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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-001437
Circuit Court Case No. 2019-CP-40-02285

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

Plaintiff,

v.

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

Defendants,

Of Which:

United States Fidelity and Guaranty Company is the

Appellant,

And

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

Respondent.

RECORD ON APPEAL
(VOLUME II)

WOMBLE BOND DICKINSON (US) LLP

SIMPSON THACHER & BARTLETT LLP

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and Guaranty Company

RIKARD & PROTOPAPAS, LLC

Jescelyn Tillman Spitz
jspitz@rplegalgroup.com
2110 N. Beltline Blvd.
Columbia, SC 29204
(803) 978-6111

SMITH ROBINSON HOLLER DUBOSE AND
MORGAN, LLC

G. Murrell Smith, Jr.
S.C. Bar No. 66263
murrell@smithrobinsonlaw.com
Jonathan M. Robinson
S.C. Bar No. 68285
jon@smithrobinsonlaw.com
Shanon N. Peake
S.C. Bar No. 102723
shanonp@smithrobinsonlaw.com
2530 Devine St., Third Floor
Columbia, SC 29205
(803) 254-5445

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

September 13, 2021

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Peter D. Protopapas as Receiver for Covil Corporation,

Plaintiff,

vs.

CIVIL ACTION NO: 2019-CP-40-02285

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

Defendants.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto, et al.,

Plaintiffs,

vs.

CIVIL ACTION NO: 2019-CP-40-06956

Covil Corporation, Sentry Ins. Agency, Inc., et al.,

Defendants.

MOTION TO CLARIFY STATUS OF RECEIVERSHIP

The Receiver for Covil Corporation files this Motion to Clarify the Status of the Receivership as raised in both Zurich American Insurance Company's ("Zurich") Tenth Affirmative Defense in *Protopapas v. Wall, Templeton & Haldrup, P.A.*, Cause No. 2019-CP-40-02285 (S.C. Com. Pl. June 15, 2020), and United States Fidelity and Guaranty ("USF&G")'s

affirmative defenses in *Hutto v. Covil Corp.*, Cause No. 2019-CP-40-06956 (S.C. Com. Pl. July 13, 2020). Although this Court already considered and rejected Zurich's and USF&G's (together, the "Insurers") arguments regarding the impact of Covil's prior receivership, the Insurers nevertheless have raised it once again as an affirmative defense. *See* Exhibit A, Zurich's Answer, ¶¶ 90-94; Exhibit B, USF&G's Answer, at 16 ("Sixth Defense"), 35 ("Eleventh Defense"). The Receiver requests that this Court clarify the impact, if any, of these affirmative defenses and thus finally adjudicate this issue of South Carolina law.

I. INTRODUCTION

A. **This Court already rejected Zurich and USF&G's argument that the prior receivership stripped Covil of the ability to sue or be sued.**

The Insurers have argued in this Court (and elsewhere) that the 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.*, 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.*, No. 7:18-cv-3291-BHH (D.S.C. filed Dec. 6, 2018). This Court already has determined that those arguments are incorrect as a matter of South Carolina law. Exhibit I, May 6, 2020 Order Denying Motions to Reconsider and Motion to Stay, at 5-15.

In this Court, USF&G's Motion to Reconsider, filed in the *Smith, Howe, Hopper, Hill*, and *Taylor* matters, argued that the prior receivership orders extinguished Covil's ability to be sued. Exhibit C. It 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.

This Court denied USF&G's motion. *See* Exhibit I. In determining the argument lacked merit, this Court noted, "It does not matter if Covil was administratively or judicially dissolved in the early 1990s." *Id.* at 9. "USF&G's objections are simply incorrect." *Id.*

B. The Insurers now attempt to revive their already-rejected argument, and the prior receivership, in their affirmative defenses.

Despite this Court's Order, the Insurers have now raised this issue as an affirmative defense. Specifically, Zurich's Affirmative Defense to the Receiver's complaint in this action is that Covil may not sue or be sued—and thus does not need a Receiver—because of the prior receivership.¹ *See* Exhibit A ¶¶ 90-94. Zurich's Affirmative Defense reads, in its entirety as follows:

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.

¹ Zurich appears to make an exception for itself here: according to Zurich, Covil cannot sue or be sued, except when Zurich decides to sue Covil. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C. filed Nov. 6, 2018) (ongoing litigation against Covil initiated by Zurich).

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.

Id. Meanwhile, USF&G's Affirmative Defense to Covil's Crossclaims in the *Hutto* case reads, in its entirety:

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.

Exhibit B at 35. USF&G asserted a similar affirmative defense against Plaintiffs' claims. *Id.* at 16.

II. STATEMENT OF BACKGROUND

A. Covil previously was in a receivership between 1991 and 1992.

In 1991, the Greenville County Master in Equity, Judge Simmons, appointed L. Winston Lee as Receiver for Covil Corporation in a matter styled *First Savings Bank, FSB v. Covil Corp. et al.*, C/A No. 1991-CP-23-4445 (S.C. Com. Pl. 1991). *See* Exhibit J.

The L. Winston Lee receivership operated until the Master-in-Equity signed a Final Order on November 30, 1992. *See* Exhibit K. The Final Order accepted the Receivership Accounting. The receipts for Covil during the receivership included \$562,500 for the sale of real estate, \$26,755.27 in auction proceeds, and \$80,209.24 in cash surrender value from New York Life, among others. *See id.* at 5. All remaining receivership funds and accounts receivable of Covil were assigned to First Savings Bank, which the receiver identified in his Final Report as a “priority lien creditor.” *See id.* at 2-3; *see also* Exhibit L, 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* Exhibit L at 5 (“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[.]”).

The Final Order of the Receivership specified that Mr. Lee was discharged as the receiver: “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.” *See* Exhibit K at 3-4. The Final Order did not provide for dissolution. The South Carolina Secretary of State signed a Certificate of Revocation of Authority for Covil Corporation on July 30, 1993. *See* Exhibit M.

B. The Insurers were aware of the prior receivership but did not attempt to use it to avoid their obligations until 2020.

The Insurers now claim that twenty-seven years after the prior receivership, Zurich decided to consult the public files of the prior receivership court, and those documents establish that Covil cannot sue or be sued. The facts do not support this position.

The Insurers were undisputedly aware of the 1991 Receivership because Danny White of Gallivan White Boyd, Zurich's asbestos personal injury defense counsel, wrote to the predecessors of Zurich and USF&G on November 14, 1991. *See* Exhibit N. Mr. White wrote, "[REDACTED]" *Id.* Indeed, in an April 15, 1992, letter to Maryland Casualty (Zurich), USF&G, and Sentry he stated: "[REDACTED]" Exhibit O, April 15, 1992 Letter to David Kappus, et al.

Mr. White's November 1991 billing records also show that he "[REDACTED]" and discussed "[REDACTED]" with Stuart Mauney. Exhibit P at PDF p. 12. Mr. Mauney called Mr. Lee to discuss "[REDACTED]", *id.* at 13. In fact, the billing records reflect at least five November 1991 calls or conferences relating to the Covil Receivership or Covil documents, including one "conference" that included Jim Covil. *Id.* at 13-14. Notably, Maryland Casualty (now Zurich) reviewed these bills and noted it was "[REDACTED]" *Id.* at 4.

Mr. White's *own law partner* at the time, Arthur Howson, even represented plaintiff The First Savings Bank, FSB, in the prior receivership proceedings against Covil. *See* Exhibit Q,

Excerpt from Deposition of Danny White, at 116:1–117:7. Mr. Howson himself signed the May 11, 1992 Order to indicate his client’s consent to the Order. *Id.*

Zurich also cannot argue that this knowledge was lost. On March 14, 2001, a Zurich Claim File Activity Memorandum notes, “[REDACTED]” *See* Exhibit R. Five days later, another Memorandum notes: “[REDACTED]” *See* Exhibit S, Mar. 19, 2001 Claim File Activity Memorandum.

Mr. White and his firm, which continued to represent Covil through 2018, were undisputedly on notice of the prior receivership—including the May 11, 1992 Order—as were the Insurers. Had they believed suits against Covil were barred by the Order, Mr. White and the Insurers could have raised the defense at any time over those years.

C. Judge Simmons transferred the first receivership to this Court.

On May 4, 2020, Judge Charles Simmons, who presided over the first receivership action, transferred that action to this Court. *See* Exhibit T, May 1, 2020 Form 4 Order. Judge Simmons later denied Zurich’s motion to seek reconsideration of his Order. *See* Exhibit U, June 10, 2020 Order Denying Intervention and Reconsideration.

III. ARGUMENT

A. The Insurers’ Affirmative Defenses fail as a matter of law under the South Carolina statutory scheme.

Zurich’s Affirmative Defense mentions the May 11, 1992 judicial dissolution of Covil. Exhibit A ¶ 90. USF&G’s Affirmative Defense is more vague. Exhibit B at 35. In any event, as this Court has already held, it does not matter if Covil was administratively or judicially dissolved in the early 1990s. Exhibit I at 9. 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. Exhibit I at 9.

Zurich also calls prior receiver Mr. Lee “the ‘*permanent* Receiver of Covil Corporation.’” Exhibit A ¶ 90 (emphasis added). The prior Receivership’s Final Order, however, shows that the prior receiver was “discharged as Receiver.” Exhibit K at 10. There is no evidence otherwise.

Zurich’s Affirmative Defense also references the May 11, 1992 Order, which provides, “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[.]” Exhibit V, May 11 1992 Order, ¶ 11. It is unclear why Zurich believes this language is significant. Section 33-13-310 does not contain any references to injunctive relief. To the extent the May 11, 1992 Order should instead cite S.C. Code Ann. § 33-14-310(c), that statute provides:

- (c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation *until a full hearing can be held*.

S.C. Code Ann. § 33-14-310(c) (emphasis added). Thus, any injunction entered in May 1992 was temporary, and was vacated, at the latest, by November 30, 1992, the date of the Final Order in the first receivership. *See* Exhibit K. As a matter of law, any 1992 injunction could not affect the current proceedings.

Zurich’s and USF&G’s affirmative defenses also reference S.C. Code Ann. § 33-14-107. Exhibit A ¶¶ 91-92, 94; Exhibit B at 35. This statute governs unknown claims. S.C. Code Ann. § 33-14-107. And it plainly provides that unknown claims “may be enforced under this section

(1) against the dissolved corporation to the extent of its undistributed assets.” *Id.* at § 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[.]”). Thus, again, the statute, as a matter of law, provides that a dissolved corporation such as Covil may continue to respond to claims “to the extent of its undistributed assets.” *Id.* at § 33-14-107(d)(1); Exhibit I at 10.

Zurich’s and USF&G’s Affirmative Defenses also mention other dissolution statutes. Answer ¶¶ 90-91. These statutes do not pertain to future unknown claims such as the asbestos personal injury claims at issue here. *See* S.C. Code Ann. § 33-14-105 (listing appropriate tasks for winding up business, affairs and rights not affected by dissolution); § 33-14-320 (listing receivership and custodian duties); § 33-14-106 (addressing procedure for known claims, not future claims).

B. There is no evidence that the Notice of Dissolution was published as required.

Before the time-bar in S.C. Code § 33-14-107(c) could apply, a dissolved corporation needed to publish a newspaper notice of its dissolution. *See* S.C. Code § 33-14-107(a), (b), and (c). Zurich’s Affirmative Defense asserts that the November 12, 1992 “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.” Answer ¶ 92 (emphasis added). There is no evidence that the publication occurred. There is no indication of how an alleged notice was published, when it was published, whether it was published in an appropriate newspaper, or what the notice said.

The prior receiver’s Petition actually constitutes evidence that he *did not* publish the notice. A

newspaper would have charged the prior receiver for publication, and that charge would have been an expense of the prior receiver. However, in the prior receiver's final accounting of reimbursable expenses, there is no mention of a publication expense to any newspaper. *See* Exhibit K at 5. Without the publication of the notice of dissolution, the time-bar in S.C. Code § 33-14-107(c) never began to run.²

The only purported "evidence" Zurich points to is a comment in Judge Simmons' November 11, 1992, Order which was entered as a result of the prior receiver's November 11, 1992, Petition that provided the prior receiver's final report. *See* Exhibit W. That Order stated: "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 [*sic*] Defendants, that his accounting is in order and that the relief sought by him should be approved." *Id.* at 2. The Order finds the Receiver complied with liquidation, but it does not address the question of publication.³

² There is also another problem of which the Court should be aware. S.C. Code § 33-14-330(a) required that "the clerk of court shall deliver a certified copy of the decree to the Secretary of State, who shall file it without charging any fee." Judge Simmons even directed the Clerk of Court to do just that, *see* Exhibit V at 4, but the Secretary of State never received the Order; and it is not on file with the Secretary of State. *See Covil Corporation*, S.C. Secretary of State Business Entities Online Search Results, <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/dc8830dd-b017-42eb-9981-061922a205b6> (last visited July 16, 2020) (showing status of Covil Corporation as "forfeited," not "dissolved" as the site does for dissolved corporations). Therefore, there was no compliance with the requirement that a certified copy of the dissolution decree be delivered to the Secretary of State, which would appear to render the attempt at a judicial dissolution ineffective. *See S.C. Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 562, 320 S.E.2d 464, 468 (Ct. App. 1984) ("Failure to strictly comply with the mandates of the dissolution statutes effectively continues the corporation with respect to creditors whose rights are prejudiced by the noncompliance.").

³ Judge Simmons was expressly referring to his prior Orders as applicable to "liquidating the assets," not with respect to all activity of the prior receiver. Exhibit W at 2. Therefore, the Order is not evidence that the prior receiver published the notice of dissolution required by S.C. Code § 33-14-107.

C. The *Krafft-Murphy* decision supports this Court’s prior ruling.

Also, as explained below, this Order did not bar future claimants. In fact, the issues raised by Zurich have been thoroughly addressed by the Delaware Supreme Court in *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013). There, the Delaware Supreme Court held that (1) “Delaware’s dissolution statutes impose no generally applicable statute of limitations that would time-bar claims against a dissolved corporation by third parties;” and (2) “for litigation commenced after the expiration of that statutory period, a dissolved corporation may act only through a receiver or trustee[.]” *Id.* at 698. The *Krafft-Murphy* decision supports Covil’s position here, too.

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, 272-73, 217 S.E.2d 789, 791 (1975), the South Carolina Supreme Court addressed 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 occasion 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.

The *Krafft-Murphy* decision soundly rejects Zurich’s position. Exhibit I at 11. 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.” *Id.* at 698. The court 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). So too, here.

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).⁴

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). *See* Exhibit I at 11-13.

D. Any argument regarding statutory history fails as a matter of law.

Zurich has argued in another court that the relevant statutory history shows the statute was materially different at the time of Covil’s dissolution. Exhibit F (Zurich’s Rule 60(b)

⁴ In USF&G’s prior briefing before this Court, it relied on *In re All Cases Against Sager Corp.*, 967 N.E. 2d 1203 (Ohio 2012). Exhibit C 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. Neither USF&G nor Zurich, however, may rely on *Sager*, 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.”); Exhibit I at 12.

memorandum in M.D.N.C.) Specifically, Zurich claimed that “newly discovered orders from Covil’s dissolution proceedings nearly three decades ago” show that South Carolina’s dissolution statute barred the asbestos personal injury plaintiffs’ claims against Covil and prevented the Middle District of North Carolina from asserting subject matter jurisdiction over Covil. *Id.* at 10. Zurich argued that the relevant statute, S.C. Code Ann. § 33-14-107(c)(1)-(2) (1988), operated at the time of Covil’s dissolution in 1992 to bar claims against dissolved corporations “[i]f the dissolved corporation publishes a newspaper notice.” *Id.* at 11. Moreover, Zurich claimed the “newly discovered evidence” establishes that Covil’s prior receiver published a notice of Covil’s dissolution in 1992, triggering the alleged statutory bar on claims against Covil. *Id.* at 12.

Zurich’s position is incorrect. The statutory history of Section 33-14-107 shows that, as a matter of law, Covil may currently sue and be sued. Sections 33-14-107(a) and (b) address the publication of the notice of dissolution in the early 1990s and are clearly inapplicable to the current asbestos claims against Covil. Further, Section 33-14-107(c)(3) did not exist at the time of Covil’s 1992 dissolution, and the Comments to Section 33-14-107 show the General Assembly specifically chose not to adopt what is today Subsection (c)(3), which addresses the bar of contingent claims and claims based on an event after dissolution, from the Model Act. In fact, the Comments note the clear legislative intent behind the version of the statute in effect at the time of Covil’s dissolution was that “[t]he statue of repose only applie[d] to *claims existing at dissolution*.” See South Carolina Reporter’s Comments, S.C. Code Ann. § 33-14-107 (emphasis added). The General Assembly did not adopt subsection (c)(3) until 2004, so this subsection, which did not exist until either eleven or twelve years after Covil’s dissolution, cannot apply. Exhibit I at 13.

Further, “there is a presumption that statutory enactments are to be considered prospective rather than retrospective . . . unless the intention to make them retrospective is clearly apparent

from the terms thereof.’ ‘Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt.’” *Hock RH, LLC v. S.C. Dep’t of Revenue*, 423 S.C. 208, 215, 813 S.E.2d 540, 544 (Ct. App. 2018) (citations omitted). “[A]bsent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.’ . . . ‘A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. *When a statute creates a new obligation* or imposes a new duty, courts generally consider the statute *prospective only*.’” *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551-52 (Ct. App. 2013) (emphasis added) (citations omitted).

The plain language of the statute and the clearly expressed legislative intent show that, as a matter of law, Section 33-14-107 does not bar claims that did not exist at the time of Covil’s dissolution, regardless of whether and how Covil was dissolved in 1992 or 1993. *Id.*

E. Covil does not seek to impugn the Orders of Judge Simmons.

Finally, Zurich’s Answer claims, “the Orders of Judge Simmons may not be impugned upon matters within his jurisdiction, such as the Covil Receivership, by counter evidence.” Answer ¶ 93 (citing *Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (citing 14 Am. Jur. *Courts* § 137)). This authority is not relevant. *Long* overturned the convictions of certain criminal defendants found guilty of contempt for violating an oral court order for which there was no written record. *Id.* at 609, 86 S.E.2d at 482. The *Long* court quoted an American Jurisprudence treatise only to note the importance of written judicial orders over unwritten orders in that context. What’s more, Covil has not sought to impugn or attack any order issued under the prior receivership. And no law prohibits Covil from asserting a legal argument regarding the scope of a prior order, as it does here. *See Agape Motorcoach Retreat, LLC v. Brintle*, 523 Fed. Appx.

948, 955 (4th Cir. 2013) (noting “an examination of the scope of [an] order” is not an impermissible collateral attack).

IV. CONCLUSION

For the foregoing reasons, Covil requests that this Court clarify its ruling and provide finality for the parties. Pursuant to Rule 11, the undersigned counsel certifies that further consultation would serve no useful purpose in resolving the issues raised herein and he will continue to attempt to resolve these issues.

Respectfully submitted,

**SMITH ROBINSON HOLLER DUBOSE
AND MORGAN, LLC**

s/Jonathan M. Robinson

G. Murrell Smith, Jr. (SC Bar 66263)

Post Office Box 580

Sumter, SC 29151-0580

Telephone: 803.778.2471

murrell@smithrobinsonlaw.com

Jonathan M. Robinson (SC Bar 68285)

Shanon N. Peake (SC Bar 102723)

2530 Devine Street, 3rd Floor

Columbia, SC 29205

803.254.5445

jon@smithrobinsonlaw.com

shanonp@smithrobinsonlaw.com

RIKARD & PROTOPAPAS, LLC

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

1329 Blanding Street

Post Office Box 5640 (29250)

Columbia, South Carolina 29201

Telephone: 803.978.6111

jspitz@rplegalgroup.com

Counsel for Peter D. Protopapas as Receiver
for Covil Corporation and Covil Corporation

July 21, 2020.

EXHIBIT C

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
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
DENVER D. TAYLOR and JANICE TAYLOR,	)	C/A NO.: 2018-CP-40-04940
	)	
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
 William P. Davis, S.C. Bar No.: 1585
 Mariel D. Norton, S.C. Bar No.: 100198
 BAKER, RAVENEL & BENDER, LLP
 3710 Landmark Drive, Suite 400
 Post Office Box 8057
 Columbia, South Carolina 29202
 (803) 799-9091; wdavis@brblegal.com

Todd Carroll, S.C. Bar No.: 74000
 WOMBLE Bond Dickinson LLP
 1221 Main Street, Suite 1600
 Columbia, SC 29201
 803-454-7730; Todd.Carroll@wbd-us.com

AND

Mary Beth Forshaw
 Andrew T. Frankel
 SIMPSON THACHER & BARTLETT LLP
 425 Lexington Avenue
 New York, NY 10017

(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 [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 #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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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.

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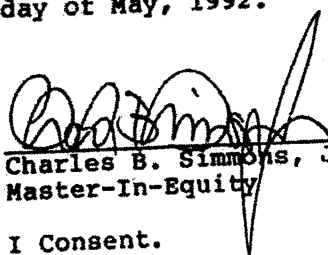
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

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.

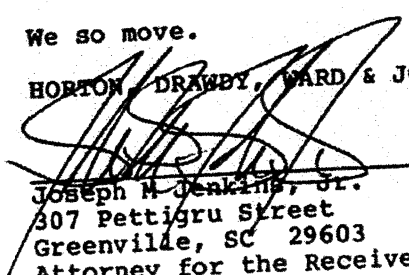
IT IS SO ORDERED this 11 day of May, 1992.

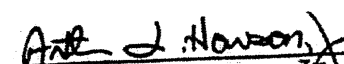

Charles B. Simmons, Jr.
Master-In-Equity

I Consent.

We so move.

HORTON, 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.

EXHIBIT D

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A NO.: 2019-CP-40-00076

) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A NO.: 2019-CP-40-00076

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) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A NO.: 2018-CP-40-04680

) FOR THE FIFTH JUDICIAL CIRCUIT
) C/A NO.: 2018-CP-40-04680

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

William P. Davis, S.C. Bar No.: 1585
Mariel D. Norton, S.C. Bar No.: 100198
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091; wdavis@brblegal.com

M. Todd Carroll, S.C. Bar No.: 74000
WOMBLE BOND DICKINSON LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
803-454-7730; Todd.Carroll@wbd-us.com

AND

Mary Beth Forshaw
Andrew T. Frankel
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000; mforshaw@stblaw.com

(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 #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.

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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.

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

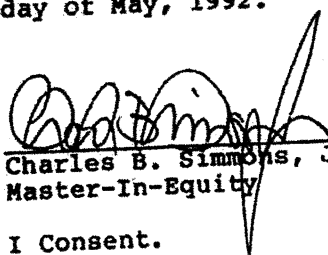
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

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

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

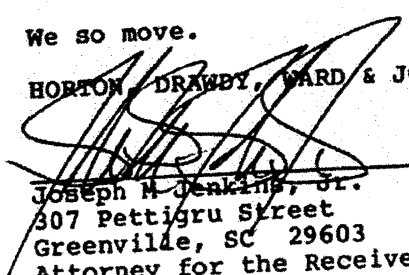
IT IS SO ORDERED this 11 day of May, 1992.

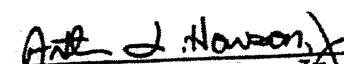

Charles B. Simmons, Jr.
Master-In-Equity

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	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	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 *broadbar*. *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

William P. Davis, S.C. Bar No.: 1585
Mariel D. Norton, S.C. Bar No.: 100198
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091; wdavis@brblegal.com

Todd Carroll, S.C. Bar No.: 74000
WOMBLE BOND DICKINSON LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
803-454-7730; Todd.Carroll@wbd-us.com

AND

Mary Beth Forshaw
Andrew T. Frankel
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(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
31 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.

