (D.S.C. Sept. 12, 2019), *report and recommendation adopted*, No. 9:18-cv-3142-BHH, 2019 WL 5855999 (D.S.C. Oct. 3, 2019) (Hendricks, J.). Similarly, in *Ross Development Corp. v. Fireman’s Fund Insurance Co.*, the court granted the defendant leave to amend its answer and add crossclaims related to insurance coverage issues. 809 F. Supp. 2d 449, 460 (D.S.C. 2011).

Here, Zurich’s proposed Amended Answer and Counterclaim would not be prejudicial, there has been no bad faith, and amendment would not be futile. This Court should therefore grant Zurich leave to amend its answer and add a counterclaim.

A. Zurich’s Proposed Amended Answer And Counterclaim Would Not Prejudice Covil.

Prejudice is often determined “by the nature of the amendment and its timing.” *Laber*, 438 F.3d at 427. A supplemental pleading may state a new cause of action so long as “the matters . . . have some relation to the claim set forth in the original pleading.” *Rowe v. U.S. Fid. & Guar. Co.*, 421 F.2d 937, 943 (4th Cir. 1970); *see also Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 243 F.R.D. 253, 257 (S.D.W. Va. 2007) (“[A] party may use Rule 15(d) to

assert separate or additional claims against an existing party, so long as some relationship exists between the original action and the supplemental claims.”). Where a claim could not have been advanced prior to some factual or legal development, leave to amend or supplement the pleadings to add a claim is proper. *See Pittston Co. v. United States*, 199 F.3d 694, 705 (4th Cir. 1999). In particular, where factual issues not known to the party during initial pleadings come to light, leave to amend or supplement is appropriate. *See, e.g., Nat’l Union Fire Ins. Co. v. Intercoastal Diving, Inc.*, No. 7:10-CV-115-FL, 2012 WL 1978291, at *6 (E.D.N.C. June 1, 2012). So long as the claims in the supplemental pleading have some relationship to the original subject matter, “they need not all arise out of the same transaction.” *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988).

Zurich’s proposed amendments and counterclaim are not prejudicial to the Receiver—in fact, they are inextricably intertwined with the issues already before this Court and are a product of the Receiver’s own recent actions. The Receiver has asked this Court to make numerous declarations as to the nature of the contractual relationship between Zurich and Covil and, in so doing, has squarely put at issue the terms and conditions of the Zurich policies, including the insured’s contractual duty to cooperate with Zurich. As in *Beaumont*, the issues are thus “directly related to [the] Plaintiff’s claims” against Zurich. 2019 WL 5856268, at *3. Accordingly, granting Zurich leave to amend its answer and add a counterclaim based on the Receiver’s breach of his contractual duty to cooperate would not be prejudicial to the Receiver because the issues raised by Zurich’s proposed Amended Answer and Counterclaim are already implicated in this case.⁴

⁴ Moreover, discovery has not even begun in this case, so there can be no prejudice to the Receiver as a result of completed discovery.

B. Zurich's Motion Is Made In Good Faith.

Zurich's claim that the Receiver has breached his duty to cooperate in the defense of Covil in the underlying asbestos cases did not arise until well after the filing of the Receiver's Complaint and Zurich's Answer. In fact, this claim has ripened only within the last two weeks, when [REDACTED]

[REDACTED]. And Zurich discovered the viability of that statutory defense only in mid-April 2020, after documents from Covil's prior law firm were disclosed to Zurich's counsel and revealed a Judgment Roll number that enabled Zurich to locate court records from Covil's prior receivership that had been previously unknown to Zurich despite its diligent search efforts. Mangum Decl. ¶ 7; *see also* McCormac Decl. ¶¶ 5–17.

It is therefore abundantly clear that Zurich's counterclaim is timely and that there was no bad faith or delay in filing this motion. *See Pittston Co.*, 199 F.3d at 705 (claims may be brought by a supplemental amendment if they accrued after the commencement of the suit). This is the very purpose for which Rules 15(d) and 13(e) permit supplemental proceedings that “set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented” and authorize the court to “permit a party to file a supplemental proceeding asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.” Zurich acted in good faith by moving to amend its Answer and assert a counterclaim as soon as its failure-to-cooperate claim accrued against the Receiver as a direct result of actions that he took well after the filing of Zurich's Answer.

C. Zurich's Proposed Counterclaim Is Not Futile.

Finally, Zurich's counterclaim is not futile. A proposed amendment to a pleading is futile only if it “fails to state a claim under the applicable rules and accompanying standards.” *Ross*,

809 F. Supp. 2d at 460 (quoting *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011)). “Leave to amend should only be denied on the ground of futility when the proposed amendment is clearly insufficient on its face.” *Id.* (internal quotation marks and ellipses omitted).

Here, not only does Zurich’s counterclaim survive Rule 12(b)(6) scrutiny, but it is exceedingly likely to be successful. See *Poly-Med, Inc. v. Novus Sci. PTE Ltd.*, No. 8:15-cv-01964, 2017 WL 2874715, at *4 (“A claim is futile if it would not survive a Rule 12(b)(6) motion.”). It is a well-settled principle of South Carolina law that insurers have the exclusive ability to control the litigation. *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933); see also *Crook*, 112 S.E.2d at 248 (the insurer “had complete control of the litigation” and “the right to settle the case, or defend it, irrespective of the desires of the insured”); *Harleysville Grp. Ins.*, 420 803 S.E.2d at 297 (citing *Tyger River*, 170 S.E. at 348). The insured must cooperate with the defense in order to fulfill its contractual obligations to the insurer. See *Pharr v. Canal Ins. Co.*, 104 S.E.2d 394, 400 (S.C. 1958); see also *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 433 F.3d 365, 374 (4th Cir. 2005) (explaining that, under South Carolina law, “the insured ha[s] a corresponding duty to cooperate with the insurance companies in the defense and settlement of any claim”). If the insured has breached its contractual obligations by failing to cooperate with the defense, the insurer is relieved from liability under the insurance contract so long as the failure to cooperate is prejudicial to the insurer. *Hodges v. State Farm Mut. Auto. Ins. Co.*, 488 F. Supp. 1057, 1061 (D.S.C. 1980) (citing *Tucker v. State Farm Mut. Ins. Co.*, 103 S.E.2d 272 (S.C. 1958); *Pharr*, 104 S.E.2d 394; *Crook*, 112 S.E.2d 241; *Squires v. Nat’l Grange Mut. Ins. Co.*, 145 S.E.2d 673 (S.C. 1965)).

The Receiver has infringed upon Zurich's *exclusive* right to control the asbestos litigation against its insured [REDACTED] [REDACTED] and in fact actively opposing that defense in court filings. *See Tyger River*, 170 S.E. at 348 (defining the insurer's right to control the defense and right to control settlement as exclusive). The act of opposing the applicability of Section 33-14-107 to claims against Covil not only impedes Covil's defense in the asbestos cases currently pending against it but may also open a Pandora's box of liability for Covil *ad infinitum*—in flat contravention of the legislative intent of Section 33-14-107, which was designed to bar claims against a dissolved corporation. [REDACTED]

[REDACTED] and a defense to various other asbestos related claims in North and South Carolina—the Receiver has breached his contractual obligations to Zurich and therefore no longer has a contractual right to require Zurich to pay Covil's defense costs or indemnify Covil against liability. *See Twin City Fire Ins. Co.*, 433 F.3d at 374. Zurich's proposed amendments and counterclaims are consequently far from futile.