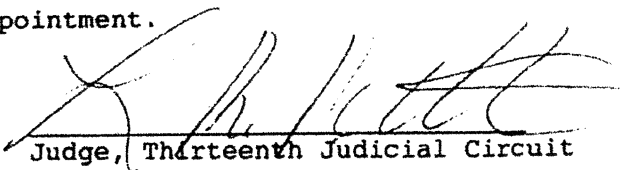
2. That L. Winston Lee be appointed as receiver of the Covil Real Property and Equitable Enterprises Real Property, to take and have complete and exclusive management and control of said property. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper 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.

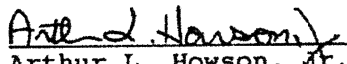
IT IS SO ORDERED.


Judge, Thirteenth Judicial Circuit

Greenville, SC

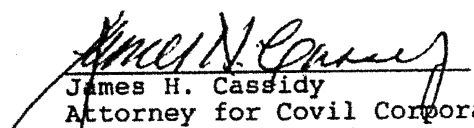
October 11, 1991

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

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.

CS #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.

CS
#3

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.

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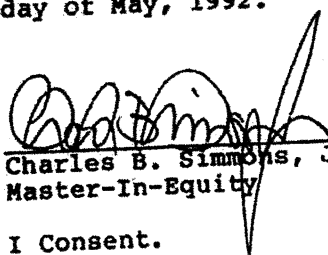
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

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.

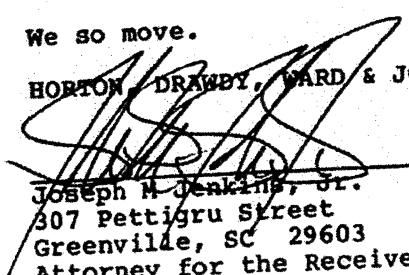
IT IS SO ORDERED this 11 day of May, 1992.

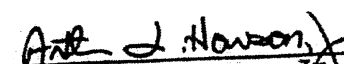

Charles B. Simmons, Jr.
Master-In-Equity

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,

Plaintiff,

v.

COVIL CORPORATION,

Defendant.

**INTERVENOR ZURICH AMERICAN
INSURANCE COMPANY’S MOTION
FOR RELIEF FROM JUDGMENT
UNDER RULE 60(b)(2) AND 60(b)(4)**

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] 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] —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**

BY: /s/ J. Matthew Little

J. Matthew Little, N.C. State Bar No. 20032
Daniel T. Strong, N.C. State Bar No. 49546
4700 Falls of Neuse Road, Suite 450
Raleigh, North Carolina 27609
Telephone: (919) 873-0166
Fax: (919) 873-1814
mlittle@teaguecampbell.com
dstrong@teaguecampbell.com

William A. Bulfer, N.C. State Bar No. 31424
22 South Pack Square, Suite 800
Asheville, North Carolina 28801
Telephone: (828) 254-4515
Fax: (828) 254-4516
wbulfer@teaguecampbell.com

*Attorneys for Intervenor Zurich American
Insurance Company*

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

BY: /s/ J. Matthew Little
J. Matthew Little, N.C. State Bar No. 20032
Daniel T. Strong, N.C. State Bar No. 49546
4700 Falls of Neuse Road, Suite 450
Raleigh, North Carolina 27609
Telephone: (919) 873-0166
Fax: (919) 873-1814
mlittle@teaguecampbell.com
dstrong@teaguecampbell.com
Attorneys for Intervenor Zurich
American Insurance Co.

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

TEAGUE CAMPBELL DENNIS & GORHAM, LLP

BY: /s/ J. Matthew Little
J. Matthew Little, N.C. State Bar No. 20032
Daniel T. Strong, N.C. State Bar No. 49546
4700 Falls of Neuse Road, Suite 450
Raleigh, North Carolina 27609
Telephone: (919) 873-0166
Fax: (919) 873-1814
mlittle@teaguecampbell.com
dstrong@teaguecampbell.com
Attorneys for Intervenor Zurich
American Insurance Co.

EXHIBIT 1



Rec. 547

EXHIBIT 2

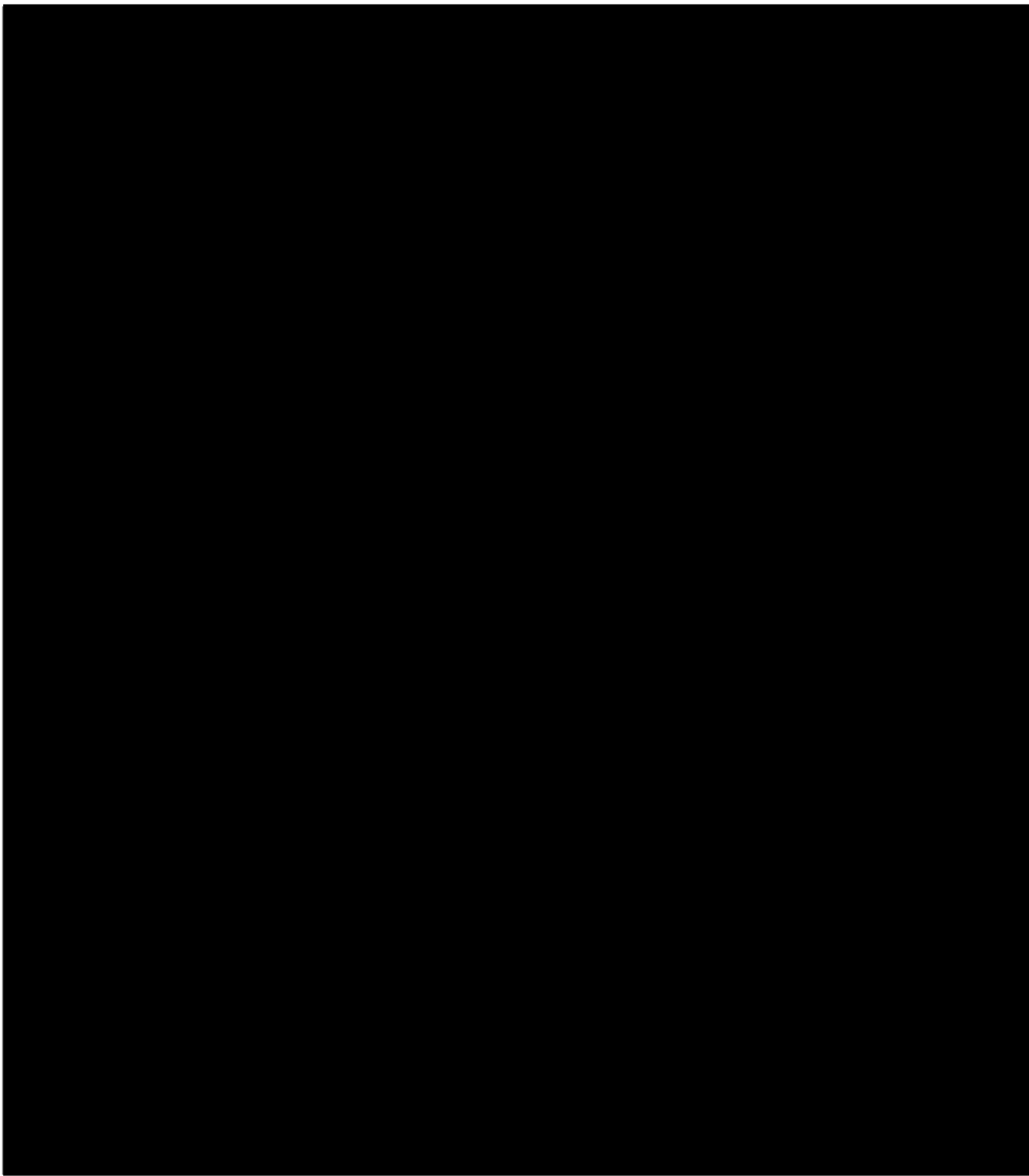


EXHIBIT 3

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

01
31 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.

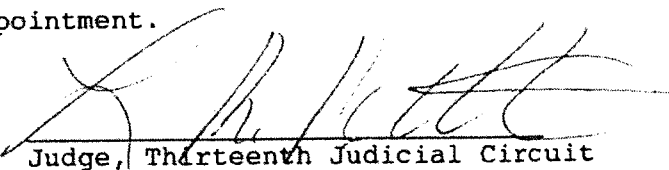
2. That L. Winston Lee be appointed as receiver of the Covil Real Property and Equitable Enterprises Real Property, to take and have complete and exclusive management and control of said property. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper 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.

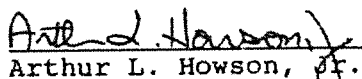
IT IS SO ORDERED.


Judge, Thirteenth Judicial Circuit

Greenville, SC

October 11, 1991

I SO MOVE:


Arthur L. Howson, Jr.

Attorney for the Plaintiff

I CONSENT:

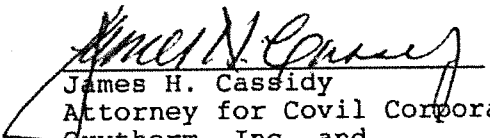

James H. Cassidy
Attorney for Covil Corporation
Oxytherm, Inc. and
Equitable Enterprises

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.

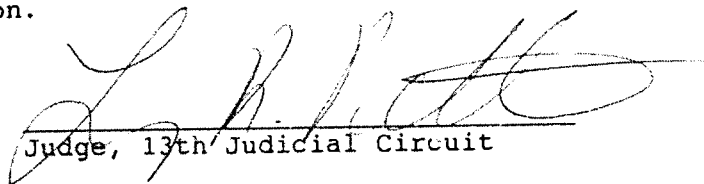
(7) The Receiver is hereby required to post a bond in the amount of Five Thousand and 00/100 (\$5,000.00) immediately upon

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

FILED
JUL 21 2 12 PM '92
CLERK
COURT

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.*

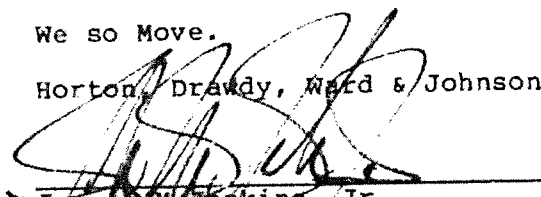
DEPOSIT MADE
MASTER IN EQUITY
GREENVILLE COUNTY
AMT. \$100 DATE 4/24/92

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

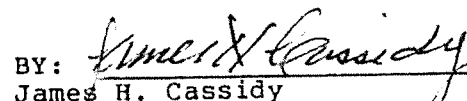
BY: 
James H. Cassidy
P. O. Box 10045
Greenville, SC 29603
Attorney for the Defendants

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


 This matter was referred to my by Order of the Honor-
able 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 Oxy-
therm, Inc. The Receiver now seeks to have his appointment
responsibility and authority broadened to that of a general re-
ceiver 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 appoint-
ment 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

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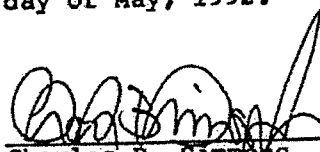
A Certified Copy

Greenville County, SC

Dated _____

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

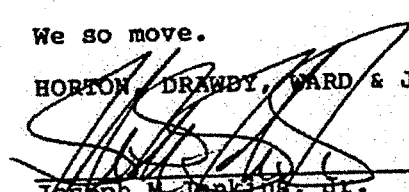
IT IS SO ORDERED this 11 day of May, 1992.

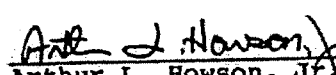

Charles B. Simmons, Jr.
Master-In-Equity

I Consent.

We so move.

HORTON, DRAWBY, WARD & JOHNSON


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

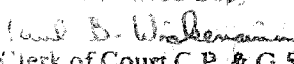

Arthur L. Howson, Jr.
Attorney for the Plaintiff

We Consent.

Love, Thornton, Arnold & Thomason

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

A Certified Copy


Paul B. Waldemann
Clerk of Court C.P. & G.S.
Greenville County, SC

Dated April 16, 2002

EXHIBIT 7

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 10th / 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 H. Verduin 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.
JH Verduin
 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

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

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.

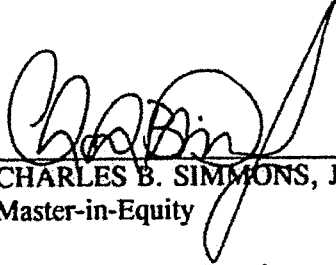
2. All Claimants are hereby ordered to file any Objections they may have to the above-referenced relief sought by the Receiver both with this Court and the Receiver. All Objections must be filed with and received by this Court and the Receiver on or before the 27th day of November, 1992 at the addresses 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. Wiseman
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
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

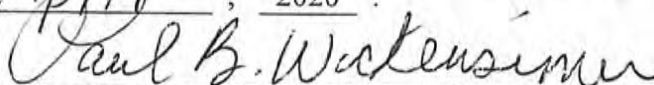
STATE OF SOUTH CAROLINA)

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.

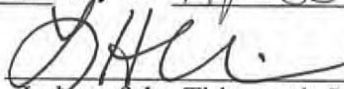
In Witness Whereof, I have hereunto set my hand and affixed the official Seal of said Court, on the 16th day of April, 2020.



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.

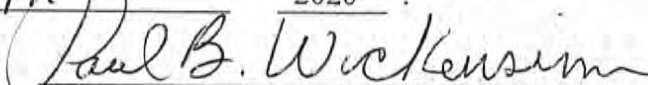
Dated at Greenville, South Carolina, this 16th day of April, 2020.



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.
CANDACE M. MILLER



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:

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 Shelnut Heating & Air Conditioning Company, Inc. provided Shelnut 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

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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.

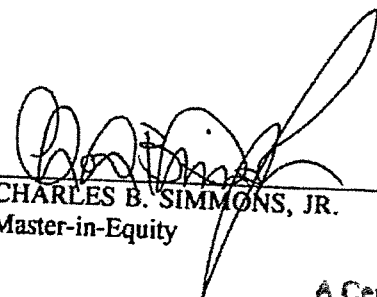
7. That the abandonment by the Receiver of all remaining assets of the above-named Defendants is hereby approved, and the Receiver is otherwise authorized to return any books and records of any of the Defendants held by him to the shareholders and/or partners of the Defendants upon written demand for 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. Wickham
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
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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
New York Life Cash Surrender Value	8,975.51
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Proposed Disbursements:

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

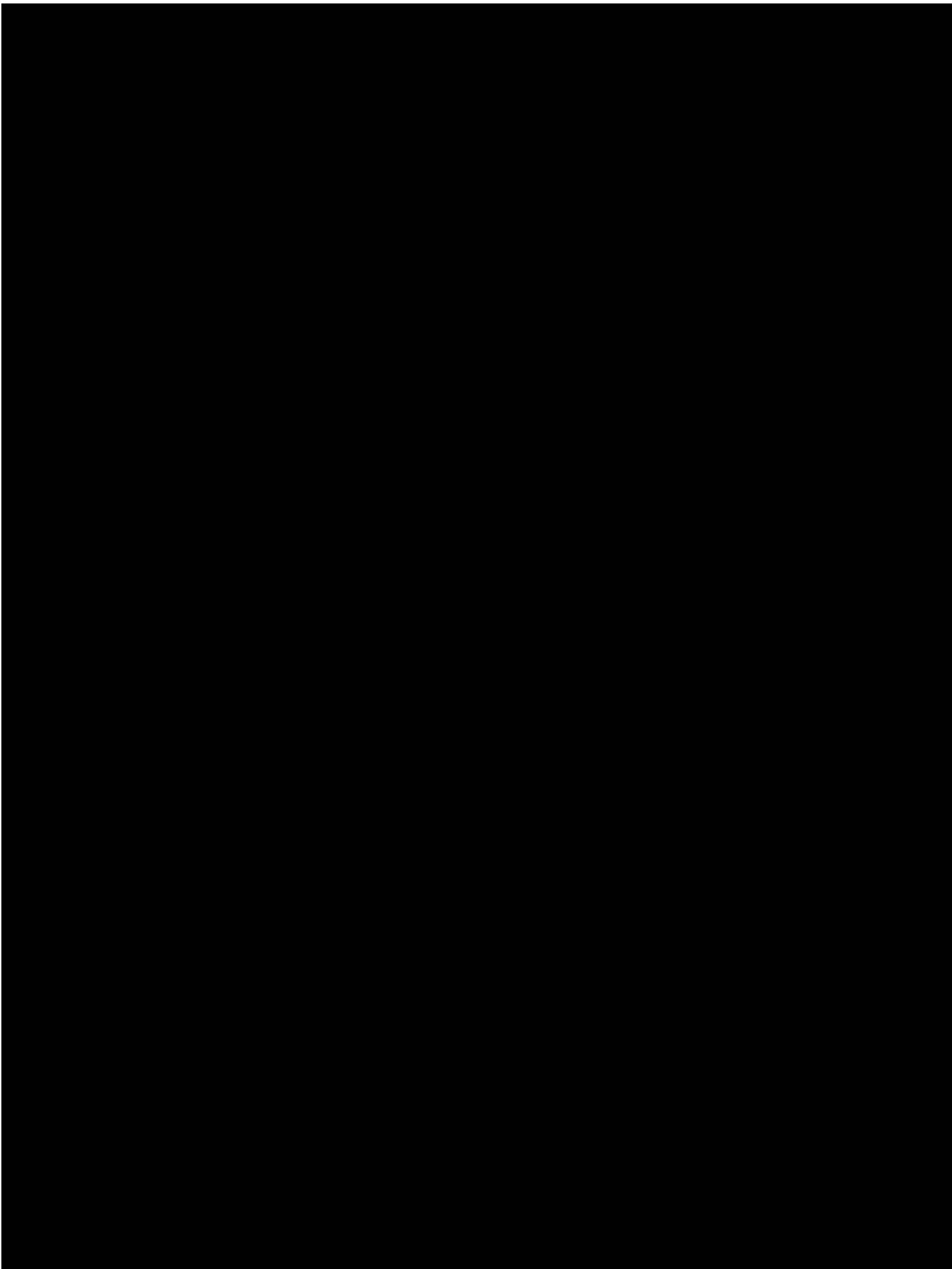
RECEIVER'S ACCOUNTING**EQUITABLE ENTERPRISES****Receipts:**

Bank Account	3,143.80
Total Receipts	3,143.80

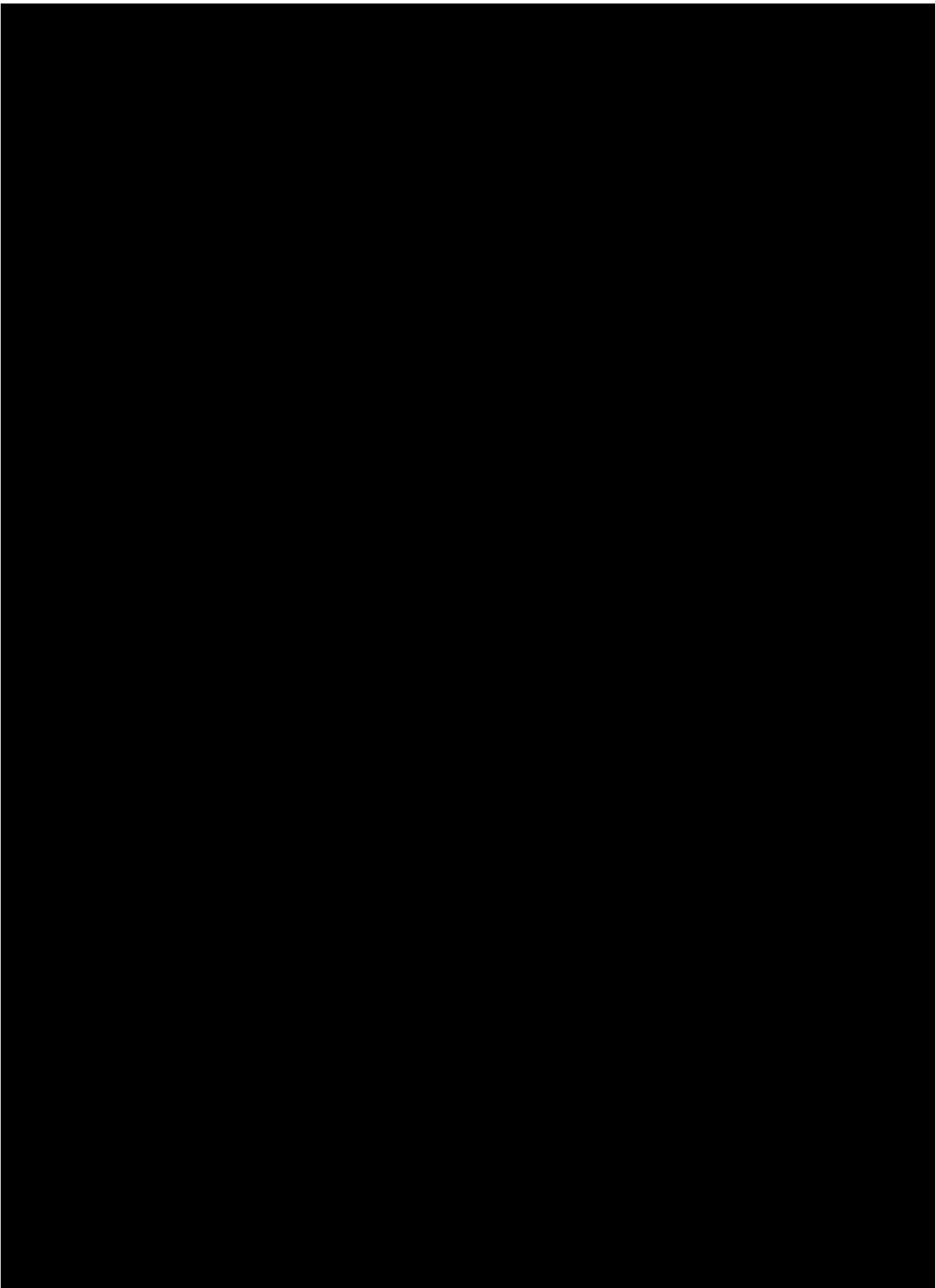
Proposed Disbursements:

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

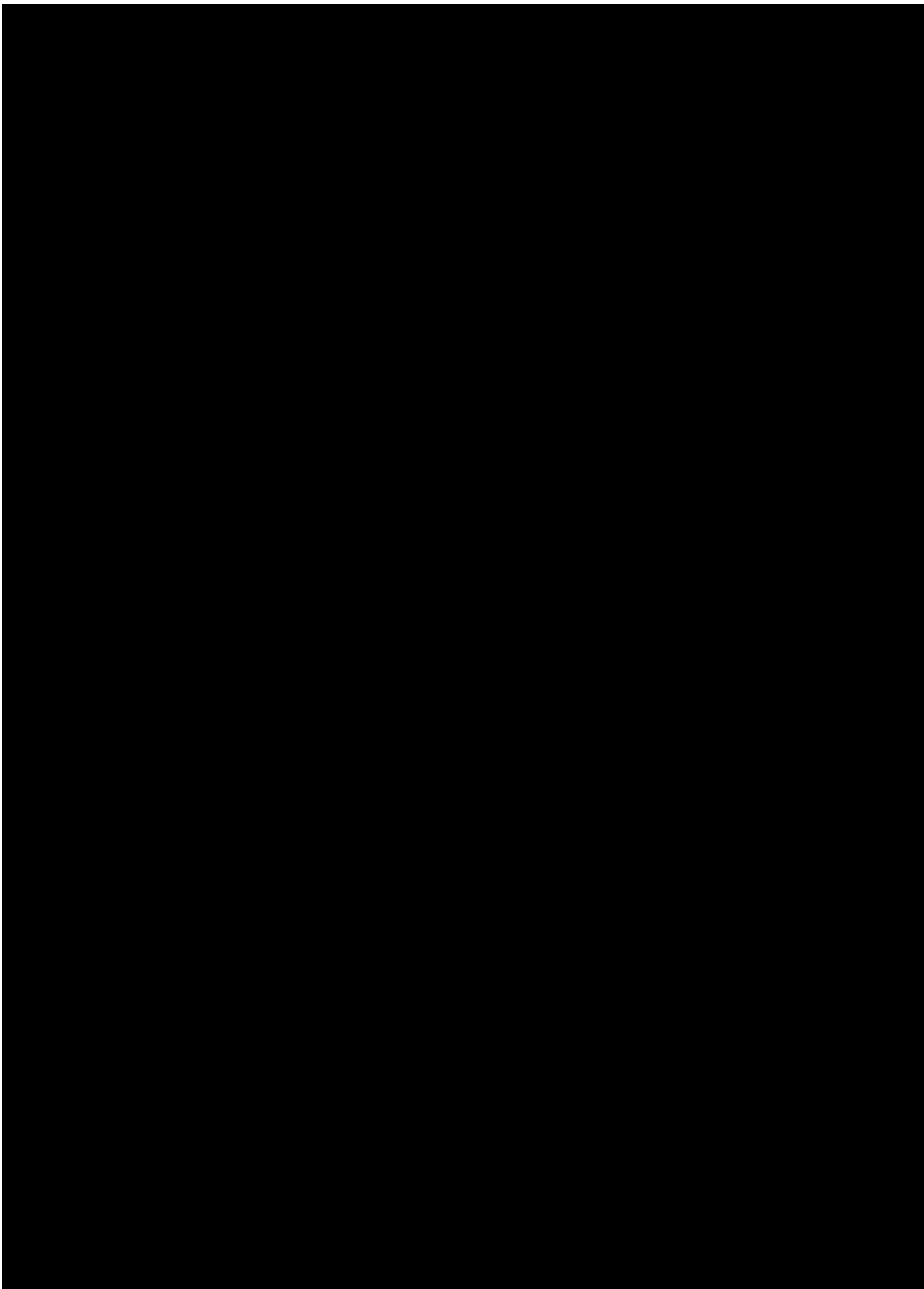
EXHIBIT 9



Rec. 594



Rec. 595



Rec. 596

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,

 γ

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.

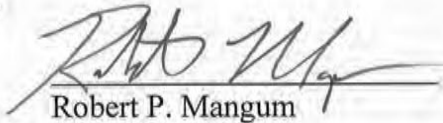
6. On March 11, 2020, assisted by a member of TPGL staff, I personally reviewed the documents made available to us by the Greenville County Clerk of Court. In our review of 12-15 physical files, we were unable to find any relevant documents other than the Order of June 23, 1992 (of which we had been 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:

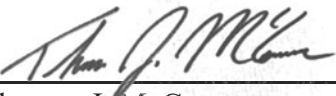

Thomas J. McCormac

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]
[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]
[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]
[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.

s/John S. Wilkerson, III

John S. Wilkerson, III, Federal ID No.: 4657

Robert E. Kneece, III, Federal ID No.: 12351

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, SC 29413

Telephone: 843-576-2801

843-576-2829

Email: jwilkerson@turnerpadget.com

rkneece@turnerpadget.com

W. Taylor Stanley, Federal ID No.: 11741

P.O. Box 1473

Columbia, SC 29202

Telephone: 803-254-2200

Email: tstanley@turnerpadget.com

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:

/s/ William P. Davis
William P. Davis Fed. ID No.: 454
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax: (803) 779-3423
wdavis@brblegal.com

AND

Mary Beth Forshaw (*pro hac vice*)
Andrew T. Frankel (*pro hac vice*)
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2846; mforshaw@stblaw.com
(212) 455-3073; afrankel@stblaw.com

*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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2019-CP-40-00076

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

JAMES MICHAEL HILL,

Plaintiff,

vs.

Advance Auto Parts, Inc., et al.,

Defendants.

In Re:

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2018-CP-40-04680

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

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

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 01
31 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.

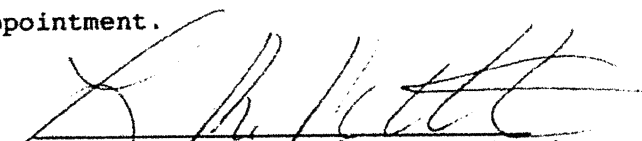
2. That L. Winston Lee be appointed as receiver of the Covil Real Property and Equitable Enterprises Real Property, to take and have complete and exclusive management and control of said property. Said receiver shall make such normal and customary payments and disbursements as may be necessary and proper 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.

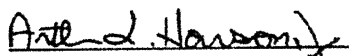
IT IS SO ORDERED.


Judge, Thirteenth Judicial Circuit

Greenville, SC

October 11, 1991

I SO MOVE:


Arthur L. Howson, Jr.

Attorney for the Plaintiff

I CONSENT:

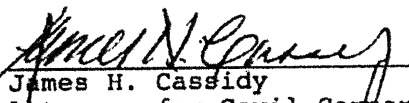

James H. Cassidy
Attorney for Covil Corporation
Oxytherm, Inc. and
Equitable Enterprises

EXHIBIT K

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

FILED-CLERK OF COURT
GREENVILLE, S.C.
CAROLINA, 29617
Dec 7 4 29 PM '92

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

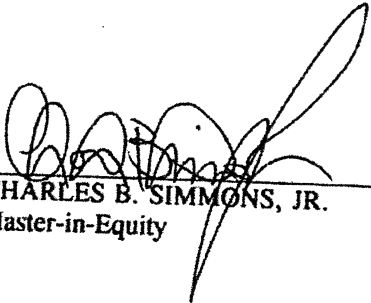

CHARLES B. SIMMONS, JR.
Master-in-Equity

EXHIBIT L

3. That full accounting of the Receivership liquidation receipts is set forth on the accounting attached hereto as "Exhibit A" and incorporated herein by reference thereto.

4. That from the foregoing receipts and in accordance with the previous Orders of this Court, your Petitioner has made those disbursements as set forth on Exhibit A.

5. That your Petitioner is informed and believes that in accordance with the previous Orders of this Court, he is entitled to the payment of the Receivership fees and costs as set forth on Exhibit A.

6. That in accordance with the previous Orders of this Court, your Petitioner retained the law firm of Horton, Drawdy, Ward & Johnson, P.A. to represent him in these proceedings, and your Receiver is informed and believes that the attorneys' fees and costs as set forth in Exhibit A should be approved.

7. That in accordance with the terms of the foregoing Orders, your Petitioner was ordered, *inter alia*, to marshal the assets of Covil and orderly liquidate same with your Petitioner having full discretion and authority to sell the corporate assets of Covil Corporation in any commercially reasonable manner at such prices as he found attainable. Your Petitioner was further authorized to incur and pay such reasonable expenses as may be necessary in carrying out his duties with such costs to be regarded as an expense of the Receivership which would be a preferred lien on the assets coming into the Receiver's hands and would be paid as a first priority before any other claim of creditors. In accordance with the foregoing authority, your Receiver heretofore sold all the furniture, fixtures, inventory and equipment of Covil Corporation at public auction. Your Petitioner was informed and believed at the time of the foregoing auction that the Covil premises were free and clear of

all asbestos and that Covil's inventory did not include any asbestos. Notwithstanding the foregoing, certain inventory and materials (the "Materials") were sold to Shelnutt Heating & Air Conditioning Company, Inc. ("Shelnutt") which apparently contained asbestos. At the time of the foregoing auction, neither your Petitioner nor Shelnutt was aware that any of the Materials sold to Shelnutt contained asbestos and it was only after delivery of these Materials to Shelnutt that Shelnutt was put on notice that the Materials might contain asbestos. Thereafter Shelnutt caused an examination to be made of the Materials and determined that they contained 60 percent (60%) asbestos. That Shelnutt then placed your Petitioner on notice of Shelnutt's foregoing findings and at your Petitioner's request, Shelnutt obtained a proposal from Environmental Protection Associates, Inc. ("Environmental") to remove the Materials from the Shelnutt premises and properly and lawfully dispose of same for a cost of four thousand five hundred dollars (\$4,500.00). Subsequently a like proposal was submitted by Environmental to your Petitioner, a copy of said "Proposal" being attached hereto as "Exhibit B" and incorporated herein by reference thereto. That Shelnutt has made demand upon your Petitioner for him to have Environmental remove the Material from the Shelnutt premises in accordance with the Proposal. That had your Petitioner known that the Materials contained asbestos before the foregoing auction, he would have had to have them removed from the Covil premises and properly and lawfully disposed of as a Receivership expense. That based upon the foregoing, your Petitioner is informed and believes that the foregoing removal of the Materials from the Shelnutt premises is a proper Receivership expense and that this expense and disbursement, as set forth on Exhibit A, should be authorized and approved with your Petitioner authorized to accept the proposal of

Environmental and to assign his rights thereunder to Shelnut provided Shelnut in return provides your Petitioner, the Defendants, and all of their respective representatives, agents, attorneys, creditors, officers, directors, shareholders, successors, heirs, representatives and assigns with a release in the form of the Release and Assignment attached hereto as "Exhibit C."

8. That your Petitioner is informed and believes that First Savings Bank FSB, formerly known as First Federal Savings Bank and Loan Association ("First Bank") is a first priority lien creditor with regard to all of the net sales proceeds of the assets of Covil and Oxytherm and that the disbursements heretofore made to, and as proposed to be made to First Bank, from the Covil and Oxytherm Receivership receipts as set forth on Exhibit A should be approved.

9. That your Petitioner is informed and believes that by reason of the Orders and Judgment issued in the matter of the First Savings Bank FSB, formerly known as First Federal Savings & Loan Association of South Carolina vs. Equitable Enterprises, a South Carolina General Partnership and Oxytherm, Inc. now or heretofore pending in the Court of Common Pleas for the County of Greenville, State of South Carolina under Case No. 91-CP-23-5207 (Judgment Roll No. 92-1232), First Bank is entitled to the net Equitable Receivership receipts and that therefore, as set forth on Exhibit A, this Court should approve the disbursement of same to First Bank .

10. That your Petitioner is informed and believes that pending his discharge as Receiver by this Court in accordance with the relief sought by him herein, that additional accounts receivable of one or more of the Defendants may be collected by your Petitioner and

that he may otherwise receive interest on his Receivership Accounts and that, should your Petitioner receive any such funds, he should be authorized to pay from same his Receivership fee in accordance with the previous Orders of this Court and, based upon the foregoing allegations of Paragraphs 8 and 9 of this Petition, your Petitioner should be authorized to pay over the balance of any such funds to First Bank.

11. That dependent upon the action or inaction of any creditors with regard to the relief sought by your Petitioner herein, your Petitioner may incur additional costs and attorneys' fees and your Petitioner respectfully reserves his rights to seek payment from the Receivership assets for all additional attorneys' fees and/or costs incurred by him in addition to those attorneys' fees and costs as set forth on Exhibit A.

12. That your Petitioner is informed and believes that certain of the remaining accounts receivable due to the Defendants may ultimately be paid subsequent to the discharge of your Petitioner as Receiver and therefore, your Petitioner is informed and believes that he should be authorized to assign all accounts receivable and/or any and all other claims of any of the Defendants against any party whatsoever to First Bank in accordance with First Bank's priority interest and/or claim thereto with an Assignment in the form attached hereto as Exhibit D.

13. 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, and to otherwise return any books and records of the Defendants held by your Petitioner to said shareholders and partners upon written demand for same

provided, however, that if said books and records are not so demanded and picked up from your Petitioner by said shareholders or partners or their authorized representatives within 30 days of an order granting the relief sought herein by your Petitioner, that your Petitioner be allowed to destroy said books and records at such time or times, and in such fashion or fashions as he, in his sole discretion, shall determine most advisable under the circumstances, provided further, however, should the Internal Revenue Service object to such disposal, your Petitioner be authorized to turn over all such books and records to the Internal Revenue Service as may be requested by it.

14. That your Petitioner is informed and believes that upon making all disbursements as ordered by this Court, the business of the Receivership will have been concluded, and that thereafter, upon filing with this Court, his affidavit that he has made all disbursements and that all checks have cleared and that the Receivership's bank accounts have a zero (0) balance, he should thereafter be automatically discharged as Receiver in this matter, provided, however, should any such check not be negotiated by the drawee thereof within 90 days after the date of same, your Petitioner should be authorized to recite such circumstances in his foregoing affidavit and be likewise automatically discharged, and that in accordance with the provisions of *Title 27 Chapter 18 of the Code of Laws of the State of South Carolina, 1976 as amended*, he be authorized to 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 your Petitioner to then be 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.

WHEREFORE, your Petitioner prays as follows:

1. That this Court approve the Receivership accounting attached hereto as Exhibit A including all disbursements heretofore made by your Petitioner.
2. That this Court authorize the payment of the Receivership fees and costs as set forth in Exhibit A.
3. That this Court authorize the payment of the attorneys' fees and costs as set forth in Exhibit A.
4. That this Court authorize your Petitioner to accept the proposal of Environmental Protection Associates, Inc. as set forth on Exhibit B, to pay the \$4,500.00 fee relating thereto from Covil Receivership assets, and to assign his rights under said proposal to Shelnutt provided Shelnutt enters into the Release and Assignment as set forth on Exhibit C.
5. That your Petitioner be awarded additional attorneys' fees and costs should any creditor of any of the Defendants object to any of the relief sought herein thereby requiring your Petitioner to incur such additional attorneys' fees and costs.
6. That should your Petitioner collect any additional funds after October 30, 1992, he be authorized to deduct his 3% Receiver's fee and pay the balance over to First Bank.
7. That this Court authorize your Petitioner to pay all other Receivership funds over to First Savings Bank, FSB in accordance with Exhibit A.
8. That this Court authorize your Petitioner to execute the Assignment as set forth on Exhibit D.

9. That this Court approve the abandonment of all remaining assets of the Defendants and authorize your Petitioner to otherwise return any books and records of the Defendants to their respective shareholders and partners upon written demand for same with leave for your Petitioner to dispose of any books and records not so demanded subject to the rights of the Internal Revenue Service to such books and records.

10. That your Petitioner be automatically discharged as Receiver upon making all of the foregoing disbursements and filing an Affidavit that the Receivership accounts have a zero (0) balance or that otherwise a check or checks issued by your Petitioner has or have not been negotiated and more than 90 days has elapsed in which event your Petitioner should likewise be discharged with authority to thereafter hold and disburse such funds as intangible property held for the owner by this Court in accordance with the provisions of Title 27, Chapter 18 of the Code of Laws of the State of South Carolina, 1976 as amended.

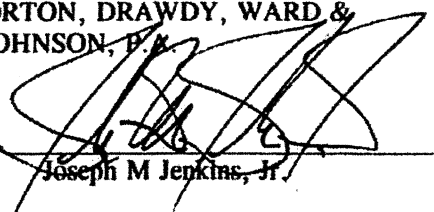
11. That this Court order that all creditors of the Defendants be notified of the relief sought herein with leave to object to same in such fashion as the Court deems just and proper in the circumstances.

12. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

HORTON, DRAWDY, WARD &
JOHNSON, P.A.

By:


Joseph M. Jenkins, Jr.

307 Pettigru Street
P.O. Box 10167
Greenville, South Carolina 29603
(803) 233-4351
Attorneys for the L. Winston Lee,
Receiver

Date: Nov 11, 1992
Greenville, South Carolina

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
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

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 B



Environmental Protection Associates Inc.
2 Tebblewood Ct. • Simpsonville, S.C. 29681
(803) 967-7573

October 22, 1992

Mr L. Wynston Lee
Receiver for Covil Corp.
10 Brookside Dr.
Greenville, SC 29609

Attn: Mr. L. Wynston Lee

Re: Disposal of asbestos material

Dear Mr. Lee

Environmental Protection Associates Inc. (EPA) is pleased to present to Mr Lee the following proposal for the removal of asbestos material from trailer and in yard at 215 Piedmont Hwy. Greenville, SC. This proposal is based on my meeting with Mr. Mike Shelnut, site evaluation, and my considerable experience in abatement projects of this kind.

According to site visit, the scope of the project will include;

- Disposal of 20 to 25 yds. of asbestos material
- Labeling and wrapping of asbestos material
- Decontaminating trailer of asbestos material

EPA will provide the following;

- Licensed contractor (#55 Claude T. Miller)
- All laborers, supervisors and consultants
- All equipment to complete project

Page 2
October 22, 1992

- All health and safety equipment
 - All approvals from DHEC and disposal approvals
 - DHEC fee
 - Disposal fee and trucking to landfill
 - Comply with all State and Federal regulations
- Covil Corp. will provide the following;
- Electricity for project
 - Purchase order or letter to proceed

The cost for completing this project will be \$4,500.00. Estimated time for job completion will be three (3) days. This proposal is good for ninety (90) days from above date.

Environmental Protection Associates offers you the benefit of years of experience in site abatement projects of this kind. We will work closely with you to answer all questions and see the project is carried out to your complete satisfaction.

We look forward to serving you.

Sincerely,
ENVIRONMENTAL PROTECTION ASSOCIATES INC.

Claude T. Miller

Claude T. Miller
President

CTM\dm

EXHIBIT C

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

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

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WITNESSETH:

This Release made entered into this ____ day of _____, 1992 by Shelnut
Heating & Air Conditioning Company, Inc. ("Shelnutt") a corporation duly organized under
the laws of the State of South Carolina with its principal place of business in the County of
Greenville, State of South Carolina.

WITNESSETH :

WHEREAS, as more fully appears in the Orders issued in the above-captioned Receivership Proceeding on October 11, 1991 and May 12, 1992, L. Winston Lee was duly appointed "Receiver" for Covil Corporation ("Covil"). That in accordance with the terms of the foregoing Orders, the Receiver was ordered, *inter alia*, to marshal the assets of Covil and orderly liquidate same with the Receiver having full discretion and authority to sell the corporate assets of Covil in any commercially reasonable manner at such price or prices as he found attainable; and

WHEREAS, in accordance with the foregoing authority, the Receiver heretofore sold all of the furniture, fixtures, inventory and equipment of Covil at public auction; and

WHEREAS, the Receiver was informed and believed at the time of the foregoing auction that the Covil premises were free and clear of all asbestos and that Covil's inventory did not include any asbestos; and

WHEREAS, notwithstanding the foregoing, certain inventory was sold to Shelnutt which apparently contained asbestos. At the time of the foregoing auction, neither the Receiver nor Shelnutt was aware that any of the goods sold to Shelnutt contained asbestos and it was only after delivery of these goods to Shelnutt that Shelnutt was put on notice that these goods might contain asbestos. Thereafter Shelnutt caused an examination to be made of these suspect materials and determined that they contained 60 percent (60%) asbestos; and

WHEREAS, Shelnutt placed the Receiver on notice of Shelnutt's foregoing findings and, at the Receiver's request, Shelnutt subsequently obtained a proposal from Environmental

Protection Associates, Inc. ("Environmental") to remove the suspect materials from the Shelnutt premises and properly and lawfully dispose of same for a cost of four thousand five hundred dollars (\$4,500.00); and

WHEREAS, Shelnutt agreed to release the Receiver and others according to the terms as hereinafter set forth if the Receiver, subject to Court approval in the above proceeding, paid from the Covil Receivership proceeds the sum of four thousand five hundred dollars (\$4,500.00) to Environmental for the removal of the subject materials from the Shelnutt premises and assign his rights under any contract or assignment with Environmental relating thereto to Shelnutt; and

WHEREAS, pursuant to the Receiver's Petition filed in the above proceeding, the Master-in-Equity for Greenville County, South Carolina issued an Order authorizing the foregoing disbursement and assignment.

NOW THEREFORE, based upon the foregoing representations which are contractual and not mere recitals, and in accordance with the terms of the foregoing Order issued in this matter and in consideration of the payment of four thousand five hundred dollars (\$4,500.00) by the Receiver to Environmental Receivership Associates, Inc. from Covil Receivership funds and in further consideration of the Assignment as hereinafter set forth, Shelnutt, on behalf of itself, its successors, assigns and their respective shareholders, directors, officers, representatives, attorneys, executors, heirs, successors and assigns does forever release, discharge and acquit the Receiver, the above-named Defendants and said Defendant's respective Claimants and Creditors and all of their respective shareholders, directors, officers, representatives, attorneys, executors, successors, heirs and assigns from any and all rights,

claims and causes of action of whatsoever nature or kind, known and unknown, rising from or relating to, directly or indirectly, any furniture, fixtures, inventory, equipment or other materials of whatsoever nature or kind, including any such items which might or might not contain any asbestos or any other types of hazardous materials whatsoever, which heretofore belonged to any of the above-named Defendants and/or the Receiver which were purchased by Shelnutt at any sale or anytime whatsoever, or which otherwise came into the possession and/or control of Shelnutt, and Shelnutt does further hereby agree to defend and hold harmless the parties hereby released from any claims whatsoever arising therefrom.

IN WITNESS WHEREOF, Shelnutt Heating & Air Conditioning Company, Inc. by and through its duly authorized President does hereby enter into this Release the day and year first above written.

SHELNUTT HEATING & AIR CONDITIONING, INC.

By _____
Charles M. Shelnutt, President
Assignment

ASSIGNMENT

In consideration of the foregoing Release and pursuant to and in accordance with the above-referenced Order, the undersigned, L. Winston Lee as Receiver in the above Receivership Proceeding, does hereby agree and forever assign, WITHOUT RECOURSE, all of his rights pursuant to the proposal of Environmental which he has herewith accepted, a copy of which proposal is attached hereto as Exhibit B to his Petition filed in the above proceeding.

L. Winston Lee, Receiver

EXHIBIT B

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

ASSIGNMENT

In accordance with the terms of the Order issued in the above Receivership Proceeding on _____ day of _____, 1992, the undersigned, L. Winston Lee, as Receiver, does hereby assign **WITHOUT RECOURSE** all accounts receivable, claims, contract rights, Judgments owned or claimed by any of the above-named Defendants against any person or entity to First Savings Bank, FSB with full rights for First Savings Bank, FSB to collect same in its own name and/or in the name of any of the said respective Defendants.

L. Winston Lee, Receiver

EXHIBIT M

Jun 04 2019

REFERENCE ID: 342107

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

DEPARTMENT OF STATE

COLUMBIA, SOUTH CAROLINA

CERTIFICATE OF REVOCATION OF AUTHORITY

COVIL CORPORATION
PO BOX 1804
GREENVILLE SC

29602

20055344-5

Whereas, Section 33-15-300, of the 1976 Code of Laws of S.C., as amended, provides for the Revocation of Foreign Corporation's Authority in The State of South Carolina if the corporation fails to:

- (1) File its annual report within the time required by Code or
- (2) Pay its franchise tax on or before the date on which such franchise tax is due and payable, or
- (3) Appoint and maintain a registered agent in this state, or
- (4) Notify the office of The Secretary of State of a change in its registered agent or registered office.

AND WHEREAS, IT APPEARS FROM THE RECORDS IN THIS OFFICE, THAT THE ABOVE NAMED CORPORATION, AFTER DUE NOTICE, HAS FAILED TO MEET REQUIREMENTS OF NOS. 1 AND/OR 2 ABOVE SET FORTH.

NOW THEREFORE, UNDER THE AUTHORITY OF SAID ACT, THE AUTHORITY OF THE ABOVE CORPORATION IS HEREBY DECLARED FOREFITED AND REVOKED THIS 30 DAY OF JULY 19⁹³.

Jim Miles
Secretary of State

Inquires concerning this administrative revocation should be directed to the SC Tax Commission,
P.O. Box 125, Columbia, SC 29214, Attn: Corporate Section.

SOS-4 (Rev. 11/90) 3121

93-01 3835 BC

EXHIBIT N
(Filed under seal with the Court)

EXHIBIT O
(Filed under seal with the Court)

EXHIBIT P
(Filed under seal with the Court)

EXHIBIT Q



Deposition of:
Daniel B. White ,
NON-CONFIDENTIAL

June 12, 2020

In the Matter of:
Zurich American Insurance v. Covil
Corporation, Et Al.