The Receiver is likely to argue that Justice Toal's Order of May 6, 2020 provides a basis for finding that S.C. Code Ann. § 33-14-107 does not bar asbestos claims against Covil and that Zurich's failure-to-cooperate counterclaim is therefore futile. But Justice Toal's interpretation of Section 33-14-107 and her assessment of the Receiver's duty to cooperate—which are still subject to appellate review—are not authoritative statements of South Carolina law binding on this Court. In the absence of a ruling by the South Carolina Supreme Court, this Court is free to make its own determination about the viability of Covil's Section 33-14-107 defense.

Moreover, the Order has no collateral-estoppel effect in this litigation because the questions whether Section 33-14-107 bars claims against Covil and whether the Receiver has a

duty to cooperate with Zurich in raising that defense were not actually litigated before Justice Toal, who was deciding only whether to grant reconsideration of a prior order approving the Receiver's settlement with three other insurers. *See Crestwood Golf Club, Inc. v. Potter*, 493 S.E.2d 826, 835 (S.C. 1997) (“Issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit.”) (internal quotation marks omitted). The Order entered by Justice Toal was a transparent attempt by the Receiver to use that unrelated proceeding to secure a preemptive ruling from Justice Toal on the Section 33-14-107 issue and, in so doing, to prevent Zurich from asserting a claim in this Court based on his failure to cooperate. Justice Toal's Order was drafted by the Receiver, and was summarily entered without a complete factual record, without discovery, without an evidentiary hearing, and in face of explicit assurances that no insurer was seeking a ruling on the Section 33-14-107 issue, which had no bearing on the validity of the Receiver's settlements with the three other insurers.⁵ Finally, the Order's lack of any preclusive effect in this proceeding is underscored by Justice Toal's conclusion that Zurich was a non-party that did not have standing to bring its objections to the settlement agreements, which means that Zurich could not possibly be bound by that Order's analysis of Section 33-14-107. *See, e.g., Duckett v. Fuller*, 819 F.3d 740, 745 (4th Cir. 2016) (noting the “general rule” that a non-party is not bound by a judgment).

⁵ Zurich did not even refer to Section 33-14-107 or the duty to cooperate in its Motion to Reconsider Justice Toal's approval of the settlement agreements. USF&G repeatedly stated that its Motion to Reconsider and Motion to Stay did “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.” Non-Party USF&G's Reply Memorandum in Further Support of Its Motions (I) to Stay and (II) to Reconsider, Alter or Amend Approval Order of April 10, 2020, *Taylor Action*, ¶ 1, attached hereto as **Exhibit P**.

CONCLUSION

Zurich's counterclaim did not accrue until recently, and the relevant issues are already implicated by the Receiver's claims against Zurich. Zurich's proposed Amendment and Counterclaim is not prejudicial to the Receiver, is not made in bad faith, and is not futile. Therefore, in the interests of efficiency and justice, this Court should permit Zurich to amend and supplement its pleadings to reflect recent events and to assert a counterclaim against the Receiver.

Respectfully submitted this 14th day of May, 2020.

TURNER PADGET GRAHAM & LANEY, P.A.

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ATTORNEYS FOR DEFENDANT ZURICH
AMERICAN INSURANCE COMPANY

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No.: 7:18-cv-3291-BHH

COVIL CORPORATION, by its duly
appointed Receiver, Peter D. Protopapas,

Plaintiff,

vs.

ZURICH AMERICAN INSURANCE
COMPANY; 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; FIRST STATE
INSURANCE COMPANY; TIMOTHY W.
HOWE, Personal Representative of Wayne
Erwin Howe; JEANNETTE HOWE; JERRY
CRAWFORD; DENVER TAYLOR and
JANICE TAYLOR; and JAMES COLEMAN
SIZEMORE, Personal Representative of
James Calvin Sizemore,

Defendants.

**MEMORANDUM OF LAW OF UNITED
STATES FIDELITY AND GUARANTY
COMPANY IN SUPPORT OF ITS MOTION
FOR LEAVE TO AMEND
AND SUPPLEMENT PLEADINGS**

Defendant United States Fidelity and Guaranty Company (“USF&G”) moves pursuant to Rules 13 and 15 of the Federal Rules of Civil Procedure for leave to amend and supplement its Answer [ECF 39] to assert a counterclaim against Plaintiff. For the reasons set forth herein, the Motion should be granted. A proposed Amended Answer and Counterclaim is attached hereto as **Exhibit A**.

INTRODUCTION AND BACKGROUND

The Motion for Leave to Amend and Supplement USF&G's Answer arises out of the recent discovery of evidence and the subsequent responsive actions of the Receiver for Plaintiff Covil Corporation (the "Receiver"). In moving for leave to file its Amended Answer and Counterclaim, USF&G hereby joins and incorporates by reference the arguments set forth in the Memorandum in Support of Leave to Amend and Supplement of Zurich American Insurance Company ("Zurich") [ECF 156-1]. So as not to burden the Court with unnecessary briefing, USF&G does not repeat the arguments and background information set forth in Zurich's filings, and instead limits the discussion herein to relevant facts and arguments specific to USF&G.

USF&G's proposed counterclaims against the Receiver arises from the recent discovery that Covil was judicially dissolved in 1992, and as a result is subject to the statute of repose codified at S.C. Code Ann. § 33-14-107. Section 33-14-107 bars all claims asserted against a judicially dissolved corporation, at the latest, ten years after publication notice of its dissolution. When the Receiver became aware of this defense to liability in the asbestos suits pending against Covil, not only did the Receiver refuse to assert the defense on Covil's behalf, but he also publicly disclaimed the viability of the defense and elicited rulings from state court that were neither necessary nor correct. The result of those actions is that the Receiver has substantially prejudiced Covil's defense in connection with the underlying tort actions that the Receiver has demanded USF&G defend and indemnify. These acts have violated the requirement in the USF&G's insurance contract that the policyholder cooperate in the defense of claims, and the implied covenant of good faith and fair dealing that prohibits the Receiver from impairing USF&G's rights and increasing its obligations under the parties' insurance contract. That is the subject matter of the counterclaims that USF&G seeks to assert and that has given rise to this motion.

During the pendency of this litigation, USF&G made reasonable inquiries concerning Covil's corporate status and its prior receivership. In November 2019, [REDACTED]

[REDACTED] Letter from Peter D. Protopapas to Peter H. Dworjanyan at 1 (Nov. 4, 2019), attached as Exhibit B (submitted under seal). [REDACTED]

[REDACTED] *Id.*

The Receiver further indicated in his January 2, 2020 interrogatory responses in a parallel action in the Middle District of North Carolina that he was “not aware of any prior receivers having been appointed for Covil from December 30, 1954 to present in the State of South Carolina.” Exhibit C (Covil's response to Interrogatory No. 16, *Zurich American Insurance Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C.)) (the “M.D.N.C. Action”). During the meet-and-confer process, counsel for the Receiver represented to USF&G's counsel that Mr. Lee's role was limited to selling off Covil's equipment and machinery. And, in pleading after pleading in this case and others pending between the parties, the Receiver indicated that Covil was merely “administratively dissolved.” *See, e.g.*, Covil's Answer to Sentry Casualty Co. Counterclaims ¶¶ 3, 22 [ECF 30]; Covil Amended Answer and Counterclaim, ¶¶ 3, 44, 59, 79 M.D.N.C. Action [ECF 155].

On April 16, 2020, USF&G was served with Zurich's supplemental disclosures in the M.D.N.C. Action, which included May 12, 1992 and November 12, 1992 orders that had the effect of appointing L. Winston Lee the permanent receiver for Covil Corporation and judicially dissolving Covil. Exhibit D (Order 1, ¶ 3, *The First Savings Bank, FSB v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (S.C. Ct. Com. Pl. (Greenville County) May 12, 1992).

Separately, the Receiver has been seeking approval of settlements he reached with certain of Covil's insurers. In connection with his motion to approve those settlements, the Receiver not

only requested approval of the settlements (in addition to an award of approximately \$15 million (33.3%) for the Receiver and his counsel), but also sought to enjoin USF&G and other insurers from asserting rights of contribution against the settled insurers and requested additional relief that would have impaired and potentially expanded USF&G's and Zurich's obligations under their policies in connection with Covil's ongoing defense. USF&G filed limited objections to the Receiver's motion solely to the extent it sought to impair USF&G's rights. The court overruled those objections by order drafted and proposed by the Receiver, dated April 10, 2020. Exhibit E. USF&G sought reconsideration of the April 10, 2020 order granting the Receiver's requested relief (a prerequisite to an appeal), and moved to stay its enforcement pending appeal.

When USF&G became aware of the recently-discovered judicial dissolution orders, USF&G promptly brought those orders to the attention of the court, noting that they raised questions that further warranted a stay of the settlement approval order and injunction. Although these issues were relevant to its request for a stay of enforcement, USF&G specifically stated that it was neither necessary nor appropriate for the court to rule on the substance of the dissolution issues. Specifically, USF&G stated that "[t]hese issues will be raised separately in the appropriate proceedings and with further briefing," and that "[t]hey are noted [in the Motion to Reconsider] *solely to apprise the Court of these developments* and demonstrate why a *stay* is necessary." Exhibit F, at 4 n.3 (emphasis added).

Rather than seek to minimize Covil's liabilities, the Receiver affirmatively argued in public filings that Covil should continue to be subjected to liability on the basis that the judicial dissolution did not bar claims against Covil, and claimed that USF&G should be deemed to have waived any argument based on Covil's judicial dissolution. Exhibit G (Covil's Response to USF&G's Motion to Reconsider). In response to that filing, USF&G's counsel wrote to the Receiver's counsel, [REDACTED]

[REDACTED]

[REDACTED]

Exhibit H (April 30, 2020 Letter from Andy Frankel to Brady Edwards) (filed under seal). In addition, USF&G requested [REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Id. at 4.

Rather than cooperate with USF&G in asserting the dissolution defense, on May 1, 2020, the Receiver doubled down by submitting a proposed order to the receivership court concerning the effect of Covil's judicial dissolution, even though that issue was not before the court. Exhibit I (Proposed Order Denying Motions to Reconsider and Motion to Stay). The Receiver's proposed order—which was later entered by the court—actively undermined any defense based on Covil's judicial dissolution, proposing that the receivership court find that Section 33-14-107 did *not* act as a claim bar. *Id.* at 14.

On May 2, 2020 and May 4, 2020, USF&G again wrote to the Receiver's counsel to request [REDACTED] USF&G also asked the Receiver to explain [REDACTED]

[REDACTED] See Exhibit J (Email from Andy Frankel to Brady Edwards dated May

2, 2020) (filed under seal); Exhibit K (email from Andy Frankel to Brady Edwards dated May 4, 2020) (filed under seal).

Rather than explaining [REDACTED], the Receiver refused to withdraw his proposed order and it was entered by Justice Toal on May 6, 2020. Exhibit L.¹ The Receiver's positions were not only wrong on the merits, the rulings affirmatively requested by the Receiver were entirely gratuitous. As noted above, USF&G specifically indicated that it was neither necessary nor appropriate for the court to rule on the substance of the dissolution issues. Exhibit F, at 4 n.3. And again, after the Receiver inexplicably sought rulings from the court to the effect that Covil should continue to be subjected to lawsuits (but before the court signed the Receiver's proposed order), USF&G again pointed out in its April 30, 2020 submission:

The impact of the newly-discovered facts regarding L. Winston Lee's prior receivership, Covil Corporation's ... judicial dissolution, and the court orders entered in connection therewith on asbestos claims against Covil *should be adjudicated in the context of pending asbestos litigation against Covil*. The court *need not, and should not, issue any declaration on the legal impact of these issues on the rights of Covil, the Receiver, any insurer, or any asbestos claimant on the current, incomplete record*.

Exhibit O (Non-Party USF&G's Reply Mem. in Further Support of its Motion (I) to Stay and (II) to Reconsider, Alter or Amend Approval Order of April 10, 2020), at 2 (emphasis added)).

¹ The Receiver's counsel thereafter responded in cursory fashion to USF&G's prior inquiries on May 8, 2020 [REDACTED] Exhibit M (email from Brady Edwards to Andy Frankel dated May 8, 2020) (filed under seal). That same day, USF&G's counsel responded by explaining [REDACTED]

[REDACTED] Exhibit N (email from Andy Frankel to Brady Edwards dated May 8, 2020) (filed under seal). The Receiver has not bothered to respond to these inquiries.

As a result of the Receiver's conduct, the Receiver has breached Covil's contractual duty to cooperate with USF&G in Covil's defense and the implied covenant of good faith and fair dealing.²

Faced with no legitimate justification for his efforts to undermine Covil's defenses, the Receiver has now taken the extraordinary step of seeking sanctions against USF&G and Zurich, and their respective counsel, personally, for taking positions that would have advanced Covil's best interests. Exhibit Q. Specifically, on May 18, 2020, the Receiver has now asked Justice Toal to sanction USF&G and its counsel for contending that claims against Covil should be deemed barred as a result of the recently discovered orders judicially dissolving Covil. That filing is extraordinary for many reasons. First, it is patently obvious that the judicial dissolution defense and issues raised by the recently discovered orders and Section 33-14-107 of South Carolina's Business Corporations Act are objectively reasonable—indeed they are correct. Second, the very notion that a party purporting to act in the best interests of a corporate insured would not only

² The policy issued by USF&G to Covil contains the following cooperation clause:

The insured shall cooperate with [USF&G] and, upon [USF&G's] request, assist in making settlements, **in the conduct of suits**, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than first aid to others at the time of accident.

Exhibit P (Special Multi-Peril Policy issued by Fidelity and Guaranty Insurance Underwriters, Inc. to Covil Corporation ("Covil"), with policy number SMP 490049, for the policy period of March 31, 1976 to March 31, 1979). In addition to breach of cooperation, USF&G alleges that the Receiver's conduct breaches the implied covenant of good faith and fair dealing, which prohibits parties from impairing rights (and increasing obligations) under the parties' insurance contract. *See Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500–01, 473 S.E.2d 52, 53 (1996).

affirmatively seek to undermine the insured's own defenses, but take the additional step of seeking sanctions against its insurers (and its counsel, personally) for asserting positions that would *benefit* the insured by *minimizing* its liabilities, is quite possibly a first in the annals of judicial history. The Receiver's latest filing is all the more extraordinary given that USF&G not only did not ask the court to rule on the substance of Covil's defenses, but specifically requested that the court *not* do so.³ Thus, the rulings solicited by the Receiver gratuitously and without justification has now permanently undermined Covil's ability to assert a significant defense in the numerous cases pending against Covil and those expected to be filed for years to come.

The Receiver's latest procedural maneuverings demonstrate that the Receiver is attempting to use the state-court system as a means of harassing its insurers and for cover in an attempt to justify his failure to abide by the contractual obligations of cooperation and good faith and fair dealing. That is an abuse of process. Accordingly, this Court should allow amendment to USF&G's pleading to reflect the breach of cooperation and breach of the duty of good faith and fair dealing that occurred subsequent to USF&G's initial pleading.