Caseworks Court Reporting

1 Q. All right. That's the order that you were
2 asked about earlier, correct?

3 A. Correct.

4 Q. All right. Could you read the civil
5 action number?

6 A. 981-CP-23-4445.

7 Q. All right. And who is the plaintiff in
8 this case?

9 A. First Savings Bank.

10 Q. Okay. And who were the defendants?

11 A. Covil Corporation, OxyTherm and Equitable
12 Enterprises.

13 Q. Now, I'm going to show the last page, page
14 seven, of this document. It's -- it's dated May the
15 11th, 1992; is that correct?

16 A. Correct.

17 Q. And it looks to me that this order was a
18 consent order. Does that look like that to you?

19 A. Horton Drawdy moved and the other two
20 consented, yes, sir.

21 Q. Okay. And who consented on behalf of the
22 plaintiff?

23 A. Arthur L. Howson, Jr.

24 Q. And what firm was he with at that time?

25 A. Gibbes & Clarkson.

1 Q. Was that your firm?

2 A. I was in the same firm, Gibbes & Clarkson.

3 Q. Okay. And he was representing the
4 plaintiff which is First Saving Bank, correct?

5 A. Correct.

6 Q. Against Covil?

7 A. Correct.

8 Q. And you would have had notice of this
9 order, don't you think?

10 MS. GRAY: Objection to form.

11 MS. FORSHAW: Objection to form.

12 THE WITNESS: I don't know. I don't know
13 who read -- I just don't know.

14 BY MR. HARDEE:

15 Q. Well, he consented to it, it appears,
16 doesn't it?

17 A. Well, he signed it.

18 Q. Okay. I'm showing you an exhibit which
19 was previously marked as Five, Zurich's Five.

20 A. Okay.

21 Q. Apparently in November 14th, 1991 you were
22 aware of the existence of the receiver for Covil,
23 Winston Lee, correct?

24 A. Yes.

25 MS. FORSHAW: Objection to form.

EXHIBIT R
(Filed under seal with the Court)

EXHIBIT S
(Filed under seal with the Court)

EXHIBIT T

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 91-CP-23-04445**

First Savings Bank FSB		Equitable Enterprise Covil Corporation	Oxytherm Inc
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit)
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

The matter is before the Court based upon a request filed by the Receiver in 2018-CP-40-04940 and filed with the Greenville County Clerk of Court on April 30, 2020.

Based upon the request, and the documents attached thereto, the Court finds it proper that the within case be referred and transferred to the Honorable Jean Toal for any and all further proceedings arising out of 2018-CP-40-04940. And It Is So Ordered.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	3023	4/30/2020
Master in Equity Judge/ Special Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Arthur L Howson

James H Cassidy

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

- Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Greenville Common Pleas

Case Caption: FIRST SAVINGS BANK F VS EQUITABLE ENTERPRISE
Case Number: 91CP2304445
Type: Order/Form 4

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-05-01 09:50:07 page 3 of 3

EXHIBIT U

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

In re: The First Savings Bank, FSB,

Plaintiff,

v.

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

Defendants.

L. Winston Lee, Receiver for Covil
Corporation,

Petitioner,

v.

Covil Corporation; The First Savings Bank;
Certainteed Corporation; Heller Financial,
Inc. / JPS Converter & Industrial; S. Fattal
Thermo Plastic, Inc.; ABF Freight Systems,
Inc.; Gen-Fab, Inc.; Dixie Truck Center of
Greenville, Inc.; John Hamrick Link; James
P. Covil; Lynn D. Link; and Pamela M.
Covil,

Respondents.

IN THE COURT OF COMMON PLEAS

C.A. No. 91-CP-23-04445

ORDER

This matter came before the Court by way of Zurich American Insurance Company's Motion to Intervene ("Zurich"). John S. Wilkerson appeared for Zurich. Bruce W. Bannister and Luke Burke appeared for Peter D. Protopapas, the current Receiver for Covil Corporation who was also present. Zurich and the Receiver consented to the hearing proceeding through Zoom video conference.

By way of background, this Court entered a Final Order in this matter on December 7, 1992. On April 27, 2020, the Receiver for Covil Corporation wrote this Court identifying himself as the Receiver in statewide asbestos litigation and duly appointed by Justice Toal. The Receiver requested that the file be transferred to Justice Toal pursuant to Chief Justice Beatty's Administrative Order assigning the asbestos docket to Justice Toal. On May 1, 2020, this Court granted the Receiver's request in a Form 4 Order and transferred the action to Justice Toal. On May 15, 2020, Zurich filed a Motion to Intervene and a Motion For Relief From Order and emailed both Justice Toal and the undersigned the filing.

Zurich filed this Motion to Intervene, which was accompanied by a Motion for Reconsideration, or to set aside the above referenced May 1, 2020 Order. Zurich argues it is entitled to Intervene as of Right under Rule 24(a)(2) SCRCP and should be permitted to intervene under Rule 24(b)(2) SCRCP. Zurich further contends that the Order appointing Chief Justice Toal to preside over statewide asbestos cases does not grant her jurisdiction over all matters involving all asbestos defendants, nor does it grant her authority to hear debt-collection cases, such as this case.

Having considered all positions asserted by the parties in briefs filed with this Court, and considering the arguments of counsel, I deny Zurich's motion, finding that this matter is currently before Justice Toal pursuant to Chief Justice Beatty's Order. Accordingly, this Court denies Zurich's Motion to Intervene. This Order does not have any preclusive or limiting effect on any motion and/or ruling that Zurich may seek in the future arising out of this particular case.

And it is so ORDERED.

JUDGE'S SIGNATURE PAGE TO FOLLOW



Greenville Common Pleas

Case Caption: First Savings Bank F vs. Equitable Enterprise , defendant, et al

Case Number: 91CP2304445

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Electronically signed on 2020-06-09 08:40:43 page 3 of 3

EXHIBIT V

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.

CS #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.

CS
#3

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.

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

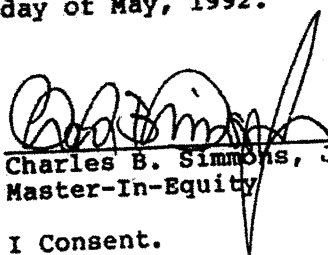
13. With the consent of Counsel for The First Savings Bank, FSB affixed to the foot of this Order, the Receiver shall not be required to post a bond pursuant to § 33-14-320(b) of the Code of Laws of the State of South Carolina, 1976 as amended.

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

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

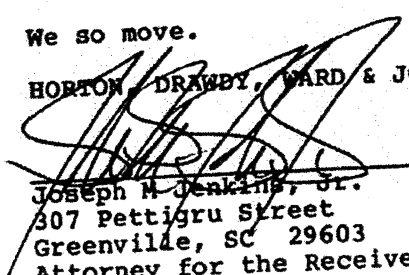
IT IS SO ORDERED this 11 day of May, 1992.

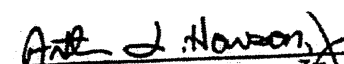

Charles B. Simmons, Jr.
Master-In-Equity

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.

EXHIBIT W

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

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

IN RE:

) JR # 91-5988

The First Savings Bank,
FSB,

) ORDER

Plaintiff,

vs.

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

Defendants.

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

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.

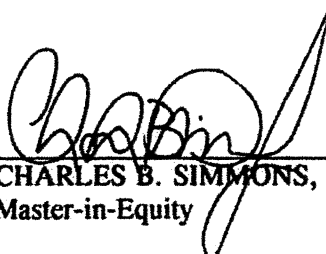
2. All Claimants are hereby ordered to file any Objections they may have to the above-referenced relief sought by the Receiver both with this Court and the Receiver. All Objections must be filed with and received by this Court and the Receiver on or before the 27th day of November, 1992 at the addresses 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

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
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

Plaintiff,

V.

CIVIL ACTION NO: 2019-CP-40-02285

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Plaintiffs,

V.

CIVIL ACTION NO: 2019-CP-40-06956

Defendants.

Rec. 712

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Defendant United States Fidelity and Guaranty Company (hereinafter “USF&G”), by and through its undersigned counsel, respectfully submits this memorandum in opposition to the Motion to Clarify Status of Receivership filed by Peter D. Protopapas as Receiver for Covil Corporation (the “Receiver” and “Covil”).

INTRODUCTION

Covil’s second defense in its Answer to the *Hutto* action states: “Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued.” Covil Answer at 30. Covil’s fourth defense in its *Hutto* answer states: “the claims set forth in the Complaint are barred by the applicable statutes of limitations and/or repose[.]” *Id.* Covil’s Receiver’s “Motion to Clarify” objects to USF&G and Zurich American Insurance Company (“Zurich”) having purportedly asserted these same defenses in the *Hutto* and *Wall Templeton* actions. The Receiver “requests that this Court clarify the impact, if any, of these affirmative defenses and thus finally adjudicate this issue of South Carolina law” (Mot. at 2) in substance moving to strike or for early summary judgment on two of Covil’s own affirmative defenses. That motion should be denied for multiple reasons.

First, unless the Receiver has a legally-protected interest in *maximizing* Covil’s liabilities to asbestos plaintiffs, the Receiver lacks standing to move against these affirmative defenses. These are Covil’s own defenses: because USF&G is sued vicariously as Covil’s purported alter ego, USF&G’s Answer also asserts defenses that are available to Covil itself, which, if successful, would result in judgment for Covil on the underlying claims. Covil does not have a legally-protected interest in exposing itself to tort judgments, and parties sued as vicariously responsible for Covil’s torts are entitled to assert those same defenses—even if Covil acts against its own legal interests by gratuitously waiving them. Thus, the Motion to Clarify should be

denied for lack of standing. Covil's court-appointed Receiver should be working with Covil to minimize its liabilities, not taking positions that would increase Covil's potential exposure.

Second, the motion fails on its own terms to the extent it seeks a ruling on a purported lack of capacity defense, *i.e.*, that "Covil may not sue or be sued." *E.g.*, Mot. at 3. The Receiver conflates capacity to sue or be sued with the entirely different issue of whether the claims against Covil are barred by a statute of repose. These are two completely different issues. Moreover, the only party that has actually asserted a lack of capacity defense is Covil itself.

Third, even assuming the Receiver has standing to move to strike, or for summary judgment, against the statute of repose defense, the motion fails on the merits. The Receiver's legal analysis of the statute of repose is incorrect, and the Receiver's factual contentions, at best, raise issues that cannot be resolved on the current record as a matter of law.

ARGUMENT

I. THE RECEIVER LACKS STANDING TO MOVE AGAINST DEFENSES THAT ARE ASSERTED BY COVIL AND VICARIOUSLY ON ITS BEHALF

As to USF&G, Covil has moved solely in the *Hutto* action against USF&G's Sixth Defense to Covil's cross-claims.¹ That defense states:

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.

Mot. Ex. B (USF&G Answer) at 35. As the text of this defense makes clear, USF&G's Sixth Defense (the "Repose Defense") is a defense that belongs to Covil that is being asserted

¹ The motion is captioned in both *Hutto* and *Wall Templeton*, seemingly because the Receiver is jointly moving against Zurich on a defense asserted in that action. The Receiver does not identify any defenses asserted by USF&G in *Wall Templeton* against which this motion is directed.

derivatively by USF&G. If meritorious, it bars the underlying asbestos claims against Covil, and thus, by eliminating the underlying liability, moots any claims asserting that USF&G (or any other party) is vicariously liable. Because of this, as the Receiver notes (Mot. at 4), USF&G also asserts the Repose Defense as its Sixth Defense to Plaintiff's claims:

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.

Mot. Ex. B (USF&G Answer) at 16. The Receiver lacks standing to move against this defense because the assertion of this defense does not cause injury to any legally-protected right of the Receiver. *See generally Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (1998) (describing requirements for standing in South Carolina courts).

Cases concerning third-party practice under Rule 14 of the Federal Rules of Civil Procedure (upon which South Carolina's rules are modeled) are instructive here, as Rule 13 cross-claims and Rule 14 impleader claims are "cognate field[s]" of the law. 6 FED. PRAC. & PROC. CIV. § 1444, *Subject-Matter Jurisdiction Over Impleader Claims* (3d ed.). Like a third-party complaint under Rule 14, Covil's Rule 13(g) cross-claims against USF&G in the *Hutto* action seek to hold USF&G liable if and to the extent Covil is held liable to the plaintiffs. In the Rule 14 context, courts "recognize[] the derivative nature of the third-party defendant's potential liability and permit[] it essentially to stand in the defendant's shoes and assert its defenses" *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (quoting MOORE'S FED. PRAC. 14.25 (3d ed.)). This "prevents the prejudice or unfairness that could result from [the underlying defendant's] failure to assert the appropriate defenses." *Beaver v. Tarsadia Hotels*, 315 F.R.D. 346, 349 (S.D. Cal. 2016) (internal quotation marks omitted). *See also* Fed.

R. Civ. P. 14(a) Advisory Comm. Notes to 1946 Amendment (“This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff’s action.”). It also “helps to reduce the risk of collusion between” the plaintiff and the underlying defendant against the third party, “a concern of increased importance” where such parties may have shared financial interests or incentives. *Lindner*, 515 F. Supp. 2d at 1148.

For these same reasons, Covil may not move against defenses asserted by USF&G that are derivative of Covil’s. Covil and its Receiver suffer no legally cognizable harm from the dismissal of asbestos tort claims brought against Covil under the statute of repose. Indeed, while not specifically referencing the applicable statute, Covil itself has asserted that the plaintiff’s claims are barred by the statute of repose. But even if Covil had waived this defense as to itself, that would not give it a legally-protected right to seek to move against USF&G in asserting a defense that Covil could have asserted but gratuitously waived. Thus, absent a finding that Covil and/or its Receiver have a legally-protected interest in maximizing Covil’s liability to asbestos plaintiffs, this motion must be dismissed for lack of standing. *See, e.g., Zahn v. Barr*, No. 2:19-cv-3553-DCN, 2020 WL 3440801, at *2 (D.S.C. June 23, 2020) (dismissing action where plaintiff “lacks standing and asks the court to issue an advisory opinion”); *Lennon*, 330 S.C. at 417–18; 498 S.E.2d at 907–08.

II. THE RECEIVER’S MOTION FAILS AS TO THE PURPORTED “CAPACITY TO SUE” DEFENSE

The Receiver repeatedly claims that “the Insurers,” defined to include both Zurich and USF&G (Mot. at 2), have asserted the defense that “the prior receivership stripped Covil of the ability to sue or be sued.” Mot. at 2. *See also id.* at 3 (“USF&G’s Motion to Reconsider ... argued that the prior receivership orders extinguished Covil’s ability to be sued.”); *id.* at 6 (“The

Insurers now claim that ... the public files of the prior receivership court ... establish that Covil cannot sue or be sued.”).

Neither USF&G nor Zurich, however, have raised a defense of lack of capacity. The fact that claims against a party may be barred by a statute of repose does not imply that the party lacks capacity to sue or be sued. Questions of capacity to sue—*e.g.*, the rights of minors or incompetent persons, or of unincorporated associations, to litigate in their own names—are governed by SCRCP 17 and specific provisions of South Carolina law; in the case of dissolved South Carolina corporations like Covil, capacity is governed by S.C. Code 33-14-105. A statute of repose—like a statute of limitations or any other defense to a claim—may lead to dismissal, but that does not impact the asserting party’s capacity.

The Receiver, in moving against a hypothetical lack of capacity defense, is thus seeking an advisory opinion to which he is not entitled. Covil’s capacity to sue or be sued is irrelevant to USF&G’s Repose Defense. Indeed, the only party to assert a true lack of capacity defense is Covil. *See* Covil Answer at 30 (“Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued.”). As above, unless the Receiver has a legally-protected interest in maximizing Covil’s liabilities, the Receiver has no standing to attack Covil’s own defenses. The motion, to the extent focused on a purported lack of capacity defense, must therefore be denied.

III. THE MOTION SHOULD BE DENIED ON THE MERITS

In the event the Court chooses to reach the merits of the Receiver’s arguments concerning USF&G’s statute of repose defense, the Court should deny the motion. South Carolina’s statute of repose applicable to claims against dissolved corporations, S.C. Code § 33-14-107, bars unknown claims against a dissolved corporation once a set number of years (originally five, later extended to ten) have passed after notice of dissolution is published. Covil was judicially dissolved in 1992 and court records from the proceeding in which it was judicially dissolved

show that Covil's prior receiver published the notice of dissolution that triggers the running of the statute. Thus, Section 107 precludes the assertion of asbestos claims against Covil, including the plaintiffs' claims in *Hutto*, which were filed decades later.

A. Factual Background

Covil ceased operations in 1991 and was placed into receivership at the behest of its creditors in an action captioned *The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty.) ("*FSB v. Covil*"). Mr. L. Winston Lee was appointed as receiver. *See* Amended Order for Appointment of Receiver, *FSB v. Covil* (Nov. 27, 1991) (attached as Ex. A). In 1992, the Greenville County Master-in-Equity entered an order that judicially dissolved Covil. Mot. Ex. V at 2 ¶ 1 (Order, *FSB v. Covil* (May 12, 1992)) ("May 12 Order"). In that same order, the Master-in-Equity directed Mr. Lee to publish notice of Covil's dissolution. *See id.* at 5 ¶ 9 ("[T]o 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[.]").

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." Mot. Ex. W at 2 (Order, *FSB v. Covil* (Nov. 12, 1992)) ("Nov. 12 Order"). The Master-in-Equity then approved "the abandonment by the Receiver of all remaining assets" of Covil, finalized Covil's dissolution, and discharged Mr. Lee as receiver. Final Order at 3 ¶¶ 7-8, *FSB v. Covil* (Nov. 30, 1992)) ("Nov. 30 Order") (attached as Ex. B).

In the ensuing years, asbestos claims continued to be filed against Covil, and in November 2018, the Court of Common Pleas for Richland County 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 (Ct. Com. Pl. Richland

Cty. Nov. 2, 2018). The Receiver thereafter filed suit in *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C.A. No. 2019-CP-40-02285 (Ct. Com. Pl. Richland Cty. (Apr. 23, 2019))—one of the two cases in which the Receiver has filed his Motion to Clarify—alleging, among other claims, a professional negligence claim against Covil’s prior counsel and an “alter ego” claim alleging that USF&G and Covil’s other insurers are responsible for Covil’s liabilities because they supposedly dominated and controlled Covil in the period between Covil’s cessation of operations and the Receiver’s appointment. The Receiver does not move against any defense asserted by USF&G in *Wall Templeton* action. The other case in which the Receiver filed his Motion to Clarify, *Hutto v. Covil Corp.*, C.A. No. 2019-CP-40-06956 (Ct. Com. Pl. Richland Cty.), is an asbestos wrongful-death action filed on December 12, 2019. In *Hutto*, the plaintiffs contend that Covil is liable under various tort theories for the decedent’s alleged asbestos-related injuries and that USF&G is responsible for Covil’s conduct under an alter-ego theory. As discussed above, USF&G raised the statute of repose as a defense in its Answer, both as to the plaintiffs’ claims and the Receiver’s cross-claims.

B. Legal Argument

The Receiver makes several factual and legal arguments as to why the statute of repose is inapplicable here: (i) the prior receiver failed to publish notice as required by the Master-in-Equity’s orders; (ii) Section 107(c) does not actually function as a statute of repose; and (iii) the current version of Section 107(c) does not apply, because it was amended in 2004, after Covil’s dissolution, and the version in force as of Covil’s dissolution did not bar future or contingent claims. For the reasons discussed below, none of these arguments has merit.²

² The Receiver asserts that the Court of Common Pleas has already rejected USF&G’s statute of repose defense in its Order Denying Reconsideration entered in connection with Covil’s settlement with several other insurers. *See* Mot. at 3. But the Order Denying Reconsideration does not have any preclusive effect in these proceedings. The question whether S.C. Code § 33-14-107(c) bars claims against Covil was not

1. Covil's Prior Receiver Complied With The Court's Order To Publish Notice Of Dissolution

The Receiver argues that “[t]here is no evidence that the Notice of Dissolution was published as required,” so as to trigger the statutory repose period on unknown claims against Covil. Mot. at 9. Orders from Covil’s prior receivership, however, establish—or, at a minimum, create a strong presumption—that Mr. Lee published this notice. As discussed above, on May 12, 1992, the Master-in-Equity directed Mr. Lee to “publish the Notice required by § 33-14-107.” May 12 Order at 5 ¶ 9. 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.” Nov. 12 Order at 2. 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. Nov. 30 Order at 3 ¶¶ 7–8.

The Master-in-Equity’s orders establish that Mr. Lee published notice of Covil’s dissolution in 1992 (although it is not known exactly when and where that notice was published). Under South Carolina law, there is a strong presumption that receivers comply with court orders and with their fiduciary obligations. 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,

actually litigated before the court in that case. Instead, the court was deciding only whether to grant reconsideration of a prior order approving Covil’s settlement with three other insurers. *See Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216 493 S.E.2d 826, 835 (1997) (“Issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit.”) (internal quotation marks omitted). Moreover, the Order Denying Reconsideration was entered notwithstanding USF&G’s explicit assurances that it was not seeking a ruling on the merits of the statute-of-repose issue and that the issue should instead be fully litigated and briefed in the underlying asbestos actions, not in the settlement approval proceedings. Finally, any doubt that the Order Denying Reconsideration lacks preclusive effect in these proceedings is eliminated by the court’s conclusion in that same Order that USF&G was a nonparty that did not have standing to bring its objections to the settlement agreements. *See, e.g., Duckett v. Fuller*, 819 F.3d 740, 744–45 (4th Cir. 2016) (noting the “general rule” that a non-party is not bound by a judgment).

and every reasonable intendment will be made in support of such presumption.” *Whitcomb v. Manderville*, 90 S.C. 384, 73 S.E. 775, 777 (1912) (internal quotation marks omitted). *See also 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). Here, the Master-in-Equity unambiguously ordered Mr. Lee to “publish the Notice required by § 33-14-107,” May 12 Order at 5 ¶ 9, thereby triggering the presumption under South Carolina law that the receiver faithfully discharged that duty.

In addition, 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,” Nov. 12 Order at 2, without ever suggesting that the Receiver had failed to carry out one of the principal duties that he had been directed to discharge. That order is controlling as a matter of South Carolina law. *See Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (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). Moreover, the Master-in-Equity subsequently approved “the abandonment by the Receiver of all remaining assets” of Covil, finalized Covil’s dissolution, and discharged Mr. Lee as receiver in a Final Order fully winding up Covil’s affairs. Nov. 30 Order at 3 ¶¶ 7–8. The Master-in-Equity could have done so only if he had been fully satisfied that all prior steps necessary to complete Covil’s dissolution and winding-up had been completed as ordered. *See* S.C. Code § 33-14-330(b). The Final Order and the proceedings held in that matter are not facially deficient, and thus are “absolutely impreguably fortified against collateral attack” in any other proceeding and may not be re-

examined elsewhere, absent exceptions not present here. *Stone v. Mincey*, 180 S.C. 317, 185 S.E. 619, 621 (1936).