³ In seeking sanctions, the Receiver now contends that "[a]fter the Receiver submitted a memorandum in opposition explaining why the bar did not apply and informing the Court of a relevant change in statutory law that USF&G [purportedly] failed to mention, ***USF&G changed positions*** in an attempt to prevent a ruling from th[e] 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.'" *Id.* at 18-19 (emphasis added). As the above discussion and attached submissions make clear, USF&G certainly did not "change[] positions" as it made clear at the outset of its brief that the court should not rule on the substance of the dissolution defenses, but instead should consider those issues in determining whether to stay enforcement of the court's approval order.

ARGUMENT

Rules 13 and 15 of the Federal Rules of Civil Procedure govern amended and supplemental pleadings. Rule 15(a)(2) provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Rule 15(d) governs supplemental pleadings and provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Rule 13(e) further provides that “[t]he court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.”

For the reasons expressed in Zurich’s memorandum of law, the motion to amend or supplement should be granted. *See Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28–29 (4th Cir. 1963). Under either Rule 15(d) or 13(e), the same “freely give[n]” standard set forth in Rule 15(a) applies, which calls for leave to be granted absent bad faith, prejudice to the opposing party, or futility of amendment. *U.S. v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000). For the same reasons expressed in Zurich’s brief, USF&G’s Proposed Amended Answer and Counterclaim would not be prejudicial to the Receiver, has not been asserted in bad faith, and the new counterclaim would not be futile as each of the proposed counterclaims is supported by the terms and conditions of USF&G’s insurance contract and governing law.

As in the case of Zurich, the counterclaims became necessary after the Receiver, in violation of his obligation to cooperate under the USF&G policy, publicly advocated positions that a good faith, and likely meritorious, defense available to Covil has no merit, all the while refusing

to explain how it could possibly be in Covil's interest to argue that Covil should remain subjected to liability in the very lawsuits for which the Receiver seeks coverage.⁴

CONCLUSION

For the foregoing reasons, USF&G respectfully requests that its Motion to Amend be granted and that USF&G be permitted to amend and supplement its pleadings with the Amended Answer and Counterclaims attached hereto as Exhibit A.

Respectfully submitted this the 21st day of May, 2020:

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*Attorneys for Defendant United States Fidelity and
Guaranty Company*

May 21, 2020

Columbia, SC

⁴ USF&G's Proposed Amended Answer and Counterclaim (Exhibit A) also contains revisions to some of USF&G's answering paragraphs, which account for intervening developments and the effects of the newly discovered information concerning Covil's dissolution described herein.

EXHIBIT I

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**
)

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

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.: 2019-CP-40-00076

ORDER DENYING MOTIONS TO RECONSIDER AND MOTION TO STAY

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**

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

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 1950s 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

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.

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.

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).

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.

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").

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, “*Krafft-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.*

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 statute 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.

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.

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.

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.

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ANN FINCH, Individually and as the	)	
Executrix of the Estates of Franklin	)	
Delanor Finch,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:16-CV-1077
	)	
COVIL CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

A year after Ann Finch obtained a judgment against Covil Corporation, one of Covil's insurers, Zurich American Insurance Company, filed the pending motions to intervene and set aside the judgment. Zurich relies on court orders entered decades ago in a proceeding Zurich knew about. Its motion to intervene and Rule 60(b)(2) motion are not timely. Zurich's Rule 60(b)(4) motion is entirely dependent on a factual assertion the Court rejects and otherwise supported by a chain of weak legal arguments about a statute of repose and subject matter jurisdiction. The requirements for diversity jurisdiction existed at all times, which Zurich does not dispute. The motions will be denied.

I. OVERVIEW OF THE ISSUES

In 2016, Ann and Franklin Finch sued Covil for personal injuries and damages resulting from Mr. Finch's exposure to asbestos-containing products sold by Covil. *See* Doc. 524 at 1. When Mr. Finch died from the mesothelioma caused by asbestos

exposure, a wrongful death claim was added. After a five-day trial in October 2018, the jury awarded \$32.7 million in compensatory damages. *Id.* The Court entered a final amended judgment for \$30.3 million on May 1, 2019. Doc. 525. The verdict was upheld on appeal. Doc. 578; *Finch v. Covil Corp.*, 972 F.3d 507 (4th Cir. 2020).

Non-party Zurich American Insurance Company, successor to one of Covil's insurers, filed the pending motions on May 1, 2020, asserting that in mid-April 2020, it discovered previously unavailable evidence likely to produce a new outcome if the case were reopened and that voids the judgment. Doc. 542 at 2, 5. Zurich moves to intervene pursuant to Federal Rule of Civil Procedure 24, Doc. 541, and to set aside the judgment pursuant to Federal Rule of Civil Procedure 60(b)(2) and 60(b)(4). Doc. 542.

Zurich asserts that (1) it recently learned of court orders entered in a 1991–92 receivership judicially dissolving Covil and from which Zurich infers that the receiver published a statutorily-compliant notice of dissolution; (2) a statute enacted after Covil was dissolved bars lawsuits filed more than ten years after the required notice of dissolution was published; (3) this statute of repose applies to Ms. Finch's claims; and (4) the statute of repose is jurisdictional. As a result, Zurich says, Ms. Finch's judgment against Covil is void for lack of subject matter jurisdiction. Zurich admits it knew about the 1991 receivership at all relevant times, but it denies that it knew about the court orders related to judicial dissolution.¹

¹ In its Rule 24 and Rule 60 motions, Zurich did not forthrightly acknowledge that it had been aware of the 1991 receivership for years. See Docs. 537, 538. Upon filing of the motion, the receiver quickly filed overwhelming documentary evidence that Zurich had long known of

Covil, acting by a new receiver appointed after the Finch verdict, is aware of the facts and theories underlying Zurich's arguments and has directed its counsel not to file a Rule 60(b) motion. The receiver for Covil believes the statute of repose and jurisdictional defenses Zurich raises are not legally or factually supported. *See* Doc. 571. Ms. Finch also contests Zurich's factual and legal arguments, Docs. 559, 572, and further contends that the motions are not timely. *See, e.g.*, Doc. 559.

Rule 24 of the Federal Rules of Civil Procedure authorizes non-parties to intervene under several specific circumstances. The motion to intervene must be timely, whether intervention is of right under Rule 24(a)(2) or permissive under Rule 24(b)(1)(B), and must comply with the specific requirements of each subsection. *Alt v. U.S. EPA*, 758 F.3d 588, 591 (4th Cir. 2014).

Federal Rule of Civil Procedure 60(b) allows a court to "relieve a party . . . from a final judgment" on a limited number of specific grounds. Fed. R. Civ. P. 60(b). Rule 60(b)(2) requires the movant to make a threshold showing of, *inter alia*, timeliness and a meritorious defense, *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *accord Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 299 (4th Cir. 2017), and then show "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial

the 1991 receivership. *See generally* Doc. 553. After the Court directed Zurich to clarify its arguments and factual support for its contentions, *see* Doc. 565, Zurich conceded that it knew about the 1991 receivership at all relevant times. *See* Doc. 569 at 1–2. For ease of reading here and throughout this Order, the Court uses "Zurich" as shorthand for "Zurich and its predecessor."

under Rule 59(b).” Fed. R. Civ. P. 60(b)(2). Rule 60(b)(2) motions must be filed within a reasonable time and in any event within a year of judgment. Fed. R. Civ. P. 60(c)(1).

Rule 60(b)(4) authorizes relief if the movant shows that “the judgment is void.” Fed. R. Civ. P. 60(b)(4). When a defendant appears in a lawsuit and defends the case through final judgment, that litigant, or someone standing in that litigant’s shoes, can only succeed on a Rule 60(b)(4) motion based on lack of subject matter jurisdiction if the jurisdictional error is egregious and there was no arguable basis for jurisdiction. *See Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 221–222 (4th Cir. 2019). Even if the defendant has not appeared, the subject matter jurisdiction argument must ultimately have merit. *See, e.g., Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (D.C. Cir. 2013) (holding that the district court “properly applied the traditional definition of voidness,” which turned on whether the court, in fact, lacked subject matter jurisdiction, where the movant had never appeared in the proceedings).

II. FACTS

The Court finds the facts based on the evidence submitted, or relied upon, by Covil, the undisputed procedural history and facts of record, and Covil’s admissions.² To a limited extent, and to the extent appropriate in the exercise of its discretion, the Court

² Some of Zurich’s factual assertions are contested, and if it were necessary to resolve those factual disputes Ms. Finch and the receiver would likely be entitled to discovery on exactly what Zurich knew and when it knew it. In light of the cost and questions of privilege such discovery would raise, the Court limited briefing to questions that could be resolved without discovery, including whether Zurich’s evidence of timeliness and due diligence is persuasive and sufficient on its own and on other legal and factual issues related to the statute of repose defense. The Court has not considered any of the evidence offered by Ms. Finch or Covil, unless Zurich also relied upon it.

has taken judicial notice of the proceedings in a coverage case between Zurich and Covil which is also pending in this district. The facts are stated here and elsewhere in the order as the need arises.

Covil Corporation, a South Carolina company, sold insulation products for many years, some of which contained asbestos. *Finch*, 972 F.3d at 512. Zurich's predecessor provided insurance coverage to Covil for some of those years, Doc. 541 at 4, *see generally Zurich Am. Ins. Co. v. Covil Corp.*, No.18-cv-932 (M.D.N.C.), including years when Mr. Finch was exposed to asbestos-containing products sold by Covil. Doc. 541 at 5; *see generally Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.).

In 2016, Mr. Finch, a North Carolina resident, developed mesothelioma caused by the asbestos exposure. *Finch*, 972 F.3d at 511. He and his wife sued Covil and other defendants in 2016, *see* Doc. 1, and his wife added a wrongful death claim after he died from mesothelioma in January 2017. Doc. 65; *Finch*, 972 F.3d at 510.

In its answer to the operative complaint, Covil asserted, *inter alia*, that Ms. Finch's claims were barred by "the statutes of limitation and repose," Doc. 156 ¶ 68, and that the Court lacked subject matter jurisdiction. *Id.* at ¶ 74. But it admitted the facts necessary to establish subject matter jurisdiction under the diversity statute, *id.* at ¶ 3, and it never filed a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment based on any statute of repose or on lack of subject matter jurisdiction. It never made a motion for judgment as a matter of law based on a statute of repose or lack of subject matter jurisdiction. And it never mentioned a statute of repose or subject matter jurisdiction in its post-trial motions to set aside the verdict.

Zurich was aware of the lawsuit filed by Ms. Finch and was involved in Covil's defense. *See generally Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.). Zurich did not seek to intervene before judgment was entered against Covil or before Covil appealed.

The jury decided in favor of Ms. Finch, and final judgment was entered in her favor and against Covil on May 1, 2019. Doc. 525. Fairly quickly after the verdict, a South Carolina court appointed a new receiver for Covil. *See generally Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.).

Some months after final judgment, new lawyers for Zurich revisited the history of Covil's dissolution. *See* Doc. 538-10. Over the course of the next few months they obtained copies of court records from the 1991 receivership. *See* Docs. 538-3; 538-4. These records show that:

- In October 1991, Covil ceased operations and a South Carolina state court appointed a receiver of Covil's property. Doc. 538-3; *see also* Doc. 538-4 (November 1991 order appointing receiver).
- In May 1992, in the same case, on motion by the receiver, the court expanded the receivership, Doc. 538-6 at p. 4, ¶ 3, judicially dissolved Covil, *id.* at p. 4, ¶ 1, and directed the receiver to undertake a long list of actions, including publishing the notice of dissolution required by § 33-14-107 of the Code of Law of the State of South Carolina. *Id.* at p. 7, ¶ 9.
- In November 1992, the court entered an order finding that the receiver "has fully complied with the previous Orders of this Court in liquidating [Covil's] assets." Doc. 538-7 at 4.

■ In December 1992, the court discharged the receiver. Doc. 538-8 at p. 3, ¶ 8.

Covil was administratively dissolved by the secretary of state in the summer of 1993. Doc. 563-2 at 5–6; Doc. 569 at 2–3.

No one who works for Zurich or who worked for its predecessor has testified that Zurich was unaware of the judicial dissolution at or near the time of the dissolution, at or near the time Ms. Finch filed this lawsuit, or at any point in between.³ In its reply brief, Zurich provided deposition testimony from a lawyer, Daniel White, hired by the insurers to defend Covil during the relevant timeframe. *See* Doc. 569 at 2 (citing Doc. 563-2); *see generally Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.). Mr. White testified that he was unaware of the judicial dissolution before 2020. Doc. 563-2 at 4. The fact that a lawyer representing Covil was unaware of the judicial dissolution does not establish that Zurich was unaware of the judicial dissolution.⁴

It is undisputed that Zurich knew about the 1991 receivership and Covil’s administrative dissolution at or near the time each occurred. Doc. 569 at 2; *see* Doc. 538-10 at p. 5, ¶ 5 (a 1994 internal memorandum in Zurich’s files mentions the receivership). No one has asserted and there is nothing on the face of the later orders related to the judicial dissolution to indicate they were sealed. The receivership orders, including the

³ The only affidavits or declarations Zurich initially submitted are from counsel retained after the Finch judgment was entered.

⁴ Zurich implicitly equates Mr. White’s lack of knowledge of the judicial dissolution to Zurich’s lack of knowledge. *See* Doc. 569 at 2. But in another brief in a related case, Zurich has emphasized that correspondence to Mr. White does not constitute correspondence to Zurich. *See Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.) (Doc. 353 at 11). Zurich cannot have it both ways. In any event, the Court need not decide the specific nature of Mr. White’s representation.

judicial dissolution orders, were publicly available. Zurich presented no evidence that it undertook any examination of the public court records concerning the receivership at any point before judgment was entered against Covil.

In the absence of any evidence from anyone at Zurich about what it knew and what it did before late 2019 – evidence which is completely within Zurich’s control – it is a fair inference, and the Court finds, that Zurich either knew about the judicial dissolution or, if it did not, that Zurich did not look at the public receivership records or ask anyone to look at those records until well after the Finch judgment was entered.

In 1992, when Covil was judicially dissolved, and in 1993 when it was administratively dissolved, S.C. Code Ann. § 33-14-106 provided several mechanisms for a dissolved corporation to “dispose of the known claims against it” by, *inter alia*, notifying known claimants in writing. S.C. Code Ann. § 33-14-106(b) (1988). This section explicitly does not apply to contingent liabilities or claims based on events occurring after dissolution. § 33-14-106(d). There is no contention that Mr. Finch received written notice pursuant to § 33-14-106, and the Court finds that he did not.

For unknown claims, the 1992–93 version of § 33-14-107(c) includes a publication requirement. Specifically, the statute provided that:

If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

- (1) a claimant who did not receive written notice pursuant to Section 33-14-106;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.