The Receiver seeks to undermine the presumption that Mr. Lee faithfully discharged his responsibilities—as well as the legal force of the Master-in-Equity’s orders—by noting that “in the prior receiver’s final accounting of reimbursable expenses, there is no mention of a publication expense to any newspaper.” Mot. at 10. First, the Receiver fails to mention that the prior receiver’s accounting of reimbursable expenses contains a general category called “Receiver Expense” totaling \$1,576.50, which very well may have included the newspaper-publication expenses. See Nov. 30 Order. In any event, a negative inference is not sufficient to overcome the presumption that Mr. Lee carried out his duties or the Master-in-Equity’s findings to that effect. See *Whitcomb*, 90 S.C. 384, 73 S.E. at 777; see also *United States v. Young*, 324 F. Supp. 69, 72 (D. Minn. 1970) (noting that “negative inferences” cannot undermine “the presumption of regularity”). Indeed, courts routinely reject attempts to use a negative inference to overcome a well-established presumption.³ The Receiver therefore cannot rely on a negative inference based on incomplete records from decades ago to impugn the prior receiver’s compliance with court orders. At a minimum, whether the prior receiver published the notice as

³ See, e.g., *Kline v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 877 F.2d 1175, 1180 n.15 (3d Cir. 1989) (explaining that it would be “problematic to allow the absence of evidence in a record to be sufficient to rebut a presumption” because “[t]he purpose of a presumption is to shift the burden of affirmative proof to the party seeking to rebut the presumed fact”); *SummitBridge Nat’l Invs. III, LLC v. Faison*, 915 F.3d 288, 294 (4th Cir. 2019) (holding that an “argument by negative inference” was insufficient to rebut the presumption that claims enforceable under state law are permitted in bankruptcy unless they are expressly disallowed); *People v. Fedalizo*, 200 Cal. Rptr. 3d 653, 659–60 (Cal. Ct. App. 2016) (rejecting a defendant’s attempt to invoke a negative inference that he had not authorized his lawyer to represent him where a “presumption exists that an attorney who appears on behalf of a party has authority to do so”) (internal quotation marks omitted).

required by court order presents a factual dispute that cannot be resolved in the Receiver's favor on this motion.⁴

2. Section 107(c) Is A Statute Of Repose That Bars All Claims Against A Dissolved Corporation After The Repose Period Has Run

Under the current version of S.C. Code § 33-14-107(c)(3), “[i]f the dissolved corporation publishes a newspaper notice” of its dissolution, then, after a period of ten years, the statute bars the claim of “a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.” To that end, and contrary to the Receiver's contentions, Section 107(c) forecloses all claims against the dissolved corporation—even post-dissolution claims such as a claim based on a post-dissolution diagnosis with an asbestos-related disease—that are brought after the ten-year period.

This decade-long period for filing suit is particularly generous to plaintiffs. South Carolina's Business Corporation Act—of which Section 107 is a part—generally “follow[s] the Model Business Corporation Act,” Tim Orr, *Successor Liability*, S.C. Law. 33, 35 (Mar. 2006), which bars unknown claims only *three* years after publication of a notice of dissolution. *See*

⁴ In a footnote, the Receiver claims that the Clerk of Court may have failed to deliver a certified copy of Covil's dissolution order to the Secretary of State, and asserts that this failure would render the dissolution ineffective. Mot. at 10 n.2. But S.C. Code § 33-14-330(a) clearly provides that the court “may enter a decree dissolving the corporation and specifying the effective date of the dissolution.” The decree itself is what effects the dissolution, not the subsequent ministerial act of filing the decree with the Secretary of State. The Receiver also cites *S.C. Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556 (Ct. App. 1984) for the proposition that the corporation's “[f]ailure to strictly comply with the mandates of the dissolution statutes” renders its dissolution ineffective. *Id.* at 562. Here, the Receiver claims that the Clerk of Court—not Covil or its receiver—failed to carry out an administrative task. Moreover, even on the Receiver's own terms, a defect in the dissolution procedure “continues the corporation with respect to creditors *whose rights are prejudiced by the noncompliance.*” *Id.* (emphasis added); *see also Licht v. Ass'n Servs., Inc.*, 463 N.W.2d 566, 570 (Neb. 1990) (holding that the “clear implication” of *Winyah* is that a technically defective “dissolution *would* be valid as against” “unprejudiced creditors”) (emphasis added). The Receiver is not a creditor of Covil, does not possess any legal claims against Covil, and thus lacks any cognizable prejudice. Even if the Receiver were permitted to assert the rights of asbestos plaintiffs or otherwise seek to maximize Covil's liabilities, asbestos plaintiffs seeking to pursue claims against Covil in 2019 were also in no way prejudiced by the Clerk of Court's supposed failure to deliver the dissolution order to the Secretary of State in 1992.

Model Bus. Corp. Act § 14.07(c). The committee that drafted the Model Act acknowledged that a “three year cut-off is itself arbitrary, but it is believed that the bulk of post-dissolution claims that can be estimated will arise during this period.” Official Comment, Model Bus. Corp. Act § 14.07 (2005). The South Carolina legislature, however, more than tripled the Model Act’s filing period, extending it to an entire decade. That the South Carolina legislature provided plaintiffs with this substantial filing period underscores the propriety of applying the statute of repose strictly, and according to its plain language, to bar all claims against dissolved corporations once that ten-year period has ended. The Receiver’s contrary arguments would wholly undermine this statutory scheme and nullify the impact of the statute of repose. They should be rejected.

(a) Section 107(d) Does Not Trump The Repose Period

The Receiver contends that Section 107(d)—which permits enforcement of a claim (1) “against the dissolved corporation to the extent of its undistributed assets” and (2) “against a shareholder . . . to the extent of his pro rata share” of the corporation’s distributed assets—supersedes the statute of repose established in Section 107(c) and allows claims against dissolved corporations and their shareholders in perpetuity. *See* Mot. at 8–9. But Section 107(d) does not nullify the statutory bar codified in Section 107(c). To the contrary, it imposes *additional* barriers to recovery against a dissolved corporation, specifying the limited classes of assets available for recovery by plaintiffs whose claims are not barred by Section 107(c). Section 107(d) sets forth how a claim “may be enforced *under this section*.” S.C. Code § 33-14-107(d) (emphasis added). This makes clear that Section 107(d) is subject to all of the preceding provisions of Section 107, including the statutory bar that arises from the publication of a notice of dissolution under Section 107(a)–(c). Interpreting Section 107(d) to override the rest of Section 107 would contradict the core tenet of statutory interpretation that “[s]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be

construed together and given effect, if it can be done by any reasonable construction.” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 623, 611 S.E.2d 297, 302 (Ct. App. 2005). The Receiver’s construction creates a loophole that would swallow the remainder of the statutory provision and create corporate and shareholder liability in perpetuity, contrary to the statutory text and purpose.

In any event, even if Section 107(d) could override the time limits for filing suit in Section 107(c), it still would not authorize the filing of asbestos claims against Covil because Covil has no “undistributed assets.” The liability insurance policies issued to Covil do not fall within the scope of Section 107(d) because insurance policies are not “undistributed assets” of a dissolved corporation. *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, construed the similar repose provisions of Michigan’s Business Corporation Act—a statute, like South Carolina’s, based on 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 866.⁵ 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 (emphasis removed). 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.

⁵ This issue arose in *Gilliam* because the Michigan statute (unlike South Carolina) permits claimants to enforce claims against undistributed assets of dissolved corporations after the statutory repose period “for good cause shown.” See 677 N.W.2d at 869 (discussing Mich. Comp. Laws § 450.1851(2)).

(b) Delaware Law Lacks A Comparable Statute Of Repose

The Receiver also relies on Delaware law to argue that South Carolina’s statute of repose does not actually function as a statute of repose. Mot. at 11–12 (citing *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013)). This reliance is misplaced, because the Delaware General Corporation Law (“DGCL”), unlike South Carolina law, does *not* include a statutory bar on unknown claims against a dissolved corporation. See *Krafft-Murphy*, 82 A.3d at 708–09 (distinguishing Delaware from other States that “explicitly bar[] claims against a dissolved corporation” after a period of years). The dissolution statutes of South Carolina and most other States are based on the Model Act and include a bar on unknown claims,⁶ but “the Delaware dissolution statutes impose no such time bar” and therefore are “inapposite” when construing dissolution statutes based on the Model Act. *Id.* at 709. The Delaware statute bars only limited categories of known claims: “any claim in cases where a known, existing claimant, who was given actual notice by the dissolving corporation . . . fails to present the claim to the corporation by the date referred to,” and “claims against a dissolved corporation brought by a claimant whose presented claim was rejected by the corporation and who does not commence an action . . . with respect to the claim no later than 120 days after the mailing of the rejection notice.” *Krafft-Murphy*, 82 A.3d at 706 (internal quotation marks omitted) (citing 8 Del. Code § 280(a)(2), (4)).

In contrast, as discussed above, the plain language of the South Carolina statute of repose bars, ten years after the publication of notice, the claims of *any* “claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.” S.C. Code

⁶ See Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 Bus. Lawyer 737, 738 (2001) (“Corporation statutes in only Kansas, Oklahoma, Nevada, and Puerto Rico are clearly modeled on the DGCL. In contrast, the Model Act is the dominant model for state corporation statutes.”).

§ 33-14-107(c)(3). Because Delaware’s dissolution statute does not include a similar categorical time bar on unknown claims, interpretation of that statute is irrelevant.

In fact, the most relevant aspect of *Krafft-Murphy* is the distinction it draws between Delaware law and other state dissolution statutes, which affirmatively *supports* USF&G’s position. The Delaware court affirmatively distinguished its statute from “Michigan law,” which “explicitly bars claims filed after a certain point.” 82 A.3d at 709 n.71 (citing *Gilliam*, 677 N.W.2d at 874). And the relevant Michigan law is materially *identical*, in relevant part, to Section 107(c), stating: “If the dissolved corporation publishes a newspaper notice,” then the claims of “[a] claimant whose claim is contingent or based on an event occurring after the effective date of dissolution” is “barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within 1 year after the publication date of the newspaper notice.” *Gilliam*, 677 N.W.2d at 866–67 (quoting Mich. Comp. Laws § 450.1842a) (emphasis omitted). Thus, under *Krafft-Murphy*’s own reasoning, Section 107(c) bars unknown claims against Covil filed after the statutorily prescribed ten-year repose period has expired.⁷

⁷ Other courts applying the Model Act-based statutes of other States have consistently applied statutes that track § 33-14-107 as statutes of repose. *See, e.g., Gilliam*, 677 N.W.2d at 868 (“reject[ing] 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” and holding 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.’”); *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.”). By contrast, *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 (Mot. at 12), merely construes the DGCL consistent with *Krafft-Murphy* in a case involving Delaware corporations and is inapposite.

3. The Statute Of Repose Bars Claims Against Covil Regardless Of Whether The 2004 Or 1992 Version Of The Statute Applies

The Receiver next argues that the 2004 Amendments to the statute of repose do not apply to claims against Covil because those amendments are not “retroactive[].” Mot. at 14 (internal quotation marks omitted). But assuming the 2004 Amendments apply purely prospectively, the statute would still bar claims against Covil, like the *Hutto* plaintiffs’ claims, that accrued after the 2004 Amendments and were filed more than ten years after their enactment. Moreover, even under the 1992 version of the statute in force at the time of Covil’s dissolution, the pending asbestos claims against Covil would be barred.

(a) The Current Version Of The Statute Applies To Plaintiffs’ Claims

“In South Carolina, the law in effect at the time the cause of action accrued controls the parties’ legal relationships and rights.” *Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 397, 596 S.E.2d 42, 47–48 (2004) (internal quotation marks omitted). Accordingly, courts regularly apply newly enacted or amended statutes of repose “to causes of action that accrue on or after th[e] [effective] date” of the statute. *Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 703 S.E.2d 883, 886 (N.C. Ct. App. 2011); *see also, e.g., Unruh v. Cacchiotti*, 257 P.3d 631, 639 (Wash. 2011) (en banc) (newly-passed statute of repose begins to run on the date the statute was enacted). Under the prospective application for which the Receiver advocates, the ten-year statutory window for bringing any claim against Covil that accrued in 2004 or later would run from the effective date of the amendments in 2004 and would therefore have closed in 2014.

Thus, plaintiffs’ claims in *Hutto*, for example, would be barred because they accrued upon the decedent’s diagnosis with an alleged asbestos-related disease in 2013 and suit was not filed until 2019, 15 years after the operative date of the 2004 Amendments to Section 107(c). Applying the statute of repose to extinguish claims filed *after* expiration of the ten-year period

does not implicate retroactivity; it just involves the normal operation of a statute of repose, which by definition can extinguish claims even before accrual. *See, e.g., CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (“A statute of repose bars 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.”) (internal quotation marks omitted).

The decision in *Quintana v. Los Alamos Medical Center, Inc.*, 889 P.2d 1234 (N.M. Ct. App. 1994), is particularly instructive. There, the plaintiff’s son never regained consciousness following a dental procedure in 1959. *Id.* at 1234. In 1987, the plaintiff discovered that the defendant had caused his son to overdose during the procedure, and he sued. *Id.* The defendant moved to dismiss, arguing that it dissolved in 1963 and that New Mexico’s two-year statutory bar foreclosed the plaintiff’s claims. *Id.* The plaintiff contended that the statutory bar did not apply because it was enacted in 1975, *after* dissolution. *Id.* at 1236. But the court rejected this argument, explaining that “the legislature would have intended the same time limitation to apply to” corporations that “dissolved prior to the 1975 Act as those dissolved subsequently”; in fact, “the reasons for repose would be *stronger* for pre-1975 dissolutions.” *Id.* (emphasis added). That same reasoning applies here. There is nothing in the text of the 2004 Amendments that limits their application to companies that dissolve *after* the date of enactment.

In any event, the 2004 Amendments presumptively apply retroactively and thus bar all of the claims currently pending against Covil, which were filed long after the expiration of the ten-year period running from Covil’s 1992 notice of dissolution. The South Carolina Supreme Court has long held that “[r]emedial or procedural statutes are generally held to operate retroactively.” *William C. Logan & Assocs. v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148; *see also Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) (“An exception to th[e]

presumption [against retroactivity] arises when the enactment is remedial or procedural in nature.”); *Wiesart v. Stewart*, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008) (“Statutes that are remedial or procedural in nature . . . operate retroactively.”). Statutes that specify the time period in which claims may be brought against dissolved corporations are “remedial measures” that are presumptively applied “retroactive[ly].” *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). These measures “alter[] no substantive right”; rather, they “only alter[] the procedure by which substantive rights may be judicially enforced.” *Id.* at 820; *see also, e.g.*, 16A Fletcher Cyc. Corp. § 8142 (“[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature.”); 9 Cyc. of Federal Proc. § 27:20 (3d ed.) (same).

(b) The 1992 Version Of The Statute Also Bars Future Claims

According to the Receiver, the 1992 version of the statute of repose applies to asbestos claims against Covil and does not bar any claims that arose after the date of Covil’s dissolution. The Receiver’s position—which would expose every South Carolina corporation that dissolved prior to 2004 to litigation in perpetuity—is incompatible with the plain language of the pre-2004 version of Section 107.

The pre-2004 version of the South Carolina Business Corporation Act divided all claims into “known claims” subject to Section 33-14-106 and “unknown claims” subject to Section 33-14-107. 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.” S.C. Code § 33-14-106(d). But the pre-2004 version of Section 107 (like the post-amendment version) contained no such exclusion; rather, as of five years after the publication of a notice of dissolution, it barred all claims of “claimant[s] who did not receive written notice under § 33-14-106.” S.C. Code § 33-14-107(c)(1) (1988). 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 and was subject to the time bar established by Section 107. *See Gilliam*, 677 N.W.2d at 868 (explaining 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” Michigan’s version of Section 107(c)(1), “which bars a claim by a ‘claimant who did not receive written notice under’” Michigan’s version of Section 106). Because the asbestos claims that are currently pending against Covil did not accrue until years after Covil’s dissolution, the plaintiffs did not have a known claim against the company in 1992 and therefore “did not receive written notice pursuant to Section 33-14-106.” S.C. Code § 33-14-107(c)(1). Accordingly, they had only five years after the publication of Covil’s notice of dissolution in 1992 to file suit against the company.

In arguing to the contrary, the Receiver relies on the Reporters’ Comment to the original version of Section 33-14-107, which stated that the provision originally did not include the Model Act’s subsection (c)(3)—addressing contingent and unknown claims—and noted that “[t]he statute of repose . . . only applies to claims existing at dissolution.” South Carolina Reporters’ Comments, S.C. Code § 33-14-107. But “[w]here,” as here, “the statute’s language is plain and unambiguous, and conveys a clear and definite meaning,” the interpretive process is at an end, and there is no basis for going outside the text “to impose another meaning.” *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). Thus, when the legislature added subsection (c)(3) in the 2004 Amendments, it was clarifying existing law, and the plain meaning of the statutory text cannot be rendered ambiguous by the statute’s subsequent legislative history or by ambiguous statements in its annotations. *See Gasque v. Eagle Mach. Co.*, 243 S.E.2d 831,

832 (1978) (refusing to consider “alleged Reporter’s comments as to the statute’s meaning” where the statutory text is clear).⁸

CONCLUSION

For the reasons stated above, USF&G respectfully requests that this Court deny the Receiver’s motion.

Respectfully submitted:

s/William P. Davis

William P. Davis, S.C. Bar No.: 1585
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091; wdavis@brblegal.com

Todd Carroll, S.C. Bar No.: 74000
WOMBLE Bond Dickinson LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
803-454-7730; Todd.Carroll@wbd-us.com

AND

Mary Beth Forshaw (pro hac vice)
Andrew T. Frankel (pro hac vice)

⁸ The Receiver also vaguely contends (at Mot. 6–7) that USF&G was aware of the prior receivership but failed to act on this knowledge. The Receiver does not identify any consequences he believes this may have for his motion, and the issue is, in fact, irrelevant. The question whether South Carolina’s statute of repose bars asbestos claims against Covil, and derivative claims against USF&G, does not turn on when USF&G learned of Covil’s judicial dissolution and the publication of Covil’s notice of dissolution. It is also irrelevant USF&G timely asserted this defense in its Answer. The Receiver is not opposing a motion to amend to assert a new defense late in the proceedings, as to which the amending party’s diligence may be relevant. USF&G does not need to make any showing regarding its knowledge or diligence in order to assert a defense in its original Answer. In any event, there is no evidence that USF&G was aware of Covil’s publication of a notice of dissolution until the spring of 2020. The documents cited by the Receiver show that USF&G was aware of Mr. Lee’s receivership at the time, but do not show any knowledge that (1) Mr. Lee’s receivership was expanded in 1992 into a general receivership, (2) Covil was judicially dissolved during that proceeding, and (3) Mr. Lee was directed to (and did) publish a notice of Covil’s dissolution. Indeed, Daniel B. White, Covil’s insurer-retained counsel during this time, on whose letters the Receiver relies, has recently confirmed in a deposition that he had no knowledge of any of those three events until 2020. *See* Dep. of Daniel B. White at 53–55, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C. June 12, 2020) (attached as Ex. C).

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2846; mforshaw@stblaw.com
(212) 455-3073; afrankel@stblaw.com

*Attorneys for United States Fidelity and Guaranty
Company*

August 21, 2020

Exhibit B

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.
CAROLINE M. MCNEIL


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:

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.

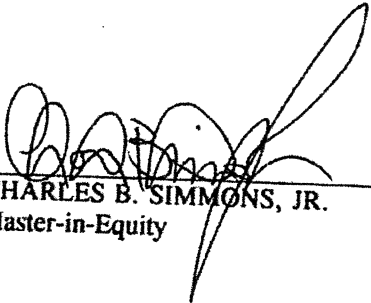
7. That the abandonment by the Receiver of all remaining assets of the above-named Defendants is hereby approved, and the Receiver is otherwise authorized to return any books and records of any of the Defendants held by him to the shareholders and/or partners of the Defendants upon written demand for 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

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
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.

**ZURICH AMERICAN INSURANCE
COMPANY'S RESPONSE TO
MOTION TO CLARIFY STATUS OF
RECEIVERSHIP**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2019-CP-40-06956

SANDRA S. HUTTO, Individually and as
Personal Representative of the Estate of
Donald L. Hutto, et al.,

Plaintiffs,

V.

COVIL CORPORATION, et al.,

Defendants.

**ZURICH AMERICAN INSURANCE
COMPANY'S RESPONSE TO
MOTION TO CLARIFY STATUS OF
RECEIVERSHIP**

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INTRODUCTION

Under the guise of a motion to clarify the receivership, the Receiver for Covil Corporation (“Covil”) seeks to strike one of the affirmative defenses asserted by Zurich American Insurance Company (“Zurich”) in each of these two cases. That defense contends that the claims against Zurich are foreclosed by South Carolina’s statute of repose, S.C. Code Ann. § 33-14-107(c), because Covil was judicially dissolved in 1992 and Covil’s prior receiver published a notice of dissolution that barred claims against Covil filed more than ten years after the date of publication. If the statute of repose bars liability against Covil, then the derivative claims against Zurich—which depend upon a finding that Covil is responsible for asbestos-related injuries—also fail.

Zurich agrees with the Receiver that the Court should “finally adjudicate this issue of South Carolina law,” which has not previously been addressed with the benefit of full, adversarial briefing from the parties. Mot. 2. Zurich disagrees, however, with the Receiver’s interpretation of South Carolina’s statute of repose and his characterization of the facts pertaining to Covil’s prior receivership.

The statute of repose “bar[s]” any claim against a judicially dissolved corporation filed more than ten years after the publication of a notice of dissolution. S.C. Code Ann. § 33-14-107(c). Evidence from Covil’s prior receivership proceedings demonstrates that Covil was judicially dissolved and that Covil’s prior receiver published a notice of dissolution in 1992. Thus, the statute of repose codified in Section 107(c) precludes every pending asbestos case against Covil, including the plaintiffs’ claims in *Hutto*, because those claims were filed decades after the publication of Covil’s notice of dissolution.

One would expect the Receiver—who has a contractual duty to cooperate with Zurich in defending Covil—to join Zurich in pressing this statute-of-repose argument. Instead, the Receiver argues that the statute of repose does not bar claims against Covil and seeks to interpose a series of legal and factual barriers to Zurich’s invocation of the statute of repose as an affirmative defense. For example, the Receiver hypothesizes that Covil’s prior receiver may have failed to publish a notice of dissolution, even though South Carolina law presumes that a receiver faithfully discharges his obligations and there is no affirmative evidence that the prior receiver failed to follow the receivership court’s explicit direction to publish a notice of dissolution. The Receiver further contends that amendments to the statute of repose enacted in 2004—which clarified that the bar applies to “a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution,” S.C. Code Ann. § 33-14-107(c)(3)—do not apply retroactively to any corporation that dissolved prior to enactment of the amendments. But even accepting the Receiver’s position that the 2004 amendments apply purely prospectively, the statute of repose would still bar every asbestos claim against Covil that accrued after the 2004 amendments and that was filed more than ten years after the amendments were enacted. Moreover, the claims currently pending against Covil would also be barred under the version of the statute of repose in force at the time of Covil’s 1992 dissolution because none of the plaintiffs currently pursuing claims against Covil “receive[d] written notice” in 1992 that they had a known claim that could be filed against Covil. S.C. Code Ann. § 33-14-107(c)(1).

Under the Receiver’s interpretation of Section 107, Covil could *never* invoke South Carolina’s statute of repose—even to bar claims that accrued decades after Covil’s dissolution in 1992—and would instead face liability in perpetuity. Because the Receiver’s position has no

grounding in the plain statutory language, relevant precedent, or sound public policy, the Court should decline to strike Zurich's statute-of-repose affirmative defenses.¹

BACKGROUND

Covil—an industrial-insulation contractor and distributor based in Greenville, South Carolina—ceased operations in 1991 and was placed into receivership with Mr. L. Winston Lee. *See* Amended Order for Appointment of Receiver, *The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty. (Dec. 4, 1991)) (attached as Ex. A). In 1992, the Greenville County Master-in-Equity entered an order that judicially dissolved Covil. Ex. V to Mot. at 2 ¶ 1 (Order, *The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty. (May 12, 1992))) (“May 12 Order”). In that same order, the Master-in-Equity directed Mr. Lee to publish notice of Covil's dissolution. *See id.* at 5 ¶ 9 (“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”). 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.” Ex. W to Mot. at 2 (Order, *The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445, Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty. (Nov. 12, 1992))) (“Nov. 12 Order”). The Master-in-Equity then approved “the abandonment by the Receiver of all remaining assets” of Covil, finalized Covil's dissolution, and discharged Mr. Lee as receiver. Final Order at 3 ¶¶ 7–8, *The First Savings Bank, F.S.B. v. Covil Corp.*, C.A. No. 91-CP-23-4445,

¹ The Receiver has styled his motion as a “Motion to Clarify the Status of the Receivership.” Because the motion seeks to strike the statute-of-repose affirmative defenses that Zurich raised in its Answers, the Receiver's motion is, in substance, a motion under Rule 12(f), SCRCP. *Cf. Gonzalez v. Crosby*, 545 U.S. 524, 527 n.1 (2005) (“Although the title ‘Motion to Alter or Amend Judgment’ suggests that petitioner was relying on Federal Rule of Civil Procedure 59(e), the substance of the motion made clear that petitioner sought relief under Rule 60(b)(6).”).