§ 33-14-107(c) (1988); Doc. 572-1. Zurich did not include copies of any such publication notices or any other direct evidence that Covil's receiver published a newspaper notice with its motions, *see* Doc. 576 at 3 (conceding it has not located any published notice), much less that any such notice included the information required by § 33-14-107(b).⁵ The accounting filed by the receiver shows the receiver did not incur any expense to publish a notice. *See* Doc. 538-7 at 5–6; Doc. 538-8 at 7–8. The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).

In 2004, § 33-14-107 was amended to include a third basis for a time bar, which is also subject to the publication requirement. It added a ten-year bar against “a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.” § 33-14-107(c)(3) (2004). There is no evidence that Covil published a notice of dissolution after the 2004 provision was enacted, and the Court finds that it did not.

None of these three bars in § 33-14-107(c) preclude claims “against the dissolved corporation to the extent of its undistributed assets.” § 33-14-107(d)(1).

⁵ Section 33-14-107(b) requires that the notice “(1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office . . . is or was last located; (2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and (3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.” § 33-14-107(b).

III. DISCUSSION

A. The Motion to Intervene

When seeking to intervene as of right under Rule 24(a)(2) or with permission under Rule 24(b)(1)(B), the intervenor must show the motion is timely. *Alt*, 758 F.3d at 591. In exercising discretion to determine whether a proposed intervenor has met the timeliness requirement for both forms of intervention, courts evaluate three factors: “[F]irst, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion.” *Id.*

“[T]imeliness is a cardinal consideration of whether to permit intervention.” *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).⁶ The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal. *United States v. S. Bend Cmty. Sch. Corp.*, 710 F.2d 394, 396 (7th Cir.1983), cited with approval in *Scardelletti v. Debarr*, 265 F.3d 195, 203 (4th Cir. 2001), *rev'd on other grounds*, *Devlin v. Scardelletti*, 536 U.S. 1, 6 (2002). That is exactly what Zurich wants to do here.

First, the underlying suit has progressed almost as far as possible: judgment has been entered and, shortly after the motion to intervene was filed, it was affirmed on

⁶ The Court omits internal citations, alterations, and quotation marks throughout this opinion, unless otherwise noted. See *United States v. Marshall*, 872 F.3d 213, 217 n.6 (4th Cir. 2017).

appeal. *Finch*, 972 F.3d 507 (4th Cir. 2020). If the underlying suit is at a “relatively advanced stage,” that counsels against granting intervention. *Alt*, 758 F.3d at 591.

Second, the prejudice to Ms. Finch is extreme. She has spent the time, money, and mental energy needed to prosecute a successful personal injury and wrongful death claim through protracted discovery, summary judgment, trial, and appeal, only to be faced with a last-minute argument about a retroactive statute of repose. There is even prejudice to Covil and its receiver, who must spend valuable time dealing with this case instead of other matters requiring their attention.⁷ If a belated intervention would cause delay and would require the parties to “expend extra effort,” this too weakens the argument for intervention. *Id.*

Third, Zurich, which has been involved with the defense of lawsuits against Covil for decades, has not provided any reason why it did not fully investigate the subject matter jurisdiction implications of the 1991 receivership back in the 1990s, or after Ms. Finch filed suit, or before final judgment, or any point in between. And a non-litigant’s strategic choice not to intervene earlier is an appropriate factor to consider against allowing intervention. *See id.* at 591–92

Zurich points to evidence of old court orders recently located by its new lawyers, who undertook a detailed investigation into Covil’s corporate status several months after the verdict was entered. Assuming Zurich did not know about the judicial dissolution

⁷ The records in this case and in insurance coverage litigation also pending in this court are replete with references to litigation between and among Covil, various insurers, previous defense counsel, and persons allegedly injured by asbestos-containing products that Covil sold.

until recently, Zurich admits it was aware of the 1991 receivership at or around the time the receiver was appointed, and it offers no explanation for its failure to review those public court records in a timely fashion. While Zurich has shown that the court orders were difficult to track down in late 2019 and 2020, it has not shown that the orders were unavailable. Indeed, once Zurich's new lawyers started looking, they found them within a few months. *See generally* Doc. 538-10. Zurich presents no evidence that the records it now claims are recently discovered were inaccessible when Ms. Finch filed suit or before judgment, or that it was somehow impeded or prevented from exploring the subject matter jurisdiction implications of the orders entered by the receivership court.

Trial courts are directed to construe Rule 24 liberally to allow intervention where appropriate. *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986). "Liberality does not, however, entail resolving every possible doubt in favor of intervention." *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 16 (S.D.W. Va. 2015) (citing 7C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure Civil* § 1497 (3d ed. Apr. 2015)). Zurich has known for almost thirty years that a South Carolina court appointed a receiver for its insured. And despite the obvious potential for defenses arising from the receivership, Zurich failed to examine the court file for decades. It cannot now rely on court orders from that file in order to intervene in a lawsuit against its insured that has moved well past final judgment.

Zurich bears the burden of showing that its motion to intervene is timely. *See, e.g., Thomas v. Andino*, 335 F.R.D. 364, 368 (D.S.C. 2020); *S.C. Coastal Conservation*

League v. Pruitt, No. 18-CV-330-DCN, 2018 WL 2184395, at *3 (D.S.C. May 11, 2018).

Zurich has not done so. The motion to intervene will be denied as untimely.

B. The Rule 60(b) Motion

Because the Rule 24 motion is denied for lack of timeliness, the Rule 60(b) motion should also be denied since Zurich is not a party. In the alternative, the motion will be denied on its merits.

1. *Rule 60(b)(2)*

Zurich seeks relief pursuant to Rule 60(b)(2) on the grounds that the court orders constitute new evidence. To prevail, Zurich must make a threshold showing of (1) timeliness, (2) a meritorious defense, (3) a lack of unfair prejudice to the opposing party, and (4) exceptional circumstances. *Dowell*, 993 F.2d at 48. It must then meet the five requirements of Rule 60(b)(2) by showing that “(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.” *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

The movant bears the burden of showing timeliness, *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016), which courts evaluate in their discretion. *Id.* at 166; *Werner v. Carbo*, 731 F.2d 204, 206 (4th Cir. 1984). To be timely, the movant must show that the motion is made “within a reasonable time” and “no more than a year after the entry of the judgment.” Fed. R. Civ. P.60(c)(1). Even if the motion is filed within a year of

judgment, denial is appropriate when the movant gives “no valid reason . . . for the delay.” *See, e.g., McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991); *Cent. Operating Co. v. Util. Workers of Am.*, 491 F.2d 245, 253 (4th Cir. 1974).

Zurich’s motion based on Rule 60(b)(2) fails for several reasons. The Court need discuss only three, though there are others.

First, Zurich has not shown that the motion is timely. As previously discussed, *see supra* at 10–12, Zurich has offered no valid reason for its delay in investigating whether the receivership would provide a basis for a defense to this lawsuit.⁸ Covil, through lawyers retained by Zurich, even asserted an affirmative defense based on statutes of limitations and repose, *see* Doc. 156 at ¶ 68, but, despite that, there is no evidence that Zurich took even one step to locate evidence in support of this defense until months after the jury verdict. “At every critical juncture,” Zurich “slept on its rights.” *Wells Fargo Bank, N.A.*, 859 F.3d at 300 (upholding denial of 60(b)(2) motion for untimeliness).

Second, Zurich has not shown that the evidence on which it relies was newly discovered. The “newly discovered evidence” provision of Rule 60(b)(2) authorizes a court to correct erroneous judgments stemming from the unobtainability of evidence. *Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994). But “evidence that was available to the movant prior to the entry of judgment as a matter of law cannot be grounds for

⁸ The Court assumes without deciding that it is Zurich’s knowledge and actions that matter here, even though a pretty good argument can be made that it is Covil’s knowledge and actions that are determinative. *See* discussion *infra* at 17 (noting that Zurich stands in Covil’s shoes). Covil, acting through its receiver, obviously knew in 1992 that Covil had been judicially dissolved.

granting a 60(b)(2) motion.” *Clayton v. Ameriquest Mortg. Co.*, 388 F. Supp. 2d 601, 609 (M.D.N.C. 2005). Court records available to Zurich for well over two decades cannot be characterized as “newly discovered.”

Third, even if these records can be characterized as newly discovered evidence, Zurich’s failure to examine them for decades, and not until months after the jury verdict, does not constitute due diligence. If a movant “fails to demonstrate why it could not discover this evidence prior to the [trial] had it exercised due diligence” by not disclosing “what attempts, if any, were made to secure the documents” and the additional evidence consists of documents the movant had access to before the trial, the evidence is “merely newly produced,” not newly discovered. *In re Wright*, 186 B.R. 394, 397 (Bankr. D. Md. 1995). Zurich has not shown due diligence, given its failure to even look at publicly available court records for over 25 years despite its knowledge of the proceedings. *Consol. Masonry & Fireproofing v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) (affirming denial of Rule 55 motion, which is subject to the same threshold requirements as Rule 60(b) motions, for untimeliness where the movant negligently relied on others to disclose the information supporting the motion rather than immediately checking the official records at the clerk’s office).

Zurich contends the 1992 orders qualify as new evidence because when it searched for them decades later, the court records were destroyed, consolidated, or misfiled. But there is no evidence the court orders were misfiled at the time they were entered. And the single case it cites in support of this view, *Bain v. MJJ Prods., Inc.*, 751 F.3d 642 (D.C. Cir. 2014), simply held that mere “awareness of evidence, standing alone, does not

categorically preclude considering the evidence ‘newly discovered’ under Rule 60(b)(2)” because categorical treatment would foreclose relief even if the evidence was unavailable due to circumstances, such as a natural disaster, entirely beyond the party’s control. *Id.* at 647. Here, there is no showing of a natural disaster or other outside circumstance that prevented Zurich from reviewing public court files on Covil’s receivership, about which Zurich knew. Indeed, the *Bain* court upheld the district court’s conclusion that where the plaintiff knew about a letter during trial but made no effort to locate it beyond looking in her own files, the plaintiff did not act with reasonable diligence. *Id.* at 647–48.

2. Rule 60(b)(4)

A party may seek relief from a final judgment if the judgment is void. Fed. R. Civ. P. 60(b)(4). The concept of a “void order” under Rule 60(b)(4) is narrowly construed because “of the threat to finality of judgments.” *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005). Relief under Rule 60(b)(4) is available only if the “judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010).

A judgment is not void simply because it may have been erroneous, and a lack of subject matter jurisdiction will not always render a judgment void. *Wendt*, 431 F.3d at 413. When considering a rule 60(b)(4) motion brought in a case where, as here, a defendant appeared during the proceedings and had an opportunity to raise the issue and did raise the issue in its pleadings, the district court is not required to review

jurisdictional questions in the same way it would decide a motion to dismiss for lack of subject matter jurisdiction during the underlying litigation. *Hawkins*, 935 F.3d at 221.

Here, Zurich not only provided a defense for Covil during the Finch litigation through verdict, it and other insurers essentially acted for and as Covil in defending that case.⁹ Zurich was not deprived of due process and could have directed Covil's counsel, or hired its own counsel, at any time to investigate a subject matter jurisdiction or statute of repose defense, just as it finally did after judgment. Moreover, Zurich is asserting a defense that belongs to Covil, Zurich's liability for the judgment flows from Covil's liability, and Zurich should not have greater or different rights than Covil. Thus, Zurich stands in Covil's shoes.

In this situation, Zurich "must show that there was no arguable basis for subject matter jurisdiction." *Id.* Courts will find a judgment void for lack of subject matter jurisdiction in this context "only in the narrowest circumstances," and it is not enough for the court issuing the judgment to have erred in asserting jurisdiction over the case. *Id.* at 221–22. Rather, the error must be egregious, representing the rare instance of a clear usurpation of power. *Wendt*, 431 F.3d at 413. So long as there was an arguable basis for jurisdiction, the judgment should be upheld. *Hawkins*, 935 F.3d at 221–22.

⁹ Covil had been administratively dissolved long before the Finch litigation, but Zurich chose to defend in Covil's name and not to intervene when Ms. Finch sued Covil. See generally *Zurich Am. Ins. Co.*, No.18-cv-932 (M.D.N.C.); see also *Penn Nat'l Mut. Cas. Ins. Co. v. Viking Pizza, Inc.*, No. 1:17-CV-1155, 2020 WL 4288280, at *16 (M.D.N.C. July 27, 2020) (discussing North Carolina law allowing an insurer to intervene when counsel retained by the insurer to represent the insured cannot locate the insured or the insured is unresponsive).

Here, Zurich contends that a South Carolina statute of repose prevents any court from exercising subject matter jurisdiction over Ms. Finch's claims, which arose after Covil was judicially dissolved in 1992. The argument is based on a South Carolina statute that bars certain claims filed more than ten years after judicial dissolution, if the corporation published a notice of dissolution. While it is undisputed that Mr. Finch was diagnosed with mesothelioma in 2016, well more than ten years after Covil dissolved, Zurich's motion otherwise raises a multitude of disputed questions of fact and unsettled questions of state law.¹⁰

Specifically, in order to prevail on its argument that the judgment is void, Zurich will have to establish the following:

1. That the receiver published a notice of dissolution in accord with the requirements of § 33-14-107(b), even though Zurich has not offered any affirmative evidence of this fact, such as copies of the newspaper publications, and even though the receiver's accounting shows no money paid to publish any such notices.

AND

2. That South Carolina courts would interpret § 33-14-107(c), enacted after Covil's dissolution, to bar the claim, even though no South Carolina court has retroactively applied this subsection or has applied it to latent disease claims and other states

¹⁰ "[A] federal court sitting in diversity has a duty to apply the operative state law as would the highest court of the state in which the suit was brought." *Liberty Mut. Ins. Co. v. Triangle Indus.*, 957 F.2d 1153, 1156 (4th Cir. 1992). If the South Carolina Supreme Court has not addressed a particular issue, this Court must predict how that court would rule. See *AGI Assocs., LLC v. City of Hickory, N.C.*, 773 F.3d 576, 579 (4th Cir. 2014).

with similar provisions have declined to do so. *See Gardner v. Asbestos Corp.*, 634 F. Supp. 609, 612 (W.D.N.C. 1986); *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198, 212 (2009).¹¹

AND

3. That Covil's insurance policies issued by Zurich and others do not constitute "undistributed assets" under § 33-14-107(d)(1), even though the law is conflicting in other states that have addressed whether insurance policies are undistributed assets in this context, no South Carolina court has addressed the issue, and the South Carolina Supreme Court has held liability insurance is an undistributed asset in another context. *See, e.g., Moulitis v. Degen*, 301 S.E.2d 554, 558 (1983).