Judgment Roll 91-5988 (Ct. Com. Pl. Greenville Cty. (Dec. 7, 1992))) (“Dec. 7 Order”) (attached as Ex. B).

In the ensuing years, asbestos claims continued to be filed against Covil, and in November 2018, the Court of Common Pleas for Richland County 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 (Ct. Com. Pl. Richland Cty. (Nov. 2, 2018)) (“Order Appointing Receiver”) (attached as Ex. C). The Receiver thereafter filed suit in *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C.A. No. 2019-CP-40-02285 (Ct. Com. Pl. Richland Cty. (Apr. 23, 2019))—one of the two cases in which the Receiver has filed his Motion to Clarify—alleging, among other claims, a professional negligence claim against Covil’s prior counsel and an “alter ego” claim alleging that Zurich and Covil’s other insurers are responsible for Covil’s liabilities because they supposedly dominated and controlled Covil in the period between Covil’s cessation of operations and the Receiver’s appointment. The other case in which the Receiver filed his Motion to Clarify, *Hutto v. Covil Corp.*, C.A. No. 2019-CP-40-06956 (Ct. Com. Pl. Richland Cty.), is an asbestos wrongful-death action in which the plaintiffs contend that Covil is liable under various tort theories for the decedent’s alleged asbestos-related injuries and that Zurich is responsible for Covil’s conduct under an alter-ego theory. In both of these cases, Zurich has raised the South Carolina statute of repose as an affirmative defense. *See* Zurich’s Answer at 14 ¶ 94, *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C.A. No. 2019-CP-40-02285 (Ct. Com. Pl. Richland Cty. (June 19, 2020)) (“[P]ursuant to S.C. Code Ann. §§ 33-14-106 and 33-14-107, underlying asbestos claims against Covil Corporation are barred.”); Zurich’s Answer at 10 ¶ 52, *Hutto v. Covil Corp.*, C.A. No. 2019-CP-40-06956 (Ct. Com. Pl. Richland Cty. (July 10, 2020)) (same).

ARGUMENT

At the time of Covil’s judicial 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 after five years any claim of “a claimant who did not receive written notice pursuant to Section 33-14-106” is barred.² S.C. Code Ann. § 33-14-107(c)(1) (1988). In 2004, the South Carolina legislature amended Section 33-14-107(c) to expand the ability of plaintiffs with claims that were not known to the corporation at the time of dissolution to bring suit. First, the amendments “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. No. 4650) (ratified title) (capitalization altered) (“2004 Amendments”); *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 amendments made clearer that the statute “provide[d] for a claim arising after dissolution,” which, until then, Section 33-14-107(c) had not expressly addressed. 2004 Amendments (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 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 asbestos claims currently pending against Covil—and the derivative claims pending against Zurich—are barred under either version of the statute of repose.

² Section 33-14-106 governs known claims against dissolved corporations.

I. South Carolina's Statute Of Repose Forecloses The Asbestos Claims Currently Pending Against Covil.

South Carolina's statute of repose bars all of the asbestos claims currently pending against Covil, as well as the derivative claims pending against Zurich, because those claims were not filed within the ten-year window triggered by the publication of Covil's notice of dissolution in 1992.³

A. South Carolina's Statute Of Repose Precludes All Claims Brought Against A Dissolved Corporation More Than Ten Years After The Filing Of A Notice Of Dissolution.

Under the current version of S.C. Code Ann. § 33-14-107(c)(3), “[i]f the dissolved corporation publishes a newspaper notice” of its dissolution, then, after a period of ten years, the statute bars the claim of “a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.” To that end, Section 107(c) forecloses all claims against the dissolved corporation—even post-dissolution claims such as a claim based on a post-dissolution diagnosis with an asbestos-related disease—that are brought after the ten-year period.

³ The Receiver (at Mot. 3) contends that the Court of Common Pleas has already rejected Zurich's position in its Order Denying Reconsideration entered in connection with Covil's settlement with several other insurers. But the Order Denying Reconsideration does not have any preclusive effect in these proceedings. The question whether S.C. Code Ann. § 33-14-107(c) bars claims against Covil was not actually litigated before the court in that case. Instead, the court was deciding only whether to grant reconsideration of a prior order approving Covil's settlement with three other insurers. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (1997) (“Issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit.” (internal quotation marks omitted)). Moreover, the Order Denying Reconsideration was entered notwithstanding explicit assurances that no insurer was seeking a ruling on the statute-of-repose issue, which had no bearing on the validity of Covil's settlements with the other insurers. Indeed, Zurich did not even refer to S.C. Code Ann. § 33-14-107(c) in its Motion to Reconsider the court's approval of the settlement agreements. Finally, any conceivable doubt that the Order Denying Reconsideration lacks preclusive effect in these proceedings is eliminated by the court's conclusion in that same Order 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 S.C. Code Ann. § 33-14-107(c). See, e.g., *Duckett v. Fuller*, 819 F.3d 740, 744–45 (4th Cir. 2016) (noting the “general rule” that a non-party is not bound by a judgment).

This decade-long period for filing suit is particularly generous to plaintiffs. South Carolina’s Business Corporation Act—of which Section 107 is a part—generally “follow[s] the Model Business Corporation Act,” Tim Orr, *Successor Liability*, S.C. Law. 33, 35 (Mar. 2006), which bars unknown claims only *three* years after publication of a notice of dissolution, Model Bus. Corp. Act § 14.07(c). The committee that drafted the Model Act acknowledged that a “three year cut-off is itself arbitrary, but it is believed that the bulk of post-dissolution claims that can be estimated will arise during this period.” Model Business Corporation Act § 14.07 (2005) Official Comment. The South Carolina legislature, however, more than tripled the Model Act’s filing period, extending it to an entire decade. That the South Carolina legislature provided plaintiffs with this substantial filing period underscores the propriety of applying the statute of repose strictly, and according to its plain language, to bar all claims against dissolved corporations once that ten-year period has ended.

The Receiver disputes the statute’s straightforward meaning. He contends that Section 107(d)(1)—which permits enforcement of a claim against the dissolved corporation “to the extent of its undistributed assets”—supersedes the statute of repose established in Section 107(c) and allows claims against dissolved corporations in perpetuity. *See* Mot. 8–9. But Section 107(d) does not nullify the statutory bar codified in Section 107(c). To the contrary, it imposes *additional* barriers to recovery against a dissolved corporation, specifying the limited class of assets available for recovery by plaintiffs whose claims are not barred by Section 107(c). Indeed, Section 107(d) sets forth how a claim “may be enforced *under this section*,” S.C. Code Ann. § 33-14-107(d) (emphasis added), which makes clear that Section 107(d) is subject to all of the preceding provisions of Section 107, including the statutory bar that arises from the publication of a notice of dissolution under Section 107(a)–(c). Interpreting Section 107(d) to

override the rest of Section 107 would contradict the core tenet of statutory interpretation that “[s]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction.” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 623, 611 S.E.2d 297, 302 (Ct. App. 2005). The Receiver ignores that settled interpretive principle by construing Section 107(d) to create a loophole that would swallow the remainder of the statutory provision.

In any event, even if Section 107(d) could override the time limits for filing suit in Section 107(c), it still would not authorize the filing of asbestos claims against Covil because Covil has no “undistributed assets.” The liability-insurance policies issued to Covil do not fall within the scope of Section 107(d) because insurance policies are not “undistributed assets” of a dissolved corporation. *See Gilliam v. Hi-Temp Prods., Inc.*, 677 N.W.2d 856, 870 (Mich. Ct. App. 2003) (stating that the court could not “locate any authority for the proposition” that an “expired third-party liability policy is property that [a corporation] could transfer in the process of liquidating its assets” (footnote and emphasis omitted)). Accordingly, Section 107(d) could not possibly authorize asbestos claims against Covil.⁴

⁴ The Receiver suggests (at Mot. 3 n.1) that Zurich has taken inconsistent positions regarding Covil’s amenability to suit by bringing a declaratory-judgment action against Covil in federal court. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C. Nov. 6, 2018). But contrary to the Receiver’s characterization, Zurich’s position is *not* that Covil “cannot sue or be sued.” Mot. 3 n.1. Instead, Zurich’s position is that “asbestos claims” seeking monetary damages against Covil “are barred” by Section 107(c). Zurich’s Answer at 14 ¶ 94, *Protopapas v. Wall, Templeton & Haldrup, P.A.* Section 107(d) confirms that the statutory bar in Section 107(c) targets claims that could be “enforced” against the dissolved corporation’s “assets” and thus does not extend to suits seeking nonmonetary relief. S.C. Code Ann. § 33-14-107(d). In its declaratory-judgment action against Covil, Zurich is not a “claimant” within the meaning of Section 107(c) because it is not seeking monetary damages but, rather, is requesting an authoritative judicial construction of the insurance policies that Zurich issued to Covil.

B. There Is No Reason To Doubt That The Prior Receiver Complied With The Master-In-Equity's Order To Publish A Notice Of Covil's Dissolution In 1992.

Orders from Covil's prior receivership establish 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 filed more than ten years after publication.

On May 12, 1992, the Master-in-Equity directed Mr. Lee to "publish the Notice required by § 33-14-107." May 12 Order at 5 ¶ 9. 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." Nov. 12 Order at 2. 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. Dec. 7 Order at 3 ¶¶ 7–8.

The Master-in-Equity's orders establish that Mr. Lee published notice of Covil's dissolution in 1992 (although it is not known exactly when and where that notice was published). Under South Carolina law, there is a strong presumption 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*, 90 S.C. 384, 73 S.E. 775, 777 (1912) (internal quotation marks omitted). "The presumption is that no official person, acting under oath of office, . . . will omit aught which his official duty requires to be done." *Id.* at 777–78 (internal quotation marks omitted); *see also 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)). Here, the Master-in-Equity unambiguously ordered Mr. Lee to “publish the Notice required by § 33-14-107,” May 12 Order at 5 ¶ 9, thereby triggering the presumption under South Carolina law that the receiver faithfully discharged that duty.

In addition, 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,” Nov. 12 Order at 2, without ever suggesting that the Receiver had failed to carry out one of the principal duties that he had been directed to discharge. That order is controlling as a matter of South Carolina law. *See Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (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)). Moreover, the Master-in-Equity subsequently approved “the abandonment by the Receiver of all remaining assets” of Covil, finalized Covil’s dissolution, and discharged Mr. Lee as receiver in a Final Order fully winding up Covil’s affairs. Dec. 7 Order at 3 ¶¶ 7–8. The Master-in-Equity could have done so *only* if he had been fully satisfied that all prior steps necessary to complete Covil’s dissolution and winding-up had been completed as ordered. *See* S.C. Code Ann. § 33-14-330(b). The Final Order and the proceedings held in that matter are not facially deficient, and thus are “absolutely impreguably fortified against collateral attack” in any other proceeding and may not be re-examined elsewhere, absent exceptions not present here. *Stone v. Mincey*, 180 S.C. 317, 185 S.E. 619, 621 (1936).

The Receiver seeks to undermine the presumption that Mr. Lee faithfully discharged his responsibilities—as well as the legal force of the Master-in-Equity’s orders—by noting that “in the prior receiver’s final accounting of reimbursable expenses, there is no mention of a

publication expense to any newspaper.” Mot. 10. First, the Receiver fails to mention that the prior receiver’s accounting of reimbursable expenses contains a general category called “Receiver Expense” totaling \$1,576.50, which very well may have included the newspaper-publication expenses. *See* Dec. 7 Order. In any event, a negative inference is not sufficient to overcome the presumption that Mr. Lee carried out his duties or the Master-in-Equity’s findings to that effect. *See Whitcomb*, 90 S.C. 384, 73 S.E. at 777; *see also United States v. Young*, 324 F. Supp. 69, 72 (D. Minn. 1970) (noting that “negative inferences” cannot undermine “the presumption of regularity”). Indeed, courts routinely reject attempts to use a negative inference to overcome a well-established presumption. *See, e.g., Kline v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 877 F.2d 1175, 1180 n.15 (3d Cir. 1989) (explaining that it would be “problematic to allow the absence of evidence in a record to be sufficient to rebut a presumption” because “[t]he purpose of a presumption is to shift the burden of affirmative proof to the party seeking to rebut the presumed fact”); *SummitBridge Nat’l Invs. III, LLC v. Faison*, 915 F.3d 288, 294 (4th Cir. 2019) (holding that an “argument by negative inference” was insufficient to rebut the presumption that claims enforceable under state law are permitted in bankruptcy unless they are expressly disallowed); *People v. Fedalizo*, 200 Cal. Rptr. 3d 653, 659–60 (Cal. Ct. App. 2016) (rejecting a defendant’s attempt to invoke a negative inference that he had not authorized his lawyer to represent him where a “presumption exists that an attorney who appears on behalf of a party has authority to do so” (internal quotation marks omitted)). The Receiver therefore cannot rely on a negative inference based on incomplete records from decades ago to impugn the prior receiver’s compliance with court orders.

The Receiver also speculates that the Clerk of Court may have failed to deliver a certified copy of Covil’s dissolution order to the Secretary of State as required by S.C. Code Ann. § 33-

14-330(a). Mot. 10 n.2 (citing *S.C. Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 562, 320 S.E.2d 464, 468 (Ct. App. 1984)). The Court of Appeals' holding in *Winyah*, however, applies only to the *corporation's* "[f]ailure to strictly comply with the mandates of the dissolution statutes." 282 S.C. at 562, 320 S.E.2d at 468; *see also id.* (holding that a "corporate dissolution was void" as to a known creditor to which the dissolving corporation failed to provide notice). Here, the Receiver does not claim that Covil, or Covil's prior receiver, failed to comply with the statutory dissolution requirements, only that the Clerk of Court, a governmental official, may have failed to carry out an administrative task. That type of ministerial shortcoming, which was entirely outside of the control of Covil and its receiver, cannot nullify Covil's judicial dissolution. Moreover, even if the Receiver's hypothesis were correct, it would not render the judicial dissolution inoperative because a defect in the dissolution procedure "continues the corporation with respect to creditors *whose rights are prejudiced by the noncompliance.*" *Id.* (emphasis added); *see also Licht v. Ass'n Servs., Inc.*, 463 N.W.2d 566, 570 (Neb. 1990) (holding that the "clear implication" of *Winyah* is that a technically defective "dissolution *would* be valid as against" "*unprejudiced* creditors" (emphases added)). The rights of asbestos plaintiffs seeking to pursue claims against Covil were in no way prejudiced by the Clerk of Court's supposed failure to deliver the dissolution order to the Secretary of State.

Finally, the Receiver's contention (at Mot. 6–7) that Zurich was aware of the prior receivership but failed to act on this knowledge is both legally irrelevant and factually incomplete. It is legally irrelevant because the question whether South Carolina's statute of repose bars asbestos claims against Covil, and derivative claims against Zurich, does not turn on when Zurich learned of Covil's judicial dissolution and the publication of Covil's notice of dissolution. It turns instead on whether Covil "published" a notice of dissolution "in a

newspaper of general circulation in the county where [its] principal office . . . was last located” and whether the asbestos plaintiffs filed suit more than ten years later to recover for a claim “based on an event occurring after the effective date of the dissolution.” S.C. Code Ann. § 33-14-107(b)(1), (c)(3). The protections that the statute of repose provides to Covil cannot be rendered inoperative by the alleged knowledge of one of Covil’s insurers.

In any event, there is no evidence that Zurich was aware of Covil’s publication of a notice of dissolution until the spring of 2020. Indeed, the Receiver cites an internal Zurich document from 2001 that confirms Zurich’s lack of knowledge about Covil’s notice of dissolution at that time. *See* Ex. S to Mot. To be sure, Zurich was aware of Mr. Lee’s prior receivership and believed that Covil had been administratively dissolved by the Secretary of State, but Zurich did not know that (1) Mr. Lee’s receivership was expanded in 1992 into a general receivership, (2) Covil was judicially dissolved during that proceeding, and (3) Mr. Lee was directed to (and did) publish a notice of Covil’s dissolution. Indeed, Daniel B. White, Covil’s insurer-retained counsel during this time (and on whose letters the Receiver relies), has recently confirmed in a deposition that he had no knowledge of any of those three events until 2020. *See* Dep. of Daniel B. White at 53–55, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932 (M.D.N.C. June 12, 2020) (attached as Ex. D). None of the documents cited by the Receiver remotely supports a contrary conclusion regarding Zurich’s knowledge.

C. The Receiver's Reliance On Delaware Law Is Misplaced Because Delaware—Unlike South Carolina—Does Not Bar Unknown Claims Against Dissolved Corporations.

The Receiver next urges this Court to rely on Delaware law to conclude that South Carolina's statute of repose does not preclude future claims against dissolved corporations. Mot. 11–12 (citing *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013)). The Receiver's reliance on Delaware law is misplaced.

The *Krafft-Murphy* opinion invoked by the Receiver addressed the Delaware General Corporation Law ("DGCL"), which—unlike South Carolina law—does *not* include a statutory bar on unknown claims against a dissolved corporation. See 82 A.3d at 708–09 (distinguishing Delaware from other States that "explicitly bar[] claims against a dissolved corporation" after a period of years). In contrast to the dissolution statutes of South Carolina and most other States—which are based on the Model Business Corporation Act and include a bar on unknown claims—"the Delaware dissolution statutes impose no such time bar" on unknown claims against dissolved corporations and therefore are "inapposite" when construing most other States' statutes. *Id.* at 709; see also Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 Bus. Lawyer 737, 738 (2001) ("Corporation statutes in only Kansas, Oklahoma, Nevada, and Puerto Rico are clearly modeled on the DGCL. In contrast, the Model Act is the dominant model for state corporation statutes." (footnote omitted)). The Delaware dissolution statute bars only limited categories of known claims: "any claim in cases where a known, existing claimant, who was given actual notice by the dissolving corporation . . . fails to present the claim to the corporation by the date referred to," and "claims against a dissolved corporation brought by a claimant whose presented claim was rejected by the corporation and who does not commence an action . . . with respect to the claim no later than 120 days after the mailing of the rejection

notice.” *Krafft-Murphy*, 82 A.3d at 706 (internal quotation marks omitted) (citing Del. Code Ann. tit. 8, § 280(a)(2), (4)).

In contrast, as discussed above, the plain language of the South Carolina statute of repose bars, ten years after the publication of notice, the claims of *any* “claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.” S.C. Code Ann. § 33-14-107(c)(3). Because Delaware’s dissolution statute does not include a similar categorical time bar on unknown claims, interpretation of that statute is irrelevant to the language of the South Carolina statute.

In fact, the most relevant of aspect of *Krafft-Murphy* is the distinction it draws between Delaware law and other state dissolution statutes, which affirmatively *supports* Zurich’s position. The Delaware court affirmatively distinguished its statute from “Michigan law,” which “explicitly bars claims filed after a certain point.” 82 A.3d at 709 n.71 (citing *Gilliam*, 677 N.W.2d at 874). And the relevant Michigan law is materially *identical* to South Carolina’s statute of repose, stating: “If the dissolved corporation publishes a newspaper notice,” then the claims of “[a] claimant whose claim is contingent or based on an event occurring after the effective date of dissolution” is “barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within 1 year after the publication date of the newspaper notice.” *Gilliam*, 677 N.W.2d at 866–67 (quoting Mich. Comp. Laws § 450.1842a) (emphasis omitted).

Thus, under *Krafft-Murphy*’s own reasoning, the South Carolina statute of repose bars unknown claims against Covil filed after the statutorily prescribed ten-year filing period has expired.

II. The 1992 Version Of The Statute Of Repose Is Inapplicable Here But, In Any Event, Would Also Bar Asbestos Claims Against Covil.

The Receiver argues that the 2004 Amendments to the statute of repose do not apply to claims against Covil because those amendments are not “retroactive[].” Mot. 14 (internal quotation marks omitted). In reality, the 2004 Amendments apply to claims against Covil whether the amendments apply retroactively or purely prospectively. Moreover, even under the 1992 version of the statute in force at the time of Covil’s dissolution, the pending asbestos claims against Covil would be barred.

A. The Current Version Of The Statute Of Repose Applies Because The Pending Asbestos Claims Against Covil Accrued After The 2004 Amendments Were Enacted.

Even if the Receiver were correct that the current version of Section 107(c) applies purely “prospectively,” Mot. 14, the statute of repose would still bar any asbestos claim filed against Covil that accrued after the 2004 Amendments and that were filed more than ten years after their enactment.

“In South Carolina, the law in effect at the time the cause of action accrued controls the parties’ legal relationships and rights.” *Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 397, 596 S.E.2d 42, 46–47 (2004) (internal quotation marks omitted). Accordingly, courts regularly apply newly enacted or amended statutes of repose “to causes of action that accrue on or after th[e] [effective] date” of the statute. *Robinson v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 703 S.E.2d 883, 886 (N.C. Ct. App. 2011); *see also, e.g., Unruh v. Cacchiotti*, 257 P.3d 631, 639 (Wash. 2011) (en banc) (newly passed statute of repose begins to run on the date the statute was enacted). Under the prospective application for which the Receiver advocates, the ten-year statutory window for bringing any claim against Covil that accrued in 2004 or later would run from the effective date of the amendments in 2004 and would therefore have closed in 2014.

Thus, plaintiffs' claims in *Hutto*, for example, would be barred because they accrued upon the decedent's diagnosis with an alleged asbestos-related disease in 2013 and suit was not filed until 2019, 15 years after the operative date of the 2004 Amendments to Section 107(c).

The decision in *Quintana v. Los Alamos Medical Center, Inc.*, 889 P.2d 1234 (N.M. Ct. App. 1994), is particularly instructive. There, the plaintiff's son never regained consciousness following a dental procedure in 1959. *Id.* at 1234. In 1987, the plaintiff discovered that the defendant had caused his son to overdose during the procedure, and he sued. *Id.* The defendant moved to dismiss, arguing that it dissolved in 1963 and that New Mexico's two-year statutory bar foreclosed the plaintiff's claims. *Id.* The plaintiff contended that the statutory bar did not apply because it was enacted in 1975, *after* dissolution. *Id.* at 1236. But the court rejected this argument, explaining that "the legislature would have intended the same time limitation to apply to" corporations that "dissolved prior to the 1975 Act as those dissolved subsequently"; in fact, "the reasons for repose would be *stronger* for pre-1975 dissolutions." *Id.* (emphasis added).

The same reasoning applies here. There is nothing in the text of the 2004 Amendments that limits their application to companies that dissolve *after* the date of enactment.

In any event, the 2004 Amendments presumptively apply retroactively and thus bar all of the claims currently pending against Covil, which were filed long after the expiration of the ten-year period running from Covil's 1992 notice of dissolution. The South Carolina Supreme Court has long held that "[r]emedial or procedural statutes are generally held to operate retroactively." *William C. Logan & Assocs. v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986); *see also Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) ("An exception to th[e] presumption [against retroactivity] arises when the enactment is remedial or procedural in nature."); *Wiesart v. Stewart*, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008) ("Statutes

that are remedial or procedural in nature . . . operate retroactively.”). Statutes that specify the time period in which claims may be brought against dissolved corporations are “remedial measures” that are presumptively applied “retroactive[ly].” *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). These measures “alter[] no substantive right”; rather, they “only alter[] the procedure by which substantive rights may be judicially enforced.” *Id.* at 820; *see also, e.g.*, 16A Fletcher Cyc. Corp. § 8142 (“[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature.”); 9 Cyc. of Federal Proc. § 27:20 (3d ed.) (same).

Ultimately, it makes little practical difference whether the 2004 Amendments apply prospectively or retroactively; either way, they bar asbestos claims against Covil.

B. The 1992 Version Of The Statute Of Repose Would Also Bar Asbestos Claims Against Covil.

According to the Receiver, the 1992 version of the statute of repose applies to asbestos claims against Covil and does not bar any claims that arose after the date of Covil’s dissolution. The Receiver’s position—which would allow every South Carolina corporation that dissolved prior to 2004 to be sued in perpetuity—is incompatible with the plain language of the pre-2004 version of Section 107.

The pre-2004 version of the South Carolina Business Corporation Act divided all claims into “known claims” subject to Section 33-14-106 and “unknown claims” subject to Section 33-14-107. 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.” S.C. Code Ann. § 33-14-106(d). But the pre-2004 version of Section 107 (like the post-amendment version) contained no such exclusion; rather, as of five years after the publication of a notice of dissolution, it barred all “claimant[s] who did not receive written notice under § 33-14-106.” S.C. Code Ann. § 33-14-

107(c)(1) (1988). 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 and was subject to the time bar established by Section 107. *See Gilliam*, 677 N.W.2d at 868 (explaining with regard to Michigan’s statute of repose 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” Michigan’s version of Section 107(c)(1), “which bars a claim by a ‘claimant who did not receive written notice under’” Michigan’s version of Section 106). Because the asbestos claims that are currently pending against Covil did not accrue until years after Covil’s dissolution, the plaintiffs did not have a known claim against the company in 1992 and therefore “did not receive written notice pursuant to Section 33-14-106.” S.C. Code Ann. § 33-14-107(c)(1). Accordingly, they had only five years after the publication of Covil’s notice of dissolution in 1992 to file suit against the company.

In arguing to the contrary, the Receiver relies on the Reporters’ Comment to the original version of Section 33-14-107, which stated that the provision originally did not include the Model Act’s subsection (c)(3)—addressing contingent and unknown claims—and noted that “[t]he statute of repose . . . only applies to claims existing at dissolution.” South Carolina Reporters’ Comments, S.C. Code Ann. § 33-14-107. But “[w]here,” as here, “the statute’s language is plain and unambiguous, and conveys a clear and definite meaning,” the interpretive process is at an end, and there is no basis for going outside the text “to impose another meaning.” *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). Thus, when the legislature added subsection (c)(3) in the 2004 Amendments, it was clarifying existing law, and the plain meaning of the statutory text cannot be rendered ambiguous by the statute’s subsequent legislative history or by ambiguous statements in its annotations.

Thus, even if the 1992 version of the statute of repose applied here, it would still bar the asbestos claims pending against Covil as well as the derivative claims pending against Zurich.

CONCLUSION

For the foregoing reasons, Zurich requests that this Court deny the Receiver's request to strike Zurich's affirmative defenses based on South Carolina's statute of repose.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.

/s/ John S. Wilkerson, III

John S. Wilkerson, III, SC Bar No.: 6105

Post Office Box 22129

Charleston, South Carolina 29413-2129

Telephone: 843-576-2801

Facsimile: 843-577-1649

Email: jwilkerson@turnerpadget.com

ATTORNEYS FOR DEFENDANT ZURICH
AMERICAN INSURANCE COMPANY

August 6, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-40-02285

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto, et al.,

Plaintiffs,

v.

Covil Corporation et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-40-06956

REPLY TO MOTION TO CLARIFY STATUS OF RECEIVERSHIP

Peter D. Protopapas (“the Receiver”), in his capacity as Receiver for Covil Corporation (“Covil”), and acting by and through the undersigned counsel, files this Reply in further support of his July 21, 2020 Motion to Clarify Status of Receivership. Zurich American Insurance Company (“Zurich”) filed a Response in Opposition to the Motion on August 6, 2020, and United

States Fidelity and Guaranty Company (“USF&G”) filed a Response in Opposition on August 21, 2020. Because the arguments raised in both Responses are, in large part, identical, the Receiver files this consolidated Reply to both insurers’ (“the Insurers”) Responses.

ARGUMENT

1. The Receiver Properly Brought His Motion.

Initially, USF&G argues the Receiver lacks standing to bring his Motion because he and Covil are not harmed by the Insurers asserting defenses related to Covil’s prior receivership. USF&G Opp’n, at 2–4. However, USF&G is improperly attempting to interject the doctrine of standing under circumstances where it is inapplicable. As is evidenced by USF&G’s lack of controlling authority on the issue, a standing analysis is not required by the South Carolina Rules of Civil Procedure or any other relevant law in the context of an existing party to an action bringing a motion before the Court.

Standing is required for a party to initially bring a justiciable action before a court for adjudication. *See Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016) (“A fundamental prerequisite *to institute an action* is the requirement that the plaintiff have standing.” (emphasis added)); *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417, 498 S.E.2d 906, 907–08 (Ct. App. 1998) (“[S]tanding acts as an element of the constitutional requirement that there be a ‘case or controversy’; when thus applied, *it acts as a limitation on the subject matter jurisdiction of the . . . courts.*” (quoting 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542 (1990))); 4 S.C. Jur. *Action* § 23 (“Standing to sue is a fundamental

requirement for instituting an action.”). Once standing is established with respect to the lawsuit as a whole, no further analysis is required for each motion brought during the action.¹

Notably, the only South Carolina cases that discuss standing as it relates to motions involve non-parties to an action attempting to bring a motion. *See, e.g., Narruhn v. Alea London Ltd.*, 404 S.C. 337, 341, 745 S.E.2d 90, 92 (2013) (ruling an insurer “did not have standing to make a Rule 60(b) motion because it was not a party to the challenged judgment”); *Gov’t Employee’s Ins. Co., Ex parte*, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (ruling an insurer did “not have standing to intervene in the family court action because it [did] not have an interest sufficiently related to the subject matter of the action”); *Townsend v. Townsend*, 323 S.C. 309, 311, 474 S.E.2d 424, 426 (1996) (ruling an attorney lacked standing to “move[] on his own behalf for reconsideration of the judge’s order removing him from the case”).

USF&G’s strained and circuitous attempt to impose a standing requirement through case law interpreting the Federal Rules of Civil Procedure related to cross-claims and impleader should not deprive the Receiver of his right to bring motions in this action, nor should USF&G’s unsupported² assertion that the Receiver must demonstrate “a legally-protected interest in maximizing Covil’s liability to asbestos plaintiffs.” USF&G Opp’n, at 4. USF&G can point to no law denying a party the right to bring a motion or supporting its contention that its defense must

¹ Additionally, to the extent standing is an appropriate consideration, the Receiver has such “standing” because the Insurers’ defenses, and by extension the pending Motion, could profoundly affect Covil’s receivership. *See Joseph*, 417 S.C. at 449, 790 S.E.2d at 769 (“Standing is defined as ‘a personal stake in the subject matter of a lawsuit.’” (quoting *Sea Pines Ass’n for the Prot. Of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001))).

² *Zahn v. Barr*, which USF&G cites, does not speak to a party’s need to demonstrate standing or “a legally-protected interest” before bringing a motion—instead, it stands for the uncontroversial proposition that standing is required to bring a justiciable action before a court. *See No. 2:19-CV-3553-DCN*, 2020 WL 3440801, at *2 (D.S.C. June 23, 2020) (“Zahn does not present the court with a justiciable case or controversy because he lacks standing and asks the court to issue an advisory opinion.”).

harm the Receiver for standing to inure here. Accordingly, the argument is without merit and should be rejected.

USF&G's other threshold argument—that the Receiver's Motion fails because it refers to Covil's "ability to sue or be sued"—is an exercise in semantics that completely lacks any substance and is equally immaterial to the Court's adjudication of the Motion. USF&G Opp'n, at 4–5. The arguments raised in Covil's motion address the Insurers' defenses related to Covil's prior receivership and dissolution. The motion asks what effect, if any, these events have on the ability of asbestos plaintiffs to maintain personal injury claims against it. Covil's arguments do not reference the capacity requirements of Rule 17, SCRCP, nor do they otherwise explore the separate question of whether Covil, as a dissolved corporation, may generally be a party to a lawsuit.³ Covil's use of the phrase "ability to sue or be sued" does not negate this fact, and it does not render the Court's adjudication of Covil's Motion an advisory opinion as USF&G suggests. USF&G's argument should be seen for what it is—a strawman—and rightfully ignored.

2. Prior Receivership Orders and Available Evidence Demonstrate That Notice of Covil's Dissolution Was Never Published.

Contrary to the Insurers' assertions, the orders from Covil's prior receivership do not demonstrate that notice of Covil's dissolution was ever published. Critically, the November 12, 1992 order cited by both USF&G and Zurich makes no explicit findings related to publication. Instead, the order merely found that the prior receiver "fully complied with the previous Orders of this Court *in liquidating the assets of the . . . Defendants*, that his accounting is in order[,], and that

³ In fact, Covil has previously acknowledged to this Court that it is amenable to suit. *See, e.g., Pavlish v. Covil Corp. et al.*, C.A. No. 2019-CP-42-03968, Receiver's Reply to USF&G's Response to Motion to Clarify Order Appointing a Receiver for Covil Corporation, at 3 (Aug. 17, 2020) (recognizing that section 33-14-105(c)(5) of the South Carolina Code provides that a corporation's dissolution does not prevent it from being a party in an action, and stating the Receiver "does not contend that he and Covil are immune from suit").

the relief sought by him should be approved.” Mot. Ex. W, at 2. This finding says nothing about publication of Covil’s dissolution, only that the prior receiver complied with the court’s instructions to “proceed with the collection of accounts and marshalling of assets, and the orderly liquidation of the business of Covil Corporation.” May 11, 1992 Order, Mot. Ex. V, at 3.

Additionally, the prior receivership court based its finding on the representations the receiver made in his Petition to the court. *See* Mot. Ex. W, at 2 (“*From the foregoing Petition of the Receiver, it appears and I find that he has fully complied . . .*” (emphasis added)). And while the Petition goes into great detail about the prior receiver’s actions, it also makes no mention of publication of Covil’s dissolution. *See* Mot. Ex. L. For example, the Petition explicitly states the prior receiver, among other things, “marshalled and liquidated the assets and collected the accounts of the Defendants,” retained legal representation, “sold all the furniture, fixtures, inventory[,] and equipment of Covil,” and addressed the presence and remediation of asbestos in inventory and materials sold to another company. *Id.* However, at no point in the Petition does the receiver assert that he published notice of Covil’s dissolution. In fact, publication is not even mentioned anywhere in the Petition. Accordingly, even if the Court’s language in the November 12 Order could be construed as a finding of compliance with all of its prior orders, including the publication requirement, the finding—which, by its own terms, was grounded solely on “the . . . Petition of the Receiver”—would have no factual basis as it relates to publication.

In addition to the lack of support for extrapolating the prior receivership court’s finding to encompass publication, evidence also exists that contradicts such an interpretation. For example, as the Receiver noted in his Motion, a Zurich Claim File Activity Memorandum from March 2001 acknowledged there was “no evidence” that notice of Covil’s dissolution had been published. Mot. Ex. S. Given that the only indication of publication is an ambiguous finding that is not only

unsupported by the record, but also contradicted by existing evidence, the Receiver respectfully submits that this Court should find that notice of Covil's dissolution was never published.

3. Section 33-14-107 Does Not Foreclose the Asbestos Claims Pending Against Covil.

Initially, the Insurers advance an interpretation of section 33-14-107 of the South Carolina Code that this Court has already rejected. *See* Mot. Ex. I, at 10–13 (ruling “section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution”). The Receiver maintains that this Court's prior ruling is correct and the Insurers have failed to demonstrate that the Court should deviate from that ruling or its underlying rationale in deciding the current Motion.

a. The 2004 Amendments Do Not Apply to Covil.

i. The Amendments Apply Prospectively.

As the Receiver noted in his Motion, section 33-14-107(c)(3), which addresses claims that are “contingent or based on an event occurring after the effective date of the dissolution,” had not been enacted when Covil dissolved. That statute, as it was written at the time of Covil's dissolution, contained no language barring such claims, and the exclusion of this prohibition was an explicit decision by the South Carolina legislature, whose intent on the matter is clear. *See* South Carolina Reporter's Comments, S.C. Code Ann. § 33-14-107 (“[T]he new provision does not contain subsection (c)(3) of Model Act Section 14.07 providing that contingent claims and those based on an event occurring after dissolution are subject to the five-year statute of repose, too. The statute of repose in the new provision only applies to claims existing at dissolution.”).

The Insurers argue the 2004 amendments to section 33-14-107, which added subsection (c)(3), apply retroactively to bar all claims currently pending against Covil. However, this provision, which both Insurers acknowledge is a statute of repose, applies only prospectively. *See* USF&G Opp'n, at 11 (“Section 107(c) Is A Statute of Repose”); Zurich Opp'n, at 11

(discussing “the statute of repose established in Section 107(c)”; *Edwards v. State Law Enf’t Div.*, 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011) (“It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.”)).

As a statute of repose, section 33-14-107(c) “creates a substantive right in those protected to be free from liability after a legislatively-determined period of time.” *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993) (“A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time.” (citation omitted) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865–866 (4th Cir.1989))); *see also Kerr v. Richland Mem’l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (“[T]he statute of repose portion of section 15-3-545(A) is substantive law, unlike a statute of limitations, which is procedural law.”); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. Balt. L. Rev. 119, 131 (2014) (noting “courts have recognized that while statutes of limitations are procedural, statutes of repose are substantive”).

Accordingly, any preclusive effect on the filing of nonexistent claims was strictly prospective and applied only to corporate dissolutions that occurred after the 2004 amendments were enacted. *See Edwards*, 395 S.C. at 579, 720 S.E.2d at 466 (“When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only.”); *Indep. Ins. Co. v. Indep. Life & Acc. Ins. Co.*, 218 S.C. 22, 33, 61 S.E.2d 399, 404 (1950) (“Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation.”); *see, e.g., Corbett v. City of Columbia*, 294 S.C. 327, 331–32, 364 S.E.2d 459, 461

(1988) (“[W]e held that the repeal of § 42–9–100 involved substantive rights and that the amendment would not be applied retroactively.”); *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) (reasoning that because an act “create[d] substantive rights and impose[d] new obligations,” it would “apply prospectively absent clear indication to the contrary by the Legislature”).

Even *United States v. Village Corporation*, 298 F.2d 816 (4th Cir. 1962), which the Insurers cite in fragmented language, does not support their position when read properly. Although the statute analyzed in that case did alter the time period during which claims could be brought against Virginia corporations, the Fourth Circuit did not apply the statute retroactively, as the Insurers’ citations suggest. In fact, the *Village Corporation* court explicitly found that its application of the statute was not retroactive. *See id.* at 820 (“Finally, defendants contend this construction gives the statute a retroactive effect, and the General Assembly did not employ words it customarily uses when it intends that effect. We find no retroactivity in this application of the statute, however.”).

ii. Prospective Application Cannot Apply to Covil.

The Insurers next argue that, even if the 2004 amendments to section 33-14-107 apply prospectively, they nonetheless bar asbestos claims against Covil because such claims must have been filed within ten years of the amendment, by 2014. However, the Insurers’ interpretation of the statute as it would apply to Covil is contrary to plain statutory language and cannot be enforced. According to the Insurers, any personal injury claimants must have filed suit against Covil between 2004 and 2014. However, section 33-14-107(c) mandates that a claim against a dissolved corporation must be filed “within ten years after the publication date of the newspaper notice.” The Insurers contend that the prior receivership court’s November 12, 1992 order found the prior

receiver had previously published notice of Covil's dissolution. Accordingly, Covil's purported notice of dissolution was filed by November 12, 1992 at the latest, which was more than ten years before the 2004 amendment. Requiring asbestos claimants to satisfy the plain language of section 33-14-107(c) and the Insurers' interpretation of the statute is therefore impossible—it would require claims to be filed against Covil between 1992 and 2002, before the statutory language existed, while at the same time requiring the claims to be filed between 2004 and 2014. The Insurers cannot rewrite section 33-14-107(c) or ignore its plain language to suit their needs, and their untenable position must therefore be rejected.

b. The Prior Version Did Not Address Nonexistent Claims

The Insurers' further claim that, even if the 2004 amendments to section 33-14-107 do not apply to Covil, the prior version of that statute, read alongside section 33-14-106 of the South Carolina Code, nonetheless bars the current asbestos claims brought against Covil. Again, however, the Insurers' position is belied by plain statutory language. The Insurers are correct that section 33-14-106 addresses "known" claims against a dissolved corporation, and subsection (d) excludes from the definition of "claim" "a contingent liability or a claim based on an event occurring after the effective date of dissolution." § 33-14-106. However, the fact that section 33-14-107 does not contain a similar exclusion does not suggest that the pre-2004 version of the statute encompasses such claims. "Unknown" as it is used in section 33-14-107 refers to claims unknown *to the dissolved corporation*, not to claims unknown *to the claimant*. This interpretation is consistent with the language of subsection (a), which provides that "[a] dissolved corporation may publish notice of its dissolution and request that *persons with claims* against the corporation present them in accordance with the notice." § 33-14-107(a) (emphasis added). Absent the explicit contradictory language in subsection (c)(3), which was added in the 2004 amendment, subsection

(a) and the remainder of section 33-14-107 is most reasonably read to encompass only existing claims that are unknown to the dissolved corporation—not nonexistent claims. This interpretation is also consistent with the Reporter’s Note accompanying section 33-14-107, which recognizes that the statute “does not contain subsection (c)(3) of Model Act Section 14.07 providing that contingent claims and those based on an event occurring after dissolution are subject to the five-year statute of repose, too. The statute of repose in the new provision only applies to claims existing at dissolution.” South Carolina Reporter’s Comments, § 33-14-107. This Comment reveals the intent of the South Carolina legislature to exclude nonexistent claims from the reach of both section 33-14-106 and -107 at the time of Covil’s dissolution.

Moreover, the Insurers’ argument that the Reporter’s Comments contradict “the plain meaning of the statutory text” is incorrect, as is their argument that the 2004 amendment adding subsection (c)(3) merely clarified existing law. In fact, the amendment stands strongly in opposition to the Insurer’s position—if section 33-14-107 already encompassed nonexistent claims prior to 2004, the addition of subsection (c)(3) would have been entirely unnecessary and that language would be surplusage. *Cannon v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) (“It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law.”); *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . .” (quoting 82 C.J.S. *Statutes* § 346)). The Insurers argue this Court should ignore (1) the plain statutory language of subsection (a) as it existed when Covil dissolved, (2) the Reporter’s Comments, and (3) the 2004 amendment, all of which support the Receiver’s position, in order to advance an expedient but incorrect interpretation of the pre-2004 version of section 33-14-107. Respectfully, the Court should reject

this distortion of South Carolina law, legislative history, and fundamental canons of statutory interpretation.

c. Covil's Insurance Policies are Undistributed Assets

Citing only out-of-state law, the Insurers also argue section 33-14-107(d) does not authorize the filing of asbestos claims against Covil because Covil's insurance policies are not "undistributed assets." *See* § 33-14-107(d) ("A claim may be enforced under this section: (1) against the dissolved corporation to the extent of its undistributed assets . . ."). However, under South Carolina law, the policies are undistributed assets. *See, e.g., Moulitis v. Degen*, 279 S.C. 1, 7, 301 S.E.2d 554, 558 (1983) (citing with approval, in the probate context, a North Carolina holding "that a liability insurance policy covering negligent actions of the deceased person was an undistributed asset of the estate"); *id.* at 8, 301 S.E.2d at 558 (reasoning that allowing the reopening of an estate "permits an aggrieved plaintiff to pursue the insurance policy and other undistributed assets"); *id.* at 8, 301 S.E.2d at 559 (stating the insurance carrier must be notified of the reopened estate "[w]hen the undistributed asset is in the form of a liability insurance policy"); *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 41, 664 S.E.2d 83, 88 (Ct. App. 2008) ("Moreover, we find that whether the Dealership is liable for any alleged insurance coverage is a question for the jury. If the jury were to find such liability, that coverage would be an asset of the Estate."); *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 293, 569 S.E.2d 371, 374 (Ct. App. 2002) (finding a life "insurance policy was the sole asset of" a trust).

d. Krafft-Murphy Is Relevant

Finally, the Insurers argue the Receiver's "reliance [on *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696 (Del. 2013),] is misplaced" because Delaware's corresponding statute "does *not* include a statutory bar on unknown claims against a dissolved corporation." USF&G Opp'n, at 14.

However, assuming *arguendo* the Insurers' position is correct, it is only relevant to the post-2004 version of section 33-14-107 that includes subsection (c)(3), and it has no force with respect to the prior version of the statute. And, as is shown above, Covil's dissolution is governed by the pre-2004 version, which also "does *not* include a statutory bar on unknown claims against a dissolved corporation." *Id.* Consequently, the reasoning in *Krafft-Murphy* is applicable here.

CONCLUSION

For all the reasons set forth above and in the Receiver's Motion to Clarify Status of Receivership, the Receiver respectfully asks the Court for a ruling on the impact, if any, of the Insurers' affirmative defenses related to Covil's prior receivership.

Signature page to follow.

RESPECTFULLY SUBMITTED,

**SMITH ROBINSON HOLLER DUBOSE
AND MORGAN, LLC**

/s/Jonathan M. Robinson

G. Murrell Smith, Jr. (SC Bar 66263)

Jonathan M. Robinson (SC Bar 68285)

Shanon N. Peake (SC Bar 102723)

2530 Devine Street, 3rd Floor

Columbia, SC 29205

803.254.5445

murrell@smithrobinsonlaw.com

jon@smithrobinsonlaw.com

shanonp@smithrobinsonlaw.com

RIKARD & PROTOPAPAS, LLC

Jescelyn T. Spitz (SC Bar 101880)

Rikard & Protopapas, LLC

1329 Blanding Street

Post Office Box 5640 (29250)

Columbia, South Carolina 29201

Telephone: 803.978.6111

jspitz@rplegalgroup.com

*Counsel for Peter D. Protopapas, as Receiver for
Covil Corporation.*

September 8, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
	)	
DENVER D. TAYLOR and	)	CASE NO. 2018-CP-40-04940
JANICE TAYLOR,	)	
	)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

**PLAINTIFFS' MOTION TO APPOINT A
RECEIVER OVER COVIL CORPORATION PURSUANT TO S.C. CODE §15-65-10(4)**

Plaintiffs, pursuant to S.C. Code §15-65-10(4), move this Court to appoint a receiver over the Covil Corporation and would respectfully show the Court as follows:

BACKGROUND

As this Court well knows, Covil Corporation, formerly a South Carolina corporation, was one of the largest suppliers and installers of asbestos insulation in the southeastern United States from the 1950s until 1991 when it voluntarily dissolved leaving its creditors, namely the thousands of men and women it exposed to asbestos, without any meaningful entity to proceed against and, apparently, disposed of its assets without regards to those creditors. Now, apparently, all that remains of Covil is its insurance coverage.¹

¹ Plaintiffs are aware of several directors and officer's policies and are investigating the ability to access that coverage, but that is an argument for a different day.

As a result, Covil is not, as a normal corporation would be, controlled by its shareholders or management, but rather its insurance carriers through its lawyers. Thus it is Covil's insurance carriers that are making strategic decisions on compliance with this Court's discovery orders and when and how to settle without regard to their fiduciary obligations to Covil. As this Court knows, Covil has flouted this Court's discovery requirements and orders on several occasions and Covil has declined to make reasonable decisions about resolution of the myriad of cases pending against it. By way of example only, in *Finch v. Covil, et. al.*, 1:16-CV-01077 filed in the Middle District of North Carolina rather than tender the limits of its policies, Covil's insurers litigated that case to a plaintiff's verdict of \$32.7 million in damages.² See Judgment attached as Exhibit A. These are not the actions of a reasonable corporation and thus Covil's insurers have subjected it to risks and now, actual damages, far greater than the limits of its insurance limits. This conduct cries out for an objective party to be appointed to attempt to inject some level of reasonableness into Covil's insurers actions. Plaintiffs request that this Court appoint a receiver to do just that.

LAW AND ARGUMENT

South Carolina Code §15-65-10(4) state states that

a receiver may be appointed by a judge of the circuit court, either in or out of court:
 . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights, and in like cases, of the property within this state of foreign corporations . . .

It is undisputed that Covil is not an existing entity, indeed Covil's own counsel improperly so argued during the *Crawford v. Covil* matter resulting in this Court granting a new trial and a further demonstration of Covil's insurers commitment to wasting judicial resources rather than deploying

² And under North Carolina's prejudgment interest statute, approximately \$5.6 million in prejudgment interest has accrued.

them effectively to compensate at least some of Covil's victims. Thus the element required for the appointment of a receiver under this code section is met.

Section 15-65-20 requires that notice of this application be provided to the party to the action whose property is sought to be put in the hands of a receiver. Plaintiffs have given notice to Covil's counsel as well as all insurance carriers of which they are aware. Under the statute, 4 days notice is required unless a shorter period of time is determined to be appropriate by the court.

An immediate appointment of a receiver is appropriate. Covil has failed to answer or respond in two recently filed cases: *Hill* and *Taylor*. Counsel for Covil has failed to respond to calls inquiring about their failure to answer. Thus it appears that the need for a receiver over Covil has become immediate so that its rights, assets and obligations are protected.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for Covil Corporation for all purposes, including, but not limited to taking possession of and disposing of any remaining assets of Covil Corporation, is appropriate. Plaintiffs request that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled.

Respectfully submitted,

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202-1476

T: 803-256-4242

F: 803-256-1952

tmcvey@kassellaw.com

Other email: emoultrie@kassellaw.com

Jonathan M. Holder (SC Bar No. 77935)
Kevin W. Paul (To be admitted *Pro Hac Vice*)
Charles W. Branham, III (To be admitted *Pro Hac Vice*)

DEAN, OMAR, & BRANHAM, LLP

302 N. Market Street, Suite 302

Dallas, TX 75202

T: 214-722-5990

F: 214-722-5991

kpaul@dobllp.com

tbranham@dobllp.com

Other email: tgilliland@dobllp.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on counsel for all parties via Certified U.S. Mail Return Receipt, U.S. Mail Standard First Class, and/or electronic mail this ____ day of October 2018. Additionally, Plaintiffs have given notice to each of the insurance carriers for Covil of which they are aware.

/s/ Jonathan M. Holder

Jonathan M. Holder

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-
Circuit Court Case No. 2019-CP-40-06956

RECEIVED
Oct 26 2020
SC Court of Appeals

Sandra S. Hutto, Individually and as Personal Representative of the Estate
of Donald L. Hutto and 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 & Guaranty 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 is the Respondent.

USF&G'S NOTICE OF APPEAL

Please take notice that United States Fidelity and Guaranty Company appeals the order captioned “Order Granting Receiver’s Motion to Clarify Status of Receivership” entered on September, 25, 2020, in the above-captioned actions. USF&G received written notice of entry of this order on September, 25, 2020, making this notice timely.

USF&G further states that all necessary transcripts for this appeal have previously been ordered from and provided by the appropriate court reporters.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O’Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William Pearce Davis
wdavis@brblegal.com
Susan D. Dubose
sdubose@brblegal.com
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

Attorneys for Appellant United States Fidelity and
Guaranty Company

October 26, 2020

Other Counsel of Record:

Robert G. Rikard
Jescelyn Tillman Spitz
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, SC 29201
(803) 978-6111

G. Murrell Smith, Jr.
Jonathan M. Robinson
Shanon N. Peake
Smith Robinson Holler DuBose
and Morgan, LLC
2530 Devine Street, Suite 1B
Columbia, SC 29205
(803) 254-5445

Ashley Brathwaite
Ellis & Winters, LLP
P.O. Box 33550
Raleigh, NC 27636
(919) 865-7000

Counsel for the Respondent Receiver for Covil Corporation

John S. Wilkerson
Turner Padget Graham & Laney, P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(864) 576-2801

R. Hawthorne Barrett
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Counsel for Zurich American Insurance Company

Wesley Brian Sawyer
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100

Counsel for Sentry Insurance

Theile B. McVey
John D. Kassel
Jamie Rae Rutkoski
Kassel McVey Attorneys at Law
1330 Laurel Street
Columbia, SC 29201
(803) 256-4242

Jonathan M. Holder
Dean Omar Branham Shirley, LLP
302 N. Market Street
Dallas, TX 75202
(855) 722-5910

Counsel for Plaintiffs in the Above-Captioned Cases

Thomas B. Boger
Mark H. Wall
Wall Templeton & Haldrup, P.A.
P.O. Box 1200
Charleston SC 29402
(843) 329-9500

Counsel for Metropolitan Life Ins. Co.

Michael J. Bogle
Keith D. Munson
Jason D. Wyman
Womble Bond Dickinson (US) LLP
P.O. Box 10208
Greenville, SC 29603-0208
(864) 255-5400

Counsel for The Goodyear Tire & Rubber Co.

Nicholas J. Cherry
Stephanie G. Flynn
Allyson R. Twilley
Fox Rothschild LLP
2 West Washington Street, Suite 1100
Greenville, SC 29601
(864)751-7600

*Counsel for Armstrong International, Inc.,
Velan Valve Corp. and Viking Pump Inc.*

William A. Collins, Jr.
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, SC 29045
(803) 865-8858

Counsel for Imo Industries, Inc.

W. David Conner
Scott E. Frick
Moffatt G. McDonald
Haynsworth Sinkler Boyd P.A.
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200

*Counsel for Daniel International Corporation,
Fluor Constructors International, Fluor Constructors
International, Inc., Fluor Corporation, Fluor Daniel
Services Corporation, Fluor Enterprises, Inc.*

James H. Elliott, Jr.
Megan C. White
Payton D. Hoover
Richardson Plowden & Robinson, PA
235 Magrath Darby Blvd., Suite 100
Mount Pleasant, SC 29464
(843) 805-6550

Counsel for John Crane, Inc.

James B. Glenn
Robert O. Meriwether
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211
(803) 799-2000

*Counsel for Carboline Company, Grinnell, LLC,
Hajoca Corporation, and Weir Valves & Controls USA, Inc.*

G. Mark Phillips
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street, Suite 600
Charleston, SC 29401
(843)853-5200

Counsel for Weir Valves & Controls USA, Inc.

David G. Harris, II
Goldberg Segalla
800 Green Valley Road, Suite 302
Greensboro, NC 27408
(336)419-49000

Counsel for CGR Products, Inc.

James G. Kennedy
Pierce, Sloan, Wilson Kennedy & Early, LLC
P.O. Box 22437
Charleston, SC 29413-2437
(843) 968-0886

Griffin L. Lynch
Marghretta H. Shisko
John B. White, Jr.
Harrison White, P.C.
P.O. Box 3547
Spartanburg, SC 29304
(864) 585-5100

Counsel for Southern Insulation, Inc.

Mary E. O'Neill
Womble Bond Dickinson (US) LLP
301 College Street, Suite 3500
Charlotte, NC 28202
(704) 331-4900

*Counsel for Aurora Pump Company and
Fisher Controls International, LLC*

Carl E. Pierce, II
Benjamin C. Smoot, II
Pierce, Sloan, Wilson Kennedy & Early, LLC
P.O. Box 22437
Charleston, SC 29413-2437
(843) 968-0886

*Counsel for Starr Davis Company, Inc. and
Starr Davis Company of S.C., Inc.*

Steven J. Pugh
Joseph E. Thoensen
Richardson Plowden & Robinson, PA
1900 Barnwell Street
Columbia, SC 29201
(803) 771-4400

*Counsel for Aecom, Harbert Yeargin, Inc.,
and Yeargin Construction Company, Inc.*

Andrew S. Rogers
Jennifer M. Techman
Evert, Weathersby & Houff, LLC
3455 Peachtree Road NE, Suite 1550
Atlanta, GA 30326
(678) 651-1200

*Counsel for CBS Corporation, Foster Wheeler
Energy Corporation, Spirax Sarco, Inc., and
Trane US, Inc.*

Jonathan E. Schulz
Michael C. Griffin
Bradley Arant Boult Cummings, LLP
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
(704)338-6000

Angela G. Strickland
Derek D. Tarver
Ashleigh R. Wilson
Bowman and Brooke
1441 Main Street, Suite 1200
Columbia, SC 29201
(803) 726-7420

Counsel for 3M Company

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): USF&G's Notice of Appeal

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

Theile B. McVey (tmcvey@kassellaw.com)
John D. Kassel (jkassel@kassellaw.com)
Jamie Rae Rutkoski (jrutkoski@kassellaw.com)
Jonathan M. Holder (jholder@dobslegal.com)

Counsel for Plaintiffs

By: /s/ M. Todd Carroll

October 26, 2020

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Oct 26 2020
SC Court of Appeals

Carroll, Todd

From: Carroll, Todd
Sent: Monday, October 26, 2020 6:06 PM
To: 'Jescelyn Spitz'; murrell@smithrobinsonlaw.com; jon@smithrobinsonlaw.com; shanonp@smithrobinsonlaw.com; Theile McVey; JKassel@kassellaw.com; Jonathan Holder (jholder@dobslegal.com); 'jrutkoski@kassellaw.com'
Cc: O'Neill, Elizabeth; Davis, William P.; Frankel, Andy T; Forshaw, Mary Beth; Johnson, Debbie (US); Wallace, Julie
Subject: notice of appeal in Hutto v. Covil
Attachments: USF&G's Notice of Appeal of 9.25.20 Order.pdf; 9.25.20 Order in Hutto v. Covil and Protopapas v. Wall Templeton.pdf

Counsel,

Please find attached and served on you USF&G's notice of appeal of the Court's September 25, 2020 Order in the above-referenced case, which are filing electronically with the South Carolina Court of Appeals. Consistent with Supreme Court Order 2020-05-29-02, USF&G will be transmitting the filing fee to the Court within five days of this submission. Best,

Todd

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-
Circuit Court Case No. 2019-CP-40-02285

RECEIVED

Oct 26 2020

SC Court of Appeals

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

v.

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

Of which:

United States Fidelity and Guaranty Company is the Appellant.

USF&G'S NOTICE OF APPEAL

Please take notice that United States Fidelity and Guaranty Company appeals the order captioned "Order Granting Receiver's Motion to Clarify Status of Receivership" entered on September, 25, 2020, in the above-captioned actions. USF&G received written notice of entry of this order on September, 25, 2020, making this notice timely.

USF&G further states that all necessary transcripts for this appeal have previously been ordered from and provided by the appropriate court reporters.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William Pearce Davis
wdavis@brblegal.com
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

Mary Beth Forshaw
Andrew T. Frankel
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
Admitted Pro Hac Vice (Orders Attached)

Attorneys for Appellant United States Fidelity and
Guaranty Company

October 26, 2020

Other Counsel of Record:

Jescelyn Tillman Spitz
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, SC 29201
(803) 978-6111

G. Murrell Smith, Jr.
Jonathan M. Robinson
Shanon N. Peake
Smith Robinson Holler DuBose
and Morgan, LLC
2530 Devine Street, Suite 1B
Columbia, SC 29205
(803) 254-5445

Counsel for the Respondent Receiver for Covil Corporation

John S. Wilkerson
Turner Padget Graham & Laney, P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(864) 576-2801

R. Hawthorne Barrett
W. Taylor Stanley
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Daniel W. Nelson
Jason R. Meltzer
Noah P. Sullivan
Gibson, Dunn & Crutcher, L.L.P.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3687

Counsel for Zurich American Insurance Company

Warren C. Powell, Jr
Bruner Powell Wall and Mullins LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Counsel for Wall, Templeton & Haldrup, P.A.

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): USF&G's Notice of Appeal

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

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October 26, 2020 By: /s/ M. Todd Carroll

Carroll, Todd

From: Carroll, Todd
Sent: Monday, October 26, 2020 6:06 PM
To: 'Jescelyn Spitz'; murrell@smithrobinsonlaw.com; jon@smithrobinsonlaw.com; shanonp@smithrobinsonlaw.com
Cc: Davis, William P.; O'Neill, Elizabeth; Frankel, Andy T; Forshaw, Mary Beth; Johnson, Debbie (US); Wallace, Julie
Subject: notice of appeal in Protopapas v. Wall Templeton
Attachments: USF&G's Notice of Appeal of 9.25.20 Order.pdf; 9.25.20 Order in Hutto v. Covil and Protopapas v. Wall Templeton.pdf; Frankel PHV Order.pdf; Forshaw PHV Order.pdf

Counsel,

Please find attached and served on you USF&G's notice of appeal of the Court's September 25, 2020 Order in the above-referenced case, which are filing electronically with the South Carolina Court of Appeals. Consistent with Supreme Court Order 2020-05-29-02, USF&G will be transmitting the filing fee to the Court within five days of this submission. Best,

Todd

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Oct 26 2020
SC Court of Appeals



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 06, 2020

Mr. Matthew Todd Carroll, Esquire
1221 Main Street
Suite 1600
Columbia SC 29201

Re: United States Fidelity and Guaranty Company v. Covil Corporation
Appellate Case No. 2020-001437

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the order(s) challenged on appeal indicates they might not be immediately appealable.

Accordingly, it is requested that you and opposing counsel serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. A. Kitchings", is written over the printed name "Jenny A. Kitchings".

Jenny A. Kitchings
CLERK

cc: Mary Elizabeth O'Neill, Esquire
William Pearce Davis, Esquire
Susan Drake DuBose, Esquire
Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Ashley K. Brathwaite, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

RECEIVED

Dec 01 2020

SC Court of Appeals

Appellate Case No. 2020-001437
Circuit Court Case Nos. 2019-CP-40-02285 and 2019-CP-40-06956

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

v.

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

And

Sandra S. Hutto, Individually and as Personal Representative of the Estate
of Donald L. Hutto and 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 & Guaranty 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.

USF&G'S RESPONSE REGARDING APPEALABILITY

The Covil Corporation was an insulator that was judicially dissolved by order of Judge Simmons in Greenville County in 1992. Both before and since that dissolution, Covil has been a serial defendant in personal-injury asbestos litigation. After it was dissolved, Covil's insurers—including USF&G, Zurich, Sentry, and several others—provided a defense for the company in asbestos litigation pursuant to their respective insurance policies that were issued to Covil through the years.

In the cases on appeal—as well as numerous others pending in the circuit court—the current Receiver for the Covil Corporation and personal-injury plaintiffs allege that USF&G and Covil's other insurers somehow became Covil's “alter ego” because they provided a legal defense for the company in asbestos litigation following its dissolution. In effect, both the Receiver and asbestos plaintiffs are pushing this novel theory in order to end-run the limits of Covil's historic insurance policies, and to shift all of Covil's actual and potential liabilities to Covil's insurers.

No court anywhere in the country has ever adopted such an “alter ego” approach based only upon an insurer providing defense or indemnity coverage pursuant to an insurance contract.

Regardless, one of the issues raised by these actions is the extent of Covil's liability in the first place in light of its prior judicial dissolution and South Carolina Code §33-14-107, which provides a ten-year statute of repose for dissolved companies. USF&G and Zurich have raised this statute as a potential defense that would dispose of most, if not all, of these cases. Inexplicably, the Receiver—who should have an interest in minimizing Covil's tort liabilities—has joined with personal-injury plaintiffs in objecting to this statute as a defense.

On September 25, 2020, the circuit court issued the order on appeal, which strikes the statute of repose as an affirmative defense from these cases. As the circuit court put it: “After careful consideration of the parties’ filings and applicable law, the Court hereby grants the Motion and finds Covil’s prior receivership presents no impediment to the assertion of asbestos personal injury claims.” (Order at 2.) It concluded: “In sum, no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil. Furthermore, as the Receivership Court for the current and former Receiver, nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil.” (*Id.* at 9.) Though couched as a motion to “clarify” the order appointing a receiver, the motion and the circuit court’s ruling effectively strikes one of USF&G’s affirmative defenses for purposes of trial.

USF&G timely served its notice of appeal of that decision on October 26, 2020. On November 6, 2020, this Court issued a letter requesting that the parties address the appealability of this order. Respectfully, the order is appealable, as it meets the appealability elements of several different statutes that vest appellate jurisdiction over the order. *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178–79 (1990) (acknowledging that an order may be appealable for multiple reasons).

S.C. Code Ann. § 14-3-330(1): An order becomes immediately appealable, even if interlocutory, when it “involv[es] the merits in actions commenced in the court of common pleas.” S.C. Code Ann. § 14-3-330(1). A decision “involv[es] the merits” when it “finally determin[e]s some substantial matter forming the whole or a part of some cause of action or defense” between the litigants. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d

777, 780 (1993) (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)).

Here, the order on appeal terminates a complete affirmative defense. If the statute of repose precludes claims against Covil commenced after the statutory repose period, and Covil can no longer have any liability for such claims, then there can be no “alter ego” liability that flows from Covil to its insurers (even assuming *arguendo* that such a theory is viable in the first place, which it is not). Because the order eliminates the statute of repose as a defense, it is immediately appealable.

S.C. Code Ann. § 14-3-330(2): Similarly, an order becomes immediately appealable when it “strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. § 14-3-330(2). As explained above, the statute of repose is an affirmative defense in this litigation; the order on appeal even acknowledges as much at the outset of its discussion. (*See* Order at 1–2 (“Through the Motion, the Receiver asks this Court to clarify the impact, if any, of Zurich’s and USF&G’s (collectively, ‘the Insurers’) affirmative defenses related to Covil’s prior receivership.”).)

By determining that the statute of repose is unavailable as an affirmative defense in this litigation, the circuit court has stricken a part of USF&G’s answer, and a complete defense to liability. The order is appealable for this additional reason.

S.C. Code Ann. § 14-3-330(4): Finally, any order from the circuit court “granting, continuing, modifying, or refusing the appointment of a receiver” is immediately appealable. S.C. Code Ann. § 14-3-330(4). The order on appeal “continu[es]” and “modif[ies]” the Covil receivership by erasing an affirmative defense that would have rendered the receivership a nullity. If the statute of repose was available as a defense to future liability, then Covil would have no

exposure going forward. That, in turn, would have effectively dissolved the receivership, as there would be no reason to marshal potential insurance proceeds—Covil’s last remaining assets—to protect against future claims.

Accordingly, the order on appeal has the effect of continuing the receivership and modifying it such that USF&G may not rely on activities of the prior receivership and judicial dissolution proceedings to mitigate or eliminate Covil’s liability going forward. As such, the order is immediately appealable for this third reason as well.

CONCLUSION

USF&G’s appeal of the circuit court’s order striking the statue-of-repose defense is properly before the Court. However, USF&G is sensitive to the oft-repeated concerns of judicial economy and avoiding piecemeal appeals. Accordingly, though this order is immediately appealable under multiple provisions of the South Carolina Code, so long as the issue is preserved and not deemed waived, USF&G would not object to a stay of this appeal until either of these cases reaches a final judgment.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William Pearce Davis
wdavis@brblegal.com
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

Mary Beth Forshaw
Andrew T. Frankel
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
Admitted Pro Hac Vice (Orders Attached)

Attorneys for Appellant United States Fidelity and
Guaranty Company

December 1, 2020

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): USF&G's Response Regarding Appealability

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

December 1, 2020

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Dec 01 2020
SC Court of Appeals

Carroll, Todd

From: Carroll, Todd
Sent: Tuesday, December 1, 2020 6:50 PM
To: Shanon Peake; Jon Robinson; Dot Faulkenberry; Jescelyn Spitz; Lindsay Valek; Murrell Smith; Austin Reed
Cc: Frankel, Andy T; O'Neill, Elizabeth; Davis, William P.; Forshaw, Mary Beth
Subject: RE: Appellate Case No. 2020-001437 - Memorandum on Appealability
Attachments: USFG's Response Regarding Appealability of Statute of Repose Order (Appellate Case No. 2020-001437).pdf

Thanks, Shanon. Attached is USF&G's response to the Court of Appeals's correspondence regarding appealability, which we are serving via this email and filing with the Court today. Have a good evening, and best regards,

Todd

Todd Carroll
Partner
Womble Bond Dickinson (US) LLP

d: 803-454-7730
m: 803-446-2883
e: Todd.Carroll@wbd-us.com

1221 Main Street
Suite 1600
Columbia, SC 29201

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From: Shanon Peake <shanonp@smithrobinsonlaw.com>
Sent: Tuesday, December 1, 2020 5:36 PM
To: Carroll, Todd <Todd.Carroll@wbd-us.com>; O'Neill, Elizabeth <Elizabeth.ONeill@wbd-us.com>; Davis, William P. <WDavis@brblegal.com>; Forshaw, Mary Beth <mforshaw@stblaw.com>; Frankel, Andy T <afrankel@stblaw.com>
Cc: Jon Robinson <jon@smithrobinsonlaw.com>; Murrell Smith <murrell@smithrobinsonlaw.com>; Dot Faulkenberry <Dot@smithrobinsonlaw.com>; Jescelyn Spitz <jspitz@rplegalgroup.com>; Lindsay Valek <Lindsay@rplegalgroup.com>; Austin Reed <Austin.Reed@smithrobinsonlaw.com>
Subject: Appellate Case No. 2020-001437 - Memorandum on Appealability

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,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

www.SmithRobinsonLaw.com

Shanon Peake

Attorney at Law

E: shanonp@smithrobinsonlaw.com	Columbia Office
P: 803.254.5445	2530 Devine Street
D: 803.704.1102	Columbia, SC 29205
F: 803.254.5007	

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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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Dec 01 2020
SC Court of Appeals

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

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, Suite 1B

Columbia, South Carolina 29205

(803) 254-5445

ATTORNEYS FOR RESPONDENTS

December 1, 2020.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

Dec 01 2020

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.

Counsel Served: **E-Mail**

Matthew Todd Carroll – todd.carroll@wbd-us.com
M. Elizabeth O'Neill – elizabeth.oneill@wbd-us.com
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

William Pearce Davis – wdavis@brblegal.com
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

Mary Beth Forshaw – mforshaw@stblaw.com
Andrew T. Frankel – afrankel@stblaw.com
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
Admitted Pro Hac Vice

Attorneys for Appellant United States Fidelity and Guaranty Company

(Signature page follows)

s/ Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, Third Floor

Columbia, South Carolina 29205

(803) 254-5445

Attorneys for Respondents

December 1, 2020.

From: Shanon Peake
To: "Carroll, Todd"; O'Neill, Elizabeth; "Davis, William P."; Forshaw, Mary Beth; Frankel, Andy T
Cc: Jon Robinson; Murrell Smith; Dot Faulkenberry; Jescelyn Spitz; "Lindsay Valek"; Austin Reed
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,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBoise and Morgan, LLC
www.SmithRobinsonLaw.com

Shanon Peake
Attorney at Law

E: shanonp@smithrobinsonlaw.com Columbia Office
P: 803.254.5445 2530 Devine Street
D: 803.704.1102 Columbia, SC 29205
F: 803.254.5007

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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 05, 2021

Mr. Matthew Todd Carroll, Esquire
1221 Main Street
Suite 1600
Columbia SC 29201

Ms. Mary Elizabeth O'Neill, Esquire
Womble Bond Dickinson
301 South College Street, Suite 3500
Charlotte NC 28202

Mr. William Pearce Davis, Esquire
PO Box 8057
Columbia SC 29202

Mrs. Susan Drake DuBose, Esquire
PO Box 8057
Columbia SC 29202

Re: United States Fidelity and Guaranty Company v. Covil Corporation
Appellate Case No. 2020-001437

Dear Counsel:

Upon careful review of the memoranda concerning appealability, the Court has determined that the above named appeal shall proceed. This case is no longer held in abeyance. Within thirty (30) days of the date of this letter, the appellant shall serve and file their initial brief and designation of matter to be included in the record on appeal.

Very truly yours,

V. Claire Allen

CLERK

cc: Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Ashley K. Brathwaite, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire
Mark Weston Hardee, Esquire