AND

4. That the time bar in § 33-14-107(b) is jurisdictional rather than a waivable affirmative defense, even though no South Carolina appellate court has held that the statute of repose in § 33-14-107(b) is jurisdictional and even though at least one South Carolina appellate court has treated a different statute of repose as non-jurisdictional. *Dunbar v. Carlson*, 533 S.E.2d 913, 918 (S.C. Ct. App. 2000) (affirming denial of a motion to amend to add a statute of repose defense raised at the close of the plaintiff's evidence at trial, noting that "inexcusable delay, or the

¹¹ In the alternative, Zurich asserts that South Carolina courts would apply the five-year bar in the 1988 version of § 33-14-107 to Ms. Finch's claims. That argument is inconsistent with § 33-14-106's explicit application only to known claimants, which Mr. and Ms. Finch were not.

taking of the adverse party by surprise, or the like” justify denying motions to amend).

AND FINALLY,

5. That there was no arguable basis for subject matter jurisdiction, even though it is and always has been undisputed that Covil and Ms. Finch are citizens of different states and the amount in controversy is over the statutory requirement in 28 U.S.C. § 1332.

In other words, in order to prevail on its Rule 60(b)(4) motion, Zurich will have to establish a chain of improbable facts and unlikely legal conclusions. If it is unsuccessful on even one of these facts or legal positions, its subject matter jurisdiction argument collapses. Zurich’s own insured disagrees with Zurich’s argument and finds it to be without merit. Doc. 571 at 1. And the South Carolina court overseeing the receivership, presided over by a retired Chief Justice of the South Carolina Supreme Court, has rejected the same arguments. *See Protopapas v. Wall, Templeton & Haldrup, P.A.*, No. 2019-CP-40-02285, and *Hutto v. Covil Corp.*, No. 2019-CP-40-06956 (Richland County Ct. Common Pleas Sept. 25, 2020) (Order Granting Receiver’s Motion to Clarify Status of Receivership).

Zurich has put forth various factual and legal arguments to establish its asserted facts and support its views of the law. But Zurich’s arguments are certainly not strong enough to establish an egregious jurisdictional error. None are clearly supported by well-established South Carolina precedent, and the case law that exists supports contrary arguments. The mere fact that authorities disagree about the propriety of jurisdiction in a

particular context constitutes an arguable basis for the exercise of jurisdiction. *Wendt*, 431 F.3d at 414; *see Hawkins*, 935 F.3d at 226.

Even if the “egregious error” standard does not apply, Rule 60(b)(4) by its terms requires the movant to show that the judgment is, in fact, void, which means here that Zurich must show the court lacked subject matter jurisdiction. *See, e.g., Wells Fargo Bank, N.A.*, 859 F.3d at 299. But the key underlying “fact” on which Zurich’s jurisdictional argument depends is that the receiver published the notice of judicial dissolution in the manner required by statute. As the Court found *supra*, Zurich has not shown that such a notice was published, either before Covil was dissolved or after the statute was amended in 2004.

Zurich points to its evidence that the receivership court directed the receiver to publish the notice of dissolution and later found that the receiver had “fully complied with the previous Orders of this Court in liquidating [Covil’s] assets,” Doc. 538-7 at 4, as establishing an inference that the receiver published the notice. But the receivership court did not make a specific finding that the receiver published the notice, and its findings about compliance in “liquidating assets” are not directed towards barring future claims or towards publication of notices, so any inference is quite weak. Zurich has submitted no evidence from any newspaper showing that the notice was actually published, much less that any published notice met the statutory requirements set by § 33-14-107(b). Any inference of compliance is fully rebutted by the absence of direct proof of publication, which one could reasonably expect to exist, and by the fact that the receiver’s accounting does not show he spent any money to publish any such notice.

From the beginning, this Court had Article III subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Zurich has presented what can at best be characterized as unsettled points of law and weak factual arguments that do not show a clear “usurpation of power.” *Wendt*, 431 F.3d at 413. This is inadequate to establish that there was “no arguable basis for subject matter jurisdiction,” which is required for a successful Rule 60(b)(4) motion brought by a party who had the opportunity to challenge subject matter jurisdiction before judgment. *Hawkins*, 935 F.3d at 221.

Even if the Court considered the subject matter jurisdiction argument afresh, it is without merit. The judgment is not void.

IV. OTHER MATTERS

Ms. Finch filed a motion to supplement the record to add additional evidence concerning what Zurich knew and when Zurich knew it. Doc. 580. As discussed *supra* n. 2, the Court does not need to resolve this issue. Even if the Court assumes Zurich did not know of the judicial dissolution until 2020, Zurich cannot prevail, so additional evidence from Ms. Finch is unnecessary. Her motion to supplement the record will be denied as moot.

VII. CONCLUSION

Zurich knew a receiver had been appointed for its insured and failed to investigate the nature of that receivership, which was all public record, for over twenty-five years. It chose not to intervene in this case when it was filed and instead hired counsel to defend in Covil’s name. Now, well after the Court entered judgment, Zurich seeks to intervene to assert a far-fetched jurisdictional argument that it could have investigated and hired

lawyers to present well before or immediately after final judgment. Its efforts to intervene and its Rule 60(b)(2) motion are not timely. The subject matter jurisdiction defense Zurich would raise on Covil's behalf does not show an egregious jurisdictional error, and in any event, is without merit. Zurich's motions will be denied.

It is **ORDERED** that Zurich America's motion to intervene, Doc. 537, and for relief from judgment, Doc. 538, are **DENIED**, and the Plaintiff's motion to supplement the record in response to the motion, Doc. 580, is **DENIED**.

This the 14th day of October, 2020.



UNITED STATES DISTRICT JUDGE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

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SC Court of Appeals

Case Nos. 2019-CP-40-06956 and 2019-CP-40-02285

Appellate Case No. 2020-001437

Peter D. Protopapas, as Receiver for Covil Corporation, Plaintiff,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and
Guaranty Company; Zurich American Insurance Company, Defendants

AND

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto,
Brian Hutto, and Candace H. Youngblood, Plaintiffs,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis
Company, Inc.; Starr Davis Company of South Carolina, Inc.; United States Fidelity &
Guarantee Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong
International, Inc.; Aurora Pump Company; BW/IP, Inc.; Carboline Company; CBS Corporation;
CGR Products, Inc.; Daniel International Corporation; Fisher Controls International, L.L.C.;
Fluor Constructors International, Inc.; Fluor Enterprises, Inc.; Foster Wheeler Energy
Corporation; The Goodyear Tire And Rubber Company; Grinnell, LLC; Hajoca Corporation;
IMG Industries, Inc.; John Crane, Inc.; Metropolitan Life Insurance Company; Spirax Sarco,
Inc.; Trane U.S., Inc.; Uniroyal Holding, Inc; Velan Valve Corporation; Viking Pump, Inc.; Weir
Valves & Controls U.S.A., Inc., Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant,

and

Covil Corporation, by and through its Receiver, Peter D. Protopapas and Peter D. Protopapas, in
his capacity as Receiver of Covil Corporation are the Respondents.

PROOF OF SERVICE

I certify that a true copy of the Memorandum on Appealability in this case has been served on the following, this 1st day of December, 2020, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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December 1, 2020.

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Subject: Appellate Case No. 2020-001437 - Memorandum on Appealability
Date: Tuesday, December 1, 2020 5:36:00 PM
Attachments: [Memorandum on Appealability 1, 2.pdf](#)
[Proof of Service Memo on Appealability, 2.pdf](#)

Good Afternoon,

Attached for service please find Respondents' Memorandum on Appealability which we are filing with the Court of Appeals today. The exhibits were too large to send as attachments to this email, so please find below a box link to view and download the exhibits:

<https://app.box.com/s/p35dkwzko1favvhscvmgk9nz24cfh2eo>

Thank you,
